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EU Tax News

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CJEU Developments

Belgium – CJEU Judgment on the compatibility of the Belgian participation exemption with the EU's Parent Subsidiary Directive

The CJEU ruled on 19 December 2019, in the case *Brussels Securities* (C-389/18) that the combination of the dividend received deduction and the order of deductions in the corporate income tax, infringes the EU's Parent Subsidiary Directive (PSD).

After multiple amendments of the Belgian participation regime, following amongst others the *Cobelfret* (C-138/07) and *KBC* (C-18/15) cases, the participation exemption in Belgium is still not in conformity with the PSD.

Article 4(1) of the PSD is implemented in Belgium via the dividend received deduction. According to the dividend received deduction, a received dividend will first be included in the taxable base of the company. Next, the company can deduct 95% (for the period in the case at hand, currently 100%) of the received dividend via the dividend received deduction. Belgian tax law also provides that the dividend received deduction must be deducted before other deductions that are limited in time or cannot be carried forward.

In the case at hand, a taxpayer realised – in a certain year – an operational loss whilst also receiving dividends that same year, resulting in a carry forward dividend received deduction, available for deduction in future years. The company realised positive profits in the next years but due to the order of the deductions, the company was required to first deduct carry-forward dividend received deduction and only after that, if profits remained, carry-forward Notional Interest Deduction (NID). The carry-forward NID was lost after the maximum period of carry-forward was reached. The company claimed that such order of deduction results in an indirect taxation of the dividend, because it was not able to deduct the carry forward NID. The case was brought before the Tribunal of First Instance in Brussels, which referred the case to the CJEU for a preliminary ruling.

In its Judgment of 19 December 2019, the CJEU ruled that the Belgian dividend received deduction system infringes the PSD. In particular, the CJEU ruled that "the deduction as a priority of the system of definitively taxed income [dividend received deduction] may reduce or even extinguish, the tax base, which may have the effect of depriving the taxpayer, totally or partially, of another tax advantage". Therefore, the combination of the fact that the company received a dividend and could offset dividend received deduction, and the time limit to set off other tax deductions (such as the NID), may result in the loss of the latter tax deductions. If so, the company will be taxed more heavily than in the case if it had not received the dividend or if the dividend had been excluded from the taxpayer's tax base.

The Belgian participation exemption in combination with other tax deductions (that are limited in time or cannot be carried forward) is thus not in line with the PSD. According to the CJEU's ruling, the receipt of dividends must be fiscally neutral for the parent company. Given the broad wording used by the CJEU, this Judgment may have a broader application than merely the combination of DRD and NID. There is an opportunity window to secure your rights for past years.

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Germany – CJEU Judgment on German dividends taxation for non-resident pension funds

On 13 November 2019, the CJEU handed down its Judgment in the case *College Pension Plan of British Columbia* (C-641/17), a pension fund providing pension benefits to former civil servants resident in Canada.

In Canada, College Pension Plan of British Columbia (CPP) accrues liabilities for future pension payments and is exempt from all income taxes. CPP received dividends from portfolio shareholdings in German resident stock corporations (shareholding less than 1%). Withholding tax at the rate of 15% was due under the Germany-Canada double tax treaty. According to German law, CPP's German tax burden was "final" due to the withholding tax withheld by the stock corporation, whereas in a comparable situation a German pension fund would be able to significantly reduce its tax base by deducting the liabilities for future pension payments which it accrued during the tax year. Withholding tax would be credited against the German pension fund corporate income tax due at the end of the year. If the tax withheld at source during the year exceeded the final corporate income tax, the domestic pension fund would receive a refund of the excess amount. CPP applied for a full withholding tax refund with the tax authority in Munich on grounds of EU law. After CPP's refund application was rejected, CPP brought an action before the Fiscal Court in Munich and claimed that the final withholding tax infringes the free movement of capital (Article 63 TFEU).

The CJEU held that the final withholding tax for non-resident pensions funds constitutes a restriction on the free movement of capital. A discrimination can only be assumed in cases where the non-resident pension fund is *comparable* to qualifying German pensions funds which are subject to specific insurance law requirements. The CJEU also held that non-resident pension funds are considered to be comparable to qualifying German pension funds, if they either voluntarily or within the laws of their respective State of residence accrue liabilities for future pension payment obligations. The CJEU left it to the national court to examine whether this requirement is met by CPP. Furthermore, the CJEU held that the restriction is not justified by the balanced allocation of taxing powers, by the coherence of the tax system or by the effectiveness of tax supervision. Finally, the CJEU held that the legislation under dispute is not covered by the so-called stand-still clause of Article 64 TFEU. In essence, the CJEU held that portfolio investments made by pension funds can neither be qualified as direct investments nor as a provision of financial services within the meaning of Article 64 TFEU.

The German withholding tax treatment of non-resident pension funds infringes EU law. Non-resident pension funds should continue to apply for a refund of withholding tax if they were subjected to a final withholding tax in Germany. This CJEU Judgment in essence means that non-resident pension funds should also examine the possibilities of legal action against a final withholding tax in Germany. It would seem essential to be able to provide evidence that a fund either voluntarily or by legal obligation accrued liabilities for future pension payments in its State of residence in a similar way as do German resident pension funds under German law. It is now up to the Fiscal court of Munich to examine whether CPP meets the requirements of accruing liabilities in a similar manner as do German pension funds.

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National Developments

Belgium – DAC6 implementation law published

The bill dated 20 December 2019, which implements Council Directive 2018/822/EU of 26 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 Belgian domestic law was published in the Belgian Official Gazette.

In brief, DAC6 provides for the obligation to report certain cross-border tax arrangements to the Belgian Tax Authorities. This obligation is incumbent on both taxpayers and intermediaries, such as tax advisers and consultants. Belgian law implements DAC6 in Belgium and closely follows the Directive.

Under the new bill, cross-border arrangements may be reportable if they meet at least one of the hallmarks set out in the law, which are identical in wording to the list of hallmarks in the appendix to DAC6. This appendix provides for both generic and specific “hallmarks”, e.g. acquisition of loss-making companies in order to use these losses, conversion of income into capital, gifts or other categories of revenue that are taxed at a lower level or exempt from tax, specific hallmarks related to transfer pricing, etc.

The main benefit test must be fulfilled with regard to category A generic hallmarks and a number of specific hallmarks (category B hallmarks and certain hallmarks of category C). This test is met when obtaining a tax advantage is the main benefit, or one of the main benefits, that a person might be expected to derive from an arrangement. There is no specific guidance in the Belgian law on this.

The bill provides that reportable cross border arrangements of which the first implementation step occurs between 25 June 2018 and 30 June 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.

An intermediary is broadly defined in the explanatory statement to the bill and covers both individuals and legal persons. Reference is made to the OECD/G20 BEPS Action 12 (Mandatory Disclosure Rules) distinguishing between ‘promoter’ and ‘service provider’, both must be considered as intermediaries.

An intermediary may potentially not be permitted to actually report because of the Belgian professional secrecy rules which apply to, for example, registered lawyers and registered tax consultants. In this case, the intermediary has to inform the taxpayer and/or other intermediaries (if any) that there is a reporting obligation due but that the intermediary is prevented from actual reporting due to the Belgian professional secrecy rules. This is known as legal professional privilege (LPP). The taxpayer can at all times waive the professional secrecy (LPP) thus enabling the intermediary to make the report. The professional secrecy (LPP) rules do not apply for reporting obligations related to so-called ‘market-ready’ arrangements.

An arrangement that has substantially standardised documentation and/or structure falls within the scope of category A and should therefore be reported, provided that the 'main benefit test' has been met.

Penalties ranging from EUR 1,250 to EUR 100,000 per infraction may be applied by the Belgian Tax Authorities. Further guidance on the applicable penalties is expected.

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Belgium – Belgian Court of First Instance's final judgment in landmark case on payment transactions from payment service providers without specific evidence of tax fraud

In 2017, the Belgian Special Tax Inspectorate (STI) launched a large-scale investigation into the use of foreign payment cards. To help identify capital 'hidden' abroad by Belgian residents, the STI requested that Payment Service Providers provide a huge amount of raw data relating to the use of foreign payment cards in Belgium. The STI launched this investigation following similar investigations carried out in, inter alia, the Netherlands, Sweden and the United States.

PwC Legal Belgium tax litigation & privacy team defended a Payment Service Provider before the Court of First Instance of Antwerp in its objections to comply with this request. The Payment Service Provider argued that the request infringed Belgian fiscal banking secrecy, qualified as a prohibited fishing expedition and violated the fundamental rights of the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights (right of privacy, right of protection of personal data).

In a first judgment of 2 February 2018, the Court of First Instance of Antwerp rejected the STI's request on the basis that the request was not purpose-bound and violated the investigative powers of the tax authorities.

Six months later, the STI launched a similar request, but with a more limited scope. PwC Legal Belgium again took the defence of the same Service Payment Provider arguing that there was still no legal basis for such kind of requests.

In a judgment of 13 December 2019, this second request was also rejected by the Court of First Instance of Antwerp. The court ruled this time that the request violated Belgian fiscal banking secrecy which prohibits tax authorities gathering information from financial institutions in view of levying withholding taxes on their clients. According to the court, fiscal banking secrecy must be interpreted broadly and applies to the requested data from Payment Service Providers. In the meantime, the Belgian Tax Authorities have informed PwC Legal Belgium that they will not appeal against the judgment.

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Bulgaria – Draft bill implementing DAC6

On 27 November 2019, the Bulgarian Parliament adopted, in first reading, the draft bill implementing Council Directive 2018/822/EU of 26 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), into the local legislation.

In brief, under DAC6 intermediaries and, ultimately, taxpayers are subject to new reporting obligations with respect to cross-border tax planning arrangements that meet certain features (hallmarks). The provisions of the bill would take effect on 1 July 2020, with specific transitional measures applicable to arrangements implemented between 25 June 2018 and 30 June 2020.

The draft bill overall follows DAC6's scope, hallmarks and reporting requirements. Its key aspects are summarised below:

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. An "arrangement", which is defined broadly to include an agreement, scheme, plan, transaction, etc. or series thereof, can involve several parts or stages of implementation or execution. VAT, customs duties and excise duties are 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 of these hallmarks is triggered. The hallmarks under the Bulgarian draft bill follow those under 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 others trigger reporting in all cases, regardless of whether obtaining a tax advantage is the main benefit or one of the main benefits of the arrangement.

Reporting obligations
The reporting obligation falls on the intermediary or the taxpayer according to detailed rules regarding the parties and the jurisdictions involved. A reference to a reportable cross-border arrangement will also be made in the annual tax return of the taxpayer. Where bound by legal professional privilege (LPP) an intermediary will be exempt from the reporting obligation, unless the taxpayer explicitly consents to it. An intermediary exempt from reporting obligations under LPP will nevertheless have to notify the National Revenue Agency of other existing intermediaries under the reportable arrangement, or the relevant taxpayer, regardless of whether the reporting obligation for them may arise in another EU Member State. The latter notification requirement is not based on the DAC6. The reporting obligations will start to apply as of 1 July 2020, but will cover arrangements implemented after 25 June 2018, which will have to be disclosed retrospectively.

Penalties
Administrative penalties for not filing a DAC6 report can be up to BGN 10,000 / approx. EUR 5,000.

Next steps
Members of the Bulgarian Parliament were given until 4 December 2019 to propose amendments to the draft bill, while the final legislation was scheduled for adoption before the end of December

2019. Further official guidance is expected by the Bulgarian Tax Authorities. Certain open questions remain in practice about the interpretation of some of the rather broadly defined hallmarks.

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Italy – Italian Tax Court of Appeal upholds single tax unit on the basis of EU principles

On 19 June 2019, the Milan Tax Court of Appeal (decision n. 4061-6-2019, published on 17 October 2019) ruled that the Italian tax group regime in force before 2015 was in breach of the freedom of establishment under Articles 49 and 54 TFEU to the extent that it did not allow Italian "sister" companies to form a tax group when controlled by a non-resident enterprise.

Until 2014, the Italian tax group regime allowed Italian "sister" companies to form a tax group between them only if the common controlling entity was a resident enterprise. Conversely, in the situation where the common controlling entity was a non-resident enterprise, the consolidation of the tax base among them was possible only to the extent that the non-resident enterprise had a permanent establishment (PE) in Italy and the shareholding of the Italian "sister" companies were attributable to it.

In 2015, the Italian tax group regime was amended by the legislator - also in the light of the jurisprudence of the CJEU (among others *SCA Holding*, joined cases C-39/13, C-40/13 and C-41/13) – by allowing the consolidation of the tax base between Italian "sister" companies also in the situation in which the common controlling entity was resident in an EU or EEA Member State irrespective of whether their shareholding was attributable to an Italian PE of the non-resident enterprise.

During the years 2010, 2011 and 2012, a French Bank with a PE in Italy formed together with several Italian controlled financial companies (the shareholdings of which were attributable to such PE) a tax group in Italy. The French Bank, during those years, indirectly controlled also other financial companies in Italy which were, instead, excluded from the tax group because their shareholdings were not attributable to the Italian PE of the French Bank. During those years, all financial companies suffered interest costs which, under the Italian interest deduction limitation rule, were deductible only up to 96% of the interest paid. Under specific rules, such deductible amount could be increased up to 100% of the interest paid when the financial companies were part of a tax group.

As a result of this, a discrimination occurred between the Italian financial companies which were part of the tax group with the French parent company (which deducted 100% of the interest paid) and the other Italian financial companies which were, instead, excluded from being part of the tax group with the French parent company (which deduct only 96% of the interest paid, while they should have been in the position to deduct 100% of the interest paid in case of participation in the tax group).

Against the above exclusion from the Italian tax group regime, both the Italian PE of the French parent company and the afore-mentioned Italian group companies which paid the interest decided to file refund claims to the Italian Tax Authorities asking for reimbursement of the tax paid on the portion of non-deductible interest paid during the years 2010, 2011 and 2012 on the basis of Articles 49 and 54 TFEU and the jurisprudence of the CJEU, among others *SCA Holding*.

The Italian Tax Authorities rejected the claims substantially ignoring the EU law discrimination arguments and affirming that the subsequent legislation which amended in 2015 the Italian tax group regime by allowing the consolidation for tax purposes between "sister" domestic companies/foreign PE could not be applied retroactively.

The taxpayer subsequently started litigation before the Milan Tax Court of First Instance which rejected the reimbursement of the tax paid. The claimant then appealed the case before the Milan Tax Court of Appeal which upheld the EU law arguments and ruled in favour of the taxpayer. The Appeal Judges ordered the reimbursement in favour of the non-resident company of the tax paid on the portion of non-deductible interest paid based on the fact that the Italian legislation in force at the time was discriminatory to the extent that it allowed, on the one hand, the consolidation for tax purposes between Italian entities and, on the other hand, did not allow the same tax treatment, between Italian entities and "sister" Italian PE, of companies resident in another EU Member State. The Appeal Judges also pointed out that the fact that Italy amended its tax group regime legislation starting from 2015 only - and that, therefore, could not be applied retroactively - is not relevant for the purposes of the right to reimbursement which is granted based on EU law exclusively.

It remains to be seen if the decision in favour of the taxpayer, which was appealed by the Italian Tax Authorities to the Italian Supreme Court (third degree), will be confirmed. In any event, the decision represents an important confirmation of the EU principles by the domestic Italian Tax Courts.
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Netherlands – Dutch Supreme Court refers to CJEU's Danish Beneficial Ownership cases in considering the application of the anti-abuse provision of the Dutch substantial interest rules

On 10 January 2020, the Dutch Supreme Court issued a judgment in which it ruled, among others, that the anti-abuse provision of the Dutch substantial interest rules is in line with EU law.

The judgment concerned the payment of a dividend of EUR 24 million by a company established in the Netherlands, originally a holding company of a Dutch insurance firm (Holding). Holding paid this dividend to its parent company, a company incorporated under Dutch law but effectively managed in Luxembourg (X BV). The ultimate shareholder of Holding is Mr. Y, an individual. Mr. Y held the shares in Holding directly since 1978 but transferred these shares to X BV in 1985. Mr. Y has been living in Switzerland since 2009. In that year, the place of effective management of X BV was transferred to Luxembourg. After Holding sold the shares that it held in two subsidiaries to a German insurance company in 2011, the sales proceeds were paid by Holding as a dividend to X BV in 2012.

The Dutch Supreme Court decided that a substantial interest is present in this case, and thus the dividend payment should be subject to Dutch corporate income tax, the so-called "substantial interest". The reason for this is tax avoidance; this has been tested on the basis of "ignoring" Holding in the structure; a comparison of the tax consequences of the situation in which Holding is, and in which Holding is not, interposed between X BV and Holding's subsidiaries. In addition, the Supreme Court held that this is a wholly artificial arrangement. Since Holding was a cash company at the time of the dividend payment, the interest in its shares could not be attributed to an enterprise of stakeholder X BV. The Dutch Supreme Court confirmed that the motive for tax avoidance must be tested when an advantage arises from a substantial interest. This must therefore be tested continuously; the initial purpose of the structure is therefore irrelevant. Finally, the Dutch Supreme Court ruled that the application of the anti-abuse scheme of the substantial interest regime is in line with the EU fundamental freedoms (in particular the freedom of establishment) and with the EU-Parent-Subsidiary Directive.

After referring to relevant CJEU jurisprudence on the division of the burden of proof for the assessment of tax abuse (*Eqiom* (C-6/16), *Deister Holding AG and Juhler Holding A/S v Bundeszentralamt für Steuern* (C-504/16)), the Dutch Supreme Court ruled that the anti-abuse provision of the substantial interest rule is in line with EU law. This is because, first, the tax inspector must always substantiate in a plausible way that the subjective condition of abuse is met and such a starting point of the burden of proof is in line with EU law as confirmed by the abovementioned case law.

In addition, the Dutch Supreme Court held that the fulfilment of the subjective condition only provides a *presumption* of evidence that tax abuse is present. This is also – according to the Dutch Supreme Court – confirmed in the Danish Beneficial Ownership cases. In that regard, the Dutch Supreme Court referred to the *T Danmark* case (C-116/16) (point 101). Where this is the case, the taxpayer must be given the opportunity to refute such a presumption by invoking facts that plausibly substantiate that the structure is not a wholly artificial arrangement that does not reflect economic reality. More specifically, the Dutch Supreme Court ruled that there is an indication of a wholly artificial arrangement when an EU company with no real economic substance is put in place between the shareholders – resident in a third country – and the Dutch resident company, with the aim to avoid Dutch personal income and dividend taxation.

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Spain – Proposed new tax measures by the new Spanish Government

The Spanish Parliament on 10 January 2020 re-elected the Socialist Prime Minister, Pedro Sánchez. A coalition government between two left-wing parties – the Socialist Party and Unidas Podemos was formed a few days later. These parties signed a political agreement which contains significant tax measures. The proposals would involve a significant tax burden for both corporations and individuals in Spain.

Three of these significant tax measures include:

- Reducing the full Spanish participation exemption on dividends and capital gains from qualifying shareholdings to a 95% exemption. The 5% taxable portion would qualify as non-deductible expenses related to managing the shareholding as allowed under the Parent-Subsidiary Directive. If the proposal is passed, dividends and capital gains from qualifying shareholdings would be subject to an effective tax rate of 1.25%. The partial exemption would apply to both foreign source and domestic dividends and capital gains.

- Introducing a Digital Services Tax. The intention would be to legislate this tax along the lines of the European Commission's proposed Directive. In this respect, the Government could revamp the draft law containing a proposal for the implementation of a Digital Service Tax published back in October 2018 (See PwC EUDTG Newsletter Issue 2019 – nr. 001 for more details).

- Implementing a Financial Transactions Tax on purchases of Spanish securities carried out by players within the financial sector. To do this, the Government could revamp the draft law on the Financial Transactions Tax published back in October 2018 (See PwC EUDTG Newsletter Issue 2019 – nr. 001 for more details).

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Spain – Appeal filed requesting the Spanish Supreme Court to determine if dividends obtained by a non-resident management company of a foreign sovereign wealth fund is taxable in Spain

On 28 November 2019, an appeal was filed with the Spanish Supreme Court requesting it to determine whether the National Central Bank of Norway should be taxed under the Spanish Non-Resident Income Tax Act for those dividends received from a Spanish corporation as a result of acting as the management company of Norway's Government Pension Fund Global.

The appeal states that if those dividends were obtained by an equivalent company in Spain, they would not be subject to any tax, including withholding taxes, in Spain, since public bodies acting as management companies are exempt from the Corporate Income Tax. Thus, the Spanish Supreme Court has to determine if the withholding tax, without exemption, on dividends paid by a Spanish corporation to a non-resident public body, without a permanent establishment in Spain, and acting as a manager of a pension fund in the form of a collective investment vehicle resident in the same jurisdiction as the public body, is against the free movement of capital, since such income would be exempt from taxation should it be received by the Spanish entities which manage Spanish Social Security.

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Spain – Spanish Central Administrative Tribunal issues first ruling applying the CJEU's Danish Beneficial Ownership cases

The Spanish Central Administrative Tribunal (i.e. administrative court) has issued a ruling in which it applies the CJEU's doctrine in the Danish Beneficial Ownership cases to a Spanish case denying the withholding tax exemption on interest payments to EU lenders. The facts were as follows: a Spanish corporation paid interest to Dutch BVs, leaving them exempt from Spanish withholding taxes under the domestic exemption. However, first the Spanish Tax Agency, and now the Spanish Central Administrative Tribunal, decided to deny the withholding tax exemption by arguing that the Dutch BVs were not the beneficial owners of the interest, stating that the real beneficial owner was a company tax resident in Andorra (i.e. ultimate parent company).

The current withholding tax exemption on interest payments to EU lenders as per the Non-resident Income Tax Act does not require the recipient (i.e. an EU tax resident lender) to qualify as the beneficial owner of the payments. However, the Spanish Central Administrative Tribunal is now of the view that the withholding tax exemption on interest payments to an EU lender may be denied if the EU lender does not qualify as the beneficial owner, based mainly on the following arguments:

- the beneficial owner clause within the EU Interest and Royalties Directive is a material requirement to be complied with to get access to the withholding tax exemption, therefore, it should be met even if it was not implemented in the domestic law since the domestic law must be interpreted in line with the goals and purposes of the Directive; and
- the prohibition of abuse of law is a general principle of EU law, hence, it can be applied automatically at domestic level without considering and following the special procedure to apply the current Spanish general anti-avoidance rule (GAAR) (which in principle is line with the GAAR within the EU Anti-Tax Avoidance Directive I (ATAD I)). This second argument would be relevant in cases where the structure is artificial due to the lack of economic/commercial activity at the level of the EU lender, as was the case in the ruling at hand. In addition, with respect to tax substance, the Spanish Central Administrative Tribunal identified evidence to support the abusive character of the companies in the Netherlands and Curaçao. In particular, their bank accounts and slips did not indicate any commercial activity, as there was no reference to clients and providers and no charges in relation to payroll, supplies or services.

The application of the CJEU's doctrine on the Danish Beneficial Ownership cases must now be closely monitored in Spain. Since, as a result of the ruling from the Central Administrative Tribunal, the Spanish Tax Authorities may now deny the domestic withholding tax exemption if the EU lender does not qualify as beneficial owner. In particular, it should be monitored whether Spain's National Court or Supreme Court share the Spanish Central Administrative Tribunal's view, or whether they decide to keep applying the previous doctrine (i.e. the beneficial owner requirement cannot be requested since it is not expressly included in the law).

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Spain – Spanish Supreme Court rules tax treatment of investment funds resident in third countries is contrary to EU law

The Spanish Supreme Court ruled on 13 November 2019, that the tax treatment provided in the Spanish Law to investment funds resident in third countries (the US, in this specific case) constitutes a breach of the EU's free movement of capital (Article 63 TFEU). Therefore, all the discriminatory withholding tax levied on dividends paid to those funds must be refunded with compound interest.

In the case now decided by the Spanish Supreme Court, in February 2017, the Spanish High Court of Justice of Madrid declared that the dividend withholding tax applied to the claimant (a US investment fund) was not in breach of EU law because it considered that the situations were not comparable and that the exchange of information mechanisms in force were not sufficient enough to verify that the US regulatory framework is equivalent to the Spanish one. Therefore, the Supreme Court had to decide on two different matters:

- Whether investment funds resident in third countries had to comply with all requirements of Spanish Law on investment funds in order to pass the comparability analysis.
- Whether the existing exchange of information mechanisms with the US are sufficient to check the information provided by the investment funds.

The Supreme Court answered the first question by referring to the CJEU's Judgment in *Emerging Markets Series of DFA Investment Trust Company* (C-190/12) concluding that it is not justified to oblige to the non-resident investment fund to prove the compliance of all requirements of Spanish Law on investment funds in order to pass the comparability analysis. It is sufficient to justify that the investment fund is subject to a regulatory framework equivalent to the EU Directives. Regarding the second question, the Supreme Court declared that it is evident that the exchange of information mechanisms with the US are sufficient to check the information provided by the investment fund. The Supreme Court ruled that the tax treatment provided in the Spanish Law to investment funds resident in third countries (US in this specific case) constitutes a breach of the free movement of capital (Article 63 TFEU) and that all the discriminatory withholding tax levied on dividends paid to those funds must be refunded.

The criterion of the Spanish Supreme Court has binding effect on all Spanish lower courts and tax administrations. Investment funds resident in third countries may invoke the content of this judgment in their claims in order to request the same tax treatment or file new claims on these grounds in order to recover the unlawful withholding tax.

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Spain – Commission requested Spain to abolish unduly restrictive conditions for tax deferrals in case of divisions of companies

The Commission sent a reasoned opinion to Spain asking to abolish conditions in Spanish law that run counter to EU rules on business reorganizations, which are meant to ensure that those reorganisations such as mergers and divisions are not precluded by taxation issues at the time of restructuring.

Taxation of capital gains resulting from such reorganisation should be deferred to a later sale or disposal of the assets and/or shares. Spanish law however attaches unduly restrictive conditions for certain types of divisions of companies. In fact, the tax deferral is not granted in those cases in which the shareholders of the divided company do not receive the same proportion of shares in all companies resulting from the division, unless the acquired assets are branches of activity.

If Spain did not act within the two months following the request, the Commission may have referred the case to the Court of Justice of the EU.

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EU Developments

EU – Member States debate EU proposal for public Country-by-Country Reporting in Council

On 22 October 2019, the Members of the European Parliament (MEPs) debated and tabled a motion for a resolution to ramp up pressure on EU Member State governments regarding the pending draft European Parliament and Council Directive on the disclosure of income tax information by certain undertakings and branches, also known as public Country-by-Country Reporting (public CbCR).

Two days later, the non-binding resolution was adopted in the European Parliament by 572 votes in favour, 42 against and 21 abstentions. What is noteworthy is that all the major political parties in the Parliament supported the motion. It was also the first tangible evidence that the extreme left-wing and extreme right-wing parties in the EU's Parliament are seeing eye-to-eye in demanding more corporate transparency and 'fairer taxation' of multinational enterprises.

However, the European Commission's proposed public CbCR has divided EU Member States from the start. In April 2018, two years after the European Commission proposal was first launched, a Council representative told the European Parliament that there were 'unresolved political issues' preventing agreement in Council. After a tweet by German Federal Finance Minister Olaf Scholz on 12 September 2019, stating that he and his fellow Social-Democratic Party (SDP) Ministers within the German Coalition Government were unanimous in their support of public CbCR, there was some anticipation that there could be some movement in the German Government's official position, which would be crucial for any progress.

Nevertheless, in their resolution, MEPs recalled the adoption on 4 July 2017, of the European Parliament's common position, or mandate, for starting '[EU] inter-institutional trilogue' negotiations with the Council of the EU (Member States), aimed at hammering out a final compromise text. MEPs urgently called on the EU Member States to break the deadlock within the Council and to conclude their first reading on the public CbCR proposal and to start inter-institutional negotiations with the EU Parliament in order to finalise the legislative process as soon as possible. They reiterated that the Council should respect the principle of 'sincere cooperation' as laid down in Article 4(3) of the Treaty on European Union (TEU).

In the resolution MEPs also urgently called on the Finnish EU Presidency to reopen and prioritise work on the public CbCR proposal based on the position adopted in the EU Parliament's first reading just before the EU's May 2019 elections, with a view to reaching a 'general approach' (political agreement). Lastly, MEPs stated they welcomed the new Von der Leyen Commission's stated 'utmost support for a prompt adoption of the public CbCR proposal' in their resolution.

The Finnish EU Presidency had already planned a meeting of the Council's Working Party on Company Law (CBCR) on 25 October 2019, hence therefore the timing of the MEPs' resolution. This technical working group did not lead to changes in country positions but clarified that the main outstanding issue was determining the proper legal basis.

The Finnish Presidency then organised a public debate and a vote in the EU Competitiveness Council on 28 November 2019, on the Finnish Presidency's 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, and Germany abstained. The Qualified Majority Voting threshold was almost met, but not quite.

The issue of the legal basis was then also raised in the Economic and Financial Affairs (ECOFIN) Council on 5 December 2019, as an information point under "Any Other Business". Sweden, with the full support of Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Luxembourg, Malta and Slovenia, reiterated their opposition to the legal basis chosen by the European Commission and called on the European Commission to reconsider and facilitate the EU Member States in making this a taxation file. A host of other EU Member States subsequently took the floor and the Council of the EU's Legal Service was also invited for its legal views. The Council's Legal Service advised that:

- To make this a tax file, a unanimous vote to that effect would be required in Council in order to be able to change the legal basis of a proposal of the European Commission;
- The Council of the EU is 'one single [EU] institution' which works in 10 different configurations, without, however, any hierarchy between them. The ECOFIN Council is therefore not in a position to simply decide to 'take over' this file;
- The current legal status of the proposal is that it will stay in the Competitiveness Council if the European Commission insists on that (as it does) and that the choice of the legal basis for the proposed EU Directive remains the European Commission's prerogative); and
- The Preamble of the proposal could/should probably be modified to shift the text in it more toward company law, so that it is clearer that it is not a tax file, the Council's Legal Service offered to assist the EU Presidency with this.

On 20 December 2019, as a follow-up to the debates in the Competitiveness Council and the ECOFIN Council, the Finnish EU Presidency issued a new Council compromise text on public CBCR with amendments to the Preamble (recitals 2, 6b, 10 and 12). In the Finnish EU Presidency's view amending these recitals should clarify the aim and content of the proposal and could alleviate concerns regarding the legal base of the proposal and pave the way for further negotiations in Council. So, it is now for the Croatian EU Presidency as to how and if they wish to prioritise this file on the Council's legislative agenda until 1 July 2020.

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EU – ECOFIN Council endorses 6-monthly progress report to the European Council on tax issues

On 5 December 2019, the ECOFIN Council endorsed the 6-monthly ECOFIN Council progress report for the European Council of 12 December 2019.

The report provides an overview of the progress achieved in the Council during the term of the Finnish EU Presidency (second half of 2019), as well as an overview of the state of play of the most important dossiers that are under negotiation in the area of taxation:

- Initiatives in the area of EU tax law
  a) Common (Consolidated) Corporate Tax Base
  b) Digital taxation package
  c) Developments at international level with regard to digital taxation
  d) Value Added Tax (VAT) and excise duties
- Other issues related to tax legislation

a) Fiscalis programme
b) The common system of Financial Transaction Tax (FTT)
c) Energy taxation
d) Conclusions on the European Court of Auditors report

- Tax Policy Coordination (outside of the scope of EU legislation in the tax area)
  a) Code of Conduct Group (business taxation) – including latest status of EU 'blacklist'
  b) International OECD/Inclusive Framework (IF) developments
  c) Exchange of information on data safety concerns
  d) Tax in non-tax dossiers

See here for the full report.

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EU – European Parliament adopts resolution: ‘Fair taxation in a digitalised and globalised economy: BEPS 2.0’

On 18 December 2019, the European Parliament adopted a (legally non-binding) resolution on ‘Fair Taxation in a digitalised and globalised economy. BEPS 2.0’, in which the European Parliament:

- Regrets the lack of a common approach at EU level vis-à-vis the current ongoing international negotiations; calls on each Member State and the Commission to make their positions publicly known on the OECD Secretariat’s proposals for Pillar One and Pillar Two;
- Calls for a joint, ambitious EU position for the OECD negotiations, ensuring that the EU speaks with one voice and leads by example to ensure a fairer allocation of taxing rights and a minimum level of taxation, allowing for fairness in the international tax environment in order to tackle tax evasion, aggressive tax planning and tax avoidance;
- Invites the Commission to provide support in developing the EU’s position; invites the Commission to provide an impact assessment on revenues for every Member State for both pillars, including spill-over effects, in particular to safeguard the EU Policy Coherence for Development approach; calls on the Commission to inform the Council and Parliament of its findings;
- Expects the Member States to share all relevant data that can be used to draft the most accurate impact assessments and relevant analysis with both the OECD and the Commission;
- Strongly encourages the Commission and the Member States to achieve a deal at international level which would then be transposed at EU level through relevant EU and national legislation; likewise supports the commitment of the Commission President to propose an EU solution should an international deal not be reached by the end of 2020, on the condition that this EU solution is not limited to digital businesses; understands that such a solution would strengthen the single market by establishing a minimum level of tax that would prevent unilateral measures;
- Recalls that the ongoing international corporate tax reform is composed of two pillars of equal importance and that those two pillars are complementary; calls, therefore, on the Member States to negotiate those two pillars as a unique package of necessary reforms;
- Calls on the Commission and the Council to prepare the legal base for incorporating the outcome of an international deal into EU law and to present a legislative proposal as soon as possible;
- Invites the Council, with the support of the Commission, to evaluate the criteria of the EU list of non-cooperative jurisdictions for tax purposes once the international rules and/or the EU’s newly agreed reforms have been adopted, and to assess whether an update is necessary;
- Calls on the Commission to explore the possibility of avoiding a legal base requiring unanimity in the Council; recalls the Commission’s contribution in its communication ‘Towards a more efficient and democratic decision making in EU tax policy’ proposing a roadmap to qualified majority voting;
- Highlights that an efficient and comprehensive international reform must be accompanied by transparency; welcomes the recent efforts of the Council Presidency to relaunch discussions on the EU proposal for public country-by-country reporting; deplores the fact

> that the Council has been unable, to this date, to agree on a general approach on this proposal; calls on the Member States to agree on a general approach as soon as possible; underlines that public country-by-country reporting would make the BEPS 2.0 reform more effective.

During the plenary debate held ahead of the vote on this resolution, on 16 December 2019, many Members of the European Parliament (MEPs) said that it was a matter of fairness to ensure that multinational and digital companies contribute fully. “While citizens, consumers and small companies pay their share with effective tax rates of 40% or more, many large multinationals do not,” said the new Chair of the Economic and Monetary Affairs Committee (ECON) MEP Irene Tinagli (Socialists & Democrats, Italy). She claimed that “according to research, 40% of large companies’ profits are shifted to tax havens.” And that “the current international fiscal regime […] increases inequalities and puts most of the fiscal burden on less mobile tax payers - workers and consumers. This is simply not fair.”

In a European Parliament press release, MEP Markus Ferber (EPP, Germany) was quoted as saying: “When we are talking about the digital economy, we are looking at international challenges. We must therefore work on these challenges internationally,” and “We should solve our own problems within the EU […]. We need to put an end to our own tax havens”.

The new EU Commissioner for the Economy, Paolo Gentiloni, who is in charge of EU Taxation as well, told MEPs that the EU was committed to finding an international agreement on this issue, but assured MEPs that the European Commission was ready to act in any case. “If no or limited agreement is reached internationally by 2020, it is crystal clear that the strong rationale for action at EU level will remain and that the Commission will act on this basis.”

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Spain – European Commission request for preliminary ruling on disproportionate penalties on Spanish taxpayers who failed to report assets held in the EU

In June 2019, the European Commission decided to refer Spain to the CJEU for imposing disproportionate penalties on Spanish taxpayers who failed to report assets held in other EU and EEA States (Modelo 720). Spain requires resident taxpayers to submit information on assets they hold abroad. This includes properties, bank accounts and financial assets. The failure to submit this information on time and in full is subject to penalties that are higher than those for similar infringements in a purely domestic situation, and which may even exceed the value of assets held abroad. The European Commission considers that such sanctions for incorrect or belated compliance with this legitimate information obligation are disproportionate and discriminatory. The European Commission holds that this deters businesses and private individuals from investing or moving across borders in the Single Market. Such provisions are consequently in conflict with the free movement of persons, workers and capital and the freedom of establishment, the freedom to provide services.

On 23 December 2019, the Official Journal of the European Union published the request for a preliminary ruling before the CJEU on the abovementioned matter under the case reference C-731/19.

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Spain – European Commission requests Spain to abolish unduly restrictive conditions for tax deferrals in case of divisions of companies

In November 2019, the European Commission decided to send a reasoned opinion to Spain requiring it to abolish conditions in Spanish law that run counter to EU rules on business reorganisations, which are meant to ensure that those reorganisations such as mergers and divisions are not precluded by taxation issues at the time of restructuring. Taxation of capital gains resulting from such reorganisation should be deferred to a later sale or disposal of the assets and/or shares. The European Commission considers that Spanish law attaches unduly restrictive conditions for certain types of divisions of companies. In fact, the tax deferral is not granted in those cases in which the shareholders of the divided company do not receive the same proportion of shares in all companies resulting from the division, unless the acquired assets are branches of activity. Spain was given two months to react to the European Commission, which may otherwise decide to bring the case before the CJEU.

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Spain – European Commission requests Spain to communicate national transposition measures on tax dispute resolution mechanisms

In November 2019, the European Commission decided to send a reasoned opinion to Spain for its failure to communicate the Spanish national transposition measure on tax dispute resolution mechanisms in the European Union (Council Directive 2017/1852) by the deadline of 30 June 2019. Spain was given two months to react to the European Commission, which may otherwise decide to bring the case before the CJEU.

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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.