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EU Tax News

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Denmark – CJEU judgment on deductibility of final losses incurred by non-resident permanent establishment

On 12 June 2018, the CJEU issued its judgment in *A/S Bevola and Jens W. Trock APS vs. the Danish Ministry of Taxation* (C-650/16).

The underlying question of the case was whether the Danish parent company could, after its Finnish permanent establishment had been shut down, deduct final losses incurred by the permanent establishment. The CJEU therefore had to decide:

- whether the Marks & Spencer doctrine still applies; and
- if yes, whether it also extends to final losses incurred by foreign permanent establishments.

A/S Bevola is a company tax resident in Denmark. Jens W. Trock ApS is the ultimate parent company of the Bevola group. In the tax year 2009, A/S Bevola shut down its Finnish permanent establishment. The Finnish permanent establishment was loss making, and thus in connection with its closure, the Bevola group suffered a loss of DKK 2.8 m. (EUR 375,000). The group wanted to deduct this loss from its taxable income in Denmark, a deduction which was denied by the Danish Tax Tribunal in its decision of 20 January 2014. The decision was appealed to the Danish High Court, which referred questions to the CJEU.

In its judgment, the CJEU first stated that under Danish law, a Danish company with a permanent establishment in another EU Member State is treated less favourably than a Danish company with a permanent establishment in Denmark as the latter is allowed to deduct losses incurred by the permanent establishment whereas a Danish company with a non-resident permanent establishment is not allowed such a deduction. According to the CJEU, this difference in treatment cannot be called into question by the fact that the Bevola Group had the possibility to opt for international joint taxation under Danish tax law, as the conditions to apply for the international joint taxation scheme were too strict. If the Bevola Group had opted for international joint taxation, it would have been allowed to deduct the losses incurred in the Finnish permanent establishment. The CJEU then stated that the situation where A/S Bevola had a Finnish permanent establishment was objectively comparable to a purely domestic situation of a Danish company with a Danish permanent establishment in light of the objective of the Danish provision at issue, which was to avoid double taxation and double deduction. According to the CJEU, that difference in treatment may however be justified by the balanced allocation of taxing powers, the need to ensure the coherence of the taxing system and the prevention of the risk of the double use of losses. Finally, when addressing the proportionality of the measure, the CJEU stated that where there is no longer any possibility of deducting the losses of the non-resident permanent establishment in the EU Member State where the permanent establishment is situated, the risk of double deduction of losses no longer exists. Accordingly, the Danish provision at issue goes beyond what is necessary for pursuing the objectives of avoiding double taxation and double deduction. With reference to the Marks & Spencer case, the CJEU stated that when the losses in the permanent establishment are final, it is disproportionate to deny the possibility to deduct the losses.

With this judgment, the CJEU has confirmed that the Marks & Spencer doctrine still applies and that it also extends to final losses incurred by non-resident permanent establishments.

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Denmark – CJEU judgment on Danish withholding tax on dividend payments to non-resident investment funds

On 21 June 2018, the CJEU issued its judgment in *Fidelity Funds* (C-480/16). The underlying question of the case was whether it is in accordance with the free movement of capital that non-resident investment funds are subject to withholding tax on dividends received from their Danish portfolio investments while resident investment funds are exempted from withholding tax on such dividend payments.

Fidelity Funds, Fidelity Investment Funds, and Fidelity Institutional Funds ("Fidelity") are resident in the United Kingdom and Luxembourg and qualify as Undertakings for the Collective Investment of Transferable Securities (UCITS) covered by Directive 85/611/EEC. Fidelity invested in Danish portfolio shares. In the years 2000-2009, it received dividends from Danish portfolio shares which were subject to withholding tax. Contrary to Fidelity, resident investment funds were exempt from withholding tax on dividends from Danish portfolio shares, and Fidelity therefore filed a claim for repayment of withholding tax levied on the dividend distributions. It is a condition in order for resident investment funds to benefit from the tax exemption that they must elect for status as a distributing fund in accordance with the rules set out in section 16 C of the Danish Tax Assessment Act (DTAA).

The CJEU first held that the situations of the resident and non-resident investment funds were objectively comparable. The CJEU then considered that the taxation of non-resident investment funds on dividend payments from Danish companies cannot be justified by the need to ensure the allocation of taxing powers as Denmark had chosen not to tax resident investment funds on similar dividend payments. The CJEU held that the need to safeguard the coherence of the Danish tax system could, in principle, constitute a justification for the restriction, however that the restriction went beyond what was necessary in order to safeguard the coherence of the Danish tax system. Thus, the CJEU stated that it could be a less restrictive measure if the non-resident investment funds were allowed to calculate income according to the minimum distribution calculations set out in section 16C of the DTAA. The CJEU therefore concluded that the restriction could not be justified by the need to safeguard the coherence of the Danish tax system, and that the Danish rules were in breach of EU law.

As the CJEU judgment concerns the free movement of capital, investment funds resident in third countries should also, in principle, be able to file a claim. The case is scheduled for a hearing before the Danish High Court in February 2019. In the meantime, we recommend that foreign investment funds file protective claims in order to avoid potential claims from being statute barred. Claims should be filed for years back to 2008.

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Germany – CJEU judgment on compatibility of German transfer pricing adjustment rules with EU law

On 31 May 2018, the CJEU ruled in *Hornbach-Baumarkt* (C-382/16) that the German transfer pricing rules, which apply only to transactions with foreign related companies, violate EU law as they do not foresee a possibility to prove that commercial reasons existed for the conclusion of the transactions deviating from arm's length conditions.

Hornbach, a German resident, was the shareholder of a Dutch group company. Hornbach issued comfort letters free of charge in order to allow its foreign subsidiaries (having negative equity) to receive bank loans. The German tax authorities increased Hornbach's taxable income by the amount of guarantee fees that third parties would have agreed upon. As a result, Hornbach brought an action against the transfer pricing adjustment.

The CJEU ruled that the German transfer pricing provisions constitute a restriction on the freedom of establishment that is justified by the balanced allocation of taxing powers. The CJEU maintained the approach followed in *SGI* (C-311/08) according to which the proportionality requirement is only met if an opportunity exists under national law that the taxpayer can prove that the non-arm's length terms of the transaction were agreed upon for commercial reasons. The CJEU further clarified that this does not preclude that economic reasons resulting from the status as a shareholder of the foreign group company are taken into account. In a situation like Hornbach's, where the expansion of the business operations of a subsidiary requires additional capital due to the fact that it lacks sufficient equity capital, it should be investigated whether commercial reasons can be brought forward why a parent company agrees to provide capital on terms other than arm's-length terms.

The CJEU left it up to the referring German court to find out whether this requirement had been met in the underlying case under German law. It remains to be seen how the German national court will react.

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Germany – CJEU judgment on compatibility of current German Anti-Treaty/Directive shopping rule with EU law

On 25 June 2018, the CJEU published its judgment in *GS* (C-440/17) deciding that the German Anti-Treaty and Anti-Directive shopping rule currently in force (since 2012) is neither compatible with the EU fundamental freedoms nor with the Parent-Subsidiary Directive. With this judgment, the CJEU essentially confirmed its earlier judgment in *Deister and Juhler Holding* (C-504/16) where it had already decided that the former version of the rule infringes both the EU fundamental freedoms and the Parent-Subsidiary Directive. The GS judgment essentially applies the Deister and Juhler reasoning to the new version of the rule.

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National Developments

Denmark – Implementation of ATAD 1 and 2 into Danish law

On 31 May 2018, the Danish Ministry of Taxation published a draft bill implementing the Anti-Tax Avoidance Directive (ATAD) 1 and 2 into Danish law. The draft bill has been in public hearing, which ended on 28 June 2018. The final bill is not yet available, but it is expected that the bill will be published shortly after the opening of the Danish parliament in October.

The provisions regarding interest limitation, CFC and the GAAR will enter into force on 1 January 2019. The provisions regarding exit taxation and hybrid mismatches enter into force on 1 January 2020. It should be noted that Danish tax law already includes most of the anti-avoidance provisions following from ATAD. In order to implement the Directive, some of the existing provisions have been adjusted in accordance with ATAD while other provisions have been drafted from scratch.

General anti-abuse rule (GAAR)
The GAAR that was implemented in Danish tax law due to the Parent-Subsidiary Directive amendment in 2015 has been abolished and will be replaced by the GAAR following from ATAD 1.

Exit taxation
A slight amendment of the existing Danish provision is proposed in the draft bill.

Hybrid mismatches

The current Danish provisions on hybrid mismatches are to some extent abolished and new rules are written in accordance with the rules set out in ATAD 2.

Interest limitation

Danish tax law currently includes three interest limitation rules, one of them being an EBIT rule allowing deduction of net financing expenses up to 80% of EBIT. The existing provision is changed to a 30% EBITDA rule. The carry forward of unused interest capacity for up to five years is new, applicable to the EBITDA rule but not the previous EBIT rule (Denmark implemented the provisions set out in Article 4(6)(c) of ATAD).

CFC

The existing Danish provisions are comparable to the CFC rules set out in Article 7(2)(a) of ATAD. However, a broadening of the scope of the current Danish CFC rules has been proposed. According to the law preparatory work the term *"other income generated from intellectual property"* should be interpreted in accordance with BEPS Action 3 and will therefore include embedded royalties (royalties included in a payment for goods and/or services). It is highly uncertain how this part of the provision should be interpreted.

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Spain – Supreme Court establishes correct procedure for requesting Fokus bank refunds

For over 10 years, non-resident entities in Spain (i.e. Collective Investment Institutions or CIIs -UCITS and non-UCITS, pension funds, insurance companies, sovereign funds and non-profit entities) have claimed withholding tax refunds based on the *Fokus Bank* judgment (E-1/04). The dismissal of these kind of claims has however been customary by the Spanish Tax Authorities (STA) and served as a prerequisite for appealing to the tax tribunals and the judicial courts in order to obtain the requested refunds.

The unlawful discrimination and the infringement of the EU's free movement of capital (Art. 63 TFEU) was recognized by the CJEU, which resulted in a reform of the Spanish Non-Residents Income Tax Act in 2010. As a result, two tax exemptions concerning CIIs and the pension funds resident in EU/EEA states were introduced.

On 5 June 2018, the Spanish Supreme Court issued its judgment in Appeal no. 634/2017 related to a Fokus bank claim brought by an EU insurance company for the pre-2010 time period. According to the Supreme Court, in the case at hand, a clear unlawful discrimination and an infringement of the EU free movement of capital took place. In addition, the Supreme Court confirmed that the correct procedure for requesting the refund in pre-2010 claims (for EU based insurance companies, pension and investment funds) should be through the unduly paid tax refund claim and not the tax assessment forms (210 forms). This is due to the "*inexistence of a specific mechanism for claiming the refund in the Spanish Non-Resident*

Income Tax Act" and essentially means that late payment interest accrues since the withholding tax was paid.

For pre-2010 periods and as concerns non-EU/EEA tax residents, the STA and the tax courts (as well as some Spanish judicial courts) have traditionally accepted refund requests for pre-2010 periods that were filed through a tax model even in those years in which non-specific tax forms (210) were approved (instead of following the unduly paid tax refund procedure).

This is a landmark judgment resulting from a major dispute with the STA as to the correct procedure to be followed for claims based on a breach of EU law (both for pre-2010 periods and for third countries cases). According to the Supreme Court, the correct procedure for claims to be filed before the Spanish tax authorities based on the breach of EU law is the unduly paid tax refund claim (non UCITS EU based funds, non EU funds, sovereign funds, etc.). As a result, late payment interest that should be paid must be higher - since the withholding tax was paid based on *Irimie* (C-565/11) - which would subsequently result in a higher amount to be refunded.

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United Kingdom – Upper Tribunal judgment in Coal Scheme MOD case

In *Coal Staff Superannuation Scheme Trustees Limited v HMRC* [2018] UKUT 152 (TCC), the UK's Upper Tribunal held that the UK's manufactured overseas dividend withholding tax rules (the 'MOD rules'), as in force prior to 2014, were an unjustified restriction of the right to the free movement of capital.

The MOD rules applied where one party (the manufacturer) paid an amount representing a dividend on non-UK shares to another party (the recipient). This usually arose where the recipient had transferred non-UK shares to the manufacturer under a stock lending or repo arrangement. Under the MOD rules, the manufacturer withheld UK income tax from the manufactured dividend, calculated as the amount that would have been withheld on the payment of a hypothetical dividend on the non-UK shares to a UK person (with certain deemed tax characteristics). The manufacturer could set off overseas tax withheld on dividends they had received against the requirement to account for UK income tax withheld. The recipient was treated as if the UK income tax withheld was non-UK tax. As such, this could not be reclaimed directly, but could be offset against UK tax liabilities.

These rules disadvantaged tax exempt pension funds because they had no UK tax liabilities to set tax withheld against, so this became a final cost. By contrast, no tax was withheld on manufactured dividends arising from UK shares.

HMRC argued the MOD rules did not infringe the free movement of capital because they put taxpayers in the same position as if they had received dividends directly. In this case, recipients of non-UK dividends would also have suffered non-UK tax withheld which could only be relieved if they had UK tax liabilities, whereas recipients of UK dividends would have suffered no tax withheld. The position for real dividends is not an infringement of free movement of capital because it arises from the parallel exercise of fiscal sovereignty by two states, not differential treatment by one state as held by the CJEU in *Kerckhaert & Morres* (C-513/04).

The tribunal considered the treatment of manufactured dividends from non-UK shares within the MOD rules should be compared to manufactured dividends from UK shares, not real dividends from non-UK shares. Using that comparison, the MOD rules made manufactured dividends from non-UK shares less attractive than those from UK shares. Further, the tax withheld was substantially UK tax rather than non-UK tax (because it did not exactly mirror non-UK tax charged on a specific dividend), so the difference did not arise from the parallel exercise of fiscal sovereignty. The MOD rules therefore restricted the free movement of capital.

The tribunal rejected several potential justifications for the restriction:

- maintaining a balanced allocation of taxing powers (because the tax withheld under the MOD rules was too loosely connected to any foreign tax actually payable);
- prevention of tax avoidance (because the MOD rules were not specifically targeted); and
- fiscal cohesion (because the tax withheld by the manufacturer was not closely linked to a tax advantage for the manufacturer or recipient).

As a remedy, the tribunal held that tax withheld from tax exempt pension funds under the MOD rules from payments to pension funds should be treated as UK tax withheld, and so should be reclaimable directly by the recipient without the need to set it against UK tax liabilities. The tribunal did not consider recipients other than pension funds, but the reasoning appears to apply identically to other tax exempt entities. Due to the tax at stake, this judgment is likely to be appealed to the Court of Appeal and the UK Supreme Court, and a reference may be made to the CJEU.

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EU Developments

EU – New EU mandatory disclosure rules for intermediaries (DAC 6) enter into force on 25 June 2018

On 5 June 2018, Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (also commonly referred to as DAC6) was published in the Official Journal of the EU after having been formally adopted by the ECOFIN Council on 25 May 2018. The main purpose of DAC6 is to strengthen tax transparency and fight against aggressive tax planning. The term aggressive tax planning is undefined, however, and instead, reference is made to a number of pre-determined hallmarks, which are features that could render a cross-border arrangement reportable under this Directive. DAC6 provides for mandatory disclosure of cross-border arrangements by intermediaries, or individual or corporate taxpayers, to the tax authorities and mandates automatic exchange of this information among Member States. For a complete overview on DAC6, please refer to PwC's EUDTG's Newsalert available here.

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EU – Council confirms that it needs more time on Public CbCR

During a debate with the European Parliament in mid-April 2018, a representative from the Council of the EU confirmed to Members of the European Parliament (MEPs) that there are unresolved political issues which prevent agreement in the Council on the Commission's April 2015 pending proposal for public country-by-country reporting (PCBCR). The two largest parties in the European Parliament, the EPP (Christian-Democrats) and the S&D (Social-Democrats), asked the Council to unblock the negotiations on the proposal for PCBCR. This was generally understood to be the last chance to reach a deal as Austria, which holds the 6-monthly rotating EU Council Presidency from 1 July, is opposed to the Commission's proposal and is not expected to treat the file as a priority.

One of the thorniest political issues surrounding the Commission's proposal is the legal base, which has divided the EU's Member States as well as the EU's Institutions. Both the Legal Services of the European Parliament and the European Commission, but not the Council's Legal Service, consider that there should be no conflict with regard to the Commission's choice of the legal basis for its proposal, since the draft PCBCR Directive in their opinion is a Tax transparency reporting tool, and not a Tax issue as such (which requires unanimity voting in the Council). MEPs expressed their discontent with the impasse around PCBCR during the debate, arguing that some EU Member States have used and are using the legal basis as a pretext to delay any meaningful negotiations on this file.

EU Tax Commissioner Moscovici already indicated in April 2018 that a deal will probably not be reached within this European Commission's mandate ending in November 2019.

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EU – Nordic-3 Finance Ministers: "Global cooperation is key to address tax challenges from digitalization"

The Finance Ministers of Denmark, Finland and Sweden issued a rare joint political statement on 1 June 2018, in which they are very critical toward unilateral EU action on a digital service tax:

> "In March 2018 the EU Commission made two proposals for directives introducing special tax rules for the digital economy. We welcome and support the active EU engagement in the discussion on counteracting base erosion and profit shifting in light of digitalization, but note that the two proposals are mainly about changing the current rules for allocating taxable income between countries, for the digital economy, rather than fighting tax avoidance. The proposals partly shift taxing rights to the country of the consumer or the digital user, based on the premise that these contribute to value creation in the digital economy.
>
> This deviates from internationally established principles. Traditionally, exporting firms do not pay taxes in their export destination simply because they have consumers there. The proposal for a digital services tax means that basically all value creation is deemed to take place at the location of the consumer. Furthermore, a digital services tax deviates from fundamental principles of income taxation by applying the tax on gross income, i.e. without regard to whether the taxpayer is making a profit or not.
>
> Such substantial changes to the current international principles need to be discussed and agreed internationally. If we in the EU unilaterally apply a digital services tax on gross income, including to non-EU firms, the tax will be difficult to enforce and there is a substantial risk that it will complicate international cooperation in the tax area. Furthermore, it seems unlikely that third countries would quietly accept isolated EU actions in this area without introducing corresponding measures for taxing companies of EU Member States. In the end, we would risk moving to a general destination-based allocation of taxing rights, which is not in the interest of the EU."

The three Finance Ministers call for a "thorough analysis whether, and to what extent, users in some specific digital business models contribute by creating value for the business and whether this should be somehow reflected in taxation. (...) We are convinced that global cooperation needs to be given a real chance to succeed also when it comes to digital taxation."

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EU – 22 June ECOFIN Council endorses 6-monthly progress report on the Code of Conduct Group (Business Taxation)

The ECOFIN Council of 22 June 2018 endorsed the Code of Conduct Group (Business Taxation)'s 6-monthly report and the below Conclusions, without further discussion. With regard to the Code of Conduct (Business Taxation), the Council:

1. Welcomes the progress achieved by the Code of Conduct Group during the Bulgarian Presidency as set out in its report (doc. 9637/18), in particular with regard to the monitoring of commitments taken by jurisdictions in the context of the EU listing exercise;
2. Endorses the new multiannual work package set out in annex to the progress report by the Group;
3. Asks the Group to continue monitoring standstill and the implementation of the rollback, including with regard to jurisdictions screened in 2017;
4. Notes with satisfaction the various initiatives undertaken by the Group since the beginning of the year to increase the visibility of its work and further transparency;
5. Welcomes in particular the publication of a compilation of the guidance agreed by the Group (doc. 5814/1/18 REV 1) and of an overview of the preferential tax regimes it has examined since its creation in March 1998 (doc. 9639/18), as well as the publication of compilations of all the letters seeking commitments by jurisdictions (doc. 6671/18) and the commitment letters received in return on which consent was given by the jurisdiction concerned (doc. 6972/18);
6. Equally welcomes the progress achieved with regard to the monitoring of the implementation of agreed guidance, including the priority list agreed by the Group (doc. 6603/18);
7. Invites the Group to continue exploring possible defensive measures that could be applied to non-cooperative jurisdictions in a coordinated manner, without prejudice to Member States' obligations under EU and international law;
8. Welcomes the procedural guidelines for carrying out the process of monitoring commitments concerning the EU list of non-cooperative jurisdictions for tax purposes (doc. 6213/18) agreed by the Group in February 2018;
9. Endorses the way forward proposed by the Group with regard to the revision of the geographical scope of the EU listing exercise;
10. Endorses the scoping paper on criterion 2.2. set out in annex to the progress report by the Group;

11. Endorses the guidance on the interpretation of the third criterion set out in annex to the progress report by the Group;

12. Invites the Group to report back to the Council on its work during the Austrian Presidency.

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EU – ECOFIN Council 6-monthly progress report to the European Council on Tax Issues

This 6-monthly Presidency report to EU leaders provides an overview of the progress achieved in the Council during the term of the Bulgarian Presidency, as well as an overview of the state of play of the most important dossiers under negotiation in the area of taxation. During the Bulgarian Presidency the Council has continued to focus its work on the fight against tax avoidance and aggressive tax planning, both at the global and EU levels, as well as on indirect tax issues. This has been done, in particular, on the basis of a Presidency tax policy roadmap (previously: "EU BEPS roadmap")**.** The tax policy roadmap is also set out in Annex I of this report. Click here for the ECOFIN progress report.

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EU – French-German joint Meseberg Declaration of 19 June

Germany and France issued their joint Meseberg Declaration of 19 June 2018. On Taxation they agreed:

– To put in place actual tax convergence between France and Germany regarding corporate tax. Both countries have agreed on a common position on the Commission proposal for a directive establishing a Common Corporate Tax Base: we will promote it jointly in order to support and accelerate the European project to harmonise the corporate tax base in Europe; and

– To reach an EU agreement on a fair digital taxation by the end of 2018.

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Fiscal State aid

Germany – CJEU judgment on German restructuring clause

On 28 June 2018, the CJEU ruled in the case *Andres* (on behalf of *Heitkamp BauHolding*) *v. Commission* (C-203/16 P)) that the German restructuring clause does not constitute unlawful State aid.

The restructuring clause, which was introduced in 2009, provided for an exception pursuant to which the carry forward of losses could be retained if the shares were transferred for the purpose of restructuring the corporate entity (restructuring clause) whereas loss carry-forwards of other corporate taxpayers were completely forfeited if more than 50% of the shares were transferred within a period of five years. In 2011, the European Commission decided that the restructuring clause constituted unlawful State aid.

An action for annulment brought by Heitkamp BauHolding was turned down by the EU's General Court (T-287/11) as unfounded. Heitkamp BauHolding had brought an admissible action as it was directly and individually concerned by the Commission's decision, but the General Court held that selectivity of the restructuring clause had been correctly defined by the Commission. Therefore, Heitkamp BauHolding asked the CJEU to set aside the General Court judgment.

The CJEU ruled that the applicant was individually concerned by the Commission's decision and was entitled to bring an action for annulment. Heitkamp BauHolding received a ruling from the German tax authorities stating that it met the requirements for the application of the restructuring clause and was thereby affected by the Commission decision by reason of certain attributes which were peculiar to it or a factual situation which differentiated it from all other persons. Examining the second question, the CJEU held that by considering the loss forfeiture rule to be the reference framework, the General Court had artificially selected some provisions from a broader reference framework (i.e. the loss carry-forward rules) and had therefore defined the reference framework too narrowly. This error in the determination of the reference framework vitiated the selectivity analysis, which led the CJEU to uphold Heitkamp's appeal against the General Court's judgment and the Commission's decision.

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Luxembourg – European Commission finds that Luxembourg gave State aid to GDF Suez

On 20 June 2018, the European Commission issued a press release concerning its final decision in the State aid investigation into tax rulings granted by the Luxembourg tax authorities to GDF Suez group (now Engie; "the Group" hereinafter) in relation to the treatment of certain financing transactions.

The Commission considered that the Group received an undue advantage and requested recovery of up to EUR 120 m of tax. The text of the final decision has not yet been made public. The formal investigation concerned the treatment of certain interest-free convertible loans ("instruments") issued by two Luxembourg group subsidiaries ("borrowers") to two other Luxembourg companies of the Group ("lenders").

According to the description in the press release:

- the borrowers treated the instruments as debt and recorded in their accounts provisions for financing charges which were deductible at their level;
- the borrowers did not make payments on the instruments to the lenders under the terms of the instruments;
- the lenders converted the instruments into shares in the borrowers that they subsequently cancelled for the receipt of cash/profits which had been accumulated by the borrowers.

The Commission considered that the two sets of tax rulings governing the treatment of the instruments incorrectly lowered the tax basis of the Luxembourg companies. The Commission also considered that the rulings endorsed an inconsistent treatment of the same transaction as both debt and equity leading to non-taxation at all levels because the borrower deducted expenses similar to interest on the loan while the creditor did not pay tax because Luxembourg tax rules exempt income from equity investments. The Commission considered that this is a more favourable treatment than that generally available under Luxembourg tax rules, which exempt from taxation income received by a shareholder from its subsidiary, provided that income is in general taxed at the level of the subsidiary.

While a number of the recent cases concern transfer pricing matters, the decision in GDF Suez's case appears to focus on the fact that the arrangement gives rise to a deduction of an expense without a corresponding income inclusion.

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Spain – European Commission decision on State aid granted to Spanish postal operator

As a result of two complaints, in February 2016, the European Commission opened a formal investigation to examine the compatibility of the compensations granted to Correos, the wholly state-owned Spanish postal operator for the delivery of its universal postal service obligation and some specific tax exemptions with EU State aid rules. The investigation focuses on fiscal years dating back to 2004-2010 because the Spanish postal service market has been fully liberalised since 2011 in accordance with the EU's Postal Directive, and Correos currently operates in full competition with other relevant postal service providers.

According to the EU State aid rules on public service compensation, EU Member States may, subject to certain criteria, provide State aid to companies to compensate them for the extra cost of providing a public service. In particular, this requires that companies entrusted with such services are not overcompensated.

In its decision dated 10 July 2018 (case number SA.37977), the Commission concludes that Correos was overcompensated by approximately EUR 166 m for providing universal postal service in Spain during the period 2004-2010 and that the specific tax exemptions granted to it since 2004 constituted an undue advantage amounting to approximately to €0.9 m in total. Therefore, the aid granted through these two measures was declared incompatible with the internal market. As a result, Spain must recover it from Correos.

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About the EUDTG

EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up. But, it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions.

So how do we help you?

- Our experts combine their skills in EU law with specific industry knowledge by working closely with colleagues in the Financial Services and Real Estate sectors.
- 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.
- Our secretariat in the Netherlands operates an EU tax news service, keeping clients up to date with developments as soon as they happen.

And what specific experience can we offer for instance?

- 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.

Find out more on: **www.pwc.com/eudtg** or contact the EUDTG's Network Driver Bob van der Made (+31 6 130 96 296, or: bob.vandermade@pwc.com) or contact any of the EUDTG country contacts listed on the previous page.