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# *EU Tax News*

*Issue 2020 – nr. 004* *May – June 2020*

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Editorial Board: Bob van der Made, Joanne Theodorides and Phil Greenfield.

## Contents

### *National Developments*


| | |
|---|---|
| Belgium | Constitutional Court rules extension of Belgian tax on stock exchange transactions to non-Belgian platforms constitutional, and follows CJEU on compatibility with EU freedom to provide services |
| Belgium | Further guidance on the Belgian DAC6 rules published |
| Denmark | Future dividend tax regime from 2023 will be based on a relief-at-source mechanism |
| Finland | Finnish treatment of final tax losses not in line with EU law |
| France | Supreme Administrative Court rules that only beneficial owners are entitled to the withholding tax exemption provided for by the EU's Parent-Subsidiary Directive |
| France | Higher Court applies the *Marks & Spencer* case law in France |
| Portugal | Revised draft law transposing DAC6 in Portugal |
| Spain | Central Administrative Tribunal applies CJEU's Danish cases to deny the withholding tax exemption on dividends |


### *EU Developments*


| | |
|---|---|
| EU | EU-27 Member States agreement on optional deferral of DAC6 deadlines due to COVID-19 |
| EU | European Commission proposes post-Covid-19 recovery package, ponders new taxes |
| EU | European Parliament sets up permanent subcommittee on taxation ("FISC") |

## ***Fiscal State Aid***

EU European Commission adopts White Paper on foreign subsidies in the Single Market, Statement by Commission Executive VP and Competition Commissioner Vestager

## *National Developments*

**Belgium – Constitutional Court rules extension of Belgian tax on stock exchange transactions to non-Belgian platforms constitutional, and follows CJEU on compatibility with EU freedom to provide services**

To prevent unfair competition between resident and non-resident professional intermediaries, the Belgian Law of 25 December 2016 widened the scope of the Belgian tax on stock exchange transactions ('TOB') to transactions executed through non-Belgian professional intermediaries. Belgian issuers of an order (i.e. the clients / investors) become liable for the TOB and the declaration obligations relating to that tax, whereas, if they had used a Belgian intermediary (generally a bank), it is the latter who would have been required to fulfil those obligations and to levy that tax at source. Due to this difference in treatment between recipients of financial intermediation services, a Belgian company had requested the Belgian Constitutional Court to annul the extension of the scope of the Belgian TOB.

The Belgian Constitutional Court referred the case to the CJEU for a preliminary ruling on the compatibility with EU law. On 30 January 2020, the CJEU ruled that the extension of the TOB to non-Belgian platforms is not contrary to the freedom to provide services (C-725/18, *Anton van Zantbeek VOF*), see EU Tax News, issue 2020 - nr. 003).

In a judgment dated 4 June 2020 (n° 79/2020), the Belgian Constitutional Court followed the CJEU Judgment and ruled that the extension of the scope of the TOB is also compatible with the Belgian constitutional principle of equality.

-- Patrice Delacroix, PwC Belgium; patrice.delacroix@pwc.com

**Belgium – Further guidance on the Belgian DAC6 rules published**

The Belgian tax authorities have published an FAQ with further guidance on the application of the DAC6 rules. This FAQ discusses a broad set of questions including what cross border arrangements are, how to interpret the hallmarks and more.

There are some interesting clarifications. Amongst others, the FAQ clarifies that it is not possible to obtain a ruling on the application of the DAC6 rules. Furthermore, the FAQ gives some more guidance on terms like 'intermediary' and 'arrangement in scope of the Directive'.

Important to note is that the Belgian tax authorities emphasise in this FAQ that the application of a tax incentive regime, like innovation deduction, does not automatically result in a reportable arrangement. This hallmark requires that the main benefit test has been met and this test is clearly not automatically met in cases where a preferential regime is applied.

Furthermore, the FAQ also provides some more guidance regarding the application of the main benefit test. The main benefit test requires an assessment of all tax and non-tax benefits of a certain arrangement. Tax benefits cover all taxes in scope of DAC6 (thus excluding VAT, customs, excise duties and social security). The tax benefits need to be measured on a global basis, so also tax benefits realised outside of the EU are relevant to consider.

The Belgian tax authorities also confirm that there are no unilateral safe harbours available in Belgium; the simplified approach with regard to low-value adding intra-group services is not considered a unilateral safe harbour. With regards to hallmark E2, the FAQ stresses that licensing arrangements with regard to hard-to-value intangible assets could also be considered a cross border arrangement. Finally, it is also confirmed that EBIT should be determined in accordance with Belgian GAAP (hallmark E3), meaning that this could also cover financial income for financial companies or holding companies.

***What's next?***

The FAQ will enable intermediaries and taxpayers to refine their governance models on DAC6 to fully align them in view of the upcoming reporting deadlines. Possibly some further clarifications will be needed, but this FAQ is an important next step in the roll-out of the DAC6 rules in Belgium.
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**Denmark – Future dividend tax regime from 2023 will be based on a relief-at-source mechanism**

The Danish Minister of Taxation has stated in a press release in Spring 2020 that the Ministry of Taxation has entered into an agreement with Finance Denmark (The Danish Banking Association) regarding new principles for taxation of dividends paid to foreign investors.

Under the current regime, 27% tax on dividends is withheld at source when the dividend is distributed to foreign shareholders. The foreign shareholders can reclaim the part of the dividend tax which exceeds the rate according to the relevant double taxation agreements, etc. which is typically 15%. Applying for a refund requires the shareholder to provide the Danish tax authorities with relevant documentation after the dividend distribution. It is an administratively heavy regime that involves the risk of errors and fraud.

The new regime is a relief-at-source regime where the dividend tax is withheld at the correct rate at the time of distribution i.e. down to the tax rate according to the double taxation agreement, etc. The relief-at-source will by default make reclaims of dividend tax obsolete. The new relief-at-source regime requires the foreign shareholders to be registered with the Danish tax authorities prior to the dividend payment to obtain a unique identification number, which is used to identify the shareholder's shares and tax rate.

Registration must be made via the shareholder's custodian bank and the shareholder must declare that the beneficial owner requirements in relation to the shares and the dividend are fulfilled under Danish tax law. The declaration describes the situations in which the immediate recipient of the dividend under Danish tax rules cannot be regarded as the beneficial owner, for example for certain types of security lending. However, institutional investors, such as pension funds, that are entitled to a particularly low dividend tax rate must go through a pre-approval procedure with the Danish tax authorities to obtain the low rate.

Under the agreement, the banks are responsible for errors if it subsequently turns out that the dividend tax has been withheld at a too low rate. The banks' liability covers situations where errors have been revealed in samples, for example when applying the wrong tax rate or the recipient is

not the beneficial owner of the dividend. However, this does not apply to institutional shareholders who must be pre-approved by the Danish tax authorities.

According to the agreement, an explicit premise for the participation of the Danish banks in the new regime is that they will be able to make recourse claims against the foreign banks which have contributed to the incorrect registration. However, it has not yet been determined how such mechanisms will be implemented in practice.

The bill to introduce the new regime has been postponed several times. The Ministry of Taxation has recently announced that the bill is expected to be put forward in the parliamentary year 2020/2021. This means that the new regime will probably not come into effect until 2023 as the regime requires significant IT system customization, etc.

### *Limited possibility for reclaims*

In the interests of shareholders who have not yet been able to obtain an identification number from the Danish tax authorities, it is possible under the new regime for the shareholder to reclaim excess tax withheld from the Danish tax authorities within a short period. The recovery requires the shareholder to register with the Danish tax authorities via the custodian bank and be issued an identification number.

### *Takeaway*

The background to the new regime is the desire for administrative simplification and that future fraud should be avoided. However, the result may be that foreign investors lose appetite for Danish equities if, for some reason, it turns out that foreign banks do not wish to join the new regime. Hence, PwC Denmark recommends that the new regime be implemented as flexibly as possible, or alternatively that the implementation of the similar OECD relief-at-source model (OECD TRACE) is awaited which, at the moment, is being adopted or considered by OECD Member Countries.

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## Finland – Finnish treatment of final tax losses not in line with EU law

On 14 May 2020, the European Commission, by way of a reasoned opinion, requested Finland to bring its rules on the tax deductibility of group contributions in line with EU law. A day later, on 15 May 2020, the Finnish Supreme Administrative Court ('SAC') issued four judgments and one formal precedent concerning cross-border upstream mergers to Finland and associated transfers of tax losses to the merging entities' Finnish parent companies. The rulings also deliberated upon the finality of tax losses, as defined by EU case-law.

Notwithstanding the technical difference between the European Commission's request regarding cross-border group contribution and the five SAC judgments, relating to transfer of tax losses in cross-border upstream mergers, the underlying issue remains the same: what are the exact criteria that need to be fulfilled in order for a foreign subsidiary's tax losses to be considered "final" within the meaning of EU and Finnish case law.

### ***The European Commission's infringement procedure against Finland***

The European Commission's request, on 14 May 2020, relates to its infringement procedure against Finland, concerning cross-border group contributions and the deductibility of final tax losses for Finnish tax purposes.

On 7 March 2019, the European Commission had announced that it was going to send a letter of formal notice to Finland, which was the first step in the infringement procedure against Finland. Approximately a year later, on 14 May 2020, the Finnish Government received a reasoned opinion from the European Commission (a formal request to comply with EU law). In its reasoned opinion, the European Commission noted that currently a group contribution between affiliated companies is deductible only if the receiving company is a Finnish resident, whereas group contributions to affiliated companies in other EU/EEA States are not deductible even in situations where these cover final losses (as defined by the CJEU) incurred by the latter. According to the European Commission's reasoned opinion, the different treatment of domestic companies and EU/EEA resident affiliated companies constitutes a breach of the freedom of establishment, Article 49 TFEU and Article 31 EEA Agreement.

The reasoned opinion is the second step in the infringement procedure, where the third step would entail the European Commission's referral of the case to the CJEU. The European Commission notes that Finland has until September 2020 to remedy the infringement, after which the European Commission may refer the case to the CJEU.

### ***The Finnish Supreme Administrative Court's five judgments***

In addition to the European Commission's infringement procedures against Finland, the matter of utilization of a foreign subsidiary's final tax losses in Finnish tax assessments has gained additional attention, as the SAC issued its five judgments on 15 May 2020.

In all five cases the question concerned the right of a Finnish parent to utilize the tax losses of its EU resident subsidiary, in a cross-border upstream merger. In other words, the SAC assessed whether the condition of finality, in accordance with the CJEU's case law, was met in the five situations at hand, and hence whether the Finnish parent could deduct the foreign tax losses for Finnish tax purposes. In brief, the SAC ruled in all five cases that the Finnish parent company had not demonstrated that the criteria for finality of the subsidiary's tax losses were met, despite such criteria being considered met in all five cases by the previous domestic court.

The SAC's rulings dealt with the following two main themes:

First, according to the SAC's rulings, the subsidiary's losses may not be deemed final in case the subsidiary receives income, no matter how minor, as in such cases there exists a possibility that the losses could be deducted in the subsidiary's jurisdiction of residence in future years. According to the SAC's rulings, it had not been demonstrated that the subsidiary could not receive minor financial or other income in its jurisdiction of residence, during future years.

Second, according to the SAC, the finality of the losses could not be determined on the basis that the subsidiary's jurisdiction of residence does not allow for any possibility to transfer losses. Hence, the restrictions imposed by the jurisdictions of residence of the subsidiary (Denmark, Latvia (in two of the cases), Hungary and Sweden) on the utilization of tax losses, does not, per se, rule out the possibility for a third party to utilize the subsidiary's losses, in future tax years, upon an acquisition of such subsidiary.

***Takeaway***

Currently, in light of the SAC's recent five judgments, the bar regarding the fulfillment of criteria for the finality of tax losses is set very high. At the same time, the European Commission's infringement proceedings against Finland will likely cause the Finnish legislator to react to this same matter, one way or another (the European Commission's reasoned opinion has a September 2020 deadline).

It remains to be seen whether Finland will comply with the European Commission's deadline in their reasoned opinion, as amendments regarding the Finnish domestic legislation of final losses and group contributions may also affect the interpretation of final losses with regards to cross-border mergers.

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**France – Supreme Administrative Court rules that only beneficial owners are entitled to the withholding tax exemption provided for by the EU's Parent-Subsidiary Directive**

On 5 June 2020, the French Supreme Administrative Court ruled on the compatibility with the Parent-Subsidiary Directive of the French tax legislation which subjects the granting of the exemption from withholding tax on dividends distributed by a French subsidiary to an EU-parent company where that parent company is the beneficial owner of the income (Conseil d'Etat, 5 June 2020, n° 423811, 423809, 423810, 423812, *Enka*).

To enjoy the tax exemption, the parent company had to justify to the subsidiary/paying agent that, in addition to fulfilling the other conditions expressly laid down by the Parent-Subsidiary Directive, it qualified as the beneficial owner of the dividends. The taxpayer was reassessed on the ground that the parent was not the beneficial owner of the dividends.

Firstly, the judges inferred from §113 of the CJEU's Judgment in the Danish beneficial ownership cases (joined cases C-116/16, C-117/16), which stated that the mechanisms of EU Parent-Subsidiary Directive 90/435, in particular Article 5, are:

> "*intended for situations in which, if they were not applied, the exercise by the Member States of their powers of taxation might lead to the profits distributed by the subsidiary to its parent company being subject to double taxation [...]. Such mechanisms are not, on the other hand, intended to apply when the beneficial owner of the dividends is a company resident for tax purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union",*

that the exemption from withholding tax is subject to the condition that the recipient is the beneficial owner of the dividends. Secondly, the French Supreme Administrative Court dealt with the burden of proof between the tax authorities and the taxpayer. As the parent company is the only one who can provide the proof on its beneficial ownership status of the dividends, the burden of proof is on the taxpayer before the court.

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**France – Higher Court applies the *Marks & Spencer* case law in France**

On 23 June 2020, the Versailles Administrative Court of Appeal ruled on the compatibility with the freedom of establishment of the French tax group legislation which does not allow the deduction from the consolidated tax result of the final losses suffered by a subsidiary located in another Member State of the European Union (ACA Versailles, 23 June 2020, n° 19VE01012, *Groupe Lucien Barrière*).

In the case at hand, a tax-integrated company, which belonged to a French tax group headed by another company (Groupe Lucien Barrière), had deducted from its individual tax result the cumulative final losses of a Belgian company, which had been liquidated on 31 January 2012. The French tax authorities refused the deduction and reassessed Groupe Lucien Barrière.

The Administrative Tribunal in Montreuil, a lower court, implemented in France the *Marks & Spencer* exception: final losses realized by an EU-integrable subsidiary should be deductible from the consolidated tax result of the group in France. They also ruled that cumulative tax losses are final losses (*AT Montreuil*, 17 January 2019, n° 1707036; see EU Tax News, issue 2019 – nr. 002). An appeal was filed by the French tax authorities before the Versailles Administrative Court of Appeal which quashed the judgment in the light of the CJEU's *Holmen* Judgment of 19 June 2019 (case C-608/17).

The Versailles Administrative Court of Appeal confirmed the incompatibility of the French tax legislation with the freedom of establishment where the EU-subsidiary realized final losses. However, for the judges, based on the *Holmen* Judgment, the qualification of losses as final cannot be deduced solely from the liquidation of the non-resident subsidiary, since it is still possible to offset those losses against a taxable result in the State of residence, in particular in the context of a transfer to a third party liable to tax in that State before the liquidation is completed.

The taxpayer tried to demonstrate that losses were final because the Belgian rules disallowed tax losses upon change of control of a company (except if motivated by legitimate economic and financial needs). The Versailles Administrative Court of Appeal ruled out this justification on the ground that those provisions cannot by themselves have the effect of requiring the French tax authorities to allow the deduction from the tax consolidated result of the group of losses which would be final solely as a result of Belgian tax law, otherwise the autonomy and balanced allocation of the taxing power of each EU Member State would be jeopardized. The Court also stressed that the taxpayer did not demonstrate that the Belgian Tax Code would prevent in any circumstances the valuation of the losses or that the factual context would have prevented the disposal of the subsidiary's assets to a third party before the completion of the liquidation. We expect an appeal from the taxpayer before the Administrative Supreme Court.

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**Portugal – Revised draft law transposing DAC6 in Portugal**

Following the end of the public consultation period, the draft law implementing DAC6 was amended extensively. We highlight below the main differences of the new draft compared with the first draft law, as well as the position of Portugal in view of DAC6:

***Reportable Arrangements:***

- Same as cross border arrangements, purely domestic arrangements are also reportable (thus deviating from DAC6) insofar as they meet hallmarks B to E; different from the first draft law, the new draft establishes that hallmark A (generic arrangements linked to the main benefit test) is not relevant in case of purely domestic arrangements.

***Main Benefit Test:***

- Different from the first draft law and deviating from DAC6 by narrowing the situations covered, the main benefit test is only satisfied if it can be established that, beyond a reasonable doubt, the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

***Tax Advantage:***

- Different from the first draft law and deviating from DAC6, both silent in this regard, the new draft law defines as "tax advantage" any reduction, elimination or tax deferral, including the use of tax losses or the granting of tax benefits that would not be granted fully or partially, without the use of the mechanism.

***Intermediary:***

- Deviating from DAC6 and from the first draft, the new draft establishes that a person is not deemed to be an intermediary in cases where it provides only a description of the tax regime applicable; as in the first draft, but again deviating from DAC6, the new draft establishes that an entity is not regarded as an intermediary if it provides advice strictly connected with an existing tax situation of the relevant taxpayer.

***Professional Privilege:***

- While the first draft disregarded all types of professional privilege or legal secrecy, the new draft took a U-turn now establishing that in cases where any professional privilege or confidentiality clauses apply the reporting obligations are shifted to the relevant taxpayer; the new draft further establishes that in cases where the relevant taxpayer does not comply with this obligation the reporting obligation is then shifted to the intermediary.

***Limitation of liability:***

- Now in line with DAC6, the new draft removed a hallmark established by the first draft regarding limitation of liability; the first draft considered as reportable an arrangement involving the exclusion or limitation of liability of the relevant taxpayer, the intermediary or any other participant in the arrangement.

***Hallmark in cross border transactions:***

- Deviating from DAC6, under the first draft a hallmark was also met in the case of a deductible payment made to an entity resident in a jurisdiction included in the Portuguese blacklist; this specific reference was removed in the new draft thus the conditions to meet the hallmark are now in line with DAC6 (reference is made to the OECD and EU lists of non-cooperative jurisdictions);

***Zero or almost zero tax rate:***

- As allowed under DAC6, according to the new draft law a zero or almost zero tax rate is a nominal tax rate lower than 1%; in the first draft, this definition also included a reference to an effective taxation of 60% or lower than the tax that would be due in Portugal.

Although Portugal is already uncompliant as DAC6 was not yet implemented in domestic law, the new draft law is still at the Parliament for discussion in details. Amendments to the reporting deadlines are now expected upon publication of the Council Directive setting out deferrals of the reporting and exchanging of information deadlines for mandatory disclosure rules under DAC6. Despite the lack of enactment, multinationals and large national companies have already started to assess potentially reportable cross border arrangements whose first implementation step has occurred or occurs on or after 25 June 2018, as well as those that may have taken place after that date.

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**Spain – Central Administrative Tribunal applies CJEU's Danish cases to deny the withholding tax exemption on dividends**

The Spanish Central Administrative Tribunal (i.e. administrative body) has recently published a ruling in which it applies the CJEU's doctrine from the Danish beneficial ownership cases to a Spanish case thereby denying the withholding tax exemption on dividend payments to EU parent companies.

A Spanish company paid dividends to a Luxembourg company, both belonged to a Qatari Entity. The Spanish law implementing the EU Parent-Subsidiary Directive provides for a withholding tax exemption on dividends payments if certain conditions are met, namely a minimum participation and a minimum holding period. Thus, beneficial ownership is not included as a material requirement. However, the withholding tax exemption could be precluded in those cases in which the majority of the voting rights of the EU company receiving the dividends were, directly or indirectly, held by non-EU persons.

The wording of the anti-avoidance provision applicable at the time of the facts addressed in the ruling stated that the withholding tax exemption would not be precluded if one of the following three conditions were met:

(i) the EU parent company receiving the dividends carried on a business activity directly related to the business activity of the Spanish subsidiary;

(ii) the business purposes of the EU parent company was to manage the subsidiary, with the necessary human and material means; or

(iii) the EU parent company proved that it was incorporated for valid economic reasons and not to gain access to the dividend withholding tax exemption in a fraudulent way.

The Luxembourg company argued that it benefited from the withholding tax exemption since it was incorporated for valid economic reasons. However, the tax inspector and the Spanish Central Administrative Tribunal rejected that statement arguing that:

- The legal domicile of the Luxembourg company was at an external service provider in Luxembourg;
- Some of the directors of the Luxembourg company were also employees of the same service provider in Luxembourg;
- The Luxembourg company did not have any employees;
- The Luxembourg company was not the beneficial owner of the dividends because it passed them on to the Qatari Entity, as ultimate shareholder, through dividend distributions and repayment of debt;
- The Qatari Entity took benefits from the fact of funding the structure through CPECs in Luxembourg.

The Luxembourg company tried to reinforce its position to justify the applicability of the withholding tax exemption, although it was not finally admitted. Some of the arguments used by the Luxembourg company were:

- The Luxembourg company was used as a regional investment platform, in which the Spanish investment represented less than 50% of the total portfolio;
- The Luxembourg company acquired the shares in the Spanish company almost a year and a half after its incorporation;
- At the time of acquiring the shares in the Spanish company, the Luxembourg company had already made other investments in jurisdictions other than Spain;
- Dividends received from the Spanish company represented only one portion of the total income from the different investments in different jurisdictions;

The application of the reduced withholding tax rate on dividend payments under the Spain-Luxembourg Double Tax Treaty was also rejected since the Luxembourg company did not qualify as the beneficial owner.

***Takeaway***

Although this ruling can be appealed before the competent Spanish court, it is clear that the current approach of the Spanish tax authorities is to challenge the applicability of the withholding tax exemption on dividend payments based on beneficial ownership and the applicable anti-avoidance provision, including the abuse of rights as a general principle of EU Law.

There is no view on whether Spanish courts and tribunals will admit and apply the approach of the Spanish tax authorities including the Spanish Central Administrative Tribunal. Thus, non-resident investors holding participations in Spanish companies and receiving dividends should revisit their corresponding investment structures to mitigate any potential impact deriving from the new resolution on the matter from the Spanish Central Administrative Tribunal.

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## EU Developments

### EU – EU-27 Member States agreement on optional deferral of DAC6 deadlines due to COVID-19

A number of EU Member States announced in the course of June 2020 that they would provide for or were considering providing for a deferral in their domestic legislation in connection with the original filing deadlines as laid down in Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ('DAC6').

These announcements and statements by EU Member States followed and referenced the political agreement that was reached on 3 June 2020 by the 27 ambassadors to the European Union in the Council's COREPER II (the body preparing the Council meetings) on the European Commission's proposed amendment to DAC6 of 8 May 2020. The agreement in COREPER deviates from the Commission's proposal. The agreement reached in COREPER II allowed EU Member States on an optional basis to postpone the filing deadlines as follows:

- for reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020 the filing deadline would be by 28 February 2021;
- for where the triggering event for the reporting took place between 1 July 2020 and 31 December 2020, the period of 30 days for filing information would start on 1 January 2021;
- for marketable arrangements: the first periodic report would have to be made by the intermediary by 30 April 2021; and,
- the amendment proposal would delay the first automatic exchange of information which would have to take place by 30 April 2021.

The agreement contained the possibility to postpone the deadline by another 3 months in cases where EU Member States have to implement lockdown measures. Each individual EU Member State had to decide whether to implement the deadline postponement or stick with the original DAC6 timelines.

On 24 June 2020, the ECOFIN Council formally adopted the amendment to DAC6. On 26 June, the new Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic, was published in the Official Journal of the European Union, and entered into force the following day.

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**EU – European Commission proposes post-Covid-19 recovery package, ponders new taxes**

On 23 April 2020, the European Council decided to work towards establishing a recovery fund to respond to the socio-economic consequences of the COVID-19 crisis. It tasked the European Commission to analyse the exact needs and to urgently come up with a proposal 'commensurate with the challenge'.

On 27 May 2020, the European Commission issued proposals for an EU-wide post-COVID-19 Recovery Fund, 'Next Generation EU' and amendment to the current multiannual EU budget (Multiannual Financial Framework; 'MFF') for 2014-2020.

The European Commission proposed to create a new recovery instrument which involves raising temporarily the current EU's 'own resources' ceiling to 2% of EU Gross National Income. This would allow the European Commission to use its credit rating to borrow € 750 billion on the financial markets for Next Generation EU.

The European Commission said that additional funds raised would be channelled through EU programmes such as its flagship European Green Deal and the EU's digital agenda. The funds would need to be repaid through future EU budgets but 'not before 2028 and not after 2058'. To help do this in a 'fair and shared' way, the European Commission proposed possible new own resources such as:

- an own resource based on the operation of large companies 'that draw huge benefits from the EU single market' (a 'single market tax'; EC estimated yield: around € 10 billion annually);
- a digital tax on companies with a turnover > € 750 million, if no global agreement is reached at the OECD (EC estimated yield: up to € 1.3 billion annually);
- An Emissions Trading Scheme-based own resource (EC estimated yield: € 10 billion annually); and
- a Carbon Border Adjustment Mechanism (EC estimated yield: € 5 billion -14 billion annually);

These will be in addition to the European Commission's proposals for own resources based on a simplified VAT and non-recycled plastics.

To ensure that solidarity and fairness is at the heart of the recovery, the European Commission said it would step up the fight against tax fraud and other unfair practices to help EU Member States generate the tax revenue needed to respond to the major challenges of the current crisis. The European Commission said that a common consolidated corporate tax base (CCCTB) would provide business with a single rulebook to compute their corporate tax base in the EU, and that tax simplification can improve the business environment and contribute to economic growth.

The European Commission also proposed to make funding available instantly to respond to the most pressing needs by amending the current MFF 2014-2020 to make an additional €11.5 billion in funds available in 2020 for:

- Support to EU Member States with investments and reforms;

- Kick-starting the EU economy by incentivising private investments; and
- Addressing the lessons of the crisis.

The European Commission also unveiled an adjusted Commission Work Programme for 2020 "to propel Europe's recovery and resilience". Direct tax-related issues included:

- Commission (non-legislative) Communication on Business Taxation for the 21st century: was postponed from Q2 to Q4 2020;
- Commission Action Plan to fight tax evasion and to make taxation simple and easy (legislative & non-legislative, including impact assessment), a 'tax good governance in the EU and beyond' plan (non-legislative) and 'revision of the Directive on automatic exchange of information (DAC7)' (legislative): 15 July 2020;
- Review of the EU's non-financial reporting by large companies Directive (legislative, including impact assessment): postponed from Q4 2020 to Q1 2021.

On 21 July 2020 at its special meeting in Brussels, the European Council reached an agreement on the EU recovery package (*more on this in the next edition of this newsletter*).
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**EU – European Parliament sets up permanent subcommittee on taxation ("FISC")**

The European Parliament announced on 19 June 2020, that after a series of special committees and a committee of inquiry into various tax leaks and scandals in recent years, it has established a permanent subcommittee on tax matters which will be composed of 30 members (all the names are available here). The permanent subcommittee will deal with the fight against tax fraud, tax evasion and tax avoidance, as well as financial transparency for taxation purposes. The vote to establish the subcommittee was carried 613 in favour, 67 against and 8 abstentions.

According to the European Parliament's rules of procedure the term of office of EU parliamentary subcommittees is open-ended. Special committees, committees of inquiry and subcommittees cannot adopt legislative texts. Subcommittees may be established either when their related standing committee is created or at the request of an already established standing committee, as was done in this case at the request of the European Parliament's Economic and Monetary Affairs Committee.

The chairs and vice-chairs of each committee will be decided at the constitutive meetings in September. Dutch socialist MEP Paul Tang is expected to chair FISC.

The European Commission has welcomed the permanent subcommittee.
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## *Fiscal State Aid*

**EU – European Commission adopts White Paper on foreign subsidies in the Single Market, Statement by Commission Executive VP and Competition Commissioner Vestager**

On 17 June 2020, the European Commission adopted a White Paper dealing with the distortive effects caused by foreign subsidies in the Single Market. The European Commission now seeks views and input from all stakeholders on the options set out in the White Paper via a public consultation, which will be open until 23 September 2020. The European Commission outlines that EU competition rules, trade defence instruments and public procurement rules play an important role in ensuring fair conditions for companies in the Single Market. According to the European Commission, subsidies by EU Member States have always been subject to EU State Aid rules to avoid distortions. It considers that subsidies granted by non-EU governments to companies in the EU appear to have an increasing negative impact on competition in the Single Market, but fall outside EU State aid control. There is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU companies or distorted the investment decisions, market operations or pricing policies of their beneficiaries, or distorted bidding in public procurement, to the detriment of non-subsidised companies.

The European Commission considers that the existing trade defence rules relate only to exports of goods from third countries and thus do not address all distortions caused by foreign subsidies granted by non-EU countries. Where foreign subsidies take the form of financial flows facilitating acquisitions of EU companies or where they directly support the operation of a company in the EU, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap.

The European Commission's White Paper therefore proposes solutions and calls for new tools to address this regulatory gap. In this context, it puts forward several approaches. The first three options (so-called "Modules") aim at addressing the distortive effects caused by foreign subsidies (i) in the Single market generally (Module 1), (ii) in acquisitions of EU companies (Module 2) and (iii) during EU public procurement procedures (Module 3). These Modules may be complementary to each other, rather than alternatives. The White Paper also sets out a general approach to foreign subsidies in the context of EU funding.

***Statement by Commission Executive VP Vestager:***

"For more than sixty years, the EU state aid rules have made sure that subsidies from EU Member States do not unduly distort the level playing field. But as Europe's economy has become more open and interlinked to the world around us, it has become clear that controlling subsidies from European governments is not enough. Foreign investment is an important source of jobs and growth and is very much welcome in Europe. But when foreign governments give subsidies to support investments and operations in the single market, that can affect our level playing field in several ways. (…) None of our existing instruments can, on their own, solve this problem:

- Our state aid rules don't stop this – because they only cover support given by EU Member States, but not support given by foreign states.

- Our merger rules look at how a merger affects competition in Europe – but don't go into how that merger is paid for.
- Our trade defence instruments enable us to act when subsidised products are exported to Europe – but not when subsidies go straight to foreign-owned businesses here.
- And our framework on screening foreign investments tackles threats to security and public order, but not to the level playing field in the broader sense.

So there's a gap here. And that needs to change - and that is the aim of today's White Paper. (…) So our White Paper puts forward several approaches that would allow us to protect the level playing field.

The first approach, we call it "Module 1" – deals with foreign subsidies to companies that are active in the EU. We're proposing that the Commission, and Europe's national authorities, could take action if a company that operates in Europe gets a foreign subsidy that harms the single market.
Of course, not every foreign subsidy is harmful. Some might have positive effects – they might incentivize investments that could contribute to jobs in Europe, or they could support the vital green and digital transitions. So we're proposing that the Commission can conduct a balancing test. That means we wouldn't act against a subsidy that had positive effects which outweighed the harm done to the single market.

On the other hand, if the benefits don't make up for the harm it would do to the level playing field, the authorities would have the power to put things right. They could do that by imposing what we call "redressive measures". Those measures could come in different forms. A company might have to divest certain assets. Or it might have to share the benefits of the subsidy – perhaps by giving other companies in the single market access to research results or infrastructure that they might have heen financed by the subsidy.

The other parts of the White Paper propose a different approach.

Module 2 deals with foreign subsidies that help companies buy European businesses. Our proposal requires notification to the Commission of the acquisition of stakes in EU companies that meet certain thresholds. This is notably the case where the company acquiring the stake has received subsidies that might facilitate the acquisition. And whilst the review is ongoing, the acquisition cannot be closed. If the Commission concludes that the subsidies are likely to harm the level playing field, then we will take action.

That would usually mean getting commitments from the company not to harm the level playing field - just as we do to fix most competition problems that we find under our merger rules. The commitments would be similar to the redressive measures that we have proposed for Module 1. And as a last resort, if we couldn't agree on suitable commitments, we would have the power to block a harmful merger altogether.

The third module of the White Paper deals with the threat that foreign subsidies can pose to fairness in our public procurement. And the White Paper also deals with the risk that the EU budget could end up in the hands of companies that get foreign subsidies.

(...) Obviously, these are complex matters. And it has never been done before. Changes like this call for careful discussion. So today, with the White Paper, we're launching a public consultation. It will run until 23 September, and we hope will produce a wide range of views and suggestions. And if that consultation shows that new rules are needed, we aim to put forward a proposal in 2021, with the aim of a better, fairer European single market."

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

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