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EU Tax News

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CJEU Cases

Belgium – CJEU judgment on interpretation of the subject-to-tax requirement of the Parent-Subsidiary Directive: *Wereldhave*

On 8 March 2017, the CJEU rendered its judgment in *Wereldhave Belgium and Others* concerning the interpretation of the subject-to-tax requirement of the Parent-Subsidiary Directive (PSD) (C-448/15).

In 1999 and 2000, a Belgian Real Estate Investment Company (REIT) distributed dividends to its two Dutch parent companies qualifying as "fiscal investment institutions" (fiscale beleggingsinstelling, FII) subject to a zero rate corporation tax in the Netherlands. The Belgian tax authorities refused to grant the PSD's withholding tax exemption for these dividends claiming that FIIs do not fulfil the PSD's subject-to-tax requirement.

The CJEU ruled that the PSD's subject-to-tax requirement lays down a positive criterion ("being subject to tax") and a negative one ("not being exempt from that tax and not having the possibility of an option"). Consequently, the PSD does not merely require that a company should fall within the scope of the tax in question but also seeks to exclude situations involving the possibility that despite being subject to tax, the company is not actually liable to pay that tax. Although FIIs are formally not exempt from tax in the Netherlands, in practice they are not liable to pay that tax. The entitlement to be taxed at a zero rate is, according to the CJEU, tantamount to not subjecting those companies to corporation tax. This interpretation is consistent with the broad logic of the PSD, which seeks to prevent double taxation of profits distributed by subsidiaries to parent companies. Based on this reasoning, the CJEU concluded that FIIs do not satisfy the subject-to-tax requirement.

Unlike the AG, the CJEU did not address the interpretational value of unpublished Council minutes preceding the adoption of the PSD. Nevertheless, the conclusion of the CJEU is in line with the unpublished statements which expressly excluded certain classes of entities, such as FIIs, from the scope of the PSD.

The appellants claimed that the withholding tax was not compliant with the freedom of establishment (Article 49 TFEU) and the free movement of capital (Article 63 TFEU), which in their view can be derived from the *Tate & Lyle* CJEU judgment (C-384/11). However, the CJEU argued that this second question was inadmissible since the referral lacked information concerning the tax rules applicable to Belgian investment companies at the relevant time.

The CJEU's interpretation of the PSD's subject-to-tax requirement is more severe than a mere formal subjective tax liability. However, the precise extent of this interpretation remains unclear in certain situations, for instance for entities benefitting from a partial or almost entire exemption of income. The interpretation of the CJEU is not only relevant for the application of the PSD withholding tax exemption but also for the participation exemption in the hands of companies receiving dividends from their subsidiaries.

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Belgium – AG Opinion on interest deduction limitation in light of the Parent-Subsidiary Directive: *Argenta*

On 27 April 2017, AG Kokott rendered her Opinion in *Argenta* (C-39/16) concerning a Belgian interest limitation rule, which was abolished as from the assessment year 2004. Based on this rule, interest payments by a Belgian company are not regarded as deductible to the extent that in the same assessment year it receives exempted dividends from holdings which have been owned by the company for less than a year. It is not required that the interest has a connection with loans for purchasing the holdings in question.

In the present case, a Belgian bank received dividends in 1999 and 2000 from holdings in companies which it held for less than a year at the time of the dividend distribution. Note that, at that time, the application of the dividends received deduction did not require any holding period to be met. The Belgian bank also paid interest amounts that were not connected to the holdings. In applying the abovementioned interest limitation rule, the Belgian tax authorities rejected the tax deductibility of the interest in the amount of the dividends. The Belgian bank objected that the application of the interest limitation rule should be limited to cases in which there is a causal relationship between the interest and the dividends. To verify whether the interest limitation rule could violate the Parent-Subsidiary Directive (PSD), the Court of First Instance of Antwerp referred the case to the CJEU.

The AG is of the opinion that the interest limitation rule is covered by the exemption clause in the second indent of Art. 3(2) of the PSD, as a result of which the PSD would not be applicable. Under this provision, Member States have the option of exempting their companies from the PSD if they have not remained in possession of a holding, on the basis of which they are deemed to be parent companies, for an uninterrupted period of at least two years. The AG specifies that the wording of this provision does not provide any details as to how the Member States should use the option. Therefore, the AG does not take into account that Belgium has not made use of the option in the dividends received deduction regime at the time of the facts.

Alternatively, to provide for the case that the CJEU were not to follow the above reasoning for regarding the PSD to be inapplicable, the AG also examined the impact of Art. 4(2) and Art. 1(2) of the PSD. Art. 4(2) PSD empowers the Member States only to provide that 'the costs relating to the holding in the subsidiary' are not deductible. Therefore, the AG agrees that the PSD precludes the interest limitation rule in question as it does not take into account whether the interest is causally connected to the holdings. Furthermore, the AG is of the opinion that the interest limitation rule does not constitute a provision of national law for the prevention of fraud or abuse (described in the AG's Opinion as "tax evasion and abuses") which would be specifically permitted by Art. 1(2) PSD. The two limbs of this argument also alternatively to the first question determine that the interest limitation rule violates the PSD.

It remains to be seen which alternative, if either, the CJEU will follow. The practical relevance of this case is however limited as it concerns a provision that no longer exists.

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Belgium – CJEU referral by the Commission of Belgium over the discriminatory tax treatment of foreign real estate income

On 3 March 2017, the European Commission referred Belgium to CJEU arguing that the Belgian taxation of immovable property outside of Belgium breaches the free movement of capital (C-110/17).

According to Belgian income tax legislation, individuals who own a (secondary) house or apartment in Belgium (i.e. a built property other than their own dwelling) and who do not rent this property out, are taxable on the indexed deemed rental income of the property (which is significantly lower than the actual rental value), increased by 40%. The same tax treatment is applied for buildings rented either to natural persons who do not use them for professional purposes or to legal persons who make such buildings available to natural persons for private purposes. The real estate income in relation to a similar property located outside of Belgium is however determined based on the actual rental value. Where a double tax treaty is in force, the foreign real estate income may be exempted from taxation in Belgium; yet, this income will still be taken into account to determine the tax rate that applies to Belgian source income.

On 11 September 2014, the CJEU decided in *Ronny Verest, Gaby Gerards v. Belgium* (C-489/13) that the above-mentioned difference in the taxation between domestic property and property located elsewhere in the EU violates the free movement of capital to the extent that it results in a higher tax burden. Meanwhile, however, the relevant Belgian tax law has not been modified. Instead, the Belgian tax authorities issued a circular letter dated 29 June 2016 based on which the rental value of non-Belgian properties can be determined based on a value established or expressly approved by a foreign authority. While noting the attempts made by Belgium to end the discrimination, the European Commission takes the view that the existence of the failure to fulfil its obligations on 26 March 2012, i.e. the due date laid down in its reasoned opinion, has been proven.

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Germany – CJEU referral on the German CFC rules: *X*

On 12 October 2016 (published 15 March 2017, case no. I R 80/14), the German Federal Fiscal Court referred to the CJEU for a preliminary ruling on whether the German CFC rules on the taxation of income with capital investment character under Sec. 7 para. 6 and 6a of the Foreign

Transaction Tax Act (FTTA - “Außensteuergesetz”) are in conformity with EU law in third country situations (in the case at hand, Switzerland).

A German GmbH holds 30% of the shares in a corporation (AG) resident in Switzerland receiving passive and low taxed income of capital investment character. The German CFC taxation on such income - which is defined as income from the administration or the increase in value from payments, receivables, bonds, participations and similar assets - applies to German resident shareholders that hold at least 1% (or under certain conditions even less than 1%) in a foreign corporation irrespective of whether there is actual *control* by German resident shareholders.

According to the Federal Fiscal Court’s referral, it is doubtful whether this CFC-taxation is in line with the free movement of capital pursuant to Article 63 TFEU as the “motive test” in Sec. 8 para. 2 FTTA (which was inserted after the CJEU judgment in *Cadbury Schweppes*, C-196/04) is not available in the year in dispute (2006) and is still not available with respect to third country cases. The Federal Fiscal Court also requested the CJEU to examine whether the standstill clause of Article 64(1) TFEU prevents the application of Article 63 TFEU since this type of CFC-taxation was originally introduced before 31 December 1993.

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National Developments

Belgium – Supreme Court does not allow withholding tax refunds for dividends received by investment companies before 12 June 2003

On 24 March 2017, the Belgian Supreme Court limited the application of *Commission v Belgium* (C-387/11), the so-called Fokus Bank claims for investment companies, to dividends after a certain date. For dividends received before 12 June 2003, the Supreme Court takes the position that based on a strict reading of the Belgian tax law at that time, Belgian investment companies cannot obtain a credit or refund of Belgian withholding tax levied on these dividends. As a result, foreign investment companies would not be allowed a refund for Belgian dividends distributed before 12 June 2003. This judgment is in our view debatable and not in line with existing practice.

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Finland – Supreme Administrative Court confirms tax treatment of dividend income from third countries to be in line with Articles 63 and 65 TFEU

On 27 April 2017, the Supreme Administrative Court (SAC) issued its decision (KHO 2017:65) on the tax treatment of dividends received by a Finnish company (the parent company) from its non-listed subsidiaries resident in non-EU/EEA countries with which Finland has not concluded a tax treaty (the third-country subsidiaries). The SAC decision confirmed the earlier advance ruling of the Central Tax Board, which was to the detriment of the parent company (CTB advance ruling CTB 34/2016, see EU Tax News Issue 2016 – nr. 006).

In the case at hand, the third-country subsidiaries (which were tax resident in Chile, Ghana and Peru) distributed dividends to the parent company of approximately EUR 20m during the fiscal year 2015 with a total of approximately EUR 2m levied as withholding taxes. The third-country subsidiaries were subject to tax on their income in their countries of residence and were not considered to be controlled foreign companies (CFC) within the meaning of the Finnish CFC rules.

According to the current provisions of the Finnish Business Income Tax Act (BITA), dividend income received by a resident limited liability company from its third country subsidiary is fully taxable in the hands of a Finnish resident. If the dividend was paid by a subsidiary resident in the EU/EEA, the dividend would be either fully or partly tax-exempt under BITA. The de facto tax treatment of dividends from third country subsidiaries has remained unchanged from 31 December 1993 (the date relevant for the application of Article 64 of TFEU, i.e. the so-called standstill clause). On 31 December 1993, Finland applied the imputation method for the taxation of Finnish-sourced dividend income received by Finnish resident companies. Dividend income originating from a subsidiary resident in a third country was fully taxable for a Finnish resident company (no imputation credit was available for the Finnish resident company for such dividends). The imputation method was repealed as per 1 January 2005 for dividend income received from Finnish resident companies, but dividend income from third country subsidiaries remained fully taxable in the hands of a Finnish parent company.

In its decision, the SAC confirmed the CTB's advance ruling according to which the tax treatment of the dividend income from the third-country subsidiaries (100 % taxable) was not discriminatory, even though dividend income from a subsidiary resident in the EU/EEA would be either fully or partly tax exempt. The CTB's ruling was based on the interpretation that as the de facto taxation of dividends from third country subsidiaries has remained unchanged from 31 December 1993, the rules currently in force can be held neither contrary to Article 64 TFEU nor discriminatory. Therefore, dividends received by the parent company from the third-country subsidiaries were to be considered as fully taxable income. Furthermore, the SAC denied the parent company's request for a referral to the CJEU based on the fact that CJEU case-law is unclear in this area.

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Italy – Amendments to the NID and Patent Box Regime

On 24 April 2017, the Law Decree n. 50/2017, giving effect to the 2017 Budget Law, was published in the Italian Official Journal. The Decree introduced several new tax provisions including amendments to the Notional Interest Deduction (NID) instrument (the so-called "ACE", similar to the "AGI" contained in the CCTB proposal) and the Italian Patent Box regime.

With respect to the NID, the Decree reduces the scope of the allowance granted to companies which finance themselves through capital injections as per 2017. Starting from the fiscal year 2017, the basis for calculating the increase in capital contributions and the corresponding NID will be limited to the last five years and will no longer take into account the amount of equity from 31 December 2010.

With regard to the Italian Patent Box regime, the Decree amends Law n. 190/2014 by excluding trademarks from the list of the qualifying intangible assets (whereas know-how is still present with no turnover limitation as provided for in BEPS Action 5). The amendment is consistent with BEPS Action 5, which does not include trademarks in the definition of the qualifying IP assets that may benefit from preferential tax regimes. Notably, the amendment applies only with respect to claims made after 31 December 2016.

Taxpayers who have already filed a claim before the aforementioned date may continue to benefit from the "extended" IP regime until 30 June 2021 (grandfathering clause).

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Norway – Government's response to ESA's decision on the compatibility of the Norwegian interest limitation rules with the freedom of establishment

In a reasoned opinion adopted on 25 July 2016 (Decision No: 192/16/COL), the EFTA Surveillance Authority (ESA) decided that the Norwegian interest limitation rules are indirectly discriminatory and infringe the freedom of establishment protected by Article 31 of the EEA Agreement. In its response to the ESA, dated 31 January 2017, the Norwegian Government argues that the rules are not contrary to the freedom of establishment. However, the Norwegian Government notes that the Norwegian interest limitation rules will be amended and requests that the ESA should take the planned changes into account in its further assessment of the case.

The ESA decided that the interest limitation rules in combination with the group contribution rules favour tax groups with solely Norwegian resident companies compared to groups also consisting of EEA resident companies. The ESA found that Norwegian-only tax groups are in a better position to mitigate the effect of the interest limitation rules through the group contribution rules applicable in Norway.

In the Ministry's view, it is not the interest limitation rules as such that constitute a restriction but the territorial limitation of the group contribution rules. The comparable situations should be, on the one hand, a Norwegian group using equity financing through group contributions and on the other, a cross-border group using debt financing rather than a Norwegian company that pays interest to a group company in another EEA country compared to a Norwegian company that pays interest to a group company in Norway (which the ESA claims). The Ministry argues that these situations are not comparable due to the differences between equity and debt financing. According to the Ministry, there is therefore no restriction on the freedom of establishment. Both the ESA and the Norwegian Government consider that even if this was the case, such restriction can in principle be justified by the need to protect a balanced allocation of taxing rights and the need to prevent tax evasion. The ESA, however, concluded in its reasoned opinion that the interest limitation rules are not proportionate because they go further than warranted by the justifications. According to the ESA, for the rules to be proportionate, they should only apply to wholly artificial arrangements.

The Norwegian Government further holds that maintaining the territorial limitation of the group contribution rules only for wholly artificial arrangements would be contrary to established case law (e.g. C-231/05, *Oy AA*). The Government also notes that the interest limitation rules will be amended in the relatively near future. One of the key amendments will be the inclusion of interest paid to third parties as subject to the interest limitation rules. This amendment will come with an escape clause likely based on an interest/earnings or equity/assets ratio in line with the BEPS recommendations and the EU Anti-Tax Avoidance Directive.

At this stage, no specific deadline is set for the amendments to the interest limitation rules. However, the Ministry of Finance aims to submit a consultation paper to interested parties in the spring of 2017. Depending on the outcome of the consultation, proposals on amendments to the Norwegian interest limitation rules may be presented in connection with the Norwegian Government's proposal on the state budget of 2018.
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Poland – Supreme Administrative Court judgment on the settlement of foreign branch losses

On 22 March 2017, the Polish Supreme Administrative Court (SAC) issued its judgment in case II FSK 484/15 in which it was confirmed that a Polish entity may gain relief for the tax losses of a foreign liquidated branch in Poland.

In 2007, the applicant, a Polish oil and gas company, established a branch in Denmark through which it conducted exploration works. Once the works were completed, the company decided to liquidate the Danish branch. Since throughout the course of its activities the branch had generated tax losses, the company had applied for an individual tax ruling to confirm whether it could settle the tax losses of the liquidated Danish branch against the company's income in Poland. The company claimed that even though there are no direct regulations in Polish tax law allowing for the settlement of the losses of a foreign branch, such settlement should be possible in view of the EU Law principles of consistent interpretation and non-discrimination as well as the freedom of establishment contained in the TFEU, in the same manner, as would have been in the case of a Polish branch.

In the ruling issued on 28 November 2013, the Polish tax authorities claimed that the loss generated by the Danish branch cannot be settled in Poland. The tax authorities noted that the income of the Danish branch was exempt from taxation in Poland and subject to taxation in Denmark as a result of which only Denmark could take into account the losses of the branch. The tax authorities did not consider this interpretation contrary to EU Law and in particular the fundamental freedoms. The company appealed the tax ruling to the Provincial Administrative Court, which overruled the decision of the tax authorities in its judgment of 10 September 2014. The Court held that due to the liquidation of the Danish branch, the foreign losses had become final and could not be relieved in Denmark. As a result, there was no risk of double use of the loss (both in Poland and Denmark). Taking into account that the foreign loss would only be relieved in Poland, there were no overriding public interests, which could justify a violation of the freedom of establishment.

The tax authorities filed a cassation appeal to the SAC. On 22 March 2017, the SAC issued a judgment in which it disagreed with the Polish tax authorities' position. The SAC emphasized that the jurisprudence of the CJEU regarding relief of foreign losses is consistent. Pursuant to the case law, the relief of foreign losses depends on whether such loss is final or can still be relieved in the country of origin.

Given that in the case at hand, due to the liquidation of the Danish branch, the losses could not be taken into account in Denmark, based on the freedom of establishment and a proportionality test (as indicated in C-446/03 *Marks & Spencer*), the Polish company was entitled to gain relief for the foreign tax losses generated by its Danish branch against its Polish taxable income. The SAC underlined that only the above interpretation would be in line with the principle of harmonious interpretation. This judgment may be of great value to businesses which have recently liquidated their foreign branches or permanent establishments or which might face that issue in the future. The judgment therefore represents a positive development for all entities with foreign branches or cross-border permanent establishments.

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Spain – Supreme Court judgment on State aid recovery procedure

In March of 2017, the Spanish Supreme Court issued a judgment which elaborated on the requirements of the recovery procedure relating to unlawful State aid. The Supreme Court concluded that "*the rights and the guarantees of the interested party must be preserved, and specifically, the recipient's right to be heard*".

This judgment was issued based on the Spanish legislation in force before 12 October 2015. In this regard, the amendment to the General Tax Law (Law 34/2015) introduced a section regulating the recovery procedure of an unlawful State aid in which a hearing stage for the taxpayer was specifically provided. The Spanish Supreme Court stated that the hearing stage in the event of a recovery of an unlawful State aid cannot be replaced by actions and unofficial contacts with the company's advisors. This is so because, from both an EU law and Spanish law perspective, it is necessary to follow a procedure that complies with the requirement that the taxpayer's right to file allegations can be fully exercised.

Although the procedural aspects required for the enforcement of State aid decisions are not contained in EU Law but left up to domestic legislation, Article 41(2) of the Charter of Fundamental Rights of the EU (Charter) proclaims the right of every person to be heard before the adoption of any individual action that adversely affects him. Likewise, Article 51 of the Charter establishes that the Member States shall respect the provisions of the Charter, and Article 6(1) TFEU states that when national administrations execute EU legal acts, they are subject to the Charter. Finally, the Court concluded that, in addition to the provisions established in the preceding paragraph, it is important to bear in mind that, internally, the hearing stage has constitutional character by virtue of Article 105(c) of the Spanish Constitution. Therefore, its omission – as it affects the rights and interests of the citizens – may even result in the invalidity of the State aid recovery procedure.

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United Kingdom – England and Wales High Court judgment regarding repayment of stamp duty reserve tax: *Jazztel plc v The Commissioners for HMRC*

The claimant, Jazztel plc (now known as Orange Spain plc), is one of many companies which paid the UK's 1.5% Stamp Duty Reserve Tax (SDRT) charge on shares on issue into a clearance system or depository scheme prior to this tax being declared unenforceable under EU Law. This case served as the test case for claims regarding repayment of SDRT based on a claim in respect of a series of payments that were made under a mistake.
The main substantive issues determined were as follows:

- Were the payments made under a mistake? If that was the case, then the applicants would benefit from an extended time limit, and Jazztel would be able to make claims in respect of payments made up to six years from the date when the mistake could with reasonable diligence have been discovered. The Court agreed that Jazztel had made payments under a mistake. Although Jazztel had notified HMRC in respect of payments it made after 1999, having understood that the payments could be unlawful, the Court ruled that the fact that the group had doubts on this point did not mean they were not entitled to take advantage of the mistake claim approach.

- Could HMRC rely on s.320 FA 20o4 to restrict the applicable time period? This rule, which was announced on 8 September 2003 and implemented in 2005, sought to remove the extended six year time limit. The Court considered that this provision, which did not include an adequate transitional period, failed to provide the applicant with effectiveness, legal certainty or legitimate expectations. The Court, therefore, distinguished between claims made on or before 8 September 2003 in respect of which the extended period of six years was allowed, and subsequent claims for which Jazztel had a two year time limit.

- Could HMRC make a "change of position" argument? The Court of Appeal had previously ruled that this route was not available to HMRC but the Court nonetheless consented to hear evidence on this point. In its judgment, the Court followed the Court of Appeal, in line with the view put forward by the taxpayers that to the extent the government revenue falls short, it will borrow.

The decision may be appealed.

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United Kingdom – The Great Repeal Bill White Paper

In a referendum held on 23 June 2016, voters in the United Kingdom chose to leave the EU (the so-called "Brexit"). On 29 March 2017, Article 50 of the TEU was triggered by the UK, which formally began its withdrawal from the EU, and on 30 March 2017, the UK Government published their "Great Repeal Bill" White Paper.

The Bill is intended to address all the EU laws and regulations made over the decades during which the UK was part of the EU. Specifically, the Bill will:

- repeal the European Communities Act 1972, which provides the legal basis through which EU law has effect as national law in the UK,
- transfer all EU laws currently in force onto the UK statute book, with the aim of securing certainty and ensuring that the legislative system will continue to function, and
- create powers to make secondary legislation. This will enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU, so that the legal system continues to function correctly outside the EU, and will also

enable UK domestic law to reflect the content of any withdrawal agreement under Article 50 TEU.

Under the paper, the CJEU's judgments before Brexit will be accorded the same status as Supreme Court judgments; judgments after that date will not have to be considered by the national courts. The Government's intention is for the Bill to complete its passage through Parliament well before the time when the UK leaves, but for it to include "commencement provisions" enabling ministers to bring it into force at a moment of their choosing, planned to be the date the UK exits the EU. This is likely to be 29 March 2019, being two years after the Government formally triggered Brexit by delivering the Article 50 TEU letter (although it could be later if Article 50 TEU negotiations are extended).
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EU Developments

EU – European Parliament clears way for formal adoption of ATAD II by the ECOFIN Council

The European Parliament's plenary session adopted the European Parliament's ECON Report on the proposal for a Council directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD II) on 27 April 2017. The European Parliament only has an advisory role on direct tax legislative files. The EU-28 Finance Ministers had already reached a political agreement on ATAD II on 21 February 2017 in the ECOFIN Council (see EU Tax News Issue 2017 – nr. 002. The European Parliament's opinion / final Resolution allows for the formal adoption of ATAD II at a next ECOFIN Council meeting in May or June.

The European Commission presented its proposal for ATAD II as part of the Corporate Tax Reform Package of 25 October 2016. This ATAD II proposal responded to a ECOFIN Council request made during the meeting of 12 July 2016, when Directive (EU) 2016/1164 on rules against tax avoidance (ATAD I) was adopted, to put forward a proposal on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2.
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EU – Update on EU proposal for public country-by-country reporting

The Members of the European Parliament (MEPs) have submitted 272 amendments to the draft Report of 10 February 2017 by the joint Economic and Monetary Affairs (ECON)

Committee and the Legal Affairs Committee (JURI) in connection with the European Commission's proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, aka "public CBCR". The Commission's proposal is an amendment to the EU Accounting Directive, so the European Parliament and the Council are co-legislators on this file.

The legal basis, and, as a consequence, the lawfulness, of the Commission's legislative proposal is however contested by a number of Member States and the Legal Service of the EU Council. One other among quite a few bones of contention, also among MEPs, is the threshold in the proposal for large undertakings that would fall within the scope of the Directive. The Commission argues that this should be the same as for BEPS action 13 CBCR, which is being implemented in EU Law via an amended Directive on Administrative Cooperation in the field of taxation, and wants to stick to the EUR 750m annual turnover threshold. However a threshold of EUR 40m is proposed by some of the political groups in the European Parliament instead, which they argue would be in keeping with existing EU Company Law Directives.

The EU Council's Working Party on Company Law (CBCR) held a meeting at technical level on the Commission's proposal on 29 March 2017. Member States were updated by the Maltese EU Council Presidency on the status of CBCR in the European Parliament, and they discussed the state of play on the public CBCR file in Council and "examined technical compromises on the text". The Maltese Presidency said informally in January that they would deal with this dossier 'with the utmost pace' however that they would wait for the European Parliament's joint Committee vote on 30 May 2017 before 'moving forward' on this file. In practice this will likely mean that Malta will leave any further action within the Council, apart from giving another, 6-monthly, legislative status update on this file to the ECOFIN Council and the European Council in June, to the incoming Estonian Presidency (second half of 2017). However, not much progress on this file is generally expected before the outcome of the general elections in Germany in September 2017.
-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com

EU – Council adopts Conclusions on EU relations with the Swiss Confederation

In it Council Conclusions adopted on 28 February 2017, the Council takes note of the negative outcome on 12 February 2017 of the vote on the Swiss legislation aiming to replace with a new set of measures certain preferential tax regimes and practices that constitute harmful tax competition. The Council stresses the need for fair tax competition and strongly encourages Switzerland to adhere to its international commitments and look for alternative solutions to effectively and swiftly remove the five tax regimes concerned, in line with the 2014 Joint Statement between EU Member States and Switzerland on company tax issues. The Council states that it will continue to follow the matter closely.
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EU – Informal ECOFIN Council held in Malta in early April

The current Maltese 6-monthly rotating EU Council Presidency issued a so-called Presidency Issues Note on 'Tax Certainty in a Changing Environment' ahead of informal discussions on 8 April 2017 among the EU-28 Finance Ministers in Valletta, Malta. According to some sources, EU Tax Commissioner Moscovici was quick to counter any attempts by the Maltese Presidency which suggested a time out was needed on tax reform in Europe. The Maltese Presidency has however rejected any claims it was trying to slow efforts to combat tax avoidance by raising concerns about the pace of EU BEPS reforms, but insisted companies have the right to tax certainty when making investments. A number of EU Member States led by Ireland also complained that they cannot serve “two masters” in complying with EU BEPS which sometimes goes further than OECD BEPS, e.g. the draft EU proposals on public country-by-country tax and profit reporting, and the CCTB and CCCTB.

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Fiscal State aid

Greece – CJEU judgment on State aid implemented by Greece: *Ellinikos Chrysos AE*

On 9 March 2017, the CJEU issued its judgment in Ellinikos Chrysos AE (C-100/16 P) on the appeal of Ellinikos Chrysos AE Metalleion kai Viomichanias Chrysou, a company established and operating under Greek legislation and the Hellenic Republic against the judgment of the General Court (GC), *Greece and Ellinikos Chrysos v Commission* (T-233/11 and T-262/11). In that judgment, the GC dismissed its action for the annulment of the European Commission Decision 2011/452/EU on State aid implemented by Greece in favour of Ellinikos Chrysos AE.

In 2004, the Greek State ratified (through Law 3220/2004) a contract whereby it transferred assets of TVX Hellas consisting of gold mines, land and gold stocks to Ellinikos Chrysos for a consideration of EUR 11m. Furthermore, the transfer deed stipulated that the transaction transferring those assets to Ellinikos Chrysos was exempt from duties and taxes.

Following a formal investigation, the Commission issued a Decision considering that the transfer of said assets constituted State aid incompatible with the internal market and that Greece had to recover it. In particular, the Commission took the view, first, that the assets had been sold at a price below market value and, second, that the exemption from registration duties or other taxes constituted an additional element of the State aid at issue.

In view of that, Ellinikos Chrysos and the Greek State filed an action for the annulment of said Commission Decision before the GC. Following the GC Judgment (T-233/11 and T-262/11) and the dismissal of the action of the company, the latter filed an appeal before the CJEU. In support of its action for annulment of the Commission Decision, Ellinikos Chrysos claimed that the Commission relied on an expert report which was unsuitable for the assessment of the value of the transferred assets.

In support of its appeal, Ellinikos Chrysos raised three pleas in law, claiming, respectively, (1) failure of the GC to state reasons concerning the assessment of the value of the mines transferred, (2) defective reasoning in that judgment concerning the assessment of the value of the land transferred, and (3) the incorrect valuation of the advantage arising from the tax exemption on the transfer transaction.

The CJEU holds that in the context of the appeal, the purpose of the review by the CJEU is to consider *inter alia* whether the GC addressed all the arguments raised by the appellant (rather than make a fresh assessment of the facts). However, the CJEU concluded that the GC failed to respond to the appellant's argument disputing the purpose for which that report had been drawn up. Moreover, an appeal before the CJEU can only succeed if the appellant shows that the GC erred in law or distorted the facts or the evidence. To the extent that Ellinikos Chrysos did not claim any such distortion, the Court dismissed the grounds of appeal regarding the validity of the expert report regarding the value of the transferred assets and the relevant tax advantage.

Other points of interest in this CJEU judgment are the following:

- Based on settled CJEU case-law, the Commission must make complex economic assessments when assessing the value of an aid. Hence, the review by the EU judicature of such a process is necessarily restricted, being limited to determining whether the rules governing procedure and the requirement for a statement of reasons have been complied with, whether the facts are accurately stated and whether there has been any manifest error of assessment or any misuse of powers.

- The obligation to state reasons does not require the GC to provide an account which follows exhaustively and one-by-one all the arguments put forward. The GC's reasoning may, therefore, be implicit on condition that it enables the persons concerned to know why it has not upheld their arguments and provides the CJEU with sufficient material for it to exercise its power of review.

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Italy – CJEU judgment on Italian bankruptcy procedure: *Marco Identi*

On 16 March 2017, the CJEU rendered its judgment in *Marco Identi* (C-493/15) regarding the compatibility of a special bankruptcy discharge procedure with the Sixth VAT Directive. The procedure was introduced by Italy with the aim of promoting the return to economic activity of natural persons.

Under this procedure, national courts may declare irrecoverable the debts (including VAT debts) of an individual, acting as an entrepreneur, which have not been settled by the close of the bankruptcy proceedings initiated against him provided that:

- the taxpayer has cooperated with the authorities carrying out the procedure by providing all information and documentation necessary to clear the liabilities;
- he has not in any way delayed, or helped to delay, the conduct of the proceedings;
- he has not benefited already from such procedure in the ten years preceding the request;
- he has not caused or aggravated the imbalance or committed credit fraud; and
- he has not been found guilty, by a final judgment, of fraudulent bankruptcy, or other related criminal offences.

The discharge procedure cannot be granted if none of the creditors have been satisfied, at least in part. The question referred to the CJEU was whether the special bankruptcy discharge procedure, in particular the partial extinguishment of VAT debts in favour of individuals admitted to such insolvency procedure, was in breach of the Sixth VAT Directive and the State aid provisions contained in Article 107 TFEU.

The CJEU ruled that – on a similar note to its previous case *Degano Trasporti* (C-546/14) - the procedure at issue, being subject to strict conditions for its application, does not constitute a general and indiscriminate waiver of collecting VAT and it is not, therefore, contrary to the Sixth VAT Directive.

Additionally, the CJEU ruled on the compatibility of the Italian provision with the State aid rules concluding that the individuals who cannot benefit from the bankruptcy discharge procedure – either because the conditions laid down by the relevant Italian law are not met or because they are not in an insolvency situation – are not in a comparable factual and legal situation to the ones who, instead, may benefit from the procedure. The CJEU underlined that the objective of the provision (which is to allow a natural person declared bankrupt, who has acted in good faith as a debtor, to resume a business activity discharged of debts) is particularly relevant. The CJEU, therefore, concluded by stating that the measure was not conferring a selective advantage within the meaning of Article 107 TFEU, and thus it cannot be considered as a State aid.

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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 or EEA presence understand the impact as they explore their activities, opportunities and investment decisions.

So how do we help you?

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- We have set up client-facing expert working groups to address specific key topics such as EU State aid & BEPS and CCCTB.
- Through our Technical Committee we constantly develop new and innovative EU law positions and solutions for practical application by clients.
- We closely monitor direct tax policy-making and political developments on the ground in Brussels.
- We input to the EU and international tax debate and maintain regular contact with key EU and OECD policy-makers through our EU Public Affairs capability.
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- Our PwC State Aid Working Group helps clients identify and manage EU State Aid risks.
- Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with dividend withholding tax refund claims.
- We have assisted clients before the CJEU and the EFTA Court in landmark cases e.g. *Marks & Spencer* (C-446/03), *Aberdeen* (C-303/07), *X Holding BV* (C-337/08), *Gielen* (C-440/08), *X NV* (C-498/10), *A Oy* (C-123/11), *Arcade Drilling* (E-15/11), *SCA* (C-39/13), *X* (C-87/13) *and Kieback* (C-9/14).
- We have carried out a number of tax studies for the European Commission.

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