EU Direct Tax Group
Ready to talk EU tax law when you are.

# EU Tax News

*Issue 2021 – nr. 001* *November – December 2020*

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



## Contents

### *National Developments*


| | |
|---|---|
| Belgium | Belgian Government proposes solution for taxation of foreign real estate after CJEU imposes penalties |
| Italy | New developments concerning the taxation of EU/EEA non-resident investment funds with respect to Italian-sourced dividends and capital gains |
| Netherlands | Dutch Ministry of Finance issues Decree on refund of dividend withholding tax and gambling tax following the CJEU's Sofina Judgment |
| UK | First-tier Tribunal decision regarding breach of the freedom of establishment arising from the UK rules for group relief of UK branch losses |
| UK | Gallaher Limited v The Commissioners for HM Revenue & Customs (HMRC) regarding potential breach of the freedom of establishment and/or free movement of capital arising from the taxation of intra-group disposals of assets to non-UK group companies |


### *EU Developments*


| | |
|---|---|
| EU | Portuguese EU Presidency tax priorities (1 January - 1 July 2021) |
| EU | ECOFIN Council adopts Council Conclusions on fair and effective taxation |
| EU | Other ECOFIN Council-related news |

| | |
|---|---|
| EU | European Parliament's Economic and Monetary Affairs Committee (ECON) adopts draft Resolution to reform the EU's list of non-cooperative tax jurisdictions (EU blacklist) |
| EU | Main decisions of the European Parliament's Permanent Sub-Committee on Taxation (FISC) November 2020 Coordinators' meeting |
| EU | Council of the EU, European Commission and European Parliament set the EU's legislative priorities for 2021 and objectives for 2020-2024, also for taxation |
| EU-UK | Trade & Co-operation Agreement between the UK and the EU |

## *Fiscal State Aid Developments*

| | |
|---|---|
| Belgum | Belgian excess profit rulings opinion of AG Kokott |
| UK | New statutory State aid recovery mechanism in respect of the alleged aid arising from the UK's group financing exemption from the CFC rules |

## *National Developments*

### Belgium – Belgian Government proposes solution for taxation of foreign real estate after CJEU imposes penalties

On 12 November 2020, the CJEU imposed a lump-sum fine of EUR 2 million and a daily penalty of EUR 7.500 for each day that the Belgian tax authorities continue to maintain a difference in tax treatment for rental income depending on whether the immovable property is located in Belgium or abroad (*Commission vs Belgium* case C-842/19. Recently, the Belgian Government has proposed a solution to the problem in the form of a draft bill which will be introduced in the Belgian Parliament. Essentially, the Belgian tax authorities will undertake a large-scale exercise to determine a cadastral income for approximately 150.000 properties abroad owned by Belgian taxpayers.

For a Belgian individual taxpayer who rents out immovable property abroad (for example renting out a vacation home in Spain) the actual rental income is in principle taxable (via the Belgian resident's income tax return). This is different from the way immovable property income is taxed when a property is located in Belgium and is rented out (to another individual who uses it for private purposes). Individual taxpayers who rent out a property located in Belgium are taxed on the basis of the "cadastral income of the property" (which is indexed and increased by 40%). The cadastral income is a notional income which is typically determined by the Belgian tax authorities based on a number of factors. The cadastral income reflects (or should reflect) the estimated average normal net income that the immovable property provides to its owner. It symbolises the net average annual rental value for a property at a certain reference date. However, in practice the cadastral income is still based on the 1975 index, but subject to annual indexation.

The above mentioned unjustified unequal tax treatment of rental income, depending on whether the immovable property is located in Belgium or in another EU Member State was already addressed by the European Commission a number of years ago. Moreover, in 2018, Belgium was ordered by the CJEU to amend its national legislation, but no action was taken by Belgium (*Commission vs Belgium*, C-110/17).

In order to ensure an equal treatment going forward, the Belgian tax authorities will allocate a cadastral income to each foreign property, on the same basis as for a property situated in Belgium. It concerns approximately 150.000 properties, the majority of which are in France, Spain, Italy and the Netherlands.

This exercise will be based on the information that the owners must provide to the Belgian tax authorities via a specific questionnaire. The owners will be asked by the tax authorities for a description of the foreign immovable property, its location and the normal market value for real estate in the region.

The Belgian tax authorities hope to receive all the information by March 2022, so that the properties can be declared in the June 2022 tax return. Anyone who acquires a foreign property from 1 January 2021 will have 4 months to complete those formalities.

From a Belgian personal income tax perspective, it will most likely concern "exempt income". In cases where a double tax treaty is concluded between Belgium and the country where the property is located, the foreign immovable income may only become taxed in the country where it is located. In Belgium, the taxpayer must however indicate this foreign income in the resident's tax return, to determine the average tax rate on his global income (exemption with progression effect).

-- Patrice Delacroix, PwC Belgium; patrice.delacroix@pwc.com

**Italy – New developments concerning the taxation of EU/EEA non-resident investment funds with respect to Italian-sourced dividends and capital gains**

On 30 December 2020, the Italian Parliament approved the 2021 Italian Finance Bill which provides, inter alia, for the exemption from dividend withholding tax and capital gains tax with respect to Italian-sourced dividends and capital gains received by qualified EU/EAA non-resident investment funds.

The new dividend and capital gains tax exemption regime for EU/EEA non-resident investment funds enters into force as from 1 January 2021.

The 2021 Italian Finance Bill provides, as from the date of entry into force of the law (1 January 2021), that:

i. foreign investment funds established in an EU Member State in accordance with the Undertakings for Collective Investment in Transferrable Securities (UCITS) Directive (Directive 2009/65/EC); and
ii. foreign investment funds established in an EU Member State, or in an EEA Member State allowing an adequate exchange of information, and managed by a fund manager subject in the country in which it is established to regulatory supervision in accordance with the Alternative Investment Fund Managers (AIFM) Directive (Directive 2011/61/EU);

are no longer subject to the 26% domestic withholding tax (or the lower tax treaty rate if applicable) on Italian-sourced dividends.

The 2021 Italian Finance Bill also provides – from 1 January 2021 - for the exclusion from taxable income of Italian-sourced capital gains derived from the sale of qualified participations in Italian companies realised by the same type of non-resident investment funds listed above.

It is expressly indicated in the Bill's preparatory works that the purpose of this new piece of legislation is to equalise the tax treatment of EU and EEA non-resident investment funds (subject to taxation, prior to the new law at issue, equal to 26% on Italian-sourced dividends and capital gains on the sale of qualified participations in Italian companies) to the taxation regime applicable to Italian resident investment funds which are exempt from taxation on such type income.

Notwithstanding the fact that this new piece of legislation appears to acknowledge (and make amendments due to) the above mentioned discrimination in place so far towards non-resident investment funds as compared to Italian resident investment funds, in breach of the free movement of capital enshrined in Article 63 TFEU, it is important to highlight that the new tax exemption regime provides for the exemption only as from the date of its entry into force (1 January 2021) with no retroactive effect. This means that, with specific reference to the new dividend withholding tax exemption, only dividends paid from January 2021 onwards will fall within the scope of the mentioned exemption.

It is also worth underlining that this new piece of legislation provides for the exemption only with respect to qualified investment funds established in an EU Member State or in an EEA Member State. It does not apply to third country non-resident investment funds.

With respect to these two above exclusions from this new piece of legislation, the Italian taxation regime for non-resident investment funds still appears contrary to EU Law.

As regard refund claims that have already been submitted by EU resident investment funds for dividend withholding tax suffered in previous years (i.e. prior to 2021), as noted, the newly enacted exemption regime does not apply retroactively (i.e. for dividends paid and capital gains accrued before 2021). In this regard, the new amendment by acknowledging that a discrimination towards non-resident investment funds was actually in place - which, based on EU law, should be removed with retroactive effects - may actually have the effect of strengthening (especially in a litigation phase) the position of the investment funds that have already submitted, or are going to submit, refund claims requesting reimbursement of Italian taxes suffered in previous years because in breach of EU law.

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

**Netherlands – Dutch Ministry of Finance issues Decree on refund of dividend withholding tax and gambling tax following the CJEU's Sofina Judgment**

On 4 December 2020, the Dutch Secretary of State for Finance issued a decree to make it possible for non-resident entities to request a refund of (a) dividend withholding tax withheld on dividends from portfolio investments, and (b) gambling tax in cases where the non-resident entity – had it been resident in the Netherlands – would have been eligible for such a refund. The decree is a consequence of the Dutch State Secretary's observation that Dutch legislation on this point may be incompatible with the CJEU Judgment in *Sofina* (C-575/17). The decree entered into force on 5 December 2020 and the relevant refund is granted under certain conditions (amongst others) that:

i. the non-resident company should be a resident in an EU Member State/EEA Member State or a State designated in Article 1c of the Dutch Dividend Tax Implementation Order 1965 with which the Netherlands has concluded an arrangement that provides for the exchange of information with respect to the levying of dividend tax or gambling tax, and

ii. the portfolio investments can be regarded as investments under Article 63 TFEU, and, in relation to third countries, do not constitute direct investments or are related to the provision of financial services within the meaning of Article 64 TFEU (the grandfathering clause).

Following the CJEU's *Sofina* Judgment, the Dutch Government announced on Budget Day in September 2020 that it intended to limit the offsetting of dividend tax and gambling tax against corporate income tax as from 1 January 2022. The December 2020 decree approves - in line with the Judgment - that until then, the inspector *"may, in certain situations, grant a refund of dividend tax and gambling tax to entities established outside the Netherlands"*. Under the current rules, such refund would only be possible for entities established in the Netherlands.

-- Hein Vermeulen and Vassilis Dafnomilis, PwC Netherlands; hein.vermeulen@pwc.com

**UK – First-tier Tribunal decision regarding breach of the freedom of establishment arising from the UK rules for group relief of UK branch losses**

The First-tier Tribunal (Tax Chamber) has held in VolkerRail Plant Ltd v The Commissioners for HM Revenue & Customs (HMRC) [2020] UKFTT 476 (TC) that the UK rules restricting group relief (tax loss transfer within a group) for losses of a UK branch of a company resident in another EU Member State entailed an unlawful infringement of the freedom of establishment under Article 49 TFEU, and must be disapplied. In doing so, it held that the *Philips Electronics* Case (C-18/11) has not been overruled by the *NN A/S* Case (C-28/17), and it held the former case (and the relevant UK group relief rules) to be distinguishable from the latter (and from the Danish rules in issue in that case).

VolkerRail Plant Limited was a UK-resident company. A Netherlands-resident company in the group carried on a trade in the UK through a branch (a UK permanent establishment or 'PE'). The PE made losses in the UK. Those losses were utilised against profits in the Netherlands for Dutch tax purposes by way of inclusion in the Dutch fiscal unity's consolidated tax returns (albeit a small part was subsequently 'recaptured', due to later UK profits). The UK group relief rules generally permit a UK-resident group company to 'surrender' its tax losses to another UK-resident group company for set-off by way of group relief against the latter's profits. In the case of losses of a branch or PE of a non-resident, however, a rule (contained at the time in section 406D(1)(c) of the UK's Income and Corporation Taxes Act 1988) denies group relief in cases where the losses may be deducted or utilised against foreign profits for foreign tax purposes.

In *Philips Electronics* (6 September 2012), the CJEU held that this rule was a restriction on the freedom of establishment, because it treated losses of a UK PE of a company resident in another EU Member State disadvantageously by comparison with losses of a UK-resident company and, in particular, by comparison with losses of a UK-resident subsidiary. The CJEU held that the situation of a PE of a non-resident company was objectively comparable to that of a resident company; and the restriction could not be justified by either the objective of preserving the balanced allocation of taxing powers between EU Member States or the objective of preventing double use of losses: the rule must therefore be disapplied in relation to losses of a UK PE of a company resident in another EU Member State.

In *NN A/S* (4 July 2018), the CJEU held that a similar Danish rule did not discriminate against a local branch compared with a local subsidiary, because another similar Danish rule applied to losses of a Danish subsidiary. Nonetheless, the CJEU held that the rule relating to PE losses was a restriction on the freedom of establishment, because no similar rule applied to a wholly Danish group; but the situation of a local PE of a non-resident company was not comparable to that of a wholly Danish group, and the rule could be justified by the need to prevent double use of losses, unless the losses satisfied the *Marks & Spencer* 'no possibilities test' for definitive losses in that there was no possibility, in practice, of deducting the losses for purposes of taxation in the other territory (e.g. because the group had ceased all activity in the other territory).

In the *VolkerRail* case, HMRC argued that the CJEU in *NN A/S* had thus overruled *Philips Electronics*, and that because the Volker group had used the losses in the Netherlands, the UK restriction on group relief was justified by the need to prevent double use of losses. The First-tier Tribunal released its decision on 16 November 2020. It held that *NN A/S* does not overrule *Philips Electronics*, or alternatively *Philips Electronics* can be distinguished from *NN A/S* on the basis of the difference between the respective UK and Danish rules in issue. The Tribunal held further that, as the taxpayer contended, the position was *acte clair*, and the UK rule fell to be disapplied so as to permit group relief.

It is considered that probably HMRC have sought permission to appeal to the Upper Tribunal.

-- Jonathan Hare, Peter Halford, Juliet Trent and Mairead Cummins, PwC UK; jonathan.hare@pwc.com

**UK – Gallaher Limited v The Commissioners for HM Revenue & Customs (HMRC) regarding potential breach of the freedom of establishment and/or free movement of capital arising from the taxation of intra-group disposals of assets to non-UK group companies**

Shortly before the 31 December 2020 deadline for UK courts and tribunals to make references to the CJEU, the Upper Tribunal in *Gallaher v HMRC* [2020] UKUT 354 (TCC) made a referral to the CJEU seeking a preliminary ruling on whether the UK's intra-group transfer rules for intangibles and capital assets were compatible with EU law.

HMRC imposed an immediate corporation tax charge on the UK resident appellant, Gallaher, on gains made from its 2011 transfer of intangibles to a Swiss resident group company, and its 2014 transfer of shares to its Netherlands resident parent. The appellant argued that its EU law rights to freedom of establishment and/or free movement of capital had been unlawfully restricted because, had the assets been kept within the scope of UK corporation tax, the tax charge on the gains would have been deferred until the assets were ultimately (if ever) transferred out of the UK group.

On appeal from the First-tier Tribunal, in a decision released on 14 December 2020, the Upper Tribunal concluded that a reference to the CJEU was required in respect of (amongst others) the following issues:

- whether the right to free movement of capital can be relied upon for legislation that applies only to group companies;
- whether the imposition of the immediate tax charge is a restriction on the freedom of establishment, or, if applicable, the free movement of capital, where the charge would be deferred for gains arising from transfers to domestic (UK-resident) group companies;
- if there is a breach of EU Law, whether domestic law should be interpreted to give the taxpayer the option to defer the payment of tax until the assets are ultimately (if ever) disposed of outside the group ('realisation basis'); or whether the option to pay in instalments (introduced by the UK Government after the First-tier Tribunal decision and applicable to later intra-group transfers) would provide a proportionate remedy;
- if the option to pay in instalments is capable of being a proportionate remedy, whether this would only actually be the case if the domestic law had contained the option at the time of the intra-group transfer, or whether it is compatible with EU law for such option to be provided by HMRC by way of remedy (extra-statutorily) after the event; and
- whether EU Law requires domestic courts to provide a remedy that interferes with the EU freedom to the least extent, or whether it is sufficient to have a remedy which, whilst proportionate, departs from the existing national law to the minimum extent possible.

The Upper Tribunal ordered the parties to agree the draft request for submission to the CJEU before the end of the Brexit transition period on 31 December 2020 (after which time, under section 6(1)(b) of the European Union (Withdrawal) Act 2018, no UK court or tribunal is permitted to make any request to the CJEU for a preliminary ruling). This may well have been the last ever such reference by a UK court or tribunal in a direct taxation case.

-- Jonathan Hare, Peter Halford, Juliet Trent and Mairead Cummins, PwC UK; jonathan.hare@pwc.com

## *EU Developments*

### EU – Portuguese EU Presidency tax priorities (1 January - 1 July 2021)

The Portuguese EU Presidency published its tax priorities for the period 1 January - 1 July 2021.

The Portuguese EU Presidency will address the challenges of European taxation, including the model for taxation of the digital economy, under the principles of fairness and tax efficiency. The stated aim is to ensure a fair and equitable distribution of taxation in a context of healthy competition, the strengthening of good governance mechanisms and global tax transparency, and to step up the fight against tax fraud, evasion and avoidance through non-cooperative jurisdictions. The Presidency also stated it will seek to create the conditions for reaching a political agreement on the revision of the rules on disclosure of information concerning tax on revenues for certain companies and branches. This refers to the public Country by Country Reporting proposal which is currently deadlocked in the Council of the EU and this means that a new vote in the Council could ensue before 1 July 2021. The Presidency will also implement the EU action plan on preventing money laundering and terrorist financing.

The Portuguese EU Presidency additionally announced in connection with the EU's twin (green and digital) transitions that:

- "As regards green taxation, and in line with the Paris Agreement, tax policy should be aligned with the objective of decarbonisation, facilitating the transition to a competitive and carbon-neutral economy and boosting sustainable growth, the circular economy and the blue (ocean) economy, as well as innovation and security of energy supply."

- "The storage and development of energy systems and smart grids will also be addressed, as will the roles of alternative fuels and green taxation."

- "We will prioritise initiatives that help accelerate the digital transition as a driver of economic recovery and promote European leadership in digital innovation and the digital economy. In this context, attention should be paid to the universal development of digital skills, so that workers can adapt to new production processes (teleworking), to the digital transformation of businesses and digital platforms, to the areas of e-commerce, payments and taxation, the promotion of health and disease prevention, and to distance learning in education and lifelong learning."

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

### EU – ECOFIN Council adopts Council Conclusions on fair and effective taxation

On 27 November 2020, EU-27 Finance Ministers adopted by written procedure a set of Council Conclusions on fair and effective taxation in response to the European Commission's July 2020 communications on an Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy and on Tax Good Governance in the EU and beyond. The Finance Ministers on behalf of the EU Member States declared that they want to ensure that EU tax policy remains fit for purpose and results in fair and effective taxation in the increasingly globalised and digitalised economy of the 21st century.

The Conclusions set out the EU's comprehensive assessment of the main tax policy issues to be addressed over the coming years, to shape the EU policy agenda in the field of taxation. The Conclusions outline the Council's priorities and provide guidance to the European Commission in different areas of EU action, including addressing the challenges of the digitalisation of the economy, enhancing administrative cooperation between EU Member States' tax authorities and promoting tax good governance in the EU and beyond.

In the Conclusions, the Council underlines that fair and effective taxation systems in EU Member States are central to the sustainable recovery of the EU from the COVID-19 crisis, requiring tax policies that generate revenues for both national and EU budgets. The Conclusions state that such systems can also support a smooth transition towards the policy goals of sustainable competitiveness, the European Green Deal and full use of the potential of digitalisation in a global economy.

The Council welcomes the significant progress made at the level of the OECD Inclusive Framework on Base Erosion and Profit Shifting (BEPS) on updating the international corporate taxation framework and confirms its continued support for this work, aimed at reaching a global consensus-based solution at the latest by mid-2021. It expresses the willingness of the EU and its Member States to look into the possibilities for implementing the global agreement as soon as possible and recalls that the European Council will assess the issue in March 2021. It asks the European Commission to engage on that basis in the relevant preparatory work in the Council on the way forward in line with EU law, in order to address the tax challenges of the digital economy, including in the absence of an international consensus by mid-2021.

The Council also underlines the important progress made under the Council's Code of Conduct for Business Taxation in promoting tax good governance standards in the EU and beyond, including with the use of the EU list of non-cooperative jurisdictions for tax purposes. It reiterates its readiness to continue to discuss the scope of the mandate of the EU's Code of Conduct Group (Business Taxation) as soon as there are relevant developments at international level, but no later than by the beginning of 2022.

The Council Conclusions state that another important work stream concerns administrative cooperation on tax matters, where the new EU rules on exchange of information on revenue generated on digital platforms will set an example globally. The Council welcomes the European Commission's intention to propose further amendments to the Council directive on administrative cooperation in the field of taxation, in particular with regard to the exchange of tax-relevant data for new alternative means of payment and investment, such as crypto-assets and e-money.

The conclusions also set out the Council's views on other tax policy issues, such as modernisation of the EU value added tax (VAT) rules and further assessment of cross-border administrative cooperation in the VAT area, excise duties, and tax administration and tax compliance.

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

**EU – Other ECOFIN Council related news**

An informal ECOFIN Council videoconference was held on 1 December 2020.

***Administrative cooperation in the field of taxation***

The German EU Presidency informed the Finance Ministers about the agreement reached at technical level on amendments to the Council directive on administrative cooperation in the field of taxation ('DAC 7'). Ministers held an exchange of views, confirming their support for the agreement. Under the new rules, from 2023 onwards EU Member States' tax authorities will automatically exchange information on income earned by sellers on digital platforms. This is intended to help to prevent tax evasion and tax avoidance in relation with activities on such platforms, enhance tax fairness and foster a level playing field for both the platforms and their sellers.

The new rules will also improve the exchange of information and cooperation between EU Member States' tax authorities. For instance, it will become easier to obtain information on groups of taxpayers and there will be improvements in the rules for carrying out simultaneous controls and for allowing the officials to be present in another EU Member State during an enquiry. The new rules also provide a framework for the competent authorities of two or more EU Member States to conduct joint audits. This framework will be operational throughout the EU from 2024 at the latest.

The Council will adopt the directive once the opinions of the European Parliament and of the European Economic and Social Committee have been received and the legal-linguistic revision has taken place.

***Economic situation and European Semester 2021***

As part of the annual European Semester process for the monitoring of the EU Member States' economic, employment and fiscal policies, the European Commission presented two documents:

- an alert mechanism report, marking the start of the annual macro-economic imbalances procedure
- a draft Council recommendation on the economic policies of the euro area

The European Commission also provided ministers with its assessment of the economic and fiscal situation based on the autumn 2020 economic forecast. Ministers held an exchange of views on this basis.

The Council was scheduled to approve the recommendation on the economic policies of the euro area and conclusions on the alert mechanism report in January 2021.

***The ECOFIN Council endorsed by written procedure:***

- 6-monthly ECOFIN Council progress report to the European Council on tax issues
- 6-monthly Code of Conduct Group (Business Taxation) Report to the Council

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

**EU – European Parliament's Economic and Monetary Affairs Committee (ECON) adopts draft Resolution to reform the EU's list of non-cooperative tax jurisdictions (EU blacklist)**

On 10 December 2020, the European Parliament's Economic and Monetary Affairs Committee (ECON) adopted a non-binding motion for a Resolution calling for reforms to the EU blacklist. The adopted text is available here. The Resolution is a joint initiative of the chairs of the European Parliament's standing ECON Committee and the Subcommittee on Tax Matters (FISC). Proposed amendments concern:

- The governance and transparency of the EU list of non-cooperative tax jurisdictions
- Updating (widening) of the EU listing criteria to adapt them to current and future challenges
- Coordination of EU Member State defensive measures.

The draft Resolution also calls for the EU blacklist to be formalised through a legally binding instrument and that removal from the EU blacklist should not be the result of only superficial tweaks.

The ECON-FISC Resolution was scheduled for a final vote in the European Parliament's Plenary Sitting on 21 January 2021.

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

**EU – Main decisions of the European Parliament's Permanent Sub-Committee on Taxation (FISC) November 2020 Coordinators' meeting**

Selected excerpt from FISC Summary of Coordinators recommendations agreed during its 10 November 2020 FISC Coordinators' meeting:

***"C. Interaction with National Parliaments***

The FISC Secretariat was tasked to draw up a proposal on how to involve national parliaments in the work of the subcommittee, including some suggestions made during the meeting including:

- Ensuring that a debate on taxation takes place during the European Parliamentary Week;
- Exploring the feasibility of and interest for a possible ad-hoc exchange of views (including via videoconference) to attract more specialised MPs;
- Regular flow of information to and from national parliaments regarding FISC's ongoing procedures;
- Creation of a network with National Parliaments;
- Discussion on files blocked in Council.

***D. Programme of hearings and exchanges of views for the 1st semester of 2021***

The Coordinators agreed on the following topics to be discussed during the first semester of 2021:

- Impact of Brexit on the level playing field in the tax area
- Cum-Ex/ Cum-cum report by ESMA
- Exchange of views with Commissioner Vestager on state aid in the tax area
- The reform of the Code of Conduct Group criteria and process
- How can technology help in reducing fraud and making tax compliance simpler?
- The development of new tax practices: what new schemes should the EU pay attention for?
- Green Taxation "

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

**EU – Council of the EU, European Commission and European Parliament set the EU's legislative priorities for 2021 and objectives for 2020-2024, also for taxation**

Since 2016, the Council of the EU, the European Parliament and the European Commission have discussed the EU's legislative priorities and agreed on their top priorities for the upcoming year, which are set out in annual joint declarations. This has enabled them to work more closely together in tackling the big challenges that lie ahead. This year, for the first time, the exercise has included a multiannual perspective for 2020-2024 to facilitate long-term planning. At the European Commission's initiative, the three institutions agreed joint conclusions on the main policy objectives for this period.

The Joint Declaration for 2021, which draws on the Commission work programme for the year ahead, focuses on six key areas, where legislative proposals have already been presented by the European Commission or will be presented by the autumn of next year, to:

1. Implement the European Green Deal
2. Shape Europe’s digital decade
3. Deliver an economy that works for people
4. Make Europe stronger in the world
5. Promote a free and safe Europe
6. Protect and strengthen our democracy and defend our common European values

*The following was agreed regarding direct taxation:*

“2. To shape Europe’s Digital Decade, we will work to create a truly functioning single market for digital services within safe and ethical boundaries, devising a framework for trustworthy artificial intelligence, developing European leadership with digital targets for 2030 and a vibrant data economy, developing an EU-wide framework for secure public electronic identification, strengthen privacy in electronic communications and develop the EU’s cybersecurity competences and resilience, notably in finance, while pursuing fair digital taxation; we will continue to push forward digitisation notably with regard to education, training and health as well as to Europe’s digital sovereignty and innovative capacity;

3. To deliver an Economy that works for people, ensuring that the recovery reaches the whole society, by deepening the single market and strengthening our industries, striving for more social fairness and prosperity, mitigate the negative consequences of the crisis for vulnerable social groups, renew our commitment to a vibrant and economically strong cultural sector. At the same time, deepen the Economic and Monetary Union, strengthen the resilience and sustainability of Europe’s banks and capital markets, ensure more transparency on the taxation of multinational businesses; and ensure fair competition within the EU and on the global stage.”

The parties add that they recall the EU’s “commitment to tackle money laundering and the financing of terrorism, tax fraud, evasion and avoidance as well as ensuring a sound and fair tax system".

As part of the also agreed Joint Conclusions on legislative programming - policy objectives and priorities for 2020-2024, the following was agreed with regard to direct taxation:

“To make our economy more resilient and robust (...) we will pursue an ambitious European industrial policy to make our industry more sustainable, green, globally competitive and more resilient. We need to strengthen our single currency, ensure greater financial stability and protect ourselves against financial crimes, tax fraud, evasion and avoidance, and money laundering. European businesses and people need to be protected against unfair competition from abroad. To achieve this, we will introduce an appropriate set of actions on taxation and address the distortive effects that certain foreign subsidies have on our single market."

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

**EU - UK – Trade & Co-operation Agreement between the UK and the EU**

The EU-UK Trade and Cooperation Agreement (TCA), signed on Christmas Eve of 2020, was brought into provisional effect at the end of the UK's transition period (22:59 UTC on 31 December 2020). The TCA outlines the commercial and regulatory relationship between the EU and the UK. It still needs to be ratified by the European Parliament which is expected by the end of February/early March 2021. The agreement is binding on the UK and the EU and is to be interpreted in accordance with the customary rules of public international law. The agreement states explicitly that it may not be directly invoked by a party in domestic legal proceedings.

The TCA sets out preferential arrangements for the UK on a variety of issues. From a tax perspective the most relevant areas which are provided for under the TCA are trade in goods, trade in services, the digital economy, intellectual property and social security. It also contains arrangements to ensure a level playing field with respect to trade and investment.

The TCA commits the UK to maintaining minimum OECD standards as they stood at 31 December 2020, in key areas of tax policy such as controlled foreign company (CFC) rules, exchange of information, hybrids and interest deduction limitations. In accordance with this commitment, HM Revenue & Customs announced on 31 December 2020, that the UK would remove reporting obligations under the mandatory disclosure rules (MDR) regime for all hallmarks except the category "D" hallmarks (which is in line with OECD recommendation).

The TCA has also committed the UK to implementing a subsidy control regime which is similar in principle to the EU State aid regime.

Interestingly, given the likely review of the EU Code of Conduct work 1) within the EU and 2) for third countries, a Joint Political Declaration on Countering Harmful Tax Regimes (in the set of ancillary declarations to the TCA) adopts the kind of language used in the intra-EU assessments.

-- Jonathan Hare, Peter Halford, Juliet Trent and Mairead Cummins, PwC UK; jonathan.hare@pwc.com

## *Fiscal State Aid Developments*

### Belgium –Belgian excess profit rulings opinion of AG Kokott

On 3 December 2020, Advocate-General (AG) Kokott of the CJEU delivered her opinion in the case *Commission v Belgium and Magnetrol International* (C-337/19) on the appeal lodged by the European Commission.

In essence, the AG opined that the European Commission was right to consider that the Belgian Excess Profit Rulings (EPR)-regime constituted an aid scheme and that the CJEU should annul the 14 February 2019, General Court of the EU Judgment. If the CJEU follows the AG, the procedure will be referred back to the General Court that will then proceed by considering the EPR-regime against the state aid criteria (on a material basis).

According to the AG the three conditions for the establishment of the State aid scheme qualification are met in the case at hand:

1. Concept of an act can also encompass a consistent administrative practice. This is the case for the EPR-regime as the European Commission's sample of 22 rulings is found to be a sufficiently representative and adequate sample by the AG to constitute a consistent administrative practice.
2. Aid granted without further implementing measures. This is the case for the EPR-regime as it is found to be a consistent administrative practice by the AG.
3. Identification of beneficiaries in a general/abstract manner which also stems from the consistent administrative practice that does not require further implementing measures. The identification of beneficiaries is found to be inherent to such practice by the AG.

In other words, AG Kokott indicates that the General Court of the EU has interpreted the notion of an aid scheme too restrictively.

Besides this assessment of the State aid scheme qualification, it is interesting to note that the AG also opined on the Belgian corporate income tax regime by stating in paragraph 105 (amongst others) that the Belgian tax authorities have gone "*...beyond the wording of Article 185(2) of the CIR 92,...*".

-- Patrice Delacroix, PwC Belgium; patrice.delacroix@pwc.com

### UK – New statutory State aid recovery mechanism in respect of the alleged aid arising from the UK's group financing exemption from the CFC rules

The UK has enacted primary legislation (new Schedule 7ZA of the Taxation (International and Other Provisions) Act 2010) introducing a new legal mechanism for recovery of alleged unlawful State aid pursuant to the European Commission's negative State aid Decision regarding the 'group financing exemption' ('GFE') from the UK CFC rules. The mechanism involves the issue of a 'charging notice', pursuant to which the amount determined by HM Revenue & Customs (HMRC) to be due must be paid by the company within 30 days with no right to postponement.

By way of reminder, in European Commission Decision (EU) 2019/1352 of 2 April 2019 (in case SA.44896) on the (alleged) State aid implemented by the UK concerning the CFC 'group financing exemption', the

Commission held that the group financing exemption for CFCs' non-trading finance profits (NTFP) derived from loans to non-UK resident group members entailed unlawful State aid to the extent that the NTFP were attributable to UK activities (such attribution being determined by reference to significant people functions carried on in the UK). In that Decision, the European Commission ordered recovery of the alleged unlawful aid. A number of beneficiaries of the alleged aid have brought proceedings in the General Court of the EU for annulment of the Decision.

As is well known, the fact that applications for annulment are pending does not suspend recovery, and the UK remains required to recover the alleged aid (notwithstanding the UK's departure, meanwhile, from the EU). However, the UK Government has had considerable difficulty in enforcing recovery, due to companies' appeal rights and to the fact that a company normally has the right to postponement of payment of tax pending the determination of any appeal by the tax Tribunal.

On 17 December 2020, the UK's Taxation (Post-transition Period) Act 2020 received Royal Assent. Section 9 and Schedule 4 insert new section 371UFA and Schedule 7ZA (headed *'Recovery of Unlawful State Aid'*) into the Taxation (International and Other Provisions) Act 2010. This introduces a new recovery regime for recovery of alleged unlawful aid specifically under the European Commission Decision relating to the group financing exemption. In outline, the features of the new regime are:

- An officer of HMRC may give a company a 'charging notice' requiring it to pay any amount ('additional amount') which ought in his or her opinion to be charged in respect of such unlawful State aid.
- The company must pay that amount within 30 days.
- The company has the right to appeal to the Tribunal if it gives notice of appeal to HMRC (specifying its grounds of appeal) within 30 days after the date of the charging notice.
- Payment by the company may not be postponed (including pending any appeal) on any grounds.
- The company may make a claim for any available 'reliefs' (e.g. losses) to be set off against the amount charged, provided that it submits such claim within 60 days after the date of the charging notice. In practice this right is only likely to assist (if at all) in relation to periods before 8 July 2015 (after which the ability to set off most reliefs against the CFC charge was abolished).

-- Jonathan Hare, Peter Halford, Juliet Trent and Mairead Cummins, PwC UK; jonathan.hare@pwc.com

# KEY EUDTG NETWORK CONTACTS


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

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

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

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

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

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


# EUDTG COUNTRY LEADERS

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

# ABOUT THE EUDTG

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