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EU Tax News

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National Developments

Austria – Austrian Tax Authority publishes draft DAC6-guidance: "de-facto deferral" till end of October 2020

On 7 July 2020, the Austrian Ministry of Finance issued draft guidance on the application of the DAC6 rules for stakeholder consultation. In the draft guidance it stated that Austria will not make use of the option granted via the EU's Directive to extend the reporting deadlines for DAC6 filings. However, due to technical delays, it said that there will be a "de-facto deferral" for DAC6-reportings till the end of October 2020.

By way of background, at EU level an agreement was reached to amend Directive 2011/16/EU (DAC6 Directive). The amending Directive (EU) 2020/876 provides for an option to postpone the start of the reporting obligation by 6 months (i.e. start of the reporting obligation for new arrangements on 1 January 2021 only; filing deadline for arrangements of the transitional period on 28 February 2021). Austria officially announced that it will not make use of this option.

As Austria will not make use of the possibility to extend the reporting deadlines, the reporting deadlines as laid down in the Austrian DAC6 implementation law ("*EU-Meldepflichtgesetz*" or "*EU-MPfG*") remain unchanged. On this basis, reportable arrangements implemented during the transitional period (first implementation step in the period from 25 June 2018 to 30 June 2020) needed to be reported by 31 August 2020. For "new arrangements" where the event triggering the reporting obligation occurs in the period from 1 July to 31 December 2020, the 30-day reporting deadline would start on 1 July 2020.

However, based on the draft DAC6-guidance of the Austrian Ministry of Finance, due to "technical delays", the actual filing of DAC6 reports via the electronic reporting tool of the Austrian tax authority (Finanz Online) will be possible from the beginning of October 2020 only. For this reason, the authority has announced that the deadline for the electronic filing of the first DAC6-reports has been extended to 31 October 2020. Hence, if the electronic filings for reports (already being due under the EU-MPfG) are submitted by the end of October 2020, this will not trigger any penalties for late reporting (Sec 49c Austrian Fiscal Penalty Code).

Beside this "de-facto deferral", the draft DAC6-guidance also includes the Austrian Ministry of Finance's interpretation on selected DAC6 questions. The statements included in the guidance reflect only the current legal view of the Austrian Ministry of Finance and are therefore subject to a different interpretation and application of the DAC6 Directive between the EU Member States which may develop later. Furthermore, the guidance is not comprehensive, and it leaves several basic questions unanswered.

The draft DAC6-guidance was available for stakeholder consultation until 30 July 2020. It remains to be seen how much of the consultation feedback will be incorporated by the Ministry of Finance in the final version. We expect that the final version of the guidance will be published in the first-half of October 2020.

Although the statutory (DAC6) reporting deadlines in the EU-MPfG remain unchanged, the draft DAC6 guidance of the Austrian Ministry of Finance results in a "de facto deferral" of the reporting

deadline by 3 months (2 months for arrangements implemented during the transitional period). This deferral relieves companies in the short term and enables them to prepare carefully for the forthcoming reporting obligation.

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Belgium – Position of the Belgian Finance Minister on the compatibility of the Belgian consolidation regime with the EU's Parent Subsidiary Directive

On the occasion of a parliamentary question in May 2020, the Belgian Finance Minister stated that the CJEU's Judgment in *Brussels Securities* (C-389/18) of 19 December 2019, should not lead to a modification of the recently introduced Belgian consolidation regime (the so-called 'Belgian group contribution regime').

The *Brussels Securities* Judgment concerns the implementation of art. 4(1) of the EU's Parent Subsidiary Directive (PSD) in Belgium via the Dividend Received Deduction (DRD) regime, based on which a received dividend is first included in the taxable base of the company, after which 95% (for the period in the case at hand, currently 100%) of the dividend can be deducted via the DRD. The CJEU ruled that the Belgian carry-forward DRD in combination with the carry-forward Notional Interest Deduction (NID) – that was lost after the maximum period of carry forward was reached – is not in line with the PSD. In other words, the receipt of dividends must be tax 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.

Under the Belgian group contribution regime, a profit-making participant can grant a tax-deductible group contribution to a Belgian loss-making group entity, that under certain conditions can offset its current year losses against the group contribution received. The group contribution received cannot be offset against tax deductions such as DRD, NID or carry-forward tax losses. In Belgian doctrine it is contended that based on the *Brussels Securities* case, the rule that the DRD cannot be deducted from the group contribution received could be contrary to the PSD.

However, the Belgian Finance Minister does not agree with this position, as this rule is intended to discourage taxpayers from applying a group contribution that is higher than the tax losses of the group entity receiving it. According to the Minister, "abnormal use" of the group contribution could be qualified as an abnormal benefit which also cannot be offset against any tax deductions. In this respect, the Minister refers to Belgian case law in which the Court of Appeal of Antwerp decided that the rule prohibiting a tax deduction from abnormal or gratuitous benefits is not contrary to the PSD. Based on this reasoning, the Finance Minister concludes that also the prohibition to deduct DRD from the group contribution received does not violate the PSD.

In our view, this reasoning could be criticized. For taxpayers which are confronted with the prohibition to deduct DRD from a group contribution received, the opportunity remains to secure their rights.

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Greece – Final bill implementing DAC6 in Greek legislation voted by the Greek parliament

On 29 July 2020, the Greek Parliament adopted the bill implementing the 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 (the so-called "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 take effect retroactively as of 1 July 2020. Specific transitional measures are applicable to arrangements implemented between 25 June 2018 and 30 June 2020.

The Greek law overall follows the DAC6 scope, hallmarks and reporting requirements. Greece also opted for the 6-month deferral on reporting deadlines provided by the Council Directive (EU) 2020/876. 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. "Arrangements", which are not defined in the law, should be interpreted broadly to include an agreement, scheme, plan, transaction, etc. or series thereof and 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 Greek law 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 other hallmarks trigger reporting in all cases, regardless of whether obtaining a tax advantage is a main benefit or not.

Reporting obligations

The reporting obligation falls on the intermediary or the taxpayer according to detailed rules regarding the parties and jurisdictions involved. Nevertheless, taxpayers should be held responsible for reporting in all cases where they are not able to prove by appropriate means that the same information on the reportable arrangement has been submitted by an intermediary in another EU Member State, which is a deviation from the Directive. Where bound by professional (legal) privilege, an intermediary will be exempt from reporting obligation. Based on the law, only lawyers are covered by the professional (legal) privilege. An intermediary exempted from reporting obligations will nevertheless have to notify with no delay 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 reporting obligations will start to apply as of

1 January 2021, covering, however, 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 EUR 10,000 per arrangement with a cap of EUR 100,000 per tax audit.

No official guidance has been published (or announced) by the Greek tax authorities at this stage. Certain open questions remain in practice, especially with respect to the interpretation of some of the rather widely defined hallmarks.

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Italy – Italian Supreme Court judgment on the interpretation of the beneficial owner requirement in the EU's Interest and Royalty Directive

On 10 July 2020, the Italian Supreme Court issued a judgment (sez. v, n. 14756/2020) on the interpretation of the beneficial owner requirement in the EU's Interest and Royalty Directive (IRD) as implemented by Italy.

The case originates from an assessment by the Italian Tax Authorities issued in the context of a merger leveraged buyout transaction aimed at the acquisition of target companies in Italy and financed by means of several intercompany loans between associated entities and ultimately with a third-party bank.

The Italian Tax Authorities challenged the application of the IRD's withholding tax exemption to the interest income paid in 2006 by the Italian entity of the foreign group in favour of its Luxembourg parent company pursuant to an intercompany loan agreement made for the purposes of the merger leveraged buyout transaction.

The Italian Tax Authorities based their assessment on the fact that the Luxembourg parent company was not the beneficial owner of the interest income for the following reasons:

- the Luxembourg parent company received the income as a mere conduit company with the purposes of 'channelling' its proceeds for the reimbursement of a second loan, having broadly similar conditions, in place with a Luxembourg associated entity;
- the interest received was soon after its receipt passed on to the associated Luxembourg entity, with the Luxembourg parent company deriving only a small margin equal to 0.125%;
- the Luxembourg parent company did not perform an actual economic activity being a holding company whose activity was limited to the holding of shares.

The taxpayer started litigation against the assessment. Both the Tax Court of First Instance (in 2010) and the Tax Court of Appeal (in 2012) upheld the taxpayer's position and dismissed the Italian Tax Authorities' objection on the lack of satisfying the beneficial owner requirement on the grounds that from an examination of the documentation provided it was not proved that the

Luxembourg parent company acted as a mere conduit company and that it did not have full ownership and availability of the interest income received.

According to the Italian Supreme Court – based on the facts and circumstances as assessed by the Tax Court of Appeal and which could not be reviewed by the Supreme Court – the IRD beneficial ownership clause as implemented by Italy was correctly interpreted. In its reasoning, the Italian Supreme Court preliminarily referred to the notion of beneficial owner as outlined in the 2014 version of the OECD Commentary which, according to the Court, represents a useful tool for the interpretation of the term.

The Italian Supreme Court made explicit reference to the recent jurisprudence of the CJEU in the 'Danish' beneficial ownership cases (joined cases C-116/16, C-117/16) and, in particular, to the 'indicia' listed therein for the assessment of abusive practices. Lastly, the Italian Supreme Court affirmed the principle according to which the fact that a company only holds controlling shares (i.e. acts as a mere holding company) and that is itself controlled by another company (being a sub-holding company) does not imply, as such, the artificiality of the structure put in place and the lack of satisfying the beneficial owner requirement.

This is the first time that the Italian Supreme Court has referred to the principles outlined in the 'Danish' beneficial ownership cases for the interpretation of the beneficial owner requirement in the context of the domestic implementation of the IRD.

It is noteworthy that the Italian Tax Authorities' investigations, as well as both the first- and second-degree judgments, were issued well before the publication of the CJEU Judgments in the 'Danish' beneficial ownership cases. It remains to be seen how the Italian domestic tax courts will decide on cases involving future potential tax investigations of the Italian Tax Authorities grounded more specifically on the assessment of the indicia of abuse listed in the CJEU 'Danish' beneficial ownership cases.

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EU Developments

Belgium – European Commission requests Belgium to bring its CFC rules and the EBITDA rule in line with the ATAD

To fulfil its obligations under the Anti-Tax Avoidance Directive (ATAD), Belgium introduced, amongst others, CFC rules and an interest limitation rule (EBITDA rule) into its tax legislation. In the July infringement package published on 2 July 2020, the European Commission stated that it is of the opinion that Belgium did not transpose the ATAD correctly and has sent a letter of formal notice to Belgium requesting it to change its legislation.

First, contrary to the ATAD, Belgian law does not eliminate double taxation arising from the application of its CFC rules and does not allow a taxpayer to deduct from its tax liability the tax paid by a CFC in the state of tax residence. This is an important development. We already raised

the concern that the application of Belgian CFC rules could lead to undesired double or even multiple taxation and are happy to see that the European Commission shares this concern and has taken action. The position of the European Commission raises, however, interesting questions regarding the scope of Article 3 of the ATAD that allows EU Member States to safeguard a higher level of protection for domestic corporate tax bases. For clients that are subject to the CFC rules, the action of the European Commission could offer a direct opportunity to claim a tax credit.

Second, the European Commission is of the opinion that Belgium did not transpose the EBITDA rule of the ATAD correctly. Belgium made use of the possibility to exempt from the EBITDA rule borrowing costs incurred on loans used to fund long-term public infrastructure projects. However, the definition of these infrastructure projects in Belgian law does not correspond to the definition of the ATAD. This is mainly of relevance for loans concluded within the framework of public-private partnership projects (project van publiek-private samenwerking/projet de partenariat public-privé). Furthermore, according to the European Commission, Belgium wrongfully implemented the EBITDA rule exemption for financial undertakings. More precisely, the European Commission considers that Belgium excludes certain types of entities from the EBITDA rule which do not qualify as “financial undertakings” under the ATAD.

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EU – European Commission adopts tax package for fair and simple taxation

On 15 July 2020, the European Commission adopted a new tax package aimed at making taxation within the European Union “fairer, greener and fit for the modern economy, and contributing to long-term, sustainable, inclusive growth.” The European Commission’s tax package consists of 3 separate but complementary proposals for fairer, simpler and modernised tax systems.

1*. Action Plan for fair and simple taxation supporting the EU recovery strategy*

The Action Plan is designed to respond to the dual challenge of the current crisis: supporting a swift and sustainable economic recovery and ensuring sufficient public revenue in the EU. The Annex to the Action Plan Communication features 25 tax initiatives to be implemented between now and 2024 in both the indirect tax and direct tax areas around the EU’s twin objectives of fighting tax evasion and making taxation simple and easy. The European Commission considers that:

- “A deep reform of the corporate tax system to fit our modern and increasingly digitalised economy is now even more important to support growth and generate needed revenues in a fair way, by realigning taxing rights with value creation and setting a minimum level of effective taxation of business profits. The European Commission is actively supporting the global discussions led by the OECD and the G20 and stands ready to act if no global agreement is reached. Before the end of the year, the European Commission will set out the next steps, following up on the global discussions in an Action Plan for Business Taxation for the 21st century.

- The global fight against tax evasion and avoidance requires decisive action. Covid-19 has prompted unprecedented action at national and EU level to support EU Member States’ economies and facilitate their recovery. This includes State intervention to ensure liquidity

and access to finance for undertakings, a considerable part of which has been subject to EU State aid rules. The EU list of non-cooperative jurisdictions for tax purposes is designed to address threats to EU Member States' tax bases. Against this background, the European Commission put forward a Recommendation (see item in the Fiscal State Aid section) that EU Member States make their financial support to undertakings in the EU conditional on the absence of links between those undertakings and jurisdictions on the EU list.

- All existing policy levers will be activated. The European Commission will explore how to make full use of the provisions of the EU Treaty that allow proposals on taxation to be adopted by ordinary legislative procedure, including Article 116 TFEU" (i.e. not by unanimous vote).

Examples of direct tax initiatives for 2020/2021

- An initiative for an EU cooperative compliance framework, based on greater cooperation, trust and transparency for a dialogue between tax administrations for the common resolution of cross-border corporate income tax issues. This would cover SMEs and larger companies and their respective circumstances and complement existing programmes;
- The European Commission and EU Member States will continue to work on the implementation of a permanent body / Standing Committee for dispute resolution to contribute to the effectiveness of cross-border dispute resolution;
- Charter on taxpayer's rights: the European Commission will publish a Communication taking stock of taxpayers' existing rights under EU law together with a Recommendation to EU Member States to facilitate the implementation of taxpayers' rights and to simplify tax obligations; and
- The European Commission will re-install an expert group on transfer pricing (TP) for pragmatic, non-legislative solutions to practical problems posed by TP practices relevant to the EU. The group will increase tax certainty, reduce double taxation risks and enable input from EU Member States and business and civil society.

2. *Revision of the Directive on administrative cooperation (DAC7)*

A new legislative proposal which would:

- introduce automatic exchange of information between EU Member States' tax administrations for income/revenues generated by sellers on digital platforms; and
- strengthen administrative cooperation through the clarification of existing rules.

3. *Communication on Tax Good Governance in the EU and beyond*

This Communication focuses on promoting fair taxation and clamping down on unfair tax competition, within the EU and internationally. The main areas for action will include:

- Code of Conduct (business taxation) reform;
- Review of the EU list of non-cooperative jurisdictions for tax purposes;
- Improvements to reinforce tax good governance vis-à-vis EU funds and improved coordinated defensive measures by EU Member States;
- Supporting developing countries in this area.

This tax package is the first part of a comprehensive and ambitious EU tax agenda for the coming years. The European Commission will also work on business taxation for the 21st century, addressing the challenges of the digital economy and ensure that all multinational groups pay their fair share. In the context of the Green Deal, the European Commission will ensure taxation supports the EU's objective of reaching climate neutrality by 2050. The European Commission called on the European Parliament, the Council of the EU, NGOs, trade unions and businesses to actively engage in a constructive and inclusive fashion.

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EU – German EU Council Presidency work programme for second half of 2020: fair taxation for an EU based on solidarity

Germany took over the rotating 6-monthly EU Council Presidency on 1 July 2020. Taxation is clearly a priority for the Germans and is presented in the following thematic way by the German Presidency in its Work Programme:

Fair taxation for an EU based on solidarity

German Presidency: Fair taxation concerns all citizens. We need greater transparency in order to create a globally fair tax system that does not allow corporations to deprive the state of its revenues. Europe must act decisively and consistently to combat tax fraud, money laundering and speculative financial transactions. Europe cannot act in solidarity unless it agrees on the minimum standards for a fair tax policy.

Emerging from the crisis with a fairer system

German Presidency: Crises have a special way of highlighting how important it is to practice solidarity in financing public goods. Throughout the EU, member state governments have adopted unprecedented assistance measures to protect citizens, jobs and businesses that have been affected by the coronavirus crisis. Providing this type of assistance, and ensuring that states remain capable of taking effective action, can only be done if states have reliable sources of tax revenue over the long term. It is therefore essential to have a fair tax system where everyone pays their proper share.

For this reason, one of the Finance Ministry's central priorities is to take decisive action against tax fraud, money laundering and speculative financial activity.

Minimum tax rate

German Presidency: The purpose of a global minimum effective tax rate is to ensure that the taxes on a company's profits do not fall below a certain rate, wherever those profits are generated. Tax legislation would thus create a level playing field for all businesses, big and small. The aim is for an international agreement to be reached by the end of the year.

Fair play for companies, revenue for public goods

German Presidency: Current tax legislation fails especially when it comes to collecting enough tax from the big tech companies: these companies can choose to have their registered office wherever tax rates are low, even if most of their market and customers are elsewhere, i.e. in countries with higher tax rates. For this reason, big tech companies often pay significantly less in taxes than conventional industrial enterprises, which is unfair. A global minimum effective tax rate would rectify this. The idea of a global minimum tax rate was floated by German finance minister Olaf Scholz and French finance minister Bruno Le Maire. At the G20 meeting of finance ministers in June 2019 in Japan, the major developed and developing countries agreed to get a global minimum tax rate underway by the end of 2020. This does not mean that countries will be told how much to tax their businesses. The idea is that countries will have the right to retroactively tax profits generated in their territory at a rate equivalent to the difference between the tax paid and the agreed minimum tax rate. This would help prevent corporations which operate internationally from avoiding fair taxation, for example by recording their profits in countries with low taxes.

Financial transaction tax (FTT)

German Presidency: A tax imposed on financial transactions on or outside of the stock market, for example on purchases and sales of shares. The goal of such a tax is to stabilise the markets by introducing higher transaction costs, which makes speculation less attractive. The FTT would rein in speculators and stabilise markets, while also involving the financial sector more deeply in the financing of public goods. The FTT allows for a fairer taxation of the financial sector. In 2018, German finance minister Olaf Scholz and his French counterpart Bruno Le Maire introduced into the EU-level negotiations on an FTT a new proposal based on the financial transaction tax already in place in France. The Franco-German proposal envisages a tax of at least 0.2 percent. Most of the tax would be paid by German and non-German institutional investors such as banks and fund management companies. German households would contribute only a small share of the revenue from this tax. The tax would apply to share purchases by companies with registered offices in Germany, though only shares of companies with an exchange value (market capitalisation) of over €1bn would be taken into account. The proposal includes a range of justified exemptions. For example, the exemption of initial issuances from the FTT ensures that German companies do not face restrictions when raising capital. France and Italy already have such a financial transaction tax. The United Kingdom's stamp duty is a proven historical FTT. Experience in these countries shows that the tax can make a contribution to ensuring the financial sector is subject to fair taxation, without adverse effects on investment and savings behaviours.

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EU – Work programme of the Code of Conduct Group (Business Taxation) during the German EU Council Presidency

In its Council Conclusions of 17 June 2020 (doc. 8892/20), the ECOFIN Council:

a) invited the Code of Conduct Group to continue its work under its multiannual work package 2018 (doc. 10420/18);
b) took the view that due to the COVID-19 public health emergency, the completion of the screening of the jurisdictions that have foreign source income exemption regimes in place, the monitoring of the implementation of the country by country (CbCR) anti-BEPS minimum standard (criterion 3.2) and the screening of the three jurisdictions added (Argentina, Mexico and Russia) to the geographical scope of the EU listing exercise in 2019, should be postponed until such time that circumstances allow them to request commitments;
c) invited the Code Group to recommend an update of the EU list of non-cooperative jurisdictions for tax purposes at the October 2020 ECOFIN;
d) invited the Code Group to complete by the end of 2020 the review of economic data for selecting jurisdictions;
e) invited the Code Group to continue discussions on future criterion 1.4 (exchange of beneficial ownership information);
f) asked the Code Group to complete by the end of 2020 the standstill monitoring of measures notified by EU Member States in 2019, the monitoring of the guidelines on the conditions and rules for the issuance of tax rulings and to continue monitoring the implementation of rollback;
g) invited the Code Group to report back to the Council on its work during the German Presidency.

Against the COVID-19 background, the work programme during the German Presidency of the Council (doc. 9531/20) is as follows:

I. Monitoring of standstill and the implementation of rollback

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

II. Links with third countries (EU list of non-cooperative jurisdictions for tax purposes)

The Code Group will continue monitoring in the jurisdictions covered by the current geographical scope:

a) the implementation of the commitments made by jurisdictions;
b) standstill in respect of the newly identified regimes under criterion 2.1 and measures under criterion 2.2 and

c) the overall compliance of jurisdictions vis-à-vis the EU listing criteria.

The EU list of non-cooperative jurisdictions for tax purposes will be revised by the ECOFIN Council in October 2020 mainly with the following objectives:

a) to delist jurisdictions that completed their commitments;
b) to extend Annex II deadlines where needed;
c) to take into consideration the new Global Forum peer review assessments under criterion 1.2.

The Code Group will continue work on

a) screening of the jurisdictions that have foreign source income exemption regimes in place;
b) the monitoring of the implementation of the country by country anti-BEPS minimum standard (criterion 3.2); and
c) the screening of the three jurisdictions added to the geographical scope of the EU listing exercise in 2019.

However, the completion of that work would be postponed until such time when the Group will consider that circumstances allow to ask jurisdictions to take commitments to address the deficiencies concerned.

The Code Group will furthermore:

a. complete by the end of 2020 the review of economic data for selecting jurisdictions under the EU listing process, on the basis of an updated scoreboard by the Commission services with a view to reviewing the geographical scope of the EU listing exercise by mid-2021 and taking into account the updated OECD list;
b. explore the options of enhancing the EU list;
c. continue discussions on EU's future criterion 1.4 on exchange of beneficial ownership information;
d. review jurisdictions' responses regarding the treatment of partnerships (economic substance requirements) under criterion 2.2;
e. advance work on the monitoring of substance requirements for criterion 2.2 and on the legal and operational procedures for exchange of information, in coordination with the Forum on Harmful Tax Practices (FHTP).

The Chair will continue the procedural/political dialogue with jurisdictions, as necessary, and schedule, as soon as circumstances allow, a coordination meeting with the Chairs and secretariats of the OECD Global Forum, the FHTP and Inclusive Framework on BEPS.

The Code Group will furthermore continue the review of classified documents that were issued in respect of the EU listing process since 2016 and assess whether some could be declassified.

III. Monitoring the implementation of agreed guidance

In line with its agreed priority list (doc. 6603/18), the Code Group will assess EU Member States'

compliance with the 2016 'Guidelines on the conditions and rules for the issuance of tax rulings - standard requirements for good practice by Member States', on the basis of EU Member States' responses to a questionnaire.

IV. Update and revision of the mandate of the Group

The Code Group seeks to review the 1997 mandate in order to take stock of the achievements of the Code Group so far as well as examining its impacts in the fight against harmful tax practices by taking into account the latest developments in the field of international taxation.

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EU – European Commission publishes Report on the implementation of the ATAD

On 19 August 2020, the European Commission published its report to the European Parliament and the Council on the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

The European Commission states that the report is the first step in the evaluation of the impact of the ATAD and provides an overview of the implementation of the early applicable ATAD measures (interest limitation, GAAR, CFC) across EU Member States. The next step will consist of the delivery of a comprehensive evaluation report of the ATAD measures, including an overview of the implementation of those ATAD measures that were not included in this report. The European Commission explains that some degree of prescribed optionality is permitted in the transposition of the ATAD measures. Additionally, as the ATAD is a minimum standard directive it allows EU Member States to provide more restrictive rules in their national legislation transposing the ATAD than the text of the directive prescribes itself, provided that such measures would comply with the fundamental freedoms of the Internal Market. An overview of more noteworthy instances where EU Member States have provided for stronger measures in their national legislation is also included in the report.

ATAD Transposition checks table - State of Play - August 2020[14]:

ATAD:	Interest limitation, GAAR, and CFC		Exit taxation		Hybrid mismatches (1st deadline)	
Member state	*Completeness checks*	*Conformity checks*	*Completeness checks*	*Conformity checks*	*Completeness checks*	*Conformity checks*
Belgium	OK	INFR				
Bulgaria	OK					
Czech Republic	OK					
Denmark	INFR					
Germany			INFR		INFR	
Estonia	OK					
Ireland	INFR					
Greece	OK	OK	INFR		INFR	
Spain	INFR		INFR		INFR	
France	OK	OK				
Croatia						
Italy	OK					
Cyprus	OK				INFR	
Latvia	OK	OK	INFR		INFR	
Lithuania	OK	OK				
Luxembourg	OK	INFR				
Hungary						
Malta	OK	OK				
Netherlands						
Austria	INFR		OK	OK		
Poland	OK	OK			INFR	
Portugal	OK	INFR	INFR			
Romania	OK		INFR		OK	OK
Slovenia	OK	OK				
Slovakia	OK	OK				
Finland	OK	OK	OK	OK		
Sweden	OK	OK	OK	OK		

The European Commission mentions furthermore that the envisaged comprehensive evaluation report of the ATAD measures will be published 'preferably' by 1 January 2022 but that this will be dependent to some extent on the need to revise the ATAD due to EU or other international developments in the discussions on preventing corporate tax avoidance practices.

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Spain – Action brought against Spain in relation to the substantive and procedural conditions and requirements governing the liability of Spanish for harm caused to individuals in breach of EU law

The European Commission brought an action before the CJEU against Spain (case C-278/20) for Spain allegedly having failed to fulfil its obligations under the principles of effectiveness and equivalence as limitations on the autonomy enjoyed by EU Member States when laying down the substantive and procedural conditions and requirements governing their liability for harm caused to individuals in breach of EU law. The European Commission states that the domestic provisions under scrutiny have aligned the rules on the liability of the State as legislature for breaches of EU law with the provisions laid down for infringements of the Spanish Constitution by acts of the legislature, by adding certain substantive conditions, which have the effect of making it impossible or extremely difficult to seek redress for infringements of EU law by the Spanish legislature, in breach of the principle of effectiveness.

The European Commission, furthermore, states that the substantive conditions added for infringements of EU law are incompatible with the principle of equivalence, by making redress for harm caused by the Spanish legislature in breach of EU law subject to conditions that are less favourable than those applicable to harm arising from an infringement of the Spanish Constitution.

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Fiscal State Aid

EU – Recommendation of the European Commission on making State financial support to undertakings in the EU conditional on the absence of links to non-cooperative jurisdictions

On 14 July 2020, the European Commission issued a Recommendation (to EU Member States) to not grant financial support to companies with links to countries that are on the EU's list of non-cooperative tax jurisdictions or to companies that have been convicted of serious financial crimes, including, among others, financial fraud, corruption, non-payment of tax and social security obligations. Recommendations are used to allow the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed (here: EU Member States).

The stated aim of this Recommendation is to provide guidance to EU Member States on how to set conditions to financial support that prevent the misuse of public funds and to strengthen safeguards against tax abuse throughout the EU, in line with EU laws. By coordinating restrictions on financial support, EU Member States would also prevent mismatches and distortions within the Single Market. The European Commission says that it is up to EU Member States to decide if they wish to grant financial support and to design measures in line with EU rules, including State aid rules, and their policy objectives. The coronavirus outbreak has required unprecedented efforts at both national and EU level to support EU Member States' economies and facilitate their recovery. This includes substantial financial support to provide liquidity and capital for companies, save jobs, safeguard supply chains and facilitate research and development.

Companies with links to jurisdictions on the EU's list of non-cooperative tax jurisdictions (e.g. if a company is resident for tax purposes in such a jurisdiction) should not be granted public support, according to the Commission Recommendation. Should EU Member States decide to introduce such provisions in their national legislation, then the European Commission suggests a number of conditions on which they should make the financial support contingent. The European Commission says that the EU list of non-cooperative tax jurisdictions is the best basis to apply such restrictions, as it will enable all Member States to act consistently and will avoid individual measures that may violate EU law. The use of this list to implement the restrictions will also create more clarity and certainty for businesses notes the European Commission, which says it stands ready to discuss with EU Member States any specific plans for ensuring that the granting of State aid, in particular in the form of recapitalisations, should be limited to undertakings paying their fair share of tax.

The European Commission also recommends exceptions to these restrictions – to be applied under strict conditions – in order to protect honest taxpayers. EU Member States are advised to introduce appropriate sanctions to discourage applicants from providing false or inaccurate information. EU Member States are also invited to agree to reasonable requirements for companies to prove that there is no link with a jurisdiction on the EU list of non-cooperative tax jurisdictions. The recommendation suggests principles to assist EU Member States in this area.

The EU Member States should inform the Commission of the measures that they will implement to comply with this Commission Recommendation in line with the EU's good governance principles. The European Commission will publish a report on the impact of this Recommendation within three years.

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EU – Non-confidential version of the European Commission's State aid decision to extend proceedings in Inter IKEA

On 2 July 2020, the public version of the State aid decision of the European Commission to extend the State aid investigation into the Netherlands' tax treatment of Inter IKEA Systems BV (Systems) was made available. The decision follows the European Commission's opening decision of 18 December 2017, in which the European Commission explained the reasons for the initiation of the formal investigation and requested additional information from the Netherlands and potentially Systems or any other company of the Inter IKEA Group, in order to reach a final conclusion. (see PwC's EUDTG Newsalert of 28 March 2018).

The European Commission's opening decision focused on two Advanced Pricing Agreements (APAs) granted by the Netherlands to Systems in 2006 and 2011, respectively.

European Commission's decision to extend proceedings

The European Commission considered that the 2006 and 2011 APAs have been modified since the adoption of its opening decision, in particular as regards the amortisation of the IKEA Proprietary Rights (PRs) and their revised transfer price. More specifically, according to the European Commission, Systems decided to start amortising the PRs. At the same time, Systems stopped setting aside allocations for the provision of future interest payments related to the price adjustment mechanism (PAM), reversing the allocations deducted in previous tax years. In addition, Systems and Interogo Foundation (that owned the PRs) decided to terminate the PAM and to increase the transfer price of the PRs to EUR 11.8 billion. In reflection of those changes, Systems filed revised corporate income tax (CIT) declarations. Consequently, the European Commission has decided to extend the scope of its investigation to include both the APAs *and* Systems' annual tax assessments for tax years 2006 and following, including those annual tax assessments in which the 2011 APA was, in the European Commission's view, not applied (collectively the contested measures).

European Commission's preliminary State aid assessment

The European Commission considers, at this stage, that the contested measures constitute State aid. Apart from the grounds mentioned in its opening decision, the European Commission puts forward two additional grounds.

Amortisation of the PRs

Although the European Commission does not contest Systems' right to deduct the amortisation of the PRs (since such a deduction appears to be in line with Dutch tax and accounting laws), the European Commission is of the view that such amortisation in this particular case took place for an amount higher than the arm's length transfer price. This resulted, according to the European Commission, in an unjustified tax base reduction for Systems given that the transfer price of the PRs was determined without subtracting Systems' contribution in relation to the PRs and the IKEA Franchise Concept. Any reduction in the arm's length transfer price of the PRs following those subtractions should thus necessarily lead to a corresponding reduction in the amount of the amortisation deducted each year by Systems.

Misapplication of Article 10a CITA

Based on its further investigation into the tax consequences of the intercompany loan provided by Interogo to Systems, the European Commission provisionally concludes that the Dutch tax administration's endorsement of the interest deduction arising from the loan is contrary to Article 10a of the Dutch CIT Act. More specifically, in its opening decision, the European Commission provisionally concluded that the transfer price of the PRs did not reflect its market value. Accordingly, the difference between the transfer price of the PRs and its market value should under Dutch law be considered a hidden profit distribution. Since the loan was aimed at financing 60% of the transfer price of the PRs in line with the intention of the parties, the European Commission provisionally considers that the loan similarly financed 60% of the hidden profit distribution. Therefore, the interest calculated on the part of the loan that finances the hidden dividend distribution, i.e. the part of the transfer price above its arm's length price, should not be deductible under Article 10a of the Dutch CIT Act.

In its decision to extend proceedings, the European Commission preliminarily concludes that the contested measures (the 2006 and 2011 APAs *and* the annual CIT assessments) constitute State aid. It will be necessary to wait for the final decision to see whether the European Commission confirms this position.

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EU – General Court of the European Union annuls the European Commission's decision in Apple

On 15 July 2020, the General Court of the European Union (GC) rendered its Judgment (T-778/16 and T-892/16) regarding the action brought by Apple Sales International (ASI), Apple Operations

Europe (AOE) and Ireland for the annulment of the final State aid decision of the European Commission of 30 August 2016, on Apple (SA.38373). The GC annulled the European Commission's decision because the European Commission did not demonstrate the existence of an economic advantage within the meaning of EU State aid rules.

In its final decision on Apple, the European Commission had concluded that the two rulings granted in 1991 and 2007 on the attribution of profits to the Irish branches of two Irish incorporated, non-resident companies constitute unlawful State aid, and ordered immediate recovery of the aid (see PwC's EUDTG Newsalert of 20 December 2016).

Both Ireland and Apple appealed this European Commission final decision before the GC challenging the European Commission's "primary line of reasoning" for:

1) incorrectly identifying the reference framework, inter alia, on the basis of incorrect assessments of Irish law, misapplication of the arm's length principle and the 2010 OECD Transfer pricing Guidelines;
2) having erroneously assessed the activities within the Apple Group; and
3) having erroneously assessed the selective nature of the contested tax rulings.

In addition, Ireland and Apple contested the assessments made by the European Commission in relation to the European Commission subsidiary line of reasoning and the alternative line of reasoning.

In its Judgment, the GC noted from the outset that the contested tax rulings form part of the general Irish corporation tax regime, the objective of which is to tax the chargeable profits of companies carrying on activities in Ireland, be they resident or non-resident, integrated or stand-alone. The GC then noted that the European Commission did not err when it concluded that the reference framework in the present instance was the ordinary rules of taxation of corporate profit in Ireland, which includes the provisions applicable to non-resident companies laid down in Section 25 of the TCA 97.

Next, the GC ruled that the allocation of profits to a branch of a company may lend itself to the application by analogy of the principles applicable to establishing the prices of intra-group transactions within a group of undertakings if it is clear from national tax law that the profits derived from the activities of the branches of non-resident undertakings should be taxed as if they resulted from the economic activities of stand-alone undertakings operating under market conditions. Where this is the case, the arm's length principle (ALP) is an appropriate tool to determine whether the profits allocated to such branches corresponds to the level that would have been obtained through carrying on that trade under market conditions.

The GC ruled Article 107 TFEU does not oblige EU Member States to apply the ALP in all areas of their national tax law. Accordingly, at the current stage of development of EU law, the European Commission does not have the power independently to determine what constitutes the 'normal' taxation of an integrated undertaking while disregarding the national rules of taxation. However, in the present case, the GC concluded that since the relevant Irish legislation forming the 'normal' rules of taxation seeks to compute the taxable profits of a branch carrying on a trade in Ireland in the same way as it would compute the taxable profits of an Irish resident company carrying on the

trade, the European Commission has the competence to check whether the profit allocated to the ASI and AOE branches correspond to the level of profit that would have been obtained if that activity had been carried on under market conditions.

Whilst the Authorised OECD Approach (AOA) has not been incorporated into Irish tax law, in the GC's view, it is clear that there is some overlap between the application of Section 25 and the functional and factual analysis conducted as part of the first step of the analysis proposed by the AOA. Therefore, the European Commission cannot be criticised for having relied, in essence, on the AOA for the purpose of allocating profits to the Irish branches of ASI and AOE. However, according to the GC, the approach followed by the European Commission in its primary line of reasoning is inconsistent with the AOA and the relevant Irish law. In particular, the GC concluded that, in determining whether the Apple Group's IP licences should have been allocated to the branches as the European Commission argued, the focus should have been on the actual activities of the branches rather than on the levels of activity (or perceived lack thereof) elsewhere in the companies (e.g. at the head offices).

The GC then went on to assess the activities of the Irish branches of ASI and AOE within the Apple Group. The Court concluded that the European Commission has not succeeded in showing that, in the light of (i) the activities and functions actually performed by the Irish branches of ASI and AOE and, (ii) the strategic decisions taken and implemented outside of those branches, the Apple Group's intellectual property (IP) licences should have been allocated to those Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland.

As regards the European Commission's secondary line of reasoning, namely that even were the IP not allocated to the branches the approaches adopted for determining the branch profits were still inappropriate, the GC ruled that the European Commission failed to demonstrate the existence of an advantage to ASI and AOE. In this context, the Court noted that the mere non-observance of methodological requirements for the determination of transfer pricing does not necessarily lead to a reduction of the tax burden for the Irish branches of ASI and AOE. In particular, whilst the European Commission had challenged the choice of the tested party, the choice of the operating costs as the profit level indicator for the Irish branches of ASI and AOE, and the remuneration of the Irish branches accepted by Irish Revenue in the contested tax rulings, in the view of the GC they had not adequately demonstrated that there were more appropriate methodologies that would have given rise to higher taxable profits in the Irish branches of ASI and AOE. The GC concluded that any defects identified by the Commission in the rulings or transfer pricing approaches are not in themselves sufficient to prove the existence of an advantage for State aid purposes.

Finally, with respect to the alternative line of reasoning, the Court held that the European Commission did not prove that the contested tax rulings were the result of discretion exercised by the Irish tax authorities and that, accordingly, ASI and AOE had been granted a selective advantage.

On 25 September 2020, the European Commission formally announced that it will appeal the GC Judgment before the European Court of Justice (*more on this in our next newsletter edition*). It remains to be seen what the implications of this judgment are for the other ongoing State aid cases which concern transfer pricing.

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