EU Direct Tax Group

Ready to talk EU tax law when you are.

EU Tax News

Issue 2021 – nr. 002 *January – February 2021*

This bi-monthly newsletter is prepared by members of PwC's pan-European EU Direct Tax Group (EUDTG) network. To receive this Newsletter and our Newsalerts automatically and free of charge, please send an e-mail to: eudtg@nl.pwc.com with "subscription EU Tax News". For previous editions of PwC's EU Tax News see: www.pwc.com/eudtg

EDITORIAL BOARD: Bob van der Made, Joanne Theodorides and Phil Greenfield.

Contents

CJEU Developments

France	CJEU rules ordinary tax credit method provided for by DTTs compatible with free movement of capital - Société Générale
Spain	CJEU Judgment on the compatibility of the Spanish municipal fee for the occupation or use of public land
Spain	CJEU Judgment on the compatibility of the Andalusian tax applicable to credit entities with Article 49 TFEU and Directive 2006/112/EC
Sweden	CJEU rules Swedish interest deduction rule incompatible with EU law

National Developments

Gibraltar	Changes to the scope of DAC6 in Gibraltar
Spain	Spanish Supreme Court rules tax treatment of pension funds resident in third countries is contrary to EU law
Spain	Spain publishes the law that transposes DAC6
UK	Scope of DAC6 is reduced in the UK following Brexit

EU Developments

EU	Broad majority support in Council for EU public country by country reporting
EU	ECOFIN Council adopts Council Conclusions on revised EU list of non-cooperative jurisdictions for tax purposes
Sweden	European Commission requests Sweden to amend dividend withholding tax rules for foreign public pension funds

CJEU Developments

France – CJEU rules ordinary tax credit method provided for by DTTs compatible with free movement of capital - Société Générale

On 24 April 2019, the French Supreme Administrative Court asked for a preliminary ruling on the *Société Générale* case (C-403/19) to the CJEU. The CJEU delivered its Judgment on 25 February 2021, without an Advocate General's opinion.

A French company, belonging to a tax group headed by Société Générale, received dividends from Italy, the United Kingdom and the Netherlands. An amount equal to those dividends was then paid to third parties pursuant to two different financial contracts. As the dividends had been subject to withholding tax in the source countries on the gross amount of the dividends, the French company deducted from the corporate income tax which it was liable for in France, tax credits as provided for by the Double Tax Treaties (DTTs) concluded by France with these countries. The deduction amounted to the withholding taxes.

The French tax authorities, however, reassessed the French company on the ground that the amount paid in accordance with the terms of the contracts entered into by the French company, was an expense connected to the dividends which should be deducted from the theoretical tax base in determining the maximum tax credit as provided for by the three DTTs. Such computation method (the so-called ordinary one by the OECD) reduced to almost nil the amount of the tax credits.

Before the French Supreme Administrative Court, Société Générale argued that this limitation contravened the free movement of capital enshrined in Article 63 of the TFEU.

The CJEU recalled firstly that the disadvantages which may arise from the parallel exercise of powers of taxation by different EU Member States, in so far as such an exercise is not discriminatory, do not constitute restrictions prohibited by the TFEU. Therefore, the Member State of residence is not obliged under EU law to prevent the disadvantages which could arise from the exercise of competence attributed by the two Member States.

Notwithstanding this, the CJEU reminded that even if the Member States are free to determine in the framework of DTTs the connecting factors for the purpose of allocating powers of taxation, the Member States must comply with EU rules and, more particularly, observe the principle of equal treatment where they exercise their power of taxation so allocated.

In the case at hand, the CJEU noted that the dividends received from Italy, the United Kingdom and the Netherlands were not subject to a heavier burden of taxation as compared to French-source dividends (same tax base and rate). In particular, the expenses "specifically" related to the foreign-source dividends which are deducted for the computation of the tax credit are also deducted from the global tax result of the company receiving French-source dividends. In other words, there is no difference of treatment.

For the CJEU, the disadvantage suffered by the company stems from the difference of tax base used in the source State for the computation of the withholding tax and the State of residence for the computation of the corporate income tax. As each EU Member State is free to define, in accordance with EU law, the basis of assessment for tax purposes which applies to the shareholder in receipt of the dividends distributed, there is no restriction to the free movement of capital. Moreover, the CJEU recalled that the purpose of DTTs is not to

ensure that the taxation to which the taxpayer is subject in one Member State is not higher than that to which it would be subject in the other.

This new ruling from the CJEU is a reminder of the great freedom EU Member States have in defining the allocation of their respective powers of taxation by means of DTTs. In particular, the Member State of residence is not forced to match the tax base of the tax credit it granted on the one used by the source State for the computation of the withholding tax in order to fully eliminate the double taxation of the income.

-- Emmanuel Raingeard, PwC France; emmanuel.raingeard@avocats.pwc.com

Spain – CJEU Judgment on the compatibility of the Spanish municipal fee for the occupation or use of public land

The CJEU ruled on 27 January 2021, in the case *Ayuntamiento de Pamplona vs. Orange España S.A.U.* (C-764/18) concerning the compatibility of a local fee, levied by the City Council of Pamplona on companies that provide fixed telephony and Internet access services, with Articles 12 and 13 of the Authorisation Directive (Directive 2002/20/EC).

In the case at hand, the company considered that the fee was contrary to the Authorisation Directive, as interpreted by the CJEU. The company argued that:

- it was not the owner of the networks that it operated in the territory of the City Council, but rather a user of them by virtue of interconnection rights;
- fixed telephony and Internet access services were included within the scope of application of the Authorisation Directive; and
- it was contrary to Articles 12 and 13 of the Authorisation Directive to impose a tax calculated exclusively on the basis of a fixed percentage of the company's gross income.

The City Council considered that the amount of the fee due did not suffer from any error of fact or law, that it had been calculated in accordance with the law and that the company was the owner of infrastructure networks and, therefore, could not be exempted from the payment of the fee.

The Spanish Supreme Court decided to suspend the proceedings and submitted the following questions for a preliminary ruling:

1. Should the Authorisation Directive be interpreted as applicable to companies that provide fixed telephony and Internet access services.
2. Should Articles 12 and 13 of the Authorisation Directive be interpreted in the sense that they preclude national legislation that imposes on companies that own the infrastructure or networks necessary for electronic communications and that use them to provide fixed telephony and Internet access services, a fee whose amount is determined exclusively on the basis of the gross income obtained annually by these companies in the territory of the Member State.

On the first question, the CJEU considered that "electronic communications services", within the meaning of the Framework Directive (Directive 2002/21/EC), are services that consist of transmitting signals through electronic communications networks, whether these are fixed or mobile networks, and that cover both telephone, fixed or mobile services such as Internet access services. Since the scope of the Authorisation Directive is determined on the basis of the definitions contained in the Framework Directive, it follows that the Authorisation Directive is applicable to authorisations to supply Internet access services and fixed telephony networks and services, and consequently, the Authorisation Directive must be interpreted in the sense that it also applies to companies that provide fixed telephony and Internet access services.

On the second question, the CJEU considered that the fee for use of public land is not included within the scope of application of Article 12 of the Authorisation Directive, as the fee is not intended to cover the overall administrative expenses related to the activities of the national regulatory authority and cannot be classified as an "administrative fee", so that said provision does not preclude national legislation that foresees a fee of this nature. The chargeable event of the fee for use of public land does not depend on the right to install the necessary facilities in the sense of Article 13 of the Authorisation Directive, such that the disputed fee is not included within the scope of this provision either, which does not preclude national legislation that establishes a tax such as the fee for use of public land.

Therefore, Articles 12 and 13 of the Authorisation Directive must be interpreted in the sense that they do not preclude national legislation that imposes on companies that own the infrastructure or networks necessary for electronic communications and that use these to provide fixed telephony and Internet access services, a fee whose amount is determined exclusively on the basis of the gross income obtained annually by these companies in the territory of the Member State in question.

-- Roberta Poza and Miguel Muñoz, PwC Spain; roberta.poza.cid@pwc.com

Spain – CJEU Judgment on the compatibility of the Andalusian tax applicable to credit entities with Article 49 TFEU and Directive 2006/112/EC

The CJEU ruled on 25 February 2021, in the case *Novo Banco, S. A. v Junta de Andalucía*, (C-712/19), concerning the compatibility of the Andalusian tax applicable to credit entities ("the IDECA tax") with Article 49 of the TFEU and Directive 2006/112/EC (the VAT Directive).

The controversial tax is levied on credit institutions on the holding of their clients' deposits, and not on commercial operations consisting of fund deposits. The claimant considered that the deductions applied to the gross amount of the IDECA tax, violate Articles 49, 56 and 63 of the TFEU, insofar as they establish an unjustified difference in treatment between credit institutions depending on whether or not they have their registered office in the territory of the autonomous community of Andalusia. On the other hand, in the claimant's view, the IDECA tax should be classified as an indirect tax levied on deposits received by credit institutions and, consequently, the financial activity carried out through those deposits. According to Novo Banco, such a tax is incompatible with Articles 135(1)(d) and 401 of the EU's VAT Directive.

According to the CJEU, given that the tax base is equal to the arithmetic average of the quarterly balance of the line item relating to customer deposits, which appears in the liabilities section of the balance sheet of credit institutions, the amount of the IDECA tax is not set in proportion to the consideration received by credit institutions. Also, the IDECA tax is not collected at each stage of the financial services production and distribution process. Insofar as Article 6.5 of Law 11/2010 expressly prohibits credit institutions from passing on the IDECA tax to third parties, the final burden of the tax does not ultimately fall on consumers. Given the circumstances the Court considers that the IDECA tax does not constitute a tax on turnover or a tax comparable to a turnover tax.

The CJEU considered that the freedom of establishment enshrined in Article 49 TFEU should be interpreted, in the case of deductions applied to the gross amount of a tax on customer deposits in credit institutions whose headquarters or offices are located in the territory of a region of a Member State, as:

- precluding a deduction of 200,000 euros, applied to the gross amount of said tax, in favour of credit institutions whose registered office is in the territory of that region;

- not precluding deductions, applied to the gross amount of said tax, of 5,000 euros for each office located in the territory of that region, an amount that rises to 7,500 euros for each office located in a municipality with less than 2,000 inhabitants, unless, in practice, these deductions generate unjustified discrimination by reason of the location of the registered office of the affected credit institutions, a point that is up to the referring court to verify.

On the other hand, according to CJEU, in the case of a tax on customer deposits in credit institutions whose headquarters or offices are located in the territory of a region of a Member State, Article 63(1) TFEU should be interpreted as precluding deductions, applied to the gross amount of said tax, for amounts equivalent to the credits, loans and investments intended for projects carried out in that region, as long as the objective of said deductions is purely economic.

The CJEU considered that the IDECA tax does not constitute a tax on turnover or a tax comparable to a turnover tax, and Article 401 of Directive 2006/112/EC should be interpreted in the sense that it does not preclude national legislation that establishes a tax payable by credit institutions for the holding of customer deposits whose taxable base is equal to the arithmetic average of the quarterly balance of these deposits and which the taxpayer cannot pass on to third parties

-- Roberta Poza and Miguel Muñoz, PwC Spain; roberta.poza.cid@pwc.com

Sweden - CJEU rules Swedish interest deduction rule incompatible with EU law

The CJEU ruled in the *Lexel* case (C-484/19) on 20 January 2021.

The main rule under the Swedish rules (in force 2013-2018) was that interest expenses from related entities were non-deductible. There were two exceptions from this main rule: the “ten percent rule” and the “business reasons rule”. Under the ten percent rule, interest expenses on loans from related entities were deductible if the income for the lender corresponding to the interest expense would have been taxed with a tax rate of at least 10 percent, if this had been the only income of the lender. This assessment was a hypothetical test, based on the tax rules where the lending company was resident. Even if the ten percent rule was met, there was an exception to that rule under which the interest expenses would still not be deductible, unless the borrower could prove that the main reason for the debt was not that the group wanted to obtain a substantial tax benefit.

The *Lexel* case concerned the exception to the ten percent rule. In 2011, the Swedish subsidiary financed an intra-group acquisition of shares in a group company with an intra-group loan from a French group company. The Swedish interest income could however be offset against tax losses carried forward in France. Although the French corporate income tax rate was over 30 percent for the years in question, the deduction was denied in Sweden on the grounds that the debt was motivated mainly by tax reasons, as the interest income in France could be offset against tax losses.

In contrast, a deduction would have been granted if the French group company (the creditor) had been a loss-making Swedish company. The reason for this was that two Swedish companies in the same structure would have been able to consolidate for tax purposes (under the Swedish group contribution rules). In such a situation, the same result could have been achieved by way of exchanging group contributions. In the preparatory works to the rules the Swedish Government therefore explained that the deduction could not be denied under such circumstances.

The CJEU ruled that the Swedish rules were incompatible with the freedom of establishment. The Swedish rules were a restriction on the freedom of establishment which could not be justified under any of the grounds that previously have been accepted by the CJEU.

The CJEU Judgment was based on the freedom of establishment. Based on the Judgment it is now clarified that it is contrary to the freedom of establishment to deny the deduction of interest expenses on a loan from a normally taxed group company (in an EU/EEA headed group company), if this would not have happened had the loan been granted from a normally taxed Swedish group company instead. The Swedish Tax Agency has denied interest expense deductions under the rules with very large amounts when the rules have been in force, and the CJEU's Judgment thus has considerable budgetary implications. In 2021 it could be possible for companies to request reassessments of the tax returns for 2015-2018.

-- Fredrik Ohlsson and Anna Romby, PwC Sweden, fredrik.ohlsson@pwc.com

National Developments

Gibraltar – Changes to the scope of DAC6 in Gibraltar

On 21 January 2021, the Gibraltar Competent Authority for the exchange of information for tax purposes announced that Gibraltar is limiting the scope of reporting under DAC6. Following the approach recently adopted in the UK, reporting in Gibraltar will be limited to cross-border arrangements falling within Category D hallmarks (Common Reporting Standard ("CRS") avoidance arrangements and opaque offshore structures).

Regulations have been enacted to amend the Gibraltar Income Tax Act 2010 and the changes take effect from 1 January 2021. Gibraltar exited the EU together with UK on 31 January 2020 and the subsequent transitional period ended on 31 December 2020.

Similar to the UK announcement in January 2021, the Gibraltar Competent Authority has stated that Gibraltar will be aligning its reporting requirements to OECD standards.

The DAC6 rules are contained in the Gibraltar Income Tax Act 2010. The legislation has been amended to remove Hallmarks A, B, C and E. References to "Member State" have been replaced with a new definition of "relevant State" which includes a Member State of the European Union, Gibraltar or the United Kingdom.

The effect of the changes is that reporting requirements for cross border arrangements falling within Hallmarks A, B, C and E have been removed. Reporting obligations in relation to Hallmark D broadly remain unchanged.

The Gibraltar Competent Authority has stated that the reporting obligations in respect of Spain may be realigned with EU DAC6 requirements in the future. This is a result of Gibraltar's potential reporting obligations under the proposed Tax Treaty with Spain.

The changes to the scope of DAC6 reporting apply with effect from 1 January 2021. As there was no requirement to make a disclosure before this date, in practice this means that no reports will be required to be made under Hallmarks A, B, C and E regardless of when the cross-border arrangement was implemented.

The Government of Gibraltar's portal for the exchange of information does not yet have functionality for DAC6 reporting and consequently there is no facility allowing for the upload of XML files in accordance with the relevant schema.

Where a report is required to be made under Hallmark D, it can be submitted to the Gibraltar Competent Authority by email until such time as the portal becomes functional. Submissions by email are required to be made in XML format and conform to the relevant schema.

The changes to the Gibraltar DAC6 legislation are likely to reduce the level of reporting required in Gibraltar. Intermediaries or taxpayers in EU Member States intending to rely on a report being submitted in Gibraltar to satisfy their own reporting obligations may need to review their position in light of the changes announced.

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

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

The Spanish Supreme Court ruled on 17 and 22 December 2020, through four rulings, that the tax treatment provided in the Spanish Law for pension funds resident in third countries (Canada, in this specific case) constitutes a breach of the EU's free movement of capital (Article 63 TFEU). Therefore, all the discriminatory withholding tax levied on dividends paid to those funds must be refunded with compound interest.

In the case decided by the Spanish Supreme Court, concerning a Canadian Pension Fund (i.e. Teacher's Pension Plan, TPP), TPP attested its comparability to a Spanish pension fund by providing all the support documentation at hand, including an attestation from the fund's management about its character as a pension scheme, which was not mandatory at that time. In this regard, it must be remarked that three of the rulings do not establish whether the comparability test must be made considering the Spanish domestic legislation or not, which opens possibilities in this regard. On the other hand, one of the rulings does state that the comparability test has to be made based on the Spanish domestic legislation (Ruling no. 1784/2020, 17 December 2020).

The exchange of information clause included in the double tax treaty (DTT) between Spain and Canada, dated 1976, is valid in order to obtain information about the funds for the above-mentioned purposes, so the Spanish tax authorities (STA) should have utilised the said clause and contacted the Canadian tax authorities in order to gather all the necessary (in the STA's view) documentation to check the comparability.

Based on those grounds the Spanish Supreme Court recognises the right of TPP to obtain the refund of the withholding taxes suffered in Spain when obtaining dividends from a Spanish source.

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

-- Roberta Poza and Miguel Muñoz, PwC Spain; roberta.poza.cid@pwc.com

Spain – Spain publishes the law that transposes DAC6

The transposition of DAC6 in Spain must be made by two legal texts:

- the law that amends the Spanish General Tax Act; and
- the text that will amend the rules about the Tax Audit Regulations ("the Regulations Bill").

Law 10/2020, dated 29 December 2020, that amends the Spanish General Tax Act, was published in the Spanish Official Gazette on 30 December 2020. This law basically deals with professional secrecy and DAC6 penalties, as explained in the relevant sections below.

However, the details about the transposition of DAC6 will be made by the amendment to the Spanish Tax Audit Regulations (Royal Decree 1065/2017, dated 27 July), the bill was published in June 2019 and its legislative process is still open. This text will transpose the key concepts and hallmarks of DAC6 and, as per the bill, the transposition will be in line with DAC6.

Consequently, the transposition of the DAC6 in Spain is not complete and, to date, the deadlines to inform about reportable arrangements as from 25 June 2018 is still unknown. Also, the tax forms to report such arrangements (Spanish tax forms 234, 235 and 236) are also in draft, pending their publication.

Although the Spanish tax authorities should exchange the correspondent information by 30 April 2021, probably this date will not be met taking into account the current DAC6 reporting situation in Spain.

Spanish professional secrecy

As per Law 10/2020, intermediaries, regardless of their activities, can be exempt from the reporting obligation when their services consist, exclusively, of analysing the Spanish rules applicable to a specific arrangement (the so-called "neutral assistance").

Those intermediaries that fall within this exemption must inform other intermediaries and the relevant taxpayer. The deadline to inform is 5 days as from the day following the event that triggers the DAC6 reporting obligation. In any case the relevant taxpayer can waive the intermediary from this exemption, in which case the reporting obligation would rest with this intermediary.

DAC6 penalties

Law 10/2020 establishes the following penalties:

- Lack of filing of the DAC6 reporting within the legal deadline, or reporting with incomplete or incorrect information (serious infringement): the penalty would amount to EUR 2,000 per data (or set of data) not declared, incomplete or incorrect, with a minimum penalty of EUR 4,000 and a maximum of the tax value of the arrangement or the intermediary's fees.
- Filing the DAC6 reporting after the legal deadline without a request having been made by the Spanish tax authorities (serious infringement): 50% of the penalties described above.
- Filing the DAC6 reporting but without using the electronic means of the Spanish tax authorities (serious infringement): penalty of EUR 250 per data (or set of data), with a minimum amount of EUR 750 and a maximum of EUR 1,500.
- Lack of filing the exemption to report based on professional secrecy, or filing with incomplete or incorrect information (minor infringement that could be serious under certain circumstances): the penalty would amount to EUR 600
- Lack of information of having filed the DAC6 reporting in order to waive other intermediaries or the relevant taxpayer (minor infringement that could be serious under certain circumstances): the penalty would amount to EUR 600.

-- Roberta Poza and Miguel Muñoz, PwC Spain; roberta.poza.cid@pwc.com

UK – Scope of DAC6 is reduced in the UK following Brexit

On 31 December 2020, the UK Government announced that the scope of reporting under DAC6 would be limited to cross-border arrangements under the category D hallmarks (which relate to Common Reporting Standard ("CRS") avoidance and opaque ownership structures). Intermediaries and relevant taxpayers in the UK will not need to report arrangements under Hallmark categories A, B C and E (unless category D is also met). Regulations enacting the change have already been made, and are effective from 1 January 2021.

Following the referendum vote in June 2016, the UK ceased to be a member of the EU on 31 January 2020. However, under the transitional agreement between the UK and the EU, which ran until 31 December 2020, the UK was treated as an EU Member State for the purposes of the law of the UK, the EU and all EU Member States.

Regulations implementing DAC6 had been implemented in the UK; however, as mentioned above, these were amended so that from 1 January 2021 disclosures are only required when the category D hallmarks are met.

The changes follow the EU/UK Trade and Cooperation Agreement, which requires that "[a] Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period, in relation to … the exchange of information … concerning … potential cross-border tax planning arrangements".

Following on from the OECD BEPS Action 12 Final Report, the OECD subsequently agreed and published model Mandatory Disclosure Rules ("MDR"), which are broadly equivalent to the DAC6 category D hallmarks.

The UK tax authority (HMRC) has also confirmed that the UK will consult on and implement the OECD's model MDR during 2021, which will replace the surviving parts of DAC 6 in UK domestic law.

HMRC has confirmed that reports only need to be made where hallmarks under category D apply to the arrangement, regardless of when the arrangement was entered into. This means that arrangements which meet hallmarks under Category E, for example, would not be reportable to HMRC, even if the arrangement was entered into before the amendments came into effect.

As it was not possible to make a disclosure before 1 January 2021, no reports under the other hallmarks will be made.

Implications where arrangement disclosable in an EU Member State

There will be situations where arrangements were expected to be disclosable both in the UK and in one or more EU Member States. In cases where intermediaries or relevant taxpayers in EU Member States were expecting to rely on a disclosure by an intermediary in the UK, to satisfy their own reporting obligations under DAC6, they will need to consider the implications of the UK announcement. In many cases the intermediary or relevant taxpayer will be required to make a disclosure themselves. Given that such disclosures are likely to be due in January or February 2021, early action is required.

-- Adrian Rudd, David Hammal and Jonathan Hare, PwC UK; jonathan.hare@pwc.com

EU Developments

EU – Broad majority support in Council for EU public country by country reporting

During the public session of the EU's (Competitiveness) Council on 25 February 2021, it became clear that there was broad support among the EU's 27 Member States to unblock the public country by country reporting (public CBCR) dossier. The impasse on this politically sensitive file was therefore broken and the required minimum threshold for a subsequent qualified majority vote in the Council met. At least 16 EU Member States representing 71% of the population publicly supported the latest Portuguese EU Presidency compromise text (same text as compromise text of 2019).

The following EU Member States voted formally against public CBCR in the Council's written procedure which was organised by the Portuguese Presidency in the following week: Cyprus, Czech Republic, Hungary, Ireland, Luxembourg, Malta and Sweden, while Germany abstained. The final ('Trilogue") negotiations between the EU's Council, Parliament and Commission to agree on the final text of Directive were scheduled to start on 29 March 2021.

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

EU – ECOFIN Council adopts Council Conclusions on revised EU list of non-cooperative jurisdictions for tax purposes

On 22 February 2021, the ECOFIN Council adopted conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. The Council added Dominica to the EU list of non-cooperative jurisdictions (Annex I of the Council's conclusions, aka the "EU blacklist") and removed Barbados. The EU blacklist includes jurisdictions worldwide that either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the reforms deemed necessary by the EU to comply with a set of objective tax good governance criteria. These criteria relate to tax transparency, fair taxation and implementation of international standards designed to prevent tax base erosion and profit shifting. Dominica has been included in the EU blacklist as it received a 'partially compliant' rating from the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and has not yet resolved this issue. Barbados had been added to the EU backlist in October 2020, after it received a 'partially compliant' rating from the Global Forum. Subsequently Barbados was granted a supplementary review by the Global Forum and was therefore moved to a state-of-play document (Annex II of the Council conclusions, aka the "EU grey list") pending the outcome of this review.

The Code of Conduct Group (Business Taxation) state-of-play document (EU grey list) identifies jurisdictions which do not yet comply with all international tax standards but which have made sufficient commitments to implement tax good governance principles. This document was also updated on 22 February 2021 to reflect various other changes endorsed by the Council. Morocco, Namibia and Saint Lucia were removed from the document as they have fulfilled their commitments according to the Code Group. Jamaica was added as it has committed to amend or abolish its harmful tax regime (special economic zone regime) by the end of 2022.

Australia and Jordan were granted an extension to the deadline for fulfilling their commitments until the assessment of their reforms by the OECD Forum on Harmful Tax Practices. Maldives was given four additional months to ratify the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Turkey was requested to solve all open issues as regards effective exchange of information with all EU Member States, as specified in the Council conclusions, by 31 May 2021.

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

Sweden – European Commission requests Sweden to amend dividend withholding tax rules for foreign public pension funds

The European Commission sent a letter of formal notice to Sweden on 18 February 2021.

Swedish public pension funds ("AP funds") benefit from a full tax exemption under Swedish law, because of being government agencies. This tax exemption is not extended to corporate subsidiaries of AP funds. Foreign public pension funds organized as separate legal entities are subject to the statutory 30% withholding tax on dividends distributed by Swedish based companies and investment funds, generally reduced to 15% in double tax treaties concluded between Sweden and EU/EEA countries. The ability for non-resident public pension funds, not organized as separate legal entities, to qualify for withholding tax relief under current Swedish law is uncertain and has previously been rejected in case law.

The question of discrimination of foreign pension funds and comparability to Swedish funds has previously been tried by the Swedish Supreme Administrative Court (SAC). The SAC has previously ruled, after referral for a preliminary ruling from the CJEU, in the C-252/14 *Pensioenfonds Metaal en Techniek* case, that a Dutch pension fund was not entitled to Swedish withholding tax relief (SAC 2017 ref. 9 I). The SAC reached a similar conclusion for the Finnish occupational pension scheme Veritas, without application for a ruling from the CJEU (SAC 2017 ref. 9 II). In the Veritas case, the SAC found that the Finnish funds operated under a different organisation, function and purpose than Swedish AP funds, and was therefore not in an objectively comparable situation.

The SAC did not grant leave for appeal for a decision by the Sundsvall Administrative Court of Appeal (Case no. 2701-12) regarding a Finnish pension fund, where the lower courts had refused the fund repayment of withholding tax requested on the basis of being a government agency comparable to AP funds.

The Swedish Ministry of Finance published a proposed overhaul of the Swedish withholding tax act for public consultation on 29 April 2020. In the proposal, the Swedish Government expressed a view that foreign governments and municipalities are exempt from Swedish dividend withholding tax under current rules, and proposed including an explicit exemption to clarify this position. This seems to imply that foreign pension funds, not organized as separate legal entities, would qualify for withholding tax relief, contrary to the position taken by the Swedish courts. No change was proposed with regards to foreign public pension funds organized as legal entities.

The European Commission considers that the Swedish fiscal scheme, under which dividends paid to foreign public pension funds are subject to less favourable treatment than similar distributions made to Swedish public pension funds, may constitute a discriminatory treatment and infringement of the free movement of capital under Article 63 of the TFEU and Article 40 of the EEA Agreement. Sweden has two months to reply to the questions raised by the Commission.

The European Commission's letter will prompt a clarification of the application of Swedish dividend withholding tax to foreign public pension funds. We expect that this will also have to be reflected in the ongoing legislative process to replace the current Swedish withholding tax act. The Government has not yet published a timeline for when a bill will be put forward.

-- Fredrik Ohlsson and Carl Wattrang, PwC Sweden, fredrik.ohlsson@pwc.com

KEY EUDTG NETWORK CONTACTS

Stef van Weeghel
EUDTG Network Chair
stef.van.weeghel@pwc.com

Bob van der Made
EUDTG Network Driver | EU affairs
bob.vandermade@pwc.com

Emmanuel Raingeard
Chair Technical Committee | Co-Chair State Aid Working Group
emmanuel.raingeard@pwcavocats.com

Jonathan Hare
Co-Chair State Aid Working Group
jonathan.hare@pwc.com

Patrice Delacroix
Chair FS-EUDTG Working Group
patrice.delacroix@pwc.com

Jeroen Elink-Schuurman
Chair Real Estate-EUDTG WG
jeroen.elink.schuurman@pwc.com

EUDTG COUNTRY LEADERS

Austria	Richard Jerabek	richard.jerabek@pwc.com
Belgium	Patrice Delacroix	patrice.delacroix@pwc.com
Bulgaria	Orlin Hadjiiski	orlin.hadjiiski@bg.pwc.com
Croatia	Lana Brlek	lana.brlek@hr.pwc.com
Cyprus	Marios Andreou	marios.andreou@cy.pwc.com
Czech Republic	David Borkovec	david.borkovec@pwc.com
Denmark	Soren Jesper Hansen	sjh@dk.pwc.com
Estonia	Martin Lehtis	martin.lehtis@pwc.com
Finland	Jarno Laaksonen	jarno.laaksonen@fi.pwc.com
France	Emmanuel Raingeard	emmanuel.raingeard@pwcavocats.com
Germany	Arne Schnitger	arne.schnitger@pwc.com
Gibraltar	Edgar Lavarello	edgar.c.lavarello@gi.pwc.com
Greece	Vassilios Vizas	vassilios.vizas@gr.pwc.com
Hungary	Gergely Júhasz	gergely.juhasz@hu.pwc.com
Iceland	Fridgeir Sigurdsson	fridgeir.sigurdsson@is.pwc.com
Ireland	Denis Harrington	denis.harrington@ie.pwc.com
Italy	Claudio Valz	claudio.valz@it.pwc.com
Latvia	Zlata Elksnina	zlata.elksnina@lv.pwc.com
Lithuania	Nerijus Nedzinskas	nerijus.nedzinskas@lt.pwc.com
Luxembourg	Alina Macovei	alina.macovei@lu.pwc.com
Malta	Edward Attard	edward.attard@mt.pwc.com
Netherlands	Hein Vermeulen	hein.vermeulen@pwc.com
Norway	Steinar Hareide	steinar.hareide@no.pwc.com
Poland	Agata Oktawiec	agata.oktawiec@pl.pwc.com
Portugal	Rosa Areias	rosa.areias@pwc.com
Romania	Andreea Mitirita	andreea.mitirita@pwc.com
Slovakia	Christiana Serugova	christiana.serugova@pwc.com
Slovenia	Miroslav Marchev	miroslav.marchev@pwc.com
Spain	Roberta Cid Poza	roberta.poza.cid@pwc.com
Sweden	Fredrik Ohlsson	fredrik.ohlsson@pwc.com
Switzerland	Armin Marti	armin.marti@ch.pwc.com
United Kingdom	Jonathan Hare	jonathan.hare@pwc.com

ABOUT THE EUDTG

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

© 2021 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details. This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors. PwC helps organisations and individuals create the value they're looking for. Find out more and tell us what matters to you by visiting us at www.pwc.com