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EU Tax News

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Contents

CJEU developments

Spain	AG Opinion regarding tax levied on the production of spent nuclear fuel and radioactive waste
Spain	Preliminary questions on compatibility of tax on the value of the production of electric energy with EU law referred to CJEU

National developments

Austria	DAC 6 implementation law published
Finland	Upcoming changes in treatment of foreign funds investing in Finnish real estate
Italy	Tax authorities' ruling on "subject to tax" requirement in the EU-Swiss Confederation Agreement
Spain	Constitutional Court rules on the acte éclairé doctrine and the right to a due process
Spain	National Court extends tax benefits to non-resident public institutions

Spain	Supreme Court confirms discriminatory tax treatment of non-resident investment funds
Switzerland	Tax reform adopted
UK	Gallaher Ltd v Revenue and Customs Commissioners [2019] UK FTT 207 (TC)

EU developments

EU	European Parliament close Public CBCR dossier in first reading
EU	Outcome Informal ECOFIN Council Bucharest meeting 5-6 April 2019
EU	European Parliament Special Committee (TAX3) Report on financial crimes, tax evasion and tax avoidance adopted in plenary, EPP MEPs warn against Britain becoming a tax haven
Spain	European Commission requests Spain to eliminate discrimination on capital gains taxation for residents in the EEA
Spain	European Commission requests Spain to abolish unduly restrictive conditions for tax deferrals in case of divisions of companies
Spain	European Commission requests Spain to eliminate discrimination on taxation of non-resident individuals' rental income

Fiscal State aid

Luxembourg	European Commission opens State aid investigation into Luxembourg's tax treatment of a Finnish company
UK	European Commission announces final State aid decision on financing income exemption within the UK's CFC rules

CJEU developments

Spain – AG Opinion regarding tax levied on the production of spent nuclear fuel and radioactive waste

Advocate General (AG) Hogan of the CJEU has issued his opinion (C-80/18 to C-83/18) on the taxes levied on the production of spent nuclear fuel and radioactive waste. The main conclusions are as follows:

- The AG considers that these taxes are out of the scope of Directive 2009/72/EC since this directive does not concern taxation and states that the competence in tax matters is in the hands of the Member States. Adoption of the Directive followed the EU's ordinary legislative procedure (i.e. no unanimity).
- Considering this, according to the AG there is no room to argue for potential discrimination based on EU law. However, the AG pointed out that in the event the CJEU were to consider otherwise (i.e. that the taxes would be within the scope of the Directive), then nuclear energy would not be comparable to other sources of energy with regard to environmental protection due to the specific health and safety risks around the treatment and storage of the nuclear waste it generates. Nonetheless, the AG states that the existence of any discrimination and any potential justification by reference to the special and distinctive environmental and safety difficulties related to the production of nuclear energy should be assessed by the domestic court or tribunal.
- Finally, the AG states that it is possible that these taxes are levied with the intention to collect higher tax revenues. However, that should also be assessed by the domestic court or tribunal.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – Preliminary questions on compatibility of tax on the value of the production of electric energy with EU law referred to CJEU

On 22 February 2019 (published in March), the High Court of Valencia referred preliminary questions to the CJEU (Joined Cases C-105/18 to C-113/18) with respect to the compatibility of the tax on the value of the production of electricity with EU law. The reasons for the referral were as follows:

- The tax is considered as a direct tax but structured as an indirect tax thereby increasing the cost of electricity to be assumed by the final customer. The High Court asks whether this can be regarded as a purely indirect tax aimed at collecting revenue;
- The High Court further questions whether the tax itself pursues environmental objectives since the revenue resulting therefrom is not used to fund environmental policies;

- The High Court doubts whether the tax violates the “polluter pays” principle since it does not encourage the use of renewables energies; and
- Whether potential discrimination and distortion of competition may arise considering that only Spanish producers have to bear the tax (i.e. non-resident producers are not subject to this tax in their State of residency).

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Back to top

National developments

Austria – DAC 6 implementation law published

As part of the Tax Fraud Prevention Act 2020, the draft of the new EU Reporting Obligations Act (EU-MPfG) was published on 8 May 2019. The EU-MPfG is intended to transpose the EU DAC 6 Directive into domestic law. The wording of the present draft bill is strongly based on the DAC 6 Directive. It regulates the reporting obligation for (potentially) aggressive cross-border tax arrangements if these fulfil certain “hallmarks”. The reporting obligation applies either to the intermediary or to the taxpayer.

The EU-MPfG applies only to cross-border arrangements (i.e. purely domestic arrangements are not reportable). Sec. 4 EU-MPfG provides for a general limitation of the reporting obligation to transactions that – amongst others – entail a “potential risk of tax avoidance”. It remains to be seen whether the fulfilment of a hallmark will automatically entail such a “potential risk of tax avoidance” under Austrian law, although for the purposes of the Directive a hallmark includes a characteristic that presents an indication of a potential risk of tax avoidance. The penalties for a breach of the reporting obligation are up to EUR 50,000 for intent and up to EUR 25,000 for gross negligence. There is no possibility to avoid this penalty by filing a voluntary self-disclosure.

The reporting must be made via the online service of the Austrian Ministry of Finance (FinanzOnline). In principle, the reporting has to be made in German, although certain information items also have to be provided in English. In case the arrangement was already reported in another EU Member State or by another intermediary, a copy of the filed reporting has to be submitted via FinanzOnline (in order to be released from the obligation).

The so-called “legal professional privilege” has been implemented so that under certain circumstances the reporting obligation is shifted from the intermediary to the taxpayer. However, the taxpayer can shift the obligation back to the intermediary by waiving the intermediary’s confidentiality obligation.

On the basis of the wording of the draft law, there are still many open questions, especially in connection with the concept of the intermediary and the concrete scope of the hallmarks. A decree with explanatory examples by the BMF will be published as soon as possible. The evaluation period of the EU-MPfG runs until 23 May 2019, and we expect the bill to be passed before summer 2019.

-- Richard Jerabek, Christine Schellander, Nikolaus Neubauer, PwC Austria; richard.jerabek@pwc.com

Finland – Upcoming changes in treatment of foreign funds investing in Finnish real estate

The law implementing the concepts of 'investment fund' and 'special investment fund' for tax purposes was approved by Parliament on 21 February 2019 and will apply as of FY 2020. Whilst the income tax exemption of both Finnish and foreign investment funds and special investment funds is maintained, the formal definitions of investment fund and special investment fund are introduced to the Finnish tax legislation for the first time. This will effectively limit the number of foreign funds that are eligible for a tax exemption in Finland. This represents a major development for those foreign real estate investors that invest in Finnish properties or mutual real estate companies directly through foreign fund vehicles that are currently regarded as comparable to Finnish special investment funds.

Overview of the current legislation and impact on foreign real estate investors

The government has implemented a general reform of the Finnish Act on Common Funds and changes to other related legislation such as the Alternative Investment Funds Managers Act. In brief, the concepts of investment funds and special investment funds will be distinguished and various amendments and clarifications made (e.g. the concept of umbrella funds will be introduced into Finnish legislation). To date, Finnish investment funds and special investment funds have been treated as opaque bodies corporate that are tax exempt for income tax purposes based on specific provisions in the Finnish Income Tax Act (ITA). However, neither are the concepts of investment fund and special investment fund defined in Finnish tax legislation nor does the legislation specifically refer to the regulatory concepts of the vehicles. This being said, the regulatory concepts have been widely used in case law and practice when applying the tax provisions applicable to investment funds and special investment funds.

Based on Finnish case law, foreign investment funds investing directly in Finnish properties or mutual real estate companies have been eligible for the same tax exemption applicable to domestic special investment funds provided that the foreign vehicle has been objectively comparable to a Finnish special investment fund. The regulatory concept of special investment fund has been used to establish the comparability. In connection with the regulatory reform, the government is now including specific definitions of investment fund and special investment fund in the ITA. The purpose of the tax legislation change is to clarify the definitions and to ensure that both Finnish and foreign fund vehicles are treated equally. In practice, this change will limit the number of foreign funds that are regarded as objectively comparable to Finnish investment funds and special investment funds.

Summary of the proposed changes

According to the proposal, both qualifying Finnish and foreign investment funds and special investment funds will continue to be tax exempt for income tax purposes. However, the tax exemption will only be available if specific requirements laid down in the legislation are met.

In relation to foreign funds, it will be required that the foreign fund:

a. is a contractual fund comparable to a Finnish investment fund/special investment fund;
b. is open-ended; and
c. has at least 30 unit-holders.

In addition, it is also required that:

d. the foreign fund is established in its country of registration in accordance with the relevant regulatory requirements applicable to collective investment undertakings or alternative investment fund managers; and
e. any foreign fund established outside the European Economic Area (EEA), is established in a jurisdiction with which Finland has an agreement regarding the mutual exchange of information in tax matters in place and that the jurisdiction is willing to provide the required information for tax assessment purposes.

In the event that requirements (b) or (c) are not met, the tax exemption is still available for foreign special investment funds provided that (i) the fund distributes to its unit-holders at least 75% of its annual profits excluding the unrealised value appreciation of its investments, (ii) the fund's capital is at least €2m and (iii) the unit-holders are professional investors or comparable high net worth individuals. Foreign special investment funds investing directly or indirectly mainly in real estate always need to meet requirement (i) above.

As the concept of sub-fund is introduced in the regulatory legislation, a provision is added to the ITA stating that if the fund consists of one or more sub-funds, the tax treatment applicable to investment funds and special investment funds will be applied to the sub-funds as well. The new rules will apply from the fiscal year 2020.

Whilst a tax exemption will continue to be available for foreign contractual funds comparable to Finnish investment funds and special investment funds, the tax exemption will be available to a more limited number of foreign entities meeting the specific requirements imposed by the Finnish tax legislation. It is therefore essential for any foreign fund investing directly in Finnish properties or Finnish mutual real estate companies to review its constitutional documentation against the requirements in order to determine whether the tax exemption will continue to be available as from FY 2020.

-- Heikki Lajunen, Okko Koskenniemi, Janina Helekorpi, PwC Finland; heikki.lajunen@pwc.com

Italy – Tax authorities' ruling on "subject to tax" requirement in the EU-Swiss Confederation Agreement

On 15 February 2019, the Italian tax authorities published a ruling on the domestic implementation of the Agreement between the European Union and the Swiss Confederation signed on 26 October 2004 (the Agreement) and amended by the Amending Protocol signed on 27 May 2015 (the Protocol), which *inter alia* set out similar rules to the EU's Parent-Subsidiary Directive and the EU's Interest-Royalties Directive. The ruling concerns the interpretation of the "subject to tax" requirement contained in Article 15, paragraph 1 of the Agreement (now Article 9, paragraph 1, as amended by the Protocol) in order to benefit from the withholding tax exemption of dividends paid to Swiss parent companies.

In particular, the taxpayer (an Italian company wholly owned by a Swiss limited company) asked the Italian tax authorities whether the accrued dividend to be paid to the Swiss parent would be exempt from withholding tax in accordance with the Agreement. In this regard, the taxpayer underlined that the Swiss parent company benefited in the past from the Swiss holding company regime, which exempts Swiss holding companies from the payment of both the cantonal and municipal corporation taxes. However, the taxpayer also pointed out that, starting from FY 2017, it effectively renounced (as also certified by the Swiss tax authorities) the aforementioned exemptions being effectively subject to the payment of the Swiss corporation tax at federal, cantonal and municipal levels.

The Italian tax authorities confirmed that the Swiss parent company was subject to tax since it renounced the Swiss holding company regime (considered, as quoted by the Italian Tax Authorities, as unlawful State aid and therefore contrary to the 1972 EU-Swiss Agreement by the Commission in its decision dated 13 February 2007). The Swiss parent company was therefore fully subject to Swiss corporation taxes. Additionally, the Italian tax authorities confirmed that the fact that the Swiss parent company will benefit from the Swiss participation relief which, according to the Italian Tax Authorities, provides for a tax treatment of the dividends received which is similar to the Italian participation exemption regime (i.e. dividends received by Italian resident companies from other Italian resident companies are exempt from tax for 95% of their amount), does not prevent the fulfilment of the "subject to tax" requirement.

It is important to notice that this ruling came out soon after the controversial Italian Supreme Court decision (see EU Tax News Issue 2019 – no. 001 "Italian Supreme Court decision on

"subject to tax" requirement in EU Parent-Subsidiary Directive"*)* according to which the EU Parent-Subsidiary Directive (containing a very similar "subject to tax" requirement) cannot apply in the case where the parent company benefited from a dividend exemption regime.

-- Claudio Valz, Luca la Pietra, Guglielmo Ginevra, PwC Italy; claudio.valz@pwc.com

Spain – Constitutional Court rules on the *acte éclairé* doctrine and the right to a due process

On 26 March 2019, the Spanish Constitutional Court ruled that when the requirements for the *acte éclairé* doctrine are not met, the competent judicial authority (i.e. court or tribunal) must refer preliminary questions to the CJEU. Otherwise, the national judicial authority may be violating the right to a due process within Article 24.2 of the Spanish Constitution. In the same way, the Spanish Constitutional Court established that non-sufficient motivation on the application of the *acte éclairé* doctrine may lead to violation of the right to effective legal protection.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – National Court extends tax benefits to non-resident public institutions

On 7 February 2019, (published in March 2019), the Spanish National Court issued two judgments extending the withholding tax exemption that is currently applicable to the Spanish Central Bank and the Spanish Social Security to withholding taxes levied under the Spanish non-resident income tax law on dividends obtained by the Central Bank of Norway (Norges Bank) due to investments carried out in Spain through the Currency Reserve and the Government Pension Fund of Norway-Global. The Spanish National Court based its judgments on the fact that the current law is contrary to the EU free movement of capital, since it leads to discrimination based on the nationality of the recipient.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – Supreme Court confirms discriminatory tax treatment of non-resident investment funds

On 27 March 2019, the Spanish Supreme Court confirmed that the Spanish tax rules created discriminatory tax treatment for non-resident investment funds that are UCITS.

The Supreme Court recognized that UCITS resident in Spain and UCITS resident in other EU Member States are comparable, since both are subject to tax on dividends. However, non-resident UCITS in Spain are confronted with a higher tax burden and therefore a restriction.

According to the Spanish Supreme Court, the restriction could only be justified, pursuant to Article 65 of the TFEU, by a reason already established under domestic tax law. Thus, the restriction could not be justified by the fact that there were no documents or proof confirming that the non-resident investment fund had the same features as a Spanish fund.

The Court concluded that the restriction could only be justified considering the objective circumstances (i.e. if the Spanish legislator had established an ordinary tax mechanism allowing the non-resident taxpayer to gain access to a reduced tax rate).

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Switzerland – Tax reform adopted

The Swiss Tax Reform Bill (Swiss Tax Reform and AHV Financing "TRAF") was subject to a public vote on 19 May 2019. The outcome of the public vote was positive (approval with a majority of 66.4% of Swiss voters). Accordingly, Switzerland is introducing new, internationally compliant tax measures and its tax law will become fully aligned with the current international standards. Switzerland's current preferential regimes for holding, domiciliary and mixed companies will be abolished as of 1 January 2020. Transitional measures will be introduced in order to ease the change from the preferential regimes to the new tax measures. With the implementation of the Swiss tax reform, Switzerland will meet the requirements of the OECD and the EU in relation to harmful tax practices/non-cooperation, and is expected to be taken off the EU's grey list of countries committed to address deficiencies (*the Code of Conduct Group's conclusions to this effect are now pending, although the Council of the EU (in ECOFIN format) will have to make the final decision*).

In the field of corporate tax, the Swiss tax reform introduces the following key measures:

- Introduction of a patent box into cantonal tax laws providing for a 90% exemption of patent box income at cantonal level;
- Optional introduction of a 50% additional R&D cost deduction into cantonal tax laws;
- Optional introduction of a deduction on excess equity (Notional Interest Deduction – NID – for high tax cantons such as Zurich);
- Rules concerning hidden reserves upon migration to/from Switzerland and transitional rules upon change of status of preferential regime companies;
- Maximum limitation of relief may not exceed 70% of profits subject to cantonal tax;
- Optional capital tax relief for cantons relating to participations, patents and intercompany loans;
- Introduction of 50% proportionality rule for withholding tax-free repayments of capital contribution reserves for companies listed on the Swiss stock exchange; and
- Broadening of the lump-sum tax credit to enable ordinarily taxed Swiss branches of foreign companies to claim a lump-sum tax credit for foreign withholding taxes under certain circumstances.

From a timing perspective, with the new legislation at federal level coming into force on 1

January 2020, the Swiss cantons have to adapt their cantonal tax laws based on the framework provided by the new Swiss federal provisions. While the updated cantonal tax laws are, in principle, all scheduled to come into force on the same date as the new federal provisions (i.e. as of 1 January 2020), the status of the legislation process in the cantons varies.
-- Armin Marti and Anna-Maria Widrig Giallouraki, PwC Switzerland; armin.marti@ch.pwc.com

UK – Gallaher Ltd vs Revenue and Customs Commissioners [2019] UKFTT 207 (TC)

On 25 March 2019, the First-tier Tribunal held that UK legislation under which tax is payable on capital gains on certain intra-group transfers contravenes the freedom of establishment under art.49 TFEU, and must be disapplied, in cases involving the exercise of the freedom of establishment.

The case involved the Japan Tobacco group. The taxpayer company was a UK-resident subsidiary (UKCo) of a holding company resident in the Netherlands (Dutch HoldCo). UKCo appealed against two decisions of HM Revenue & Customs (HMRC):

- The first decision imposed a charge for corporation tax on profits on a transfer of intangible fixed assets (intellectual property rights consisting of tobacco brands) in 2011 by UKCo to a Swiss-resident subsidiary of Dutch HoldCo (the 2011 transfer).
- The second decision imposed a charge for corporation tax on chargeable gains on a transfer of shares in a subsidiary in 2014 by UKCo to Dutch HoldCo (the 2014 transfer).

The relevant UK legislation provides for tax neutrality (no gain, no loss, or stand in shoes tax treatment) on an intra-group transfer within a ≥75% group, on condition that the transferee is within the charge to UK corporation tax. The legislation does not provide tax neutrality for a transfer (as in both the present cases) to a group company which, being non-UK resident and having no UK permanent establishment, is not within the charge to UK corporation tax. In the relevant periods, moreover, the legislation required immediate payment of tax on the notional or paper profit or gain: there was no provision for payment in instalments.

As regards the 2014 transfer – a transfer by UKCo to its Dutch parent – the Tribunal held that freedom of establishment was engaged. An immediate liability to tax arose on the gain on the intra-group transfer, which would not have arisen if the transferee (Dutch HoldCo) – being the transferor's parent company – had been UK-resident or had had a permanent establishment in the UK. This was therefore a restriction on the freedom of establishment of Dutch HoldCo as parent company. Although the Dutch parent company was not within the UK tax net, nonetheless the situation was objectively comparable to a transfer to a UK-resident parent company. The restriction was in principle justified by the need to secure balanced allocation of taxing powers between Member States (by taxing the increase in value of the assets – the shares transferred – which accrued while they were within the UK tax net and which would fall outside the UK tax net following transfer to the non-resident transferee). However, following the CJEU exit tax cases, the requirement to pay all of the tax immediately following the transfer was disproportionate because there was no provision for the tax to be paid in instalments.

The question then arose whether the Tribunal could apply a 'conforming construction' pursuant to the principles in *Marleasing* (C-106/89) such as to 'read in' instalment payment rules to make the charge compliant with the Treaty. The Tribunal held that because there were various options possible as regards potential provision for instalment payments (e.g. the period for payment, ranging from say five years to ten, any provision for interest and any provision for security), if the Tribunal selected a particular option or system of instalment payments to 'read in' then it would in effect be taking a legislative decision which is of a type which the Legislature and not the courts or tribunals should take. Therefore the Tribunal had to disapply the rule which confined the 'no gain, no loss' treatment to transfers to group companies within the charge to corporation tax; accordingly, the UK had to grant 'no gain, no loss' treatment in respect of the 2014 transfer, and so the company's appeal in this respect was allowed.

As regards the 2011 transfer, this was from UKCo to a Swiss-resident subsidiary (SwissCo) of UKCo's Dutch parent company. The Tribunal held, following case law including *FII (2)* (C-35/11) that only the freedom of establishment was engaged, not the free movement of capital, because the potential difference in treatment (the possible restriction) related only to transfers effected within a ≥75% group and thus involving situations of 'definite influence'. The question was therefore whether the denial of tax neutrality and the immediate charging of tax on the notional profit on the 2011 transfer infringed the freedom of establishment. The transfer gave rise to an immediate liability to tax which would not have arisen if the transferee (SwissCo, UKCo's sister company) had been within the charge to UK corporation tax. However, the Tribunal held that this did not entail any restriction on the freedom of establishment. The relevant freedom of establishment to be considered was that of the common parent company, Dutch HoldCo (which was the parent company both of UKCo, the transferor, and of SwissCo, the transferee). There was no difference in treatment so as to constitute a restriction on Dutch HoldCo's freedom of establishment, because the profit on the transfer would have been equally chargeable immediately to tax if Dutch HoldCo as common parent company had been a UK-resident company. Therefore the company's appeal in relation to the 2011 transfer was dismissed.

This is only a decision at first instance. Therefore, it can be expected that HMRC will appeal to the Upper Tribunal in respect of the 2014 transfer. If so (and possibly in any event), the taxpayer is similarly likely to appeal in respect of the 2011 transfer.

-- Peter Halford, PwC UK; peter.halford@pwc.com

EU developments

EU – European Parliament closes Public CBCR dossier in first reading

On 27 March 2019, outgoing Members of the European Parliament (MEPs) reaffirmed the European Parliament's common position on Public country-by-country reporting (Public CBCR) adopted on 4 July 2017.

More specifically, MEPs voted to formally close the first reading stage. This is widely regarded as a highly symbolic move by MEPs with no other concrete procedural effect than to earmark this dossier as unfinished legislative business for the next EP Legislature to consider and to keep this topic on the EU's agenda. The move provided some outgoing MEPs with a last opportunity to publicly criticize the ongoing stalemate in Council for two years where the Member States have not been able to agree on a common position amongst themselves, and with no solution in sight for the moment. In order for the draft Public CBCR Directive to become EU legislation, the EU Parliament and Council would have to see eye to eye on a final compromise text which is based on the European Commission's original Public CBCR proposal; however, this has proved impossible so far.

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

EU – Outcome of informal ECOFIN Council meeting, Bucharest 5-6 April 2019

Remarks by EC Vice-President Valdis Dombrovskis during the press conference held after the informal ECOFIN Council press conference in Bucharest, which neatly summarizes the (outgoing) Juncker Commission's views on tax policy issues:

"Ministers also discussed the role of taxation in supporting inclusive and sustainable growth. Taxation policy is indeed a powerful tool to tackle issues such as income inequality, incentivising innovation or supporting a cleaner environment and improved health. It is also about tax fairness and the fight against tax avoidance. Billions of euros are lost every year to State budgets due to tax avoidance.

Going forward, our view is that the EU needs a shared strategy for future tax policies. We need to factor in the changing environment with fast developing technologies, the digital economy and new forms of work, amongst others.

I would also like to thank the OECD for updating Ministers on progress made in finding global solutions to digital taxation. In this context, the Commission calls on Member States to coordinate their positions and speak with one voice to have more impact and influence in those international negotiations.

Several Ministers stressed the need to modernise our taxation system to make it fit for the 21st century and step up the fight against tax avoidance. This work will be brought forward in the frameworks of the OECD and G7. The Commission stands ready to support that work. And, as we have been often emphasising, in absence of international consensus, we have to be more ambitious at EU level."
-- Bob van der Made, PwC Netherlands; bob.vandermade@pwc.com

EU – European Parliament Special Committee Report on financial crimes, tax evasion and tax avoidance (TAX3) adopted in plenary; EPP MEPs warn against Britain becoming a tax haven

In an unprecedented move, the Christian Democratic EPP, the dominant political group in the outgoing European Parliament, issued a separate EPP press release on 26 March 2019 on account of the adoption by the plenary sitting of the TAX3 Report recommending over 200 measures for the EU to combat financial crimes, tax evasion and tax avoidance more effectively, in which they also called out the UK in the EU's fight against corporate tax evasion.

"With Prime Minister May announcing that 'the lowest level of corporation tax in the G20' would be introduced in Great Britain, we fear and regret that the UK itself might become a tax haven on the EU's doorstep", high-profile EPP MEPs Niedermayer and Rosati were quoted as saying.

MEP Niedermayer, Co-Rapporteur of the TAX3 Report stated: "I am strongly concerned about possible divergences that may emerge even shortly after Brexit between Britain and Europe in the area of financial crimes and tax evasion that would bring new economic, fiscal and security risks. I believe in healthy tax competition among countries and in their right to set their corporate tax rates, but I also hope that the UK will remain a strong partner in the global effort towards fair and efficient taxation and will cooperate with all OECD initiatives on this issue".

The EPP Group's TAX3 Spokesman MEP Rosati stated: "For many years, Britain had its foot on the brakes to hinder stronger EU rules against tax evasion. And very recently, the UK has been hampering some of its overseas territories from appearing on the so-called tax havens blacklist."

The TAX3 Report was adopted by the European Parliament's plenary by an overwhelming cross-party majority on 26 March 2019.

Quotes by leading MEPs on the TAX3 Report's adoption:
TAX3 Chair Jezek (ALDE Liberals): "Member states are not doing enough and in the EU, the Council is clearly the weakest link. Without political will, there can be no progress. Europeans deserve better."

TAX3 Co-rapporteur Niedermayer was quoted as saying: “The growing interconnectedness of our economies as well as the digitalisation of the economy need to be addressed more systematically as they affect taxation. Yet many areas of taxation must remain a Member State competence, and those who pay their taxes must not face extra red tape.”

TAX3 Co-rapporteur Kofod (Socialists and Democrats group): “This report is the result of the most comprehensive work ever done by the European Parliament on tax evasion and avoidance. Within the EU we need a minimum corporate tax rate, an end to tax competition and to make it more difficult to bring dirty money in.”

The European Parliament’s Own-initiative and legally non-binding TAX3 Report is seen as the outgoing European Parliament’s political legacy in the area of tax avoidance and evasion. Under the EU’s Inter-institutional Agreement, the European Commission is required to provide a formal response within three months (i.e. by 27 June 2019) to the European Parliament as to whether it intends to launch any new legislative initiatives as a direct result of the TAX3 Report, or not.

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

Spain – European Commission requests Spain to eliminate discrimination on capital gains taxation for residents in the EEA

The European Commission has sent a letter of formal notice to Spain requesting it to eliminate discrimination on capital gains from share disposals for taxpayers resident in Norway, Iceland and Liechtenstein. Currently, Spanish tax law exempts capital gains from the transfer of shares under certain conditions, but only for tax residents in Spain and EU Member States. On the other hand, EEA-based tax residents cannot get the same benefits from that tax exemption, which constitutes a restriction of both the freedom of establishment and the free movement of capital. Spain has been given two months to reply in a satisfactorily manner, otherwise the European Commission may decide to send a reasoned opinion to the Spanish authorities.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – European Commission requests Spain to abolish unduly restrictive conditions for tax deferrals in case of divisions of companies

The European Commission has sent a letter of formal notice to Spain requesting the elimination of unduly restrictive conditions for certain types of divisions of companies, for which the tax deferral is not granted if the shareholders of the divided company do not receive the same proportion of shares in all the companies resulting from that division, unless the acquired assets are branches of an activity. Spain has been given two months to reply in a satisfactorily manner, otherwise the European Commission may decide to send a reasoned opinion to the Spanish authorities.

-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Spain – European Commission requests Spain to eliminate discrimination on taxation of non-resident individuals' rental income

The European Commission has sent a letter of formal notice to Spain requesting the elimination of the discriminatory tax treatment for non-residents on income derived from the letting of dwellings. Based on the Spanish tax law currently in force, resident individuals enjoy a reduction of 60% of the net income obtained from the letting of properties used by the tenant as dwellings. However, this reduction is not available to non-resident individuals, which constitutes a clear restriction against the EU free movement of capital. Spain has been given two months to reply in a satisfactorily manner, otherwise the European Commission may decide to send a reasoned opinion to the Spanish authorities.
-- Antonio Puentes and Roberta Poza, PwC Spain; roberta.poza.cid@pwc.com

Back to top

Fiscal State aid

Luxembourg – European Commission opens State aid investigation into Luxembourg's tax treatment of a Finnish company

On 7 March 2019, the European Commission issued a press release announcing the opening of a State aid investigation into tax rulings granted by the Luxembourg tax authorities to a Luxembourg subsidiary of a Finnish group in relation to the treatment of interest-free loans granted by another Irish subsidiary of the group to the Luxembourg company.

According to the Commission's press release, the formal investigation concerns three rulings obtained by the Luxembourg subsidiary from the Luxembourg tax administration in 2009, 2012 and 2013.

According to the facts as presented in the preliminary decision of the Commission:

- The Luxembourg subsidiary, which carried out intra-group financing activities, has been granted interest-free loans from an Irish group subsidiary and used the funds to grant in its turn loans to other group companies.
- The rulings confirmed that the Luxembourg subsidiary can deduct from its taxable basis an amount of deemed interest on the interest-free loans corresponding to interest payments that an independent third party would have otherwise demanded for the loans in question.

According to the press release, the Commission expresses doubts as to whether the treatment endorsed by the rulings in question can be justified. Notably, the Commission appears concerned that the unilateral downward adjustment applied on the interest-free loans by the Luxembourg company represents a selective advantage to the group because it would allow the group to pay less tax than other stand-alone or group companies whose transactions are priced in accordance with market terms. The decision is the latest in a number of high profile cases concerning State aid and taxation and it is the first one that concerns the treatment of interest-free loans.

-- Alina Macovei, PwC Luxembourg; alina.macovei@lu.pwc.com

UK – European Commission announces final State aid decision on financing income exemption within the UK's CFC rules

On 2 April 2019, the European Commission announced in a press release that it has found that the Group Financing Exemption (GFE) within the UK Controlled Foreign Company (CFC) rules is "partly justified". The UK CFC rules are provisions which broadly allow the UK to tax the income of overseas subsidiaries, controlled by a UK corporate parent where that income is regarded as artificially diverted from the UK. The Commission focuses on the two ways in which income might be regarded as related to the UK:

- Where the loans are financed with funds or assets which derive from capital contributions from the UK;
- Where lending activities relevant to managing the financing activities are located in the UK.

The Commission finds that where the GFE provides an exemption for arrangements which fall into the first category above, this is justified since the exemption avoids a complex and burdensome intragroup tracing exercise. However, where the GFE has been applied to arrangements in the second category, the Commission considers that the exemption is not justified and instead constitutes unlawful State aid. The conclusions set out in the press release give a result consistent with the application of the rules that have been in place from 1 January 2019 (when changes were introduced in response to ATAD) and indeed the Commission specifically note that the rules applicable from 1 January 2019 no longer give rise to any State aid concerns.

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Back to top

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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, taxation of the digital economy and the 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 provide input to the EU and international tax debate and maintain regular contact with key EU and OECD policy-makers in Brussels and Paris.
- Our central EUDTG secretariat in Amsterdam operates an EU tax news service, keeping our clients up to date with developments 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.

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