tax advisers europe

ADDRESS
Av.de Tervueren 188
1150 Brussels
www.taxadviserseurope.org

CONTACT
T: + 32 2 761 00 92
+ 32 2 761 00 91
E : info@taxadviserseurope.org

EU Tax Policy Report

July – December 2018

AUTHORS
Aleksandar Ivanovski and Brodie McIntosh

DATE ISSUED
25 January 2019

CFE's EU Tax Policy Report provides a detailed analysis of primary tax policy developments at EU level of interest to European tax advisers. It also includes an overview of selected CJEU case-law and relevant European Commission decisions covering the second half of 2018.

Highlights

The second half of 2018 was as eventful as the first, and whilst there may have been fewer tax proposals emanating from the European Commission than in the first six months of the year, progress on existing proposals was the main focus of the Economic and Financial Affairs (ECOFIN) Council. To that end, the Austrian Presidency Agenda Programme set taxation of the digital economy, CCTB and the EU's definitive VAT regime proposals as priorities for the taxation focus of the Presidency. ECOFIN published its report on Tax Issues in December, providing a round-up of progress on all tax dossiers under the Austrian EU Presidency, which detailed the numerous proposals that have been adopted related to the implementation of the definitive VAT regime, as well as the revision of excise duties amongst its successes for the Presidency.

Discussions on the CCTB dossier under the Austrian Presidency explored the impact of the proposed Directive on national revenues. It was concluded that the impact would be more positive if applied to all corporate taxpayers, but delegations are apparently divided on extending the compulsory scope to all corporate income taxpayers. Delegations are reportedly also divided over tax incentives to be included in the Directive and the concept of permanent establishment in a Member State.

In relation to the digital taxation package, the short-term proposal (DST) was discussed on multiple occasions under the Austrian Presidency, with a view to agree the interim measure by December, but ultimately proved impossible. France and Germany put forward a last minute proposal at the December ECOFIN for revising the proposal further, and it is expected that the work of the Romanian EU Presidency will take this issue further.

Another interesting development was Commission President Jean-Claude Juncker's announcement in his 2018 State of the Union speech that the Commission would be identifying areas in tax matters where it proposes to move to qualified majority voting by using one of the Passerelle Clauses of the Treaty (TEU). A Communication was issued on 15 January 2019 setting out the Commission's next steps in relation to this initiative. Monitoring developments concerning the matter will be of priority for CFE in 2019.

Contents

Taxation of the Digital Economy

01

The demise of the Digital Services Tax (DST): How the DST became the "Digital Advertising Tax" (DAT)

Under the Romanian EU presidency, the Commission's heavily criticised Digital Services Tax Proposal has been renamed the "Digital Advertising Tax Directive". It will be discussed by the Working Party on Taxation on 31 January as part of the Romanian presidency priorities, but, perhaps more interestingly, let us consider the developments of the last six months that led to the demise of DST.

From Brussels with (digital) love…

The Council of the European Union sitting as ECOFIN discussed the European Commission proposals for a digital services tax in the EU on multiple occasions over the past six months without any agreement in sight. Political pressure on Member States to accept the digital services tax mounted, leading to a possible compromise on a 'diluted' (advertising) tax. However, even this compromise seemed difficult to agree. The (then) Austrian Presidency note concerning the proposed EU digital tax set out that certain delegations were as a matter of principle unable to agree to the proposal, irrespective of the technical revisions made by the Presidency, and that a number of other delegations reportedly had concerns as to specific provisions in the draft legislative proposal.

Sunset (clause) and (yet) another sunrise…

In September, France and Germany proposed that the EU Commission include a 'sunset clause' in the proposal, under which the digital services tax would be a temporary levy valid until an agreement had been reached at international level. At the December ECOFIN a Franco-German 'sunrise clause' proposal was instead put forward and discussed, wherein it was suggested that the Commission and Council should amend the proposed tax such that it would be a 3% turnover tax to apply to digital advertisement services that would enter into force on 1st January 2021, if no international solution has been agreed upon by that date, and expire by 2025. In the instance an international solution had been agreed and translated into EU law before the proposed implementation date, France and Germany proposed that the directive could then be withdrawn by majority vote. However, this proposal was not able to be agreed at the December ECOFIN.

The Austrian Presidency recommended the Council continue its work on the issue on the basis of the latest proposed compromise text, incorporating appropriate aspects of the Franco-German proposal. The Austrian Finance Minister, Mr Löger, further confirmed that the EU Member States will seek to arrive at a position which is aligned with the OECD proposals on the matter. It was also reported that delegations have been considering whether Member States which would be most adversely affected by the introduction of the tax could be allocated more of the revenue from the interim tax.

From Paris with love (too)? OECD would not necessarily disagree with Franco-German propsal, but...

In an OECD tax update, Pascal Saint-Amans, the Director of the OECD's Centre for Tax Policy and Administration, confirmed that the OECD is supportive of the German - French proposals, but that some countries still fundamentally disagree on how to address specific digitalisation challenges. It stated that the United States favours more comprehensive reform of international tax rules that would not ring-fence the digital economy for tax purposes, but would reconsider taxation powers of market jurisdictions. However, countries like the United Kingdom reportedly consider that international tax reform should remain limited in scope and address the user value contribution in the digital economy.

UK, France and Spain call it day?

The clock is ticking faster in some Member States, or so it seems as far as digital tax is concerned – given the raft of unilateral taxes proposed and approved by France and Spain in the second half of the year. Italy is considering taking the same route, with Parliament reportedly discussing such proposals as part of Budget negotiations before Christmas.

Madrid follows Brussels - but on their own

The Spanish Council of Ministers approved a 2019 Budget Plan to implement both a minimum corporate tax and a digital tax from 2019 onwards. Spain's plans mimic the European Commission proposal, imposing a 3% tax on revenue from 2019 onwards.

Back to France – DST & minimum tax rate proposals

A paper presented to the French National Assembly's Finance Committee recommended that a national measure be introduced to impose a levy on diverted profits, and introduce an appropriate nexus in order to tax digital business, should Member States fail to agree to the current EU proposal to introduce an interim EU-wide digital services tax. Whilst Germany sees the introduction of a minimum corporate tax rate as an alternative to the DST, France is reportedly seeking to supplement the introduction of DST with a minimum tax rate. It is not clear how the new proposal ties in with the CCTB/ CCCTB proposals of the European Commission.

On the other side of the English Channel: The British consider a 'profitability threshold'…

The UK in its Budget introduced a proposed digital services tax for online business on a similar basis to the Commission proposal; imposing a 2% digital services tax on revenues from April 2020. Unlike the Commission proposal, the UK intends to introduce a "profitability threshold" as a safe harbour provision that exempts loss-makers and reduces the effective rate of tax on businesses with very low profit margins. The United Kingdom has launched a consultation concerning its proposed domestic digital tax, in which it states its proposed digital tax is intended to be a temporary tax that will be replaced by a comprehensive global solution.

Finally, the US politely request the EU reconsider their position …

Various US officials, including the US Treasury Secretary Steven Mnuchin have urged European partners to refrain from unilateral measures. A letter was sent by the US Senate Finance Committee to European Commission President Jean-Claude Juncker and European Council President Donald Tusk urging the EU not to progress the current interim digital tax proposal any further. The letter raised concerns relating to double taxation and discrimination against US tech companies, and urged the EU to instead focus efforts on reaching consensus at OECD level. It seems that the US request may have influenced EU ministers to reconsider and abandon the digital services tax to focus instead on a multilateral solution under auspices of the OECD, but not national governments.

Whistleblowers' Protection

02

Tax Whistleblowers to be Protected Under Single EU Directive…

Hold on a minute though…taking decisions in Brussels is a bit complicated

Things related to whistleblowers protection at EU level came close to a halt when the opinion of the Legal Service of the Council of the EU was presented to a Working Group on 17 December. The opinion divided Member States, given it recommended splitting the original "horizontal-protection" single EU directive into separate pieces of legislation. If accepted, the opinion would necessitate tax whistleblowers to be protected under separate legislation (requiring unanimity, which is difficult to obtain in any event).

A game changer, reportedly, was the COREPER meeting of 16 January (Brussels jargon for the Member States' permanent representatives - ambassadors or their deputies accredited to the EU), where the majority of Member States decided to overrule the advice. Member States agreed that protection of whistleblowers, including those that report on tax evasion, should be covered under one piece of legislation, as originally proposed by the European Commission. This is good news for the protection of whistleblowers in taxation matters it seems, although Member States will continue discussions on a technical level under the Romanian EU presidency.

Recap of the EU Commission Proposal

On 23 April 2018, the European Commission published a directive proposing EU-wide protection be adopted for whistleblowers reporting on breaches of EU legislation. The proposed directive would require companies with either more than 50 employees or an annual turnover exceeding €10 million to set up internal procedures for whistleblower reporting. Regional, state and municipal bodies with over 10,000 inhabitants would also be subject to the proposed directive. The protections require clear reporting channels both inside and outside of an organisation and a three-tiered reporting system consisting of: 1) internal reporting channels; 2) reporting to competent authorities; and 3) public or media reporting. Companies and authorities would also have feedback obligations, such that they have 3 months to respond to whistleblower reports under the proposal.

The directive also includes provisions which would forbid all forms of retaliation, to be enforced by means of sanctions. Whistleblowers are also to be provided access to free advice and remedies in instances where retaliation is experienced, with the burden of proof to be reversed such that the organisation or person must prove they are not acting in retaliation against the whistleblower.

CFE Position: Supportive of the EU Commission proposals – subject to minor tweaks

In July 2018, the CFE Professional Affairs Committee issued an Opinion Statement on the European Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of EU law. This statement set out CFE's support for the proposals that seek to establish horizontal rules for protection of whistleblowers, as well as their important societal role in advancing public policy interests, specifically in reporting tax fraud, corruption and abusive and illegal practices. The Opinion Statement highlighted certain aspects of the Commission proposal in relation to taxation that in our members' view merit further technical refinement, in particular the broad wording of Article 1(1)d.

EU Parliament gives its unwavering support for whistleblowers, including journalists

In September 2018, the EU Parliament's Committee on Legal Affairs issued a draft report containing proposed amendments. The proposed amendments primarily relate to extending the protection to journalists involved with revealing a breach, as well as to public and legal servants, including EU public servants, and to further provide for the protection of the identity of a whistleblower. The amendments also propose Member States nominate or establish an independent body through which whistleblowers could seek advice and support, both legal and psychological. The tabled amendments will be voted on by the various Committees involved, whereafter the proposed amendments will be voted by Parliament. Provided the amendments are passed, the file will then return to Council for further review or adoption.

Virginie Rozière MEP (France, S&D), on the news coming from the Council meeting that Member states are living up to the expectation to protect whistleblowers comprehensively, tweeted: "Regarding whistleblowers, positive signals at the end of the Coreper meeting, the horizontal approach is maintained, taxation remains within scope," the MEP Virginie Rozière, tweeted.

EU Policy – Direct Tax Files

03

Public Country-by-Country Reporting Back on Council Agenda

Ahead of the Council of EU Company Law Working Party group meeting on 24 January, the Romanian EU Presidency published a presidency compromise text on the revised proposal for public country-by-country reporting (CbCR) in the EU. The proposal does not introduce significant amendments compared to the compromise reached earlier in negotiations. Considering that no significant action has been taken since the EU Parliament vote in 2017, Member States are still assessing the situation. Whilst previous Council Presidencies were taking a "wait and see" approach, the Romanian Presidency is keen on re-examining the proposal.

Progress on public CbCR came to a halt when Council Legal Service issued its opinion in November 2016. The Opinion concluded that public CbCR was a taxation matter and not a matter falling within the ambit of the Accounting Directive, as was initially found by Commission Legal Services. The Opinion is based on the premise that the purpose of the proposals is the protection of the functioning of the internal market and prevention of tax avoidance rather that the protection of shareholders and the public interest under Article 50 TFEU. In order for the public CbCR proposals to be characterised as a "tax file" by the EU Commission, Member States must unanimously request that the Commission characterise it as such, therefore the legal Opinion alone has limited practical consequences without subsequent action. Some Member States still dispute the proposed legal basis in the original proposal, suggesting that it relates to taxation matters and therefore falls within the ambit of Article 115 TFEU.

The European Parliament appears to be maintaining its steadfast support, and went a step further in its initial opinion. The Parliamentary Rapporteurs originally proposed the 750 million euro threshold be reduced to 40 million and the scope of the publication of the information be extended beyond that relating to EU countries to every country in which they operate. The question of the legal basis was also assessed. After the vote on the report in a joint committee meeting on 12 June 2017, the amendments were adopted by Plenary on 4 July 2017 (including a compromise on the 750 million euro threshold) and the file was referred back for inter-institutional negotiations.

New EU Reporting Requirements for Intermediaries – Lots of Information for Tax Administrations…

DAC6 enters into force…

The DAC6 directive entered into force on 25 June 2018, introducing complex mandatory disclosure rules for intermediaries across the EU. Member States have until 31 December 2019 to implement the directive into national legislation, and disclosure requirements will apply from 1 July 2020. Intermediaries who design and/or promote reportable tax planning schemes are required to disclose this to their national tax administrations, who will then automatically exchange the information with other Member States through a centralised database. Penalties will be imposed on intermediaries who do not comply with the new reporting measures. The initial automatic exchange of information between member states should take place on 31 October 2020.

The definition of an intermediary is ‘a person that is expected to reasonably know about a reportable arrangement, on basis of the facts and circumstances and their relevant expertise’, and information on a reportable arrangement needs to be filed within 30 days of the day after they provided, ‘directly or means of other persons, aid, assistance or advice to other persons’. An exemption to this filing obligation applies only if the intermediary has proof that the same information has already been disclosed by another intermediary. Accordingly, intermediaries are not expected to report where they hold proof that the same information has been filed already in another Member State, in cases of multiple reporting obligations.

… with lack of clarity and implementation guidance…

Although Members States have until 31 December 2019 to implement the Directive into domestic legislation and disclosure requirements will only apply to intermediaries from 1 July 2020, given that all arrangements initiated after 25 June 2018 that fall within the scope of the Directive are reportable, there have been increased calls for the Commission to issue technical guidance to provide more clarity for tax advisers in the course of transposition of the directive.

CFE, ECG and EGIAN appeal to the Commission and Working Party IV for clarification

The Commission Expert Group on Direct Taxes, Working Party IV, discussed the application of DAC6 in its meeting of 24 September 2018, raising the possibility of a workshop between EU Member States, the European Commission and stakeholders.

CFE wrote to Working Party IV, together with the European Contact Group (ECG) and the European Group of International Accounting Networks and Associations (EGIAN), to encourage the Commission and the Member States to continue their efforts to provide more guidance and clarification and to welcome any opportunity to contribute to public consultations.

Interesting discussions with the Commission (and OECD) on the DAC6 Implementation in Madrid

Practical implementation of the DAC6 EU mandatory disclosure rules was the topic of CFE's 2018 Professional Affairs Conference, which took place on 23 November in Madrid, in order to give members further insight on the issue. Reinhard Biebel, Direct Tax Policy Unit of the European Commission DG Taxation and Customs Union, was a speaker at the conference and provided attendees with a high-level overview of the Directive, elaborating on the scope of the directive, as well as timing of reporting, the definitions, retroactivity and the hallmarks as main features or an indication of a reportable cross-border arrangement. A comprehensive report of the Madrid conference on the DAC6 implementation is available in CFE's Annual Report (pages 22 – 25).

CFE urges Member states to respect national privilege rules when transposing DAC6

CFE published an Opinion Statement on the legal professional privilege reporting waiver provided for in the EU Mandatory Disclosure Rules Directive, setting out CFE's expectation that European Union Member States will fully respect the legal professional privilege reporting wavier in the course of transposition and implementation of this Directive, in those Member States where such rights exist for tax advisers under domestic law.

5th Anti-Money Laundering Directive Enters Into Force

On 9 July 2018, the 5th Anti-Money Laundering Directive entered into force following publication in the EU Official Journal. Member States now have to implement these new rules into their national legislation before 10 January 2020. The Directive introduces increased transparency requirements, such as enhanced levels of access to beneficial ownership registers concerning both companies and trusts, and measures to limit anonymous payments through pre-paid cards and virtual currency platforms. The Directive also introduces increased customer verification processes and checks for transactions involving third countries, as well as an increased exchange of information.

The 5th AML Directive stems from Commission's Action Plan of July 2016 for strengthening the fight against money-laundering and terrorist financing, aiming to prevent illicit movement of funds or other assets and disrupting the sources of revenue. On 12 February 2016, the ECOFIN Council called on the Commission to initiate amendments to the 4th AML Directive in the second quarter of 2016. The informal ECOFIN Council also called for action in April 2016 to enhance the transparency of beneficial ownership registers, to clarify the registration requirements for trusts, to speed up the interconnection of national beneficial ownership registers, to promote automatic exchange of information on beneficial ownership and to strengthen customer due diligence rules. The EU's AML revised framework that is in force at present was adopted on 20 May 2015, consisting of the 4th AML Directive and Regulation (EU) 2015/847 on information accompanying transfers of funds. The transposition deadline for the 4th AML Directive and the entry into force of Regulation (EU) 2015/847 was set for 26 June 2017. The EU's supranational risk assessment was also published back in June 2017.

EU Tax Policy – Indirect Tax

04

EU VAT proposals progress pleasingly...one regime to bind them?

In May 2018, the European Commission published its proposal setting out the technical measures required to be introduced to completely overhaul the current system of VAT in the EU, and replace the current transitional system with the definitive system of VAT, in line with the European Commission's VAT Action Plan of April 2016. A recap of the cornerstones of the definitive VAT regime is set out further below.

Over the summer of 2018, the Commission ran a consultation concerning the proposal for the technical measures required to implement the definitive system. CFE wrote an opinion statement setting out its concerns with the potential consequences of many aspects of the proposals, in particular the practical implications of introducing "Certified Taxable Persons" and the potential impact of the proposed Directive on SMEs. CFE also raised concerns in relation to call-off stock and chain transactions, reverse charge supplies, and the special schemes extending the one-stop account for VAT.

At a meeting of the Council of the EU (ECOFIN) in Luxembourg on 2 October, agreement was reached on a number of VAT proposals, including:

- **Reverse-Charge of VAT Liability –** to allow Member States facing endemic carousel fraud to apply a generalised reversal of payment of VAT liability from supplier to customer. The reverse charge may only be used by a Member State which meets certain eligibility criteria and has been authorised by the Council to use the reverse charge mechanism.

- **Administrative Co-operation -** to strengthen administrative cooperation providing for the exchange and analysis of information between Member States in order to better prevent VAT fraud by putting in place an online system for information sharing, increase interaction with other law enforcement bodies and data exchange between tax authorities and European law enforcement bodies on cross-border activities suspected of leading to VAT fraud.

- **E-publications -** to align VAT rates for e-publications and physical publications, allowing Member States to apply reduced VAT rates to e-publications in addition to physical publications. The adopted directive will apply on a temporary basis until the definitive VAT regime is agreed and implemented. The EU Council adopted the legislative proposal in November.

- **4 "Quick Fixes"** - aimed at rectifying a number of issues in relation to the day-to-day running of the EU VAT system, known as VAT "quick-fixes". At the ECOFIN in December, the Council adopted the legislation and the fixes will apply from 1 January 2020. The fixes were designed to address specific issues with EU VAT rules, pending the introduction of a definitive EU VAT Regime, as follows:

  - Call-off stock arrangements – simplification and harmonisation of rules regarding call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another Member State;
  - VAT identification number – introduction of an identification number for a customer as an additional condition for VAT exemption for intra-EU supplies of goods;
  - Chain transactions – simplification and harmonisation of rules regarding chain transactions; and
  - Proof of intra-EU supply – introduction of a common framework of criteria of documentary evidence required to claim a VAT exemption for intra-EU supplies.

However, discussions at the Council are ongoing in relation to the Commission's proposed Directives on reform of VAT rates, wherein a simplified list of products subject to the standard rate will be created, and Member States will be allowed to have two separate reduced rates, one reduced rate and one exemption. The proposal setting out simplification of VAT rules for SMEs, by way of introducing new simplified measures regarding invoicing, VAT registration, accounting and returns for SMEs acting both in wholly domestic markets and also cross-border across the EU, has also not yet been agreed.

Council discussions concerning the legislative proposals that introduce the definitive VAT system, and the above proposals concerning VAT rates and SME simplification are ongoing and will be the focus of CFE's Indirect Taxes Subcommittee in 2019.

The Definitive VAT Regime – A Brief Recap

Given the current VAT system has been in place for some 25 years, the proposal for introducing the "definitive" VAT regime has been a long time goal of the Commission. The Commission aims to have a robust, simple system which is resilient to fraud and lowers the compliance burden. The Cornerstones of the system are as follows:

Destination-Based Principle

- Suppliers will be liable for VAT at the rate applicable in the Member State of destination. Goods traded cross-border will be taxed in the country where they are consumed (the destination country) and at the destination country's tax rate, rather than where they are produced (the origin country).
- Suppliers will be obliged to account for VAT at the rate applicable in the destination Member State. Whilst tax will be collected by the country of origin, it will ultimately be transferred to the destination country.

Cross-border B2B transactions

- Under current VAT rules, B2B cross-border supplies of goods are exempt from VAT, in the sense that the transaction is split between an exempt intra-EU supply of goods in the Member State of origin, and, a taxable intra-EU acquisition in the Member State of destination.
- This design of the current VAT system has resulted in substantial revenue losses, with the VAT gap estimated at circa 50 billion euro per year. The Commission thus proposed the introduction of a single taxable supply in the Member State of destination.

Certified Taxable Person

- The concept of a certified taxable person ("CTP") is a key element of the new proposals regarding a definitive VAT regime, analogous to the Authorised Economic Operator ("AEO") in the customs context.
- A business with this certification will be considered a reliable VAT taxpayer throughout the EU and therefore be subject to lesser administrative constraints and eligible to apply some of the so-called quick fixes.
- In order to receive the classification, businesses must apply to the national tax authority of the Member State of establishment and demonstrate that they have satisfied three criteria concerning its compliance record, procedures and financial solvency.

One-Stop-Shop

- The mechanism to give effective to the new destination system is known as the One Stop Shop, an online portal for businesses to file declarations and declare VAT on cross-border transactions in a single return using the same rules and the language of their state of establishment. Member States will accordingly settle their VAT that is due directly through the mechanism.

Simplification of VAT invoicing rules

- Under the proposed definitive VAT regime, sellers will be allowed to prepare invoices in accordance with the rules applicable in their own Member State. There will also be an end to the necessity to complete recapitulative statements (list of cross-border transactions for tax authorities).

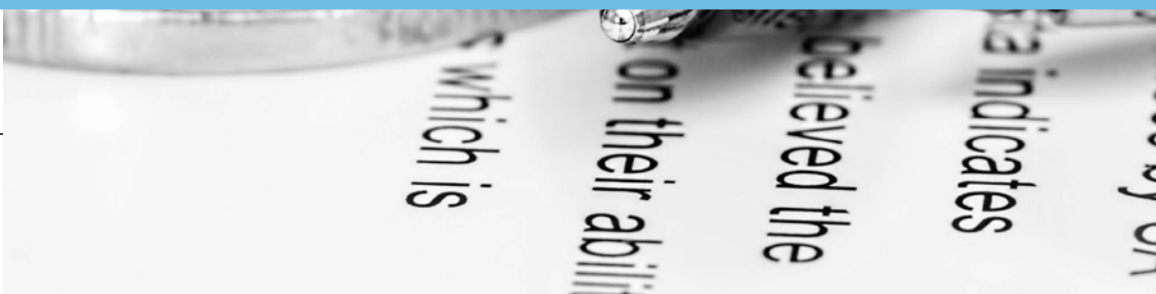
Steps Envisaged to Implement the Definitive VAT Regime

Anticipating that reaching agreement and implementing the proposed definitive VAT regime would be a timely process, the Commission proposed the definitive VAT regime be implemented in two tiers, such that the new VAT system will initially apply only to B2B supply of goods and after 5 years of monitoring by the European Commission the new system would then be expanded in scope to apply to services.

The implementation of the B2B phase is also proposed to be implemented in two parts; the implementation of temporary measures known as the Quick Fixes to address some of the problems in the existing system and, thereafter, the implementation of the cornerstones of the new system, after agreement is reached on these principles.

BREXIT & TAX

05



The Taxing Implications of Brexit...

The UK Government in the past six months has published and updated various technical papers that set out guidance for citizens and business in the event of exiting from the European Union on 29 March 2019 without any agreement. The UK Government maintains that a 'no-deal' scenario remains unlikely given the mutual interests of the European Union and the United Kingdom in securing a positive outcome in the ongoing negotiations, however given the political volatility in the UK surrounding Brexit, it is certainly a possibility.

At the special EU summit meeting which took place on 25 November, the leaders of the EU27 endorsed the Brexit Withdrawal Agreement and a political declaration on future EU-UK relations. Key tax policy commitments contained in the Withdrawal Agreement include commitments for the UK to continue to apply the EU's tax good governance standards, the Code of Conduct for business taxation, the provisions of domestic law that give effect to DAC (including DAC6 once transposed) & ATAD.

Additionally, the Withdrawal Agreement includes commitments by the UK to be subject to the joint surveillance powers of DG COMP and the UK Competition Authority to ensure consistency on State aid matters throughout the "Single Customs Territory". The political declaration sets out further intentions concerning the single customs territory, including intentions to ensure there are no tariffs which would create barriers to trade, to ensure freedom of movement of capital and investment, and to create a level playing field for open and fair competition.

No Deal Scenario - Current VAT system to be maintained

In the area of VAT, the UK will continue maintaining its current VAT system aligned as closely as possible to the European system, with expected changes to the VAT rules and procedures to apply to transactions between the UK and EU member states in the event of a 'no-deal' Brexit.

The technical notice issued details the main VAT issues that will affect UK businesses trading with the EU in goods and services, highlighting the changes that companies will need to prepare for when importing goods from the EU, exporting goods and supplying services to the EU, and utilising the EU's IT systems, such as MOSS.

No Deal Scenario - State Aid

In the State aid area, the technical paper published by the UK Government sets out that the UK intends to transpose existing EU rules into UK legislation, effectively replicating existing block exemptions as allowed under the current European laws. The UK government maintains that a rigorous State aid control system will continue to provide benefits for consumers, businesses and the society at large.

At present, the regulatory and enforcement role concerning State aid rules is centralised at EU level and exercised by the European Commission, DG COMP. In a 'no-deal' scenario, the Competition and Markets Authority (CMA) will take on the role of enforcement and supervision for the whole of the UK. As of 30 March 2019, any complaints from businesses about unlawful State aid shall be made to the CMA. Further guidance from the CMA is expected to be published in early 2019.

European Court of Justice

It is not yet clear what role, if any, the jurisprudence of the European Court of Justice (ECJ) shall have in a no-deal scenario, albeit with a full regulatory alignment as set out in the State aid technical guidance.

However, in the midst of much political instability in the UK and ongoing Brexit drama, the Court of Justice of the European Union held that the United Kingdom can unilaterally revoke its notification to withdraw from the European Union under Article 50 of the TEU, provided a "withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired." Arguments of those advocating for a second referendum were strengthened by the decision.

The decision was released one day ahead of the expected date for the House of Commons vote on the currently proposed Brexit deal, which was then postponed by UK Prime Minister Theresa May as it was widely expected the deal would not be approved by the UK Parliament. Following an unsuccessful leadership spill challenge to Theresa May's Prime Ministership on 12 December, the Government lost the meaningful vote on Prime Minister's Brexit deal in the House of Commons in January. Discussions on the direction of the future relationship between EU and the UK are ongoing both at the House of Commons and between the UK Government and the European Union.

EU Policy – Blacklist & TAX3

06

EU blacklist of non-cooperative jurisdictions

The so-called “Blacklist” of Non-Cooperative Jurisdictions for Tax Purposes was compiled following a screening process undertaken by the Code of Conduct Group in 2017, in order to identify jurisdictions whose tax practices did not conform to EU standards. The screening process initially excluded the European Union Member States, a decision that was widely criticised.

The Austrian Presidency reportedly examined the mandate of the Code of Conduct Group under its Presidency. The Head of the Code of Conduct Group, Fabrizia Lapecorella stated that “screening the EU member states with the same criteria is under discussion in the context of the revision of the mandate of the code of conduct group”. The outcome of any review has yet to be made public.

In the meantime, agreement was reached by the European Council to update the Blacklist following a report published in September by the Code of Conduct Group which recommended that Palau be removed to the grey list of countries to be monitored, following high-level commitments made to remedy EU concerns. The report also recommended that Liechtenstein and Peru be removed from the grey list, following positive assessments of reforms having been implemented by the jurisdictions. Agreement was then reached at the ECOFIN meeting on 6 November to further update the list of non-cooperative tax jurisdictions for tax purposes to remove Namibia to the grey list, also to be subject to close monitoring by the Council.

Five jurisdictions now remain on the list of non-cooperative jurisdictions: American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands.

Additionally, the EU Code of Conduct Group (Business Taxation) has published an updated overview of all preferential tax regimes examined since its creation in 1998. The Code of Conduct resolution was adopted in December 1997 by the Council with a commitment by Member States’ governments to eradicate harmful tax competition.

TAX3 – EU Parliament's Tax Inquiries Continue

On 7 February 2018, the European Parliament voted in favour of beginning a new investigation into financial crimes, tax evasion, and tax avoidance. The inquiry aimed to further the work of its predecessor inquiries, TAXE 1 and TAXE 2 and the work carried out by the PANA Committee. According to its terms of reference the inquiry, European Parliament's Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance, referred to as "TAX3", included a focus on tax avoidance and evasion related to the digital economy, circumvention of VAT, methods used in the EU tax blacklist of third-country tax havens, EU progress in removing harmful tax regimes and the impact of double tax treaties.

TAX3 met on 22 March in Brussels for its inaugural meeting. Petr Ježek (ALDE/ CZ), co-rapporteur on the PANA Committee, was appointed as chair of the TAX3 Committee. Over the course of its inquiry TAX3 held multiple hearings and workshops examining previous investigations' findings and recommendations, as well as the topics of virtual currencies, taxation of the digital economy, national aggressive tax planning practices, tax evasion/avoidance in relation to third countries and anti-money laundering measures.

On 14 November, TAX3 published their draft report. The report presents the findings and recommendations of the rapporteurs following eight months of hearings by the Committee concerning anti-money laundering and aggressive tax planning.

Key recommendations in the report are that the Commission and Council adopt a comprehensive definition of aggressive tax planning, as well as a definition of permanent establishment, economic activity requirements and expenditure tests to avoid companies having an artificial taxable presence in a Member State. The rapporteurs further recommend that EU efforts to fight corporate aggressive tax planning are strengthened, that the BEPS Action Plan is supplemented, and that Member States' tax systems are scrutinised. They also call on the Council to adopt proposals on CCTB and CCTB, as well as the digital tax package proposals. The Committee calls for a broader scope for the exchange of tax rulings and for broader access by the Commission to those rulings, as well as guidance concerning what constitutes tax-related State aid and appropriate transfer pricing. The rapporteurs welcomed the VAT action plan, but expressed regret that no safeguards were adopted concerning the Certified Taxable Person proposal.

Co-rapporteurs Luděk Niedermayer and Jeppe Kofod presented the report to their Committee members at a meeting on 27 November, and amendments were due from Committee members by 17 December 2018. The amendments, some of which concern the tax and accountancy profession, were published on 14 January. The report will thereafter be voted by the Committee on 27 February 2019 and is legally non-binding per EU law.

EU's Company Law Package...Tax Implications

In April 2018, the Commission published proposals on reforming and digitalising EU company law in order to make it easier for companies to reorganise - merge, divide or move within the EU Single Market. Further, the proposals seek to prevent tax avoidance practices that rely on artificial arrangements. The proposals are not taxation proposals, meaning unanimity in voting is not required. This is significant as the proposals have tax implications.

The proposal on cross-border conversions, mergers and divisions envisages common EU rules for cross-border conversions and divisions aiming to update existing ones to facilitate reorganisation, provided that the operations are genuine. One of the Commission's policy objectives with this proposal is to increase the cross-border accessibility to company-related information that will help ensure fair taxation where profits are generated. The proposal includes provisions for safeguards against abuse of the conversion and division procedures to create artificial arrangements aimed at obtaining undue tax advantages. Further, the proposal sets out safeguards for employee rights, including the establishment of artificial arrangements for tax avoidance purposes.

The proposal addresses the fundamental freedom of establishment within Member States which has led to "letterbox" companies, and includes a provision that departure and destination Member States will have to certify the legality of cross-border operations, which will require genuine economic activity at the place of registration.

On 6 December 2018, the EU Parliament's Legal Affairs Committee approved, by a vote of 21 to 2, a draft report of amendments to the European Commission proposal on cross-border conversions, mergers and divisions, part of the so-called Company Law Package.

The Committee in the report introduces a requirement for genuine economic activity in the Member State where a company is being established, in line with the decision of *Cadburry Schweppes*. Rapporteur, Evelyn Regner (S&D, AT), noted that "with these new rules for conversions and divisions, national authorities receive the option for a veto when identifying an artificial arrangement that constitutes a letter-box company used for social or tax fraud or any other abusive purposes."

The Committee voted to begin inter-institutional negotiations with European ministers when Parliament as a whole has adopted a position on the proposed directive. The proposed amendments will then be voted on by Parliament. Provided the amendments are passed, the file will then return to Council for further review or adoption.

International Policy – OECD & UN

07

OECD Update

G20 July Communiqué & December Declaration – Support for the Tax Agenda

In the July 2018 Communiqué and December 2018 Declaration, G20 finance ministers reiterated their support for the OECD tax agenda, urging a consensus-based solution to the tax challenges of the digital economy as well as stricter criteria to identify non-cooperative jurisdictions for tax purposes. The G20 reaffirmed backing for full implementation of the BEPS package and the importance of seeking a consensus-based approach to the tax challenges of the digital economy by 2020, with an interim update in 2019. The Communiqué discussed that automatic exchange of financial account information for tax purposes would commence in 2018, calling on all jurisdictions to sign and ratify the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. A report released later in the year concerning the implementation by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes sets out that over 4,500 bilateral exchanges of information have taken place between 86 jurisdictions, in line with the Automatic Exchange of Information standards.

At the summit meeting which took place from 30 November to 1 December 2018 in Buenos Aires, Argentina, the G20 leaders adopted a declaration setting out the priorities of the G20. The Declaration confirms that the G20 will continue to cooperate concerning the challenges in taxation of the digital economy, and will attempt to find an international consensus on the best solution to address the challenges. The prior commitments made to produce an update in 2019 and a final report in 2020 were reconfirmed. Leaders also committed to reforming the World Trade Organisation, stating that the system is "currently falling short of its objectives".

Inclusive Framework Update: Digital Tax Report Due in June 2019

The OECD published a report in July 2018 setting out the activities and achievements of OECD's tax agenda and further progress needed on international tax policy, as well as the progress achieved by the Global Forum on Transparency and Exchange of Information for Tax Purposes.

In respect of progress of the BEPS project, the report sets out key updates in relation to BEPS Action 5 (Harmful Tax Practices). The report also includes a Country-by-Country reporting update in light of the second annual peer review, which will cover all members of the OECD/G20 Inclusive Framework. The outcomes will be released in 2019.

Regarding the tax challenges of the digital economy, an Interim Report is expected to be published in June 2019 whilst the 2020 Report is still planned pending agreement of a common position among the members of the Inclusive Framework. The report sets out an expectation that different perspectives will be taken into account, with a view of agreeing a common position on the revised transfer-pricing rules, the minimum standard approach and the merits of a user-contribution approach. The Secretary-General reported to G20 ministers that members had all recognised the need for a long-term solution and had also further refined their positions in an effort to bridge gaps since the last meeting of the OECD Task Force on the Digital Economy on 11 July 2018.

The BEPS Inclusive Framework progress report update highlights the commitment to a globally fair and modern international tax system and the implementation of the BEPS project. The report provides a more detailed analysis of the interim achievements of the BEPS project and the first peer reviews of the BEPS minimum standards, in particular the updates on Action 5 (Preferential Tax Regimes and Tax Rulings), Action 13 (Country-by-Country Reporting) and Action 14 (MAP). The BEPS multilateral tax treaty instrument ("MLI") entered into force on 1 July 2018, allowing jurisdictions to update their existing double tax treaties and transpose measures agreed in the BEPS project without further need for bilateral negotiations.

The Group of Seven have also reportedly called on the OECD to produce a policy paper setting out a proposed system on how multinational Controlled Foreign Corporations ought to be taxed as part of the BEPS project. The G7 reportedly are concerned with ensuring that a minimum level of tax is paid by multinational CFCs, and ensuring companies are prevented from "forum shopping" in order to artificially shift profits to low tax jurisdictions, potentially by having jurisdictions agree a global minimum corporate tax rate. CFE will monitor developments concerning this issue.

Tax Revenue Database Launched

At the 5th plenary meeting of the Inclusive Framework on BEPS, the OECD announced the launch of a new database which will provide detailed comparable taxation revenue information concerning 80 jurisdictions (and increased to cover 90 jurisdictions by the end of 2018).

The database will be known as the Global Revenue Statistics Database, and will include country-specific indicators concerning tax structures and tax rates, with a view to enable necessary tax policy reforms to sufficiently fund public services. A working paper compiled using information from the database sets out that tax revenues have increased since 2000.

The OECD also published the third edition of its 'Tax Policy Reforms 2018' publication, which covers the latest tax policy reforms in all OECD countries, as well as in Argentina, Indonesia and South Africa. The report highlights the trend towards a reduced corporate income tax rate (CIT), which, according to the OECD, has been largely driven by "reforms in a number of large countries with traditionally high corporate tax rates". The average corporate income tax rate across the OECD has dropped from 32.5% in 2000 to 23.9% in 2018.

Tax Disputes Resolution: MAP Update

The OECD also released the annual Mutual Assistance Procedure ("MAP") Statistics for 2017. Members of the Inclusive Framework on BEPS provide annual reports of statistics concerning the resolution of disputes, in accordance with an agreed reporting framework. 2017 MAP statistics are now available for 85 jurisdictions, and set out detailed information for each jurisdiction, as well as aggregated information concerning all jurisdictions. The information sets out the number of existing cases, the number of new cases, the number of existing cases resolved, and the average duration of those cases. The outcomes of cases are also detailed in the statistics.

The number of transfer pricing disputes increased in 2017 by 25%, and the number of outstanding and new disputes increased significantly. This was despite the fact that the statistics demonstrate that more disputes were resolved in 2017 than in 2016.

Tax news from the IMF

The International Monetary Fund (IMF) published a working paper on 23 July 2018 that reviews the channels, scope and blind spots of international corporate tax avoidance. It is based on a survey of empirical literature on international tax avoidance, that is defined as profit shifting by a multinational company in response to disparities among tax jurisdictions in order to minimise their taxation burden.

The working paper assesses the overall magnitude of profit shifting and includes transfer pricing, strategic location of intellectual property (IP), international debt shifting, and treaty shopping. It also discusses tax avoidance devices that are unique to worldwide taxation systems, such as corporate inversions, headquarter relocation, and tax deferral.

The IMF and OECD also published a Tax Certainty Report in July 2018, which provided a follow-up on a first report presented in March 2017 identifying the main sources of uncertainty in tax matters. This update identifies approaches to improve tax certainty, reporting progress on the implementation of the OECD/G20 BEPS Project in relation to dispute resolution, such as mutual agreement procedures (MAP) and arbitration, the OECD initiatives to mitigate uncertainty in tax treaties, the IMF initiative to address international taxation issues, developments in treaty relief, and the Forum on Tax Administration initiative to improve risk assessment and audit processes.

Some initiatives are discussed in this more recent report that were not explicitly mentioned in the 2017 report, but which do matter for tax certainty, such as exchange of information, Country-by-Country reporting and OECD International VAT/ GST Guidelines.

EU State Aid Update

08

Google Pays the Price for Abuse of Dominance

In July, the EU Commission published their decision to fine Google €4.34 billion Euros for breach of EU competition rules in respect of the utilisation of the Android operating system as a vehicle for abuse of dominance in the Single Market and the European Economic Area. The European Commission published the decision after an in-depth investigation found Google had required smartphone operators to pre-install Google's search and browser apps or lose access to the Google Play store and streaming services. The decision announced by Commissioner Vestager increased transatlantic tensions, with President Donald Trump accusing the EU of "taking advantage of US companies, but not for long."

Commissioner Vestager on behalf of the EU Commission stated: "In Europe, we congratulate all companies for the success they achieve through innovation and developing products that consumers value. That is why market dominance is, as such, not a problem under EU antitrust rules. But with market dominance comes responsibility –because, when one company dominates a marketplace, competition is already weakened. So, EU antitrust rules put special responsibilities on dominant companies. They must not deny other companies the chance to compete on the merits, to the detriment of further innovation and European consumers."

Google issued a public statement that they will appeal the Commission decision: "Android has created more choice for everyone, not less. A vibrant ecosystem, rapid innovation and lower prices are classic hallmarks of robust competition. We will appeal the Commission's decision."

Netherlands Sets Out Its Position on Starbucks Appeal

In July, the Netherlands published a statement setting out its position in relation to the European Commission decision that the Netherlands had provided illegal State aid to *Starbucks Manufacturing B.V*. The Netherlands asserts that the Commission failed to carry out a proper analysis based on the arm's length principle as contained in Dutch national law and regulations, and notes that Member States have autonomy as concerns direct taxation. It further stated that the Netherlands is of the view that the Commission is attempting to impose its own interpretation of the arm's length principle, which is not supported by Article 107 of the Treaty.

The Netherlands has appealed against the ruling of the Commission, and a hearing concerning the case took place in the General Court of the European Union on 2 July 2018. The Netherlands noted in its statement that the decision of the General Court can be appealed to the Court of Justice of the European Union, indicating that it will likely appeal any adverse decision of the General Court.

Engie Decision Published

On 4 September, the EU Commission published the non-confidential version of the final decision adopted on 20 June 2018 concluding that Luxembourg granted tax benefits to Engie of around €120 million, contrary to the EU State aid rules.

In this case, the EU Commission is challenging two tax rulings issued by the Luxembourg tax authorities to GDF Suez Group (currently Engie) in 2008 and 2010. Both rulings concern tax treatment of intra-group interest-free mandatorily convertible loans, i.e. loans allowing the lender to become shareholder of the borrower upon conversion. According to the rulings in question, the borrowing companies were taxed on a fixed margin while the difference between their profits and the fixed margin were considered deductible expense.

The Commission is challenging such deductibility, highlighting that the aforementioned loans are equity rather than debt instruments. Furthermore, it is challenging the agreed non-taxation of the deductible amounts at ultimate owner level.

Amazon State Aid Appeal Grounds Published

The legal grounds forming the basis of Amazon's application to the General Court of the European Union to have the decision of the European Commission annulled, i.e. the decision that Luxembourg granted illegal State aid by virtue of a tax ruling granted to Amazon in 2003, was made available on the Curia website.

Amazon in its application relies on nine pleas in law to support its application to have the Commission decision annulled. In particular, Amazon asserts that the Commission failed to establish an advantage benefiting Amazon, as it improperly ignored direct evidence showing royalties were in keeping with the arm's length principle, and that the decision accordingly violates the Charter of Fundamental Rights of the EU through the Commission failing to consider all the available evidence.

Amazon also contends that the decision is based on a flawed analysis of the functions of Amazon and LuxOpCo, and fails to establish an advantage under the subsidiary line of reasoning. Further, Amazon pleads that the decision is based on a flawed finding of an advantage premised on an analysis that deviates from the arm's length principle, and that in any event recovery of aid would now be prevented by the expiration of the applicable limitation period.

Surprise, surprise: McDonalds State Aid Investigation Abandoned by Commission

In September 2018, the European Commission formally closed a three-year long investigation that aimed to establish that the Luxembourgish tax treatment of McDonald's amounted to State aid. The case was of paramount importance for the Commission aiming to showcase that double-non taxation can amount to State aid by virtue of a tax-ruling based favourable interpretation of a Double Taxation Treaty provision. It transpires that by not pursuing the McDonald's line of inquiry further, the Commission has by its own motion set a limit to the State aid tax investigations: disparities among tax systems and arbitrage resulting from divergent interpretation of conflicting taxation laws could not be addressed by the EU State aid rules.

EU Commissioner Vestager said of the decision to close the investigation: "The Commission investigation has shown that the reason for double non-taxation in this case is a mismatch between Luxembourg and US tax laws, and not special treatment by Luxembourg. Therefore, Luxembourg did not break EU State aid rules. Of course, the fact remains that McDonald's did not pay any taxes on these profits – and this is not how it should be from a tax fairness point of view. That's why I very much welcome that the Luxembourg Government is taking legislative steps to address the issue that arose in this case and avoid such situations in the future."

UK Businesses Disclose Financing Structures in Scope of EU State Aid Investigation

UK businesses affected by the EU State aid investigation into the UK CFC rules group financing exemption have reportedly disclosed their financing structures. In regulatory filings, both FTSE 100 telecommunications business Vodafone Group Plc and the media company Daily Mail have identified Luxembourg as the location of their inter-group financing structures affected by the European Commission's State aid tax investigation.

Since October 2017, the European Commission has been investigating the features of the UK CFC rules, in particular the Group Financing Exemption, a legislative scheme that exempts from UK corporate taxation certain group financing income. According to the EU Commission, the possibilities provided by the Group Financing Exemption amount to a selective advantage for multinational group companies when compared with other UK resident entities that do not operate cross-border. According to ECJ settled case-law, national anti-abuse provisions must not be selective. The Commission relies on interpretation of UK general corporate tax as a reference system, under which standalone and multinational group companies are deemed in a comparable factual and legal situation for the purposes of State aid tax scrutiny, as per ECJ case-law. EU's Anti-Tax Avoidance Directive (ATAD), as of 1 January 2019, requires EU Member states to introduce some form of CFC rules, albeit with the caveat that the ATAD does not intend a group financing exemption such as the one under Commission's State aid investigation.

Case Law of the CJEU: State Aid

09

ECJ judgment in Spanish Tax Lease State Aid Case C-128/16P *Commission v Spain*

On 25 July 2018, the Second Chamber of the Court of Justice set aside a General Court judgment that had annulled a Commission decision that originally assessed the Spanish tax lease system as incompatible State aid.

Facts

The Spanish scheme was a structure organised by a bank, which acted as an intermediary between a shipping company (buyer) and a shipyard (seller), interposing a leasing company and an economic interest company (EIG) set up by the bank. The aim of the arrangement was to generate tax advantages for the investors in the EIG and to transfer part of those advantages to the shipping company in the form of a rebate on the price of the vessel, with the investors retaining the other advantages as a return on their investment. The Commission established that three of the five fiscal measures under examination constituted illegal State aid to the EIGs and their investors and had been unlawfully implemented by Spain since 1 January 2002.

Effects of a Tax Measure v Regulatory Technique

The ECJ found that the General Court incorrectly applied Article 107(1) TFEU on what constitutes State aid. The General Court concluded that the EIGs could not be the beneficiaries of State aid solely on basis of the tax transparency of those groupings. The General Court, in holding that the EIGs could not be the beneficiaries of State aid solely because of their legal form, erred by not taking into account settled case-law that the classification of a measure as State aid depends on the effects of the measure, which takes precedence over the legal status of the undertaking or the regulatory techniques used.

Selectivity– Error in Law by the General Court

As a consequence of this error of law, the General Court incorrectly assessed the criterion of ‘selectively’ by reference to the investors rather than the EIG as a beneficiary of the aid, which is a crucial element of the State aid analysis in accordance with EU law. In relation to selectivity, the Court of Justice decided that the General Court incorrectly relied on its judgments in *World Duty Free* and *Autogrill Espana*, which have subsequently been annulled by the Court of Justice.

Case C-416/17 - *Commission v France*

The Court of Justice of the European Union rendered a judgment on 4 October in Case C-416/17 *Commission v France*, on an action for infringement of EU law initiated by the European Commission against the French Republic. The case concerns discriminatory tax treatment of parent companies which receive dividends from foreign subsidiaries with regard to the right to reimbursement of tax levied in breach of EU law, as interpreted by ECJ in its ruling in C-310/09 *Accor*.

Regarding the French tax rules that seek to prevent the economic double taxation of distributed profits, the Court reiterated that settled ECJ case-law requires from a Member State, which has a system for relief of double economic taxation as regards dividends, to treat dividends paid to residents by resident companies in the same way as dividends paid to residents by non-resident companies, in a situation where comparability has been established (national or equal treatment principle). The ECJ found that France was required, in order to bring an end to the discriminatory treatment in the application of the tax mechanism seeking to avoid the economic double taxation of distributed dividends, to take into account the taxation levied earlier on the distributed profits resulting from the exercise of the taxation powers of the Member State in which the dividends originated, within the limits of its own powers of taxation. Such treatment is required irrespective of the level of the chain on which that tax was levied, a subsidiary or a sub-subsidiary. By failing to bring an end to such discriminatory tax treatment of dividends France was in breach of the freedom of establishment and the freedom of movement of capital, as set out in Articles 49 and 63 of the Treaty.

The ECJ also established in C-416/17 *Commission v France* that the French Supreme Court for administrative matters, Conseil d'État was legally required under EU law to submit a preliminary question to the ECJ in absence of established acte clair case-law, in order to prevent incorrect interpretation of EU law (cf. CILFIT-ruling criteria establishing duty to refer a preliminary question to ECJ). Since the Conseil d'État failed to make such a reference in a situation where the appropriate application of EU law could not be established as a matter of certainty, ECJ found that France was in breach of its obligations under EU law (Article 267 of the Treaty).

Case Law of the CJEU: Direct Tax

10

Irrecoverable Default Interest Related to Cross-Border Withholding Tax

The Seventh Chamber of the Court of Justice delivered a judgment on 25 July 2018 in the case C-553/16 TTL, which concerns a restriction of the freedom to provide services by the Bulgarian tax legislation concerning the tax treatment of irrecoverable default interest related to cross-border withholding tax which is ultimately not due.

Restriction to the Freedom to Provide Services

The dispute in the main proceedings concerned interpretation of the Bulgarian corporate income tax legislation and Tax Procedural Code that stipulates that a resident company which pays out income to a non-resident one must pay default interest in the event of non-payment of withholding tax. Such an irrecoverable default interest payment, which may ultimately not be due, due to applicability of a Double Tax Treaty, is applicable only in the event of cross-border transactions. In such a situation, it is contrary to the freedom to treat a cross-border situation less favourably than a national one, effectively discouraging resident companies from using services of companies established in other member states.

Proportionality

The Court established that the applicable Bulgarian tax legislation amounted to a restriction to the freedom of provision of services, which is capable of being justified by effective fiscal supervision and the effective collection of tax. However, the imposition of penalties such as irrecoverable interest was found to be disproportionate and therefore a hindrance to the cross-border provision of services.

In spite of such a restriction being capable of justification under the effectiveness of fiscal supervision and the need to ensure effective collection of taxes, the measures were found to be disproportionate.

The Court held that the imposition of penalties, including criminal penalties, may be considered to be necessary in order to ensure compliance with national rules, subject, however, to the condition that the nature and amount of the penalty imposed is in each individual case proportionate to the gravity of the infringement which it is designed to penalise (*NN International*, C-48/15, paragraph 59 and the case-law cited).

EU Tax Policy Report

July – December 2018