Briefing

International review for January

Speed read

Activity continues in relation to the taxation of the digital economy, with digital taxes proposed in Italy and France. The UK tax authorities have announced a new profit diversion compliance facility, linked to its diverted profits tax. The Luxembourg supreme administrative court has ruled against an administrative process for refund claims on dividend withholding tax which extends the claim window for some taxpayers. France has introduced a number of tax measures in response to the recent social unrest. At the EU level, parts of the Anti-Tax Avoidance Directive are now live, and there have been developments in relation to State aid cases against Gibraltar and the Netherlands.

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I hope everyone had an enjoyable break over the Christmas period. Since my last update there have been some interesting international tax developments, all with a European focus. As has become traditional in recent months, I start with an update on digital taxes.

Italy: new web tax

On 18 December 2018 the Italian Parliament proposed a Budget Law 2019 amendment which will introduce a 6% web tax on electronically supplied services rendered by suppliers (whether or not established in Italy) to Italian residents. This final version of the web tax, expected to become effective from 30 June 2019, differs from that previously proposed.

The new Italian web tax (at a 3% tax rate) applies to revenues generated from certain digital services rendered to Italian customers by companies or groups of companies of a certain size.

The web tax will apply to businesses that, during a calendar year, generated both of the following:

- total (group) revenues of not less than €750m, wherever realised; and
- (group) revenues of not less than €5.5m, realised in Italy from provision of 'digital services'.

In scope 'digital services' include advertising, digital platforms and data.

Italy therefore joins the other countries (such as the UK and Spain) which have implemented a unilateral approach to the widely discussed problem of taxing the digital economy. Similarly to those regimes, the Italian rules are fairly narrow in scope, only targeting the largest companies supplying digital services to Italian residents.

France: digital services tax

As 2018 closed, France's finance minister announced France will introduce its own tax on large internet and technology companies from 1 January 2019. The French government estimates it will raise €500m in 2019. In addition to taxing direct sales, France will also require the companies to pay a levy on advertising revenues, websites and the resale of private data. No further information is available on the DST at the time of writing.

UK: profit diversion compliance facility

Despite the introduction of the diverted profits tax (DPT) in 2015, HMRC consider that there remain taxpayers with tax arrangements that are not consistent with the OECD's response to BEPS and are planning a programme of investigations in response. On 10 January HMRC announced the profit diversion compliance facility for taxpayers not already under investigation to encourage them to review their transfer pricing policies. The facility enables the taxpayer to bring their tax affairs up-to-date in an accelerated, collaborative and controlled manner whilst also reducing the risk of penalties and the chances of an intensive HMRC investigation with tax being payable at the higher DPT rate and up-front.

Although the facility is primarily targeted at taxpayers with arrangements potentially subject to DPT, this is not a prerequisite. Businesses will have the opportunity to register with HMRC after which they will be required to submit a report, generally within six months, setting out proposed historical liabilities and the underlying technical analysis.

HMRC has indicated that taxpayers it considers 'high risk' may receive a 'nudge' letter. Recipients of such letters will be strongly encouraged to take advantage of the facility or risk an HMRC investigation. However, any businesses that may be perceived by HMRC as exhibiting risks of profit diversion may be at risk of investigation even if no letter is received and should also therefore review their transfer pricing policies and the key features of the facility.

Luxembourg: refund claims for withholding tax on dividends

Luxembourg's supreme administrative court issued a decision that rejects an administrative practice concerning the limitation period allowed for filing refund claims with respect to tax withheld on dividend payments. The court both overturned the existing administrative practice, and reversed a decision of the first-tier administrative tribunal.

In Luxembourg, a tax refund claim must be filed by the end of the year following the year in which the events giving rise to the claim occurred. The supreme administrative court clarified that a claim for the refund of dividend withholding tax arises only after the end of the 12-month holding period (a pre-condition for the Luxembourg withholding tax exemption). The refund claim therefore is required to be filed by the end of the year following the year in which this 12-month holding period ended.

The scope of the dividend withholding tax exemption in Luxembourg is generally viewed as being broad and generous – not only may EU-resident parent companies benefit, but also parent companies resident in a treaty country such as the United States, Switzerland, Norway, Iceland and Liechtenstein.

The court's decision means that in instances when the 12-month holding period for the dividend withholding tax exemption has not yet lapsed, taxpayers now may have an additional year for filing a refund claim relating to withholding tax on certain dividend distributions.

France: tax proposals to finance new social measures

The unrest in France has been ongoing and at the time of writing there is little sign of it ending. Tens of thousands of

police officers are mobilised each weekend to control the protestors and prevent violence. The French government in December announced and voted on several (tax) measures in response to the 'yellow vests' (*gilets jaunes*) social movement.

The measures would:

- cancel an increase in the environmental taxes to be imposed on certain petroleum products such as oil;
- increase several allowances paid to low-wage workers;
- cancel an increase of the CSG (*contribution sociale généralisée* – a social charge) on certain pensions that are below a threshold amount;
- remove paid overtime from being subject to social contributions and income tax; and
- encourage employers to pay certain employees (those whose salary is below €3,600) a bonus of a maximum €1,000, with this bonus payment being exempt from social contributions and from income tax provided the bonus amounts are paid on or before late March 2019.

The proposed social measures would increase what has been forecasted as a budget deficit for 2019. To address the financial impact of these measures on the deficit, several specific tax revenue measures are being considered including:

A modification of the corporate tax rate: At present, this measure has not yet been announced by the government, but it is the subject of persistent rumours and some believe it might be included in legislation submitted to the French parliament early this year.

The 2018 Finance Law included a reduction of the corporate income tax rate from 33.33% to 31% for the portion of profits exceeding €500,000 (profits below this threshold amount still being subject to the 28% rate) for financial years on or after 1 January 2019. This tax rate reduction could be repealed for companies with revenues over a certain threshold level (to be determined). Hence, profits of the affected taxpayers would still be taxed at the 33.33% regular rate.

However, the latest proposals are not intended to impact the progressive and subsequent phased-in reduction of the corporate income tax rate during years 2020 to 2022 (as well as the continued application of the 3.3% surtax on the standard corporate income tax), as provided for by the Finance Law for 2018 would remain unaffected.

Taxation of long-term capital gains: Under current legislation, long-term capital gains on shares are exempt from corporate tax, except for a 12% portion when the share sale takes place outside of a tax group. It had been proposed that the Finance Act for 2019 would reduce this portion to 5%. This change has now been cancelled.

EU update: ATAD now in force

The European Commission (EC) issued a reminder that new rules to eliminate the most common corporate tax avoidance practices were effective 1 January 2019. Beginning in 2019, all EU member states are to apply new legally binding anti-abuse measures that target the main forms of tax avoidance used by certain large multinational entities.

The EU rules build on global standards developed by the OECD under BEPS. The EC's release on 30 December reminds us:

- All EU member states will now tax profits moved to low-tax countries where the company does not have any genuine economic activity (the controlled foreign company (CFC) rules).
- To discourage companies from using excessive interest payments to minimise taxes, EU member states will limit the amount of net interest expenses that a company can deduct from its taxable income (the interest limitation rules).
- EU member states will be able to address tax avoidance schemes in cases where other anti-avoidance provisions cannot be applied (the general anti-abuse rule).

Further rules governing hybrid mismatches to prevent companies from exploiting mismatches in the tax laws of two different EU countries in order to avoid taxation, as well as measures concerned with gains on assets such as intellectual property arising from a transfer from an EU member state's territory (exit taxation rules) will be effective beginning 1 January 2020.

Gibraltar: state aid investigation outcome

On 19 December 2018, the EC announced its conclusions on the state aid investigations into Gibraltar's corporate tax regime and tax rulings. These confirmed the Commission's preliminary view that Gibraltar's non-taxation of interest and royalties (under Income Tax Act 2010) provided selective tax benefits to certain categories of companies and this was incompatible with the EU state aid rules.

However, only five of the 165 tax rulings that underwent an in-depth review by the Commission were considered to constitute state aid by providing the companies an undue and selective advantage.

As a result, the Government of Gibraltar must recover the alleged aid from the companies that benefited but it is now open to both the Government of Gibraltar and the companies concerned to appeal the decisions before the General Court (and possibly later the CJEU).

During the course of the Commission's investigations, the Government of Gibraltar made amendments to the Income Tax Act 2010, which were welcomed by the Commission, so that inter-company loan interest and royalties received or receivable by Gibraltar registered companies became subject to tax from July 2013 and January 2014 respectively. In addition, in 2018 further legislative amendments enhanced the Gibraltar tax ruling procedure and related guidance notes were issued.

Netherlands: tax ruling investigation

As one EC investigation closes, another opens. An in-depth investigation has been opened to examine whether tax rulings granted by the Netherlands to a multinational corporation provide 'an unfair advantage over its competitors' in breach of EU state aid rules. The tax rulings endorsed a method to calculate the amount of royalty to be paid by two Dutch companies for the use of intellectual property.

The EC's concern is that 'the royalty payments endorsed by the rulings may not reflect economic reality. They appear to be higher than what independent companies negotiating on market terms would have agreed between themselves in accordance with the arm's length principle.'

The EC's investigation will focus on whether the Netherlands' tax rulings endorsing these royalty payments may have unduly reduced the taxable base in the Netherlands of the two Dutch operating companies since 2006 and whether the Netherlands may have granted a selective advantage to the taxpayer group by allowing it to pay less tax than other stand-alone or group companies whose transactions are priced in accordance with market terms. If confirmed, this would amount to illegal state aid. ■

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- The profit diversion compliance facility: a welcome opportunity or a trap to be avoided? (Steve Edge and Mike Lane, 17.1.19)
- The UK's emerging response to the EU's ATAD (James Taylor, 26.7.18)