Briefing

International briefing for September

Speed read

EU state aid investigations have dominated the media over the summer, with the US Treasury expressing its displeasure. In the UK, following a backbench amendment to the Finance Bill, the Treasury now has the option to require CBCR as part of a group's published tax strategy; and the EU is making progress on its tax haven blacklist. There has been a referral to the CJEU on German transfer pricing rules, and the AG believes the Spanish rules on amortisation of goodwill constitute state aid. There are also developments of note in Ireland, Luxembourg and Poland.

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It's autumn, the children are back to school, the roads and railways are jammed with commuters again, and the international briefing has a new author. It's with great pleasure that I pick up the baton to report on the latest developments in the international tax world. Before doing so, I would like to take the opportunity to thank my predecessor, Chris Morgan, for the great work he has done month in, month out over the last eight years.

Like Chris, I have focused for most of my career on international tax, and like him I've always taken a keen interest in EU developments. But, of course, 'EU developments' have taken on a different meaning since 23 June. With at least two years of major policy upheaval ahead, coming at precisely the moment BEPS really starts to take effect and with elections threatening radical changes of political direction in France, Germany, Italy, the Netherlands and the USA in the next 12 months, I'm expecting this series to keep me busy.

Despite the fact that most of us were away on holiday for at least some of the past two months, there is a surprising amount to report on. The biggest news, at least from the media's perspective, has been the European Commission's ruling on the alleged illegal state aid given to Apple by Ireland amounting to €13bn. The Irish government announced immediately that it would seek to appeal this decision so we have yet to see where it ends up, but the political fall-out had erupted even before the EC published its decision on 30 August.

Six days earlier, the US Treasury Department released a 'white paper' reiterating its objections to these state aid investigations, following an earlier written exchange with the European commissioner for competition, Margrethe Vestager. The white paper:

- argues that the approach is new and departs from prior EU case law;
- emphasises that the EC should not seek to impose recoveries under this new approach in a retroactive manner because it sets a bad precedent for tax policymakers around the world; and
- argues that the approach is inconsistent with international norms and undermines US tax treaties, international transfer pricing guidelines already accepted broadly in the global tax community, and the work done as part of the OECD base erosion and profit shifting (BEPS) project.

It concludes that 'a strongly preferred and mutually beneficial outcome would be a return to the system and practice of international tax cooperation that has long fostered cross-border investment between the US and EU member states. The US Treasury Department remains ready and willing to continue to collaborate with the Commission on the important work of ensuring that the international tax system is fair, efficient and predictable.'

This was followed by an op-ed by US Treasury secretary Jacob J Lew in the *Wall Street Journal* on 12 September, arguing that these state aid investigations present a new opportunity for Congress to act on business tax reforms and infrastructure investment to foster America's future economic growth – sensible, if perhaps optimistic, sentiments.

BEPS update

UK: public CBC reporting

There is so much activity around the world now on implementing the various OECD BEPS recommendations, particularly in relation to country by country reporting (CBCR), that it is impossible to mention them all. However, one specific development worthy of mention was here in the UK, where Parliament agreed to an amendment to the Finance Bill (now FA 2016 following royal assent on 15 September, at Sch 19 para 17(6)), giving the Treasury the option to require CBCR as part of a group's published tax strategy.

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The amendment was very brief, so there are a lot of uncertainties around scope, e.g. the UK requirement to publish a tax strategy applies to groups that fall within the senior accounting officer (SAO) regime, many of which are not within the current CBCR regime. Also, at this stage it is unclear whether HMRC could compel non-UK headquartered groups to publish their full CBC report if filed with a tax authority elsewhere.

The amendment does not include a fixed timetable for implementation and, in practice, may just be a declaration of intent to global policymakers – the UK government has repeatedly expressed support for multilateral public CBCR and appeared reluctant to go it alone.

OECD activity

Since the last article in this series, the OECD has published one further discussion draft, on 28 July, dealing with approaches to address BEPS involving interest in the banking and insurance sectors under Action 4 (Interest deductions and other financial payments). This draft, along with a number of others, concluded over the summer and the comments received were published by the OECD, including

those on the design and operation of the group ratio rule under Action 4 and the attribution of profits to permanent establishments under Action 7. We can expect to see some further recommendations published in the next few months, once the input from stakeholders has been considered.

Global update

EU: tax haven blacklist

On 15 September, the EC published its 'work in progress' in relation to its plans to develop a first common EU list of non-cooperative tax jurisdictions (a so-called EU tax haven blacklist). As part of this update, it published a scoreboard of indicators and jurisdictions to help determine the risk level of third country tax systems in facilitating tax avoidance. A decision will be made by the end of the year on which countries to screen and then the screening process itself is intended to be completed by the end of 2017. A decision on which countermeasures against third countries should be introduced is still to be made.

Germany: transfer pricing referral to the CJEU

In *Hornbach-Baumarkt* (Case C-382/16), the claimant is a German parent company which had given guarantees and letters of comfort to banks, in relation to loans to its foreign subsidiaries, without requiring any payment; and, as a consequence, it incurred a transfer pricing adjustment under the German legislation. Unlike the facts of a similar case, *SGI v Belgium* (Case C-311/08), where the CJEU concluded that the Belgian rules were justified, in this instance the German rules in question do not have an explicit mechanism for taxpayers to provide commercial justifications to prevent the transfer pricing adjustment. The German courts have referred the case to the CJEU, questioning whether the transfer pricing rules are compatible with the freedom of establishment under EU law. This case is still at the very early stages but it is an interesting development worth keeping an eye on.

Spain: amortisation of goodwill

A recent advocate general (AG) opinion in the joined cases of *Commission v World Duty Free Group* (Case C-20/15 P) and *Commission v Banco Santander and Santusa* (Case C-21/15 P), provides another example of the potential reach of the EU state aid rules. These cases concern the Spanish provisions that allow companies which are tax resident in Spain to amortise the goodwill resulting from the acquisition of certain shareholdings in foreign companies, but not for shareholdings in Spanish companies. The AG concluded that this measure is selective and therefore should be regarded as state aid incompatible with the common market. We need to wait for the CJEU decision, which normally appears a few months after the AG opinion, for the final position on these Spanish rules.

Ireland: property assets

It is not just state aid rulings that have focused media attention on the Irish tax regime recently. There has also been extensive coverage of certain foreign investors acquiring debt secured on Irish real estate (e.g. home mortgages and commercial property loans) through 'section 110' special purpose securitisation vehicles and Irish qualifying investor alternative investment funds (QIAIFs). In the case of section 110 companies, changes were announced on 6 September, to take immediate effect, to deem any financial assets which derive (directly or indirectly) all or most of their value from Irish real estate to be held in a separate business, which will be subject to a new restriction on the ability to deduct interest on profit-participating debt. There are exclusions where the interest on the profit-participating loan is paid to: a person who is within the charge to Irish corporation tax in respect of the loan interest; certain Irish pension funds; and certain EU/EEA residents.

> The swift action [on section 110 companies] illustrates very effectively the growing power of public opinion around the world to influence tax policy

This swift government action in response to a media outcry illustrates very effectively the growing power of public opinion around the world to influence tax policy.

Luxembourg: 2017 tax reform

Over the summer, draft legislation was published providing more detail on various tax measures announced previously. Some of the more notable measures are:

- A reduction in the corporate income tax rate to 19% in 2017, and to 18% from 2018 onwards. This will mean the aggregate income tax rate for companies with a registered office in Luxembourg City would be 27.08% in 2017 and 26.01% in 2018.
- For income/municipal business tax purposes, the carry forward of tax losses incurred from 1 January 2017 will be limited to 17 years. In contrast to previous government announcements, there will be no restriction to the amount of taxable income that can be reduced annually by the tax losses.
- The ability to neutralise exchange gains for tax purposes will be extended to all companies which have their capital in a foreign currency, effective from 1 January 2016 (where a written request is filed).

Poland: cash pooling arrangements, and a continued focus on transfer pricing

Following a period of uncertainty arising from inconsistent administrative court decisions, a judgment issued on 3 August by the Supreme Administrative Court (SAC) in Poland concluded that a cash pooling arrangement constituted a form of loan and, therefore, if certain thresholds are exceeded, transfer pricing documentation will be required. The position is being put beyond doubt by new transfer pricing provisions that will be effective from 1 January 2017 but the SAC judgment clarifies the position before that date.

Unrelated to this, on 18 August Poland's minister of finance released a list of steps the tax authorities will take to address tax fraud and close 'loopholes' in the tax collection system. The stated intention is to reduce harmful tax 'optimisation' by addressing 'artificial' activities or schemes, primarily used by multinational corporations and to reduce perceived transfer pricing fraud. A competence centre within the tax authorities will be created to concentrate on this and an anti-tax avoidance council will also be created to close loopholes and issue opinions in tax proceedings. ■

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- Ten questions on the Apple state aid decision (Dominic Robertson & Isabel Taylor, 6.9.16)
- 30 questions on BEPS (Jill Gatehouse & Susanna Brain, 29.10.15)
- The Finance Bill change for public CBCR (Tim Law, 13.9.16)
- First step towards EU list of 'non-cooperative' jurisdictions (Tim Law, 22.10.16)