EU Tax News

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Contents

CJEU Cases

Belgium
AG Opinion on the compatibility of the Belgian Net Asset Tax with EU Law: SPF Finances v. ING International SA

Belgium
CJEU referral regarding the “subject to tax” condition of the Parent-Subsidiary Directive: Belgische Staat v Comm. VA Werelhave Belgium and Others

France
CJEU referral regarding the requirement of an advance administrative approval for the application of the Merger Directive tax regime

France
CJEU referral regarding the French Parent-Subsidiary Directive anti-abuse rule

Germany
CJEU Judgment on German rules on loss recapture/ final losses: Timac Agro

Germany
CJEU Judgment on the relationship between Article 4 para. 4 of the Germany-Switzerland DTT and the Swiss-EU Agreement on free movement of persons: Bukovansky
Sweden
CJEU Judgment on the availability of personal deductions to non-resident taxpayers opting for taxation at source: Hirvonen

National Developments

Belgium
Amendments to Belgian legislation following Tate & Lyle
Belgium
Extension of the withholding tax exemption on interest income paid to foreign investment companies
Belgium
Cayman Tax: tax transparency for “legal constructions”
Belgium
Introduction of a new capital gains tax
EU
Update on transposition of the EU Parent-Subsidiary Directive’s anti-hybrid provisions and GAAR into Member States’ legislation
France
Proposed amendments to domestic dividend taxation regime following Groupe Steria SCA
Germany
Judgment of the Lower Fiscal Court of Düsseldorf following Verder LabTec
Luxembourg
Amendments to the Luxembourg participation exemption and tax unity regime
Poland
Penalty interest on Polish dividend or interest withholding tax levied on non-residents ruled to be in breach of EU law
Sweden
Swedish Supreme Administrative Court judgments regarding the compatibility of the taxation of foreign earned equity compensation with EU law
Spain
Recent Spanish National High Court of Justice judgments granting late payment interest

EU Developments

EU
EU
6-monthly ECOFIN Council progress report to the European Council on Tax Issues
EU
European Parliament’s own legislative initiative resolution on corporate tax reform/tax rulings adopted
EU
European Parliament Special Committee on tax rulings
EU
Luxembourg EU Council Presidency publishes working paper with recommendations for EC anti-BEPS Directive
Germany

European Commission requests Germany to amend the German inheritance tax rules on special maintenance allowances

Netherlands

European Commission requests The Netherlands to amend the LOB clause in the Dutch-Japanese DTT

**Fiscal State aid**

Luxembourg

European Commission opens formal State aid investigation into Luxembourg’s tax treatment of McDonald’s

Spain

General Court considers the Spanish Tax Lease regime is not State aid

Spain

Spanish Supreme Court orders suspension of tax on large retail establishments
CJEU Cases

Belgium – AG Opinion on the compatibility of the Belgian Net Asset Tax with EU Law: SPF Finances v. ING International SA

The Court of Appeal of Brussels has referred to the CJEU for a preliminary ruling a question on the compatibility of the Belgian Net Asset Tax (“NAT”) with EU law, as applicable to non-Belgian undertakings for collective investments (“UCIs”) marketing their units in Belgium (SPF Finances v. ING International SA case, C-48/15). On 21 January 2016, AG Bobek delivered his Opinion.

The AG first examined whether levying the NAT on non-Belgian UCIs is contrary to (i) the EU fundamental freedoms (in particular the free movement of capital), (ii) Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital and (iii) Directive 85/611/EEC of 20 December 1985 (“UCITS Directive”). The AG advised the CJEU to rule that these EU provisions do not preclude the levying of the NAT.

Irrespective of the outcome of the case before the CJEU, the Court of Appeal of Brussels has yet to decide whether the Belgian NAT infringes the Belgium-Luxembourg double tax treaty (“DTT”) provisions. The Court of First Instance decided in 2011 that the Belgium-Luxembourg DTT prevents Belgium from levying a “wealth tax” (such as the Belgian NAT) on Luxembourg UCIs. The Court of Appeal will have the last word on this question.

Whilst the final outcome is awaited, Luxembourg and other foreign UCIs established in countries with which Belgium has concluded a DTT should consider whether to take action to safeguard their rights for recovery of the NAT.

-- Patrice Delacroix and Olivier Hermand, PwC Belgium; patrice.delacroix@be.pwc.com

Belgium – CJEU referral regarding the “subject to tax” condition of the Parent-Subsidiary Directive: Belgische Staat v Comm. VA Wereldhave Belgium and Others

The Court of Appeal of Brussels has referred to the CJEU for a preliminary ruling a question on the interpretation of the “subject to tax” condition in the Parent-Subsidiary Directive (Belgische Staat v Comm. VA Wereldhave Belgium and Others, C-448/15). In the underlying case the Belgian tax authorities refused to grant the Parent-Subsidiary withholding tax exemption for dividends distributed by a Belgian subsidiary (a Belgian Real Estate Investment Trust, REIT) to a Dutch parent company qualifying as a “fiscal investment institution” (fiscale beleggingsinstelling, FBI) which is eligible for a zero rate of corporation tax. If the withholding tax is not precluded by the Parent-Subsidiary Directive, the Court of Appeal also asks the CJEU whether it is compliant with the freedom of establishment (Article 48 TFEU) and the free movement of capital (Article 63 par. 1 TFEU).

-- Patrice Delacroix and Olivier Hermand, PwC Belgium; patrice.delacroix@be.pwc.com
France – CJEU referral regarding the requirement of an advance administrative approval for the application of the Merger Directive tax regime

On 30 December 2015, the French Supreme Administrative ("Conseil d'Etat") Court referred a preliminary ruling to the CJEU regarding the French cross-border tax regime (case n° 369311).

Sections 210 A to 210 C of the French Tax Code, implementing the Merger Directive, provide for a tax neutral regime for cross-border mergers.

Although the deferral tax regime is subject to similar conditions for both cross-border and domestic mergers, the former is subject to an advance administrative authorization procedure. In order to obtain the administrative approval from tax authorities the taxpayer must demonstrate that (a) the merger is justified by an economic reason; (b) the main purpose or one of the main purposes of the transaction is not tax evasion or tax avoidance; and (c) the new structure will ensure the future taxation of the deferred capital gains.

In this case, a French company was merged into its Luxembourg parent company. The taxpayer did not request the advance administrative approval and applied the tax neutral regime. Accordingly, the tax authorities contested the tax treatment.

The French Supreme Administrative Court has asked the CJEU if this procedural difference of treatment is contrary to the freedom of establishment (Article 49 TFEU), taking into account that France had exercised its right safeguarded in Article 15 of the Merger Directive, which authorizes Member States to deny the benefit of the Merger Directive in cases of tax evasion or tax avoidance.

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France – CJEU referral regarding the French Parent-Subsidiary Directive anti-abuse rule

On 30 December 2015, the French Supreme Administrative Court ("Conseil d'Etat") referred to the CJEU for a preliminary ruling a question in respect of a Parent-Subsidiary Directive anti-abuse rule (case n° 374836).

According to the former section 119 ter 3 of the French Tax Code, the Parent-Subsidiary Directive withholding tax exemption is not applicable to dividends distributed to a company which is controlled, directly or indirectly, by one or several companies resident in third countries, unless the company demonstrates that the structure does not have as a main purpose or one of the main purposes the withholding tax exemption benefit.

The French Supreme Administrative Court has asked the CJEU whether or not this domestic anti-abuse rule infringed the freedom of establishment (Article 49 TFEU), the
free movement of capital (Article 63 para. 1 TFEU) and the former Article 1 para. 2 of the Parent-Subsidiary Directive (currently Article 1 para. 4), which authorizes Member States to apply any domestic or agreement-based provisions required for the prevention of fraud or abuse.

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Germany – CJEU Judgment on German rules on loss recapture/final losses: Timac Agro

On 17 December 2015, the CJEU published its decision in the Timac Agro case (C-388/14).


Irrespective of the facts that firstly the income of a foreign PE is tax-exempt due to the Germany-Austria DTT, and secondly Germany interprets the exemption method symmetrically and therefore exempts losses, these losses had been deducted in 1997-1998 at the level of the German head office (i.e. temporary deduction with recapture, former Sec. 2a para. 3 German Income Tax Act (GITA)).

Due to the sale, the German Tax Authorities applied the recapture rule (Sec. 2a para. 4 GITA) which provided for a loss recapture even if there were no actual profits generated by the sale. Hence, the losses deducted in 1997-1998 were added to the taxable income of the German head office in 2005. The losses incurred in 1999/2001-2004 had been exempted via the Germany-Austria DTT, since the temporary deduction had been abolished as of FY 1999.

The claimant argued that the recapture rule is not in line with EU law and all of the losses are “final losses”.

For the period 1997/1998, the CJEU considered that the situations of a foreign and a domestic PE are comparable, because Germany exercised a taxing right via the recapture rule. The application of this rule is however justified, because the recapture forms a logical symmetry with the previous loss deduction. Therefore the recapture rule – in line with the Krankenheim judgment (C-157/07) dealing with the recapture of actual profits – is coherent and necessary to preserve the balanced allocation of taxing powers. It is up to the referring fiscal court of Cologne to determine whether the recapture rule is also proportionate, i.e. whether Timac Agro was in fact able to provide sufficient evidence that the losses incurred are final. If so, they should be deductible.

For 1999 and onwards, the CJEU distinguished the application of the exemption method from the recapture rule which had been applicable in earlier years. It considered that Germany now exempts foreign PE income symmetrically via the exemption method
of the underlying DTT. Therefore, in the view of the CJEU, the situations of a foreign and a domestic PE are not objectively comparable anymore.

It remains to be seen how the CJEU’s view on the objective comparability test can be reconciled in the future with the judgments in Marks & Spencer (C-446/02), Lidl Belgium (C-414/06), K (C-322/11) and Commission vs. UK (C-172/13).

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**Germany – CJEU Judgment on the relationship between Article 4 para. 4 of the Germany-Switzerland DTT and the Swiss-EU Agreement on free movement of persons: Bukovansky**

On 19 November 2015, the CJEU rendered its Judgment in the Bukovansky case (C-241/14). The CJEU essentially decided that Article 4 para. 4 of the Germany-Switzerland DTT (so called “umbrella taxation”) does not infringe the Swiss-EU Agreement on the free movement of persons. The main argument is that Article 21 para. 1 of the Agreement stipulates that DTTs between Switzerland and EU Member States remain unaffected by the Agreement. Furthermore, the claimant who was moving from Germany to Switzerland was not treated differently by Germany with regard to taxation of an individual staying in the country.

An individual (Mr. Bukovansky) who is a national of Germany (and the Czech Republic) had moved from Germany to Switzerland. Under Article 15a para. 1 sent. 1 and 2 of the Germany-Switzerland DTT, Germany was in principle only allowed to apply a tax rate of 4.5% on Mr. Bukovansky’s gross income sourced in Germany. However, Article 4 para. 4 DTT (in conjunction with Article 15a para. 1 sent. 4 DTT) stipulates that in cases where a non-Swiss individual is moving from Germany to Switzerland, Germany – for a period of 5 years – is still allowed to tax the individual as if the treaty does not exist.

Therefore, Mr. Bukovansky claimed that Article 4 para. 4 DTT violates the Swiss-EU agreement on the free movement of persons since non-Swiss individuals moving to Switzerland are treated differently than Swiss citizens moving to Switzerland. However, under the Swiss-EU agreement on the free movement of persons, the correct comparator would have been a German national staying in Germany. In such a situation, the Germany-Switzerland DTT would, of course, not be applicable. Therefore discrimination was not present.

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**Sweden – CJEU Judgment on the availability of personal deductions to non-resident taxpayers opting for taxation at source: Hirvonen**

The Swedish Supreme Administrative Court (SAC) had requested a preliminary ruling from the CJEU in the Hirvonen case (C-632/13), which concerns a Finnish resident individual, Ms Hilkka Hirvonen, whose main income was a pension earned in a previous employment in Sweden. The pension income was taxed in Sweden under the special income tax regime for non-residents (the SINK tax regime). This is a 20% flat rate withholding tax (for the income year concerned the rate was 25%) on Swedish source...
employment income which is applied on the entire gross income, with no deductions or tax credits allowed. Furthermore, under the applicable double tax treaty, the pension income was tax exempt in Finland.

Ms Hirvonen claimed tax relief in Sweden for home mortgage expenses. Under Swedish tax law, Ms Hirvonen had the option to be taxed under the ordinary taxation regime applicable for Swedish tax residents. If so, she would also have had the possibility to deduct home mortgage interest expenses. Nevertheless, Ms Hirvonen did not opt for this, since the resulting total income tax would then have been higher than the withholding tax under the SINK tax regime.

In its Judgment of 19 November 2015 the CJEU held that the Swedish tax rules as applied in the case were not contrary to the right to freedom of movement as a citizen of the EU (Article 21 TFEU). According to the CJEU: "in matters of taxation of income, the refusal to grant non-resident taxpayers, who obtain the majority of their income from the source State and who have opted for the taxation at source regime, the same personal deductions as those granted to resident taxpayers under the ordinary taxation regime does not constitute discrimination contrary to Article 21 TFEU where the non-resident taxpayers are not subject to an overall tax burden greater than that placed on resident taxpayers and on persons in a similar situation whose circumstances are comparable to those of non-resident taxpayers."

-- Kristian Gustavson and Gunnar Andersson, PwC Sweden; gunnar.andersson@se.pwc.com

**National Developments**

**Belgium – Amendments to Belgian legislation following Tate & Lyle**

To end the discrimination identified by the CJEU in the *Tate & Lyle* case ([C-384/11](http://ec.europa.eu/cgi-bin/search.nsf/4c0f094a7c2917f9802574f50041f76a/8c6908030f2053f0c125755600475c32)), the Act of 18 December 2015 has introduced a new withholding tax rate of 1.6995% (i.e. 5% of 33.99%) on Belgian dividends paid to qualifying parent companies. The reduced withholding tax rate is subject to the following conditions:

- the parent company must be established in an EEA country or in a country with which Belgium has concluded a double tax treaty with an exchange of information provision;
- the parent company must have the legal form of one of the companies listed in the Parent-Subsidiary Directive or a similar legal form if the parent company is established in a non-EEA country;
- at the time of the dividend distribution, the participation held by the parent company should have an acquisition value of at least EUR 2.5 Million, but the participation should be smaller than 10% of the capital of the Belgian company distributing the dividend;
- the parent company must hold the participation for an uninterrupted period of one year in full ownership;
Belgium – Extension of the withholding tax exemption on interest income paid to foreign investment companies

Following an infringement procedure initiated by the European Commission several years ago, Belgium has amended its legislation regarding the application of withholding tax on Belgian-source interest on debt claims and debt securities issued or allocated to investment companies established in another EEA country.

Belgian and foreign investment companies receiving Belgian-source interest on debt claims and debt securities were treated differently from a tax perspective. While a withholding tax exemption applies on such income received by Belgian investment companies under the specific income tax regime, foreign investment companies were not always exempted on that income, which was subject to a final withholding tax.

Following an infringement procedure initiated by the Commission and before the CJEU Judgment (C-589/14), Belgium removed this difference in treatment with effect from 1 December 2015. In a nutshell, foreign investment companies established in an EEA country will henceforth benefit from the same withholding tax exemption on interest payments as Belgian investment companies.

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Belgium – Cayman Tax: tax transparency for “legal constructions”

With effect from assessment year 2016 (i.e. income collected during calendar year 2015), Belgian individuals and Belgian entities subject to legal entities income taxation (with the exemption of Belgian companies subject to corporate income tax) may be affected by a new so-called “Cayman Tax”, which may be described as a form of CFC legislation. Under the “Cayman Tax” regime certain “legal constructions” are deemed to be transparent for tax purposes, as a result of which the Belgian individual or Belgian entity qualifying as a founder or beneficiary of the legal construction would be taxable on the income derived by the legal construction as if it did not exist.

Some aspects of this new tax were amended in December 2015. For instance, the scope of the “legal construction” notion has been broadened; not only private investment funds, but also public or institutional investment funds whose rights are held by one person or more persons related to each other (to be assessed per sub-fund) can now qualify as a “legal construction”. Also hybrid entities, such as a Luxembourg Société en Commandite Simple, can be considered as a “legal construction”. Furthermore, the
Luxembourg Fondation patrimoniale has been put on the list of EEA-legal constructions with legal personality.
-- Patrice Delacroix and Olivier Hermand, PwC Belgium; patrice.delacroix@be.pwc.com

Belgium – Introduction of a new capital gains tax

In the framework of the “Tax Shift” agreement, the Act of 26 December 2015 has introduced a new capital gains tax (CGT), the so-called “speculation tax”, which enters into force with effect from 1 January 2016. The main characteristics of this new measure can be summarised as follows:

- This 33% tax is suffered by individuals subject to personal income tax (individuals regarded as Belgian tax residents) or subject to non-resident personal income tax, when these individuals transfer financial instruments which they have held for less than six months (calculated on a “Last in first out” basis).

- Financial instruments that fall within the scope of this tax include listed shares, options and warrants, and more generally any financial derivatives provided that: (i) these instruments are listed; and (ii) their underlying assets are exclusively made up of one or several specified listed shares. Units in undertakings for collective investments (UCITS, including ETF; AIF) and Belgian regulated real estate companies are excluded from the scope of application of the CGT. Of note is that the exclusion of Belgian regulated real estate companies from the scope of the tax is not extended to similar foreign REITs, which may give rise to some concerns from an EU law perspective.

- When a financial institution established in Belgium intervenes in the transaction, the tax charge is made through a Belgian withholding tax. In the absence of a financial institution based in Belgium (typically, a securities account held with a foreign credit institution or broker), the individual taxpayer will have to declare the income in his/her annual personal income tax return.

EU – Update on transposition of the EU Parent-Subsidiary Directive's anti-hybrid provisions and GAAR into Member States' legislation

PwC’s EUDTG network has undertaken an informal Status Update on progress with the transposition of the EU Parent-Subsidiary Directive’s (PSD) anti-hybrid provisions and General Anti-Avoidance Rule (GAAR) into Member States’ legislation. EU Member States had to bring into force their national legislation in line with PSD amendments by 31 December 2015. Despite the fact that the PSD is applicable only within the EU, the anti-abuse provisions of EEA countries and Switzerland are also covered. With reference to the transposition of the GAAR and based on the available information provided by the members of the EUDTG network, two groups of Member States can be identified: Member States that have implemented the new GAAR provisions into their legislation and Member States that maintain that their national legislation is already in line with the PSD.
France – Proposed amendments to domestic dividend taxation regime following Groupe Steria SCA

On 2 September 2015, the CJEU ruled in the Groupe Steria SCA case (C-386/14) that the freedom of establishment precludes legislation of a Member State which results in the add back for tax purposes of costs in respect of holdings in EU companies whilst at the same time, under a special regime of group taxation exclusively available to domestic companies, allowing a full deduction for costs related to holdings of companies included within the tax consolidation.

To align the French participation exemption regime with EU law, the Amended 2015 Finance Act amends the tax exemption regime applicable to French tax consolidated groups and lowers the dividend taxable portion from 5% to 1%.

The decrease in dividend taxability results in a 99% participation exemption for participation income received by a member of a consolidated tax group from:
- another member of the same group, or
- a company which: i) is subject to a tax equivalent to French corporate income tax in another Member State, or in an EEA country that has concluded an administrative assistance agreement with France to fight tax fraud and tax evasion; and ii) would fulfil the conditions to participate in a French tax consolidated group, if it was established in France (other than being subject to corporate tax in France).

This new regime applies with effect from 1 January 2016. Nevertheless, the 95% participation exemption will continue to apply to distributions from subsidiaries eligible for the Parent-Subsidiary regime that do not meet the above conditions (e.g. dividends distributed by French subsidiaries that are not part of a consolidated group, or dividends received from a foreign subsidiary if the French parent is not a member of the French consolidated group). The latter might raise concerns in relation to its compatibility with EU law.

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Germany – Judgment of the Lower Fiscal Court of Düsseldorf following Verder LabTec


In this case, intangibles were transferred from the German head office of a German limited partnership (“KG”) to its Dutch PE. The limited partners of the KG were two Dutch BVs. The German tax authorities considered the transfer to trigger exit tax on the unrealised gains on the intangibles, but allowed the exit tax to be paid in ten equal instalments over ten years. Referring to its decision in DMC (C-164/12), the CJEU considered this deferral to be in line with the freedom of establishment (Article 49 TFEU).
The Lower Fiscal Court has now rejected the KG’s claim based on the CJEU Judgment. However, the court allowed the taxpayer to appeal against the decision because it is highly disputed in German professional tax literature, whether: (i) the relevant domestic exit tax law is applicable; and (ii) whether its retroactive effect is in line with German constitutional law. The matter is currently pending with the German Federal Fiscal Court (reference no. I R 95/15).

-- Ronald Gebhardt, Philip Niemann and Jürgen Lüdicke, PwC Germany; ronald.gebhardt@de.pwc.com

**Luxembourg – Amendments to the Luxembourg participation exemption and tax unity regime**

On 17 December 2015, the Luxembourg Parliament enacted Bill no. 6847 which:

- transposed into domestic Law the amendments to the EU Parent/Subsidiary Directive (“PSD”), i.e. the anti-hybrid and common minimum anti-avoidance rules; and
- amended the Luxembourg tax consolidation regime aligning it to the decision in SCA Holding ([Joined cases C-39/13, C-40/13 and C-41/13](https://eur-lex.europa.eu)) by introducing the possibility of a so-called "horizontal tax consolidation".

**Amendments to the participation exemption regime:** New provisions, amending the participation exemption regime, introduce, effectively verbatim, into Luxembourg law the anti-hybrid and common minimum anti-avoidance rules of the PSD, adopted in July 2014 and January 2015 respectively. These new provisions apply to income distributed or received after 31 December 2015.

This common minimum anti-avoidance rule precludes the benefits of the PSD in situations where there are arrangements which (having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the PSD) are “not genuine”, having regard to all relevant facts and circumstances. For the purposes of this rule, an arrangement must be regarded as “not genuine” insofar as it has not been put into place for “valid commercial reasons which reflect economic reality”.

The Luxembourg tax authorities have not provided so far any guidance on how to interpret the wording of the new PSD-derived measures.

**Amendments to the tax unity regime:** The tax unity fiscal consolidation regime (set out in Article 164bis LITL) is amended, with effect from the 2015 tax year, in order to allow the horizontal integration of qualifying companies that are held by a common parent company established in any EEA country and subject to a tax comparable to Luxembourg corporate income tax.

A PE of a company established in another EEA country that is subject to a tax comparable to Luxembourg corporate income tax can also be a member of the tax unity.
The text of Article 164bis LITL has been completely rewritten. Nevertheless, the conditions for the application of the regime remain substantially unaltered.
-- Julien Lamotte and Gregory Jullien, PwC Luxembourg; julien.lamotte@lu.pwc.com

**Poland – Penalty interest on Polish dividend or interest withholding tax levied on non-residents ruled to be in breach of EU law**

On 4 November 2015, the Provincial Administrative Court in Wroclaw ("PAC") issued the first ever judgment on the calculation of penalty interests on taxes withheld in breach of EU law.

In line with the EU freedoms and recent CJEU judgments, withholding taxes levied in breach of EU law have to be refunded and penalty interest has to be paid for the whole period during which the taxpayer was not able to use the amount of tax withheld. However, as the Polish Tax Ordinance Act ("PTOA") does not allow the calculation of penalty interest on withholding taxes levied on non-residents, such taxes (including those withheld in breach of EU law) are refunded net of any penalty interest.

PwC Poland was the advisor of the taxpayer in question (a Dutch based pension fund) who filed in August 2014 the first ever penalty interest claim in Poland. The claim followed a previously successful Fokus Bank claim and was based on the discriminatory application of the PTOA provisions by the Polish Tax Authorities to non-resident investment and pension vehicles. As the Polish Tax Authorities denied interest payments, a negative decision was issued. However, the taxpayer appealed the decision. On 4 November 2015, the PAC issued a judgment, confirming that denying penalty interest where tax is withheld in breach of EU law, constitutes an infringement of EU law.

Following the arguments presented by the PAC, all entities which suffered from withholding taxes in Poland levied in breach of EU law on dividend or interest income are entitled to penalty interest calculated on the amount of tax suffered from the day that the tax was unduly withheld. As the applicable penalty interest rate is relatively high (i.e. 11-13%), the amounts involved are often high (in some cases reaching the amount of tax initially withheld and already refunded).

The judgment provides an additional justification for pending refund claims and should make it easier to resolve the penalty interest proceedings in favour of our clients.

In addition, as the majority of Fokus Bank claims filed by PwC Poland have been accepted and resulted in positive refund decisions, underlining that taxes in question were in fact withheld in breach of EU law, claiming penalty interest on behalf of such investment and pension funds should now be easier and more cost efficient
-- Agata Oktawiec, Weronika Missala and Michal Malkiewicz, PwC Poland; agata.oktawiec@pl.pwc.com
Sweden – Swedish Supreme Administrative Court judgments regarding the compatibility of the taxation of foreign earned equity compensation with EU law

On 4 November 2015, the Swedish Supreme Administrative Court (“SAC”) issued two judgments (HFD 2015 ref. 60 and case number 1483-15) concerning EU nationals who worked as employees abroad, then moved to Sweden to work and received equity-based compensation that was earned before they had become Swedish tax residents.

The SAC held that taxation of the foreign source parts of the compensation in Sweden was contrary to EU law, and more specifically to the free movement of workers. The SAC arrived at this conclusion after comparing the cases to a situation where a Swedish resident individual takes up an employment abroad for a certain period and then returns to Sweden. The individual often remains a Swedish tax resident, which means that the income earned abroad may be tax exempt under the Swedish six-month or one year rules (foreign earned income exclusion rules).

Referring to the CJEU case law (Schumacker, C-279/93), the SAC found that taxation in Sweden of the foreign EU nationals would be discriminatory and could not be justified. Accordingly, the SAC concluded that the exemptions that are currently applicable only to Swedish tax residents should also be available to EU nationals who were not Swedish tax residents prior to moving to Sweden.

-- Kristian Gustavson and Gunnar Andersson, PwC Sweden; gunnar.andersson@se.pwc.com

Spain – Recent judgments of the Spanish National High Court of Justice granting late payment interest

On 11 and 16 November 2015, two judgments of the National High Court of Justice (appeals no 12/13 & 14/13) concerning a UK UCITS fund were published. The Court, referring to its previous judgment dated 23 July 2015 (appeal no. 630/13), in a case where PwC Spain provided legal advice, reaffirmed the discriminatory tax treatment of UK UCITS and the correct procedure to be followed by the taxpayer to obtain a refund of withholding tax levied in breach of EU law.

Under Spanish legislation in force prior to 1 January 2010, Spanish dividends distributed to an EU resident UCITS within the scope of Directive 2009/65/EC (formerly Directive 85/611/EC) were taxed at a rate of 15%-18% (depending on the fiscal year under consideration), whilst the tax burden suffered by Spanish UCITS for the same dividend distribution was just 1%. There was no specific provision which allowed EU-resident UCITS to obtain a refund of the withholding tax difference, apart from CJEU case law (Fokus Bank and Denkavit cases).

Following an infringement procedure issued by the European Commission, Article 14 of the Non-Resident Income Tax Act was amended with effect from 1 January 2010 in order to establish the same taxation for dividends received by EU resident UCITS.
A UK UCITS fund which received Spanish sourced dividends from 2004 to 2008 filed the relevant claim based on EU law (free movement of capital, Article 63 TFEU) to obtain a refund of the discriminatory withholding tax. While the Central Economic-Administrative Tax Court upheld the right of claimants to obtain a refund, because the duration of legal proceedings exceeded the verification period for the tax returns filed, effectively the decision was purely procedural. The accrual of late payment interest was limited to six months from the filing of the tax returns, because the procedure was considered appropriate for the refund claim. However, if the procedure itself was a claim for refund instead of a tax return filing, then late payment interest (5% - 7% depending on fiscal year) would be accrued as of the imposition of withholding tax.

Confirming its previous judgment dated 23 July 2015 the Court declared that the correct procedure to be followed in cases of discriminatory taxation in breach of EU law for the years at issue – prior to the 2010 legislative amendment – is the claim for a refund and not the filing of the tax returns. In addition, the Court reaffirmed that the withholding tax levied on dividends paid to EU-resident UCITS and harmonized under Directive 2009/65/EC was in breach of the principle of non-discrimination on grounds of nationality and free movement of capital (Arts. 18 and 63 TFEU).

Finally, with respect to the interest claim, the Court declared that late payment interest is accrued at the point in time when Spanish taxpayers file tax returns for the withholding tax levied, rather than six months from the filing date.

On the basis of these judgments which are in line with previous judgments, taxpayers with pending claims prior to 2010 should consider requesting the payment of the whole late payment interest.

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**EU Developments**


On 8 December 2015, the ECOFIN Council formally adopted the [Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information (AEOI) in the field of taxation](https://eur-lex.europa.eu) (also known as the Directive on Administrative Cooperation 3, or DAC3). Member States must adopt and publish, by 31 December 2016, the laws, regulations and administrative provisions necessary to comply with this Directive. They must also communicate to the Commission the text of those measures. Member States must apply the measures from 1 January 2017.

-- Bob van der Made, PwC Netherlands; bob.van.der.made@nl.pwc.com
EU – 6-monthly ECOFIN Council progress report to the European Council on Tax Issues

The Council (ECOFIN) was invited to report back to the December meeting of the European Council (EU leaders) on various tax issues, in particular its conclusions of March and June 2012 and of 22 May 2013. The Luxembourg ECOFIN report covers the following legislative and non-legislative tax issues:

A. Legislative dossiers
   • Increasing Tax Transparency
     a) Cross-border tax rulings
     b) Repeal of the Savings Taxation Directive
   • Interest and Royalties Directive
   • Common Consolidated Corporate Tax Base
   • Savings Negotiations with European third countries, the UK’s Crown dependencies and overseas territories and the non-European Countries within the Kingdom of the Netherlands
   • The common system of Financial Transaction Tax
   • VAT: Treatment of Vouchers
   • VAT: Standard VAT Return
   • VAT fraud and use of reverse charge mechanism

B. Tax Policy Coordination
   a) Code of Conduct Group (Business taxation)
   b) Code of Conduct Group – anti-abuse: Subgroup on hybrid mismatches
   c) Other tax coordination issues
      i) EU/OECD: Base Erosion and Profit Shifting (BEPS)
      ii) Tax in non-tax dossiers
      iii) Tax provisions in Agreements between the EU and third countries
      iv) Third-country non-cooperative tax jurisdictions

The Annex to the ANNEX contains the EU-BEPS PRESIDENCY ROADMAP.
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EU – European Parliament’s own legislative initiative resolution on corporate tax reform/tax rulings adopted

On 16 December 2015, the European Parliament's Plenary Session adopted the Dodds-Niedermayer ECON Committee report: "Bringing transparency, coordination and convergence to Corporate Tax policies in the Union" in a new resolution. This is the European Parliament's own legislative initiative report on tax rulings.

The Commission is now required to look at these ECON legislative recommendations. In addition, the MEPS of the new TAXE II committee (see next item) will also be closely looking at whether and how the Commission follows up with regard to the TAXE recommendations.
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EU – European Parliament Special Committee on tax rulings

On 25 November 2015, the European Parliament’s Plenary Session adopted the Ferreira-Theurer TAXE (Tax rulings and other measures similar in nature or effect) fact-finding report with recommendations in a resolution.

On 2 December 2015, MEPs approved in a following Parliamentary Plenary Session a proposal to create a successor to TAXE after its mandate ended in November 2015. The new TAXE II mandate is very similar and will run for six months again, until 2 June 2016. Again with 45 MEPs, TAXE II will be “building on the work done by its predecessor.” In their final public hearing held on 16 November 2015, TAXE MEPs grilled various multinational corporations which had declined previous invitations about their views on recent developments on corporate taxation in the EU and beyond. TAXE II will closely look at whether and how the European Commission follows-up with regard to its recommendations and the legislative recommendations in the Dodds-Niedermayer report.

On 17 December 2015, the TAXE II Committee held its constitutive meeting (approximately 20 minutes in total). The meeting was chaired by another senior MEP, Markus Ferber (EPP, Germany), and subsequently, as soon as he was re-appointed as TAXE (II) Chair, MEP Alain Lamassoure (EPP, France). Re-appointed as 1st, 2nd and 3rd Vice-Chairs, respectively, were: MEPs Bernd Lucke (ECR, Germany), Maria Mathias (GUE/NGL, Portugal and Eva Joly (Greens, France). The formal decision with regard to the re-appointment of the two TAXE I Co-Rapporteurs, MEPs Elisa Ferreira (S&D, Portugal) and Michael Theurer (ALDE, Germany), was postponed until January 2016. The first meeting of TAXE II together with the ECON Committee was scheduled for 11 January 2016.

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EU – Luxembourg EU Council Presidency publishes working paper with recommendations for EC anti-BEPS Directive

On 15 December 2015, the current Luxembourg EU Council Presidency made available to the public a “consolidated text of a possible split from the CCCTB proposal related to the international anti-BEPS aspects.” The document reflects the further work done in the Council in November at the request of the Commission in line with its June 2015 Action Plan on the international anti-BEPS Directive. The Presidency paper was also discussed at a political level by the EU-28 Finance Ministers in the ECOFIN Council on 8 December 2015. It was not however sent to the December 2015 European Council (EU Leaders) for any discussion or endorsement.

The Presidency paper provides legislative and substantial recommendations on how to implement a number of relevant G20/OECD-driven BEPS actions into EU Law in a coordinated manner. It should be noted that the EU Parliament also produced recommendations for the Commission on bringing transparency, coordination and convergence to corporate tax policies in its Resolution of 16 December 2015. Whilst the Luxembourg Presidency chose to make this Presidency working paper publicly available
in the form of an EU proposal for a Council Directive on a CCCTB, it was important when the working paper came out to realize that this was not the much-anticipated EU Commission’s draft anti-BEPS Directive. The latter was published on 27 January 2016, and is similar to the proposals included in the Presidency paper (see next edition of this newsletter).

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Germany – European Commission requests Germany to amend the German inheritance tax rules on special maintenance allowances

On 19 November 2015, the European Commission asked Germany to bring its inheritance tax rules on special maintenance allowances (“besondere Versorgungsfreibeträge”) into line with EU law, i.e. the free movement of capital (Article 63 para. 1 TFEU).

According to German inheritance tax law, surviving spouses or registered partners are granted a special maintenance allowance of € 256,000. This allowance, however, is subject to the condition that the surviving spouse or registered partner and/or the deceased are tax resident in Germany. If neither the surviving spouse/registered partner, who inherits an estate or an investment located in Germany, nor the deceased is tax resident in Germany, but in another EU Member State, the allowance is not available.

The Commission considers this to be an unjustified restriction of the free movement of capital (Article 63 para. 1 TFEU). It takes this view because in cases where this allowance is not granted the inheritance tax base increases. In addition, this might deter residents of other EU Member States from investing in German properties and investments.

The Commission’s request is a reasoned opinion and Germany has two months to provide a satisfactory response. In the absence of such a satisfactory response, the Commission may refer Germany to the CJEU (Article 258 TFEU).

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Netherlands – European Commission requests The Netherlands to amend the LOB clause in the Dutch-Japanese DTT

On 19 November, the European Commission issued its monthly package of infringement decisions in which it asked the Netherlands to amend the limitation on benefits (“LOB”) clause in the Dutch-Japanese DTT.

The Dutch-Japanese DTT entered into force on 1 January 2012. The DTT lowers or eliminates the withholding tax on investment income, i.e. dividends, interest and royalties, and also introduces measures against treaty abuse. Furthermore, it allows taxation in the source country on capital gains derived from a disposition of shares in a real property holding company.

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The DTT introduces a limitation on benefits clause and anti-conduit provisions. Dividends, interest, royalties, capital gains and other income are subject to the LOB provision which limits the availability of treaty benefits to qualified persons. Nevertheless, the DTT’s benefits are extended to non-qualified residents when they meet either the equivalent beneficiary test, the active trade/business test, or the headquarters test.

The request takes the form of a reasoned opinion, which sets out the Commission’s position with regard to the infringement procedure and the actions required by the Netherlands within a period of two months. If the Netherlands fails to comply with the reasoned opinion, the Commission may decide to bring the matter before the CJEU.

The Commission is of the opinion that, on the basis of previous CJEU case law (*Gottardo*, C-55/00 and *Open Skies*, C-466/98), a Member State concluding a treaty with a third country cannot grant more favourable treatment to companies held by shareholders resident in its own territory, than to comparable companies held by shareholders resident elsewhere in the EU/EEA.

Moreover, the Commission considers that a Member State cannot offer better conditions to companies traded on its own stock exchange than to companies traded on stock exchanges elsewhere in the EU/EEA. It should be noted that the current LOB clause in the Dutch-Japanese DTT also recognizes certain foreign stock exchanges, which include a number of EU and even third-country stock exchanges. However, some entities are still excluded from the DTT’s benefits. This means that they pay higher withholding taxes on dividends, interest and royalties received from Japan than similar companies with Dutch shareholders or whose shares are listed and traded on recognised stock exchanges.

If the infringement is upheld, this will result in an amendment to the LOB clause included in the Dutch-Japanese DTT. Furthermore, this infringement procedure will be highly relevant with regard to the compatibility of any LOB clauses included in DTTs signed by any EU Member States, as well as to the implementation of BEPS Action Plan 6, which proposes a LOB clause, within the EU.

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**Fiscal State aid**

**Luxembourg – European Commission opens formal State aid investigation into Luxembourg’s tax treatment of McDonald’s**

On 3 December 2015 the European Commission announced, in a press release, its decision to open a formal investigation into tax rulings between McDonald’s and the
Luxembourg tax authorities. The press release elaborates the reason for this investigation, and specifies the additional information which the Commission has requested from Luxembourg. This decision represents the opening, not the outcome, of the Commission’s formal investigation in this matter.

The formal investigation pertains to the granting of two tax rulings concluded in March 2009 and September 2009 on the tax treatment of royalty income in Luxembourg received by a Luxembourg McDonald’s entity, McDonald’s Europe Franchising. The Commission believes that the combination of these two rulings leads to a situation where McDonald’s does not pay corporate income tax in either Luxembourg or the United States (US) on royalty income it receives from franchisees operating restaurants in Europe and Russia for the right to use the McDonald’s brand and associated services.

The Commission states that its key area of concern is the incidence of double non-taxation, and the Commission appears to have doubts with regard to the differing qualifications of McDonald’s Europe Franchising activities under the Double Tax Treaty between Luxembourg and the US.

From a Luxembourg tax perspective, the US activities of McDonald’s Europe Franchising are characterized as constituting a PE there. The result is that the income attributed to that PE from a Luxembourg tax perspective should not be taxed in Luxembourg. However, from a US perspective, the US activities of McDonald’s Europe Franchising are not characterized as constituting a taxable presence there. In the view of the Commission, this results in a situation of double non-taxation, since the royalty income is neither taxed in Luxembourg nor in the US.

The Commission asserts that the purpose of “Double Taxation Treaties between countries is to avoid double taxation – not to justify double non-taxation.”

This is the first time that the Commission has targeted double non-taxation resulting from the application of a Double Tax Treaty. If this approach is confirmed in the final decision, further litigation before the EU Courts is likely (see also PwC EUDTG Newsalert here).

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**Spain – General Court considers Spanish Tax Lease regime is not State aid**

In a decision delivered on 17 December 2015 (Joined cases T-515/13 Spain v Commission, and T-719/13 Lico Leasing and PYMAR v Commission) the General Court of the EU annulled a previous European Commission Decision that considered the Spanish Tax Lease system (“STL”) State aid incompatible with the internal market.

The STL system allowed shipping companies to acquire sea-going vessels (mostly from Spanish shipyards) with a rebate on the price. This discount was made possible because
of the tax benefits obtained by the investors in an Economic Interest Grouping (“EIG”) which undertook to buy the vessel from the shipyard at a gross price.

Following several complaints lodged with the Commission by several European shipbuilding associations and at least one shipping company, the Commission decided in 2011 to initiate a formal investigation into the STL. By decision of 17 July 2013, the Commission concluded that certain elements of the STL system constituted illegal state aid and ordered recovery. Nevertheless, the aid granted as part of financing operations between the entry into force of the STL in 2002 and 30 April 2007 should not be recovered due to beneficiaries’ legitimate expectations.

The Commission ordered Spain to recover the aid from the EIG investors that had benefited from it, without providing any possibility for them to transfer the burden of recovery to other persons (namely, the shipyards).

In its assessment of the selective nature of the STL, the General Court has basically applied the same approach developed in the last year’s judgments on the Spanish goodwill amortisation (Autogrill v Commission case, T-219/10, and Banco Santander and Santusa v Commission case, T-399/11): a measure which is potentially available to all undertakings is not selective, even if it constitutes an exemption from the reference framework.

According to the General Court, the fact that the tax advantages associated with the STL system were available only under certain tax arrangements intended to finance sea-going vessels does not suffice to render the system selective, because all Spanish corporate taxpayers had the possibility to invest in a STL operation.

Finally, the General Court decided that the Commission failed to demonstrate that the STL system threatens competition and affects trade between Member States. The General Court did not accept the Commission’s argumentation that the investors in the EIGs were the aid beneficiaries, whilst the Commission acknowledged that the investors retained only a small part of the tax benefit and most of the advantage (80-85%) was passed on to the shipping company as a lower acquisition price for the vessel. Consequently, the General Court decided that the Commission should have more clearly elaborated the possible distortion of competition and effects on trade.

The General Court Judgment is the first of many still to come. In total, there are over 60 pending appeals against the Commission’s decision on the STL. Any appeal against the GC decision must be filed by the Commission before the CJEU within two months.

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Spain – Spanish Supreme Court orders suspension of tax on large retail establishments

The Spanish Supreme Court, by two judgments of 25 December 2015, has suspended the payment of several “Catalonian tax on large retail establishments” assessments issued to
large retail enterprises, on the condition that the taxpayers must provide bank guarantees equal to the amount of the tax.

The Court considered that following formal correspondence between the Commission and Spain in 2014 the relevant tax assessments should be annulled. The Commission had stated that the exemptions granted to small shops and certain specialized stores may constitute State aid. The Commission maintained that the imposition of the tax on large retail establishments is not justified by any environmental and urban planning externalities and is not supported by any study or data demonstrating that smaller outlets and specialized outlets have no or lower impact on the environment or on urban planning than large-sized outlets. Nevertheless, the Spanish Supreme Court did not consider the validity of the tax but merely suspended its payment.

In the coming months the Spanish Supreme Court will decide on the validity of the Catalonian tax on large retail establishments. It is foreseeable that the decision will affect identical taxes levied in five other Spanish Regions (Autonomous Communities).

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Back to top
About the EUDTG
The EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax: the fundamental freedoms, EU directives, fiscal State Aid rules, and all the rest. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up. But, this provides plenty of opportunities to taxpayers with an EU or EEA presence.

So how do we help you?
- Through our Technical Committee we constantly develop new and innovative EU Law positions and solutions for practical application by clients.
- Our experts combine their skills in EU law with specific industry knowledge by working closely with colleagues in the Financial Services and Real Estate sectors.
- We have set up client-facing expert working groups to address specific key topics such as EU State Aid & BEPS and CCCTB.
- We closely monitor direct tax policy-making and political developments on the ground in Brussels.
- We input to the EU and international tax debate and maintain regular contact with key EU and OECD policy-makers through our EU Public Affairs capability.
- Our secretariat in the Netherlands operates an EU tax news service, keeping clients up to date with developments as soon as they happen.

And what specific experience can we offer for instance?
- Our EU-wide State Aid Working Group helps our clients identify and proactively manage EU State Aid risks.
- Together with our FS colleagues, we have assisted foreign pension funds, insurance companies, and investment funds with their dividend withholding tax refund claims.
- We have assisted clients before the CJEU and the EFTA Court in a number of high-profile cases such as Marks & Spencer (C-446/03), Aberdeen (C-303/07), X Holding BV (C-337/08), Gielen (C-440/08), X NV (C-498/10), A Oy (C-123/11), Arcade Drilling (E-15/11), SCA (C-39/13), X (C-87/13) and Kieback (C-9/14).
- Together with our Financial Services colleagues, we have assisted foreign pension funds, insurance companies and investment funds with their dividend withholding tax refund claims.
- We have carried out a number of tax studies for the European Commission.

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