

EUROPEAN U.S. TAX DESK NEWSLETTER

September 2016



IN THIS ISSUE!

Welcome to the first issue of the Mazars European U.S. Tax Desk Newsletter!

This is our new series of regular European tax newsletters. These will provide you with insights on current topical tax issues and discuss how they will affect you.

Following the Brexit announcement and the European Commissions Apple decision, we consider the impact these decisions have on foreign direct investment and what your business needs to do. In this edition, our contributors from 5 European countries, discuss the increasing transparency of the European tax regimes, new anti-avoidance legislation and increased exchange of information. On a more positive development, draft German legislation proposes greater flexibility in the utilisation of trading tax losses.

On behalf of the Mazars European U.S. Tax Desk, we hope you find our newsletter useful. If there are any issues you would like to discuss further, please do not hesitate to contact us.

HERE TO HELP YOU!

International firms with a competitive advantage have real time access to insightful foreign tax knowledge. The right advisor helps to identify opportunities and to manage risk profiles. Given the far reaching effects of the OECD BEPS project, awareness of legislative and regulatory changes has never been more important.

The Mazars European US Tax Desk was created to help US companies successfully manage these challenges. We can help you to ask the right questions, set priorities and define the action plans needed to succeed in the fast moving landscape of international tax.

The Mazars European US Tax Desk is a platform for companies with existing European operations and those looking to enter Europe.

In working with the Desk, companies will be able to access a wealth of multifaceted, cross border experience in areas such as:

- International tax structuring
- Transfer pricing
- Inbound and outbound investment
- Intellectual property planning
- Financing structuring
- Treaties – interpretation and maximisation of benefits
- Research and development tax credits
- Cross border financing, leasing and licensing
- Corporate acquisitions and divestments

We are here to help you! As part of our programme to keep you up to date on what is happening in Europe, we will publish regular newsletters. These will discuss important tax legislative changes, provide on the ground insight, but most importantly, identify how this news is of relevance to you.

We hope you enjoy our first newsletter. Please do not hesitate to contact any of the Desk members if you have a particular issue you would like to discuss further.

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THE NETHERLANDS

1. NEW TAX AVOIDANCE RULES

On 28 January 2016, the European Commission (EC) announced an anti-tax avoidance package for corporate tax in response to the OECD-G20 agreed BEPS measures.

These measures will need to be ratified by the 28 Member States. Some of the measures are not completely aligned with the OECD's proposals, and there are some additional proposals too. Given that many Members of the EU are also OECD members, it is not clear why the EC has chosen to plough a different furrow in some areas, notably on how the anti-hybrid measures would operate. The EC is also taking the opportunity to revive proposals for a Common Consolidated Corporate Tax Base (CCCTB). Whilst we can expect some changes to be made to the proposals, EU based groups need to be aware of the proposals as they stand.

Key aspects of the proposals are:

- draft anti-tax avoidance directive;
- automatic exchange of CbyC reports;
- draft anti-treaty shopping rules;
- external strategy regarding non-Member State countries

DRAFT ANTI-AVOIDANCE DIRECTIVE

The objective of this draft directive is the implementation of various anti-avoidance measures in common form across the 28 Member States. The directive will cover all taxpayers subject to corporate tax in EU Member States, as well as permanent establishments of other companies located in the EU. There are six specific areas covered by the draft.

INTEREST DEDUCTIBILITY

To discourage erosion of the tax base through 'inflated' interest charges, the proposal is for a limitation to be placed on the amount of interest which will be tax deductible in a given year. Net interest will only be deductible up to a fixed ratio based on gross operating profit (proposed to be calculated on the higher of 30% of EBITDA or €1 million). However, the taxpayer will be able to have full deductibility if they are able to demonstrate that its equity to total assets ratio is within 2% of being as high as the equivalent ratio of the group. Interest costs which are not deductible one year can be relieved in a future year provided the 30% EBITDA limit is not exceeded. These rules will not apply to the financial sector.

EXIT TAXATION

The exit tax provisions are aimed at taxpayers intending to reduce their tax liabilities by either moving their tax residence and or assets, to a low tax jurisdiction. An exit charge will apply based on the market value of the assets transferred. The EC is clearly mindful of previous litigation at the Court of Justice of the European Union (CJEU) in respect of exit charges, so within the EU or EEA, the taxpayer will be able to defer payment of the tax by payment in instalments over five years. This is an area which was not covered by the OECD-G20 BEPS proposals.

GENERAL ANTI-ABUSE RULE

The EC proposal would apply to '*Non-genuine arrangements carried out for the essential purpose of obtaining a tax advantage that defeats the object or purpose of the otherwise applicable tax provisions shall be ignored for the purposes of calculating the corporate tax liability... An arrangement or series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*' If the EC GAAR were to apply, the tax liability would be calculated by reference to the economic substance.

CONTROLLED FOREIGN COMPANY LEGISLATION

Not all Member States currently have CFC rules. The draft directive proposes to change this, with the introduction of a CFC regime for 50% subsidiaries based in non-Member States with a tax rate less than 40% of the tax rate in the parent company's territory. This would be targeted at companies with at least 50% of their income coming from passive sources. Furthermore, the CFC's profits would only be apportioned if the CFC did not have significant people functions to manage its business.

In view of the Cadbury Schweppes litigation, there is a carve out for EU/EEA subsidiaries. These would only be within the scope of CFC rules if they were wholly artificial or engaged in arrangements with a main purpose of obtaining a tax advantage.

HYBRID MISMATCHES

This would apply where two Member States give different legal characterisation of the same taxpayer (hybrid entity) or to the same payment (hybrid instrument). However, in these proposals, the treatment adopted in the state in which deduction is first claimed would then need to be followed in the second state.



2. NEW DUTCH DOCUMENTATION REQUIREMENTS

On 30 December 2015, the Dutch Ministry of Finance enacted a decree on new Transfer Pricing requirements to apply to Dutch taxpayers. In general, the new legislation adopted the provisions of the Action 13 of the OECD Base Erosion and Profit Shifting (BEPS) Project.

COUNTRY-BY-COUNTRY REPORT

(Consolidated turnover in excess of €750m)

A Dutch based multinational group with consolidated turnover in excess of €750m has to prepare a Country-by-Country (CbyC) report. This report will provide specific information (e.g. revenues, profit and losses, main business activities and taxes paid) for each jurisdiction in which the group operates. The CbyC report is to be submitted by the Dutch ultimate parent to the Dutch tax authorities. They in turn will share this information with other relevant tax jurisdictions. Foreign-based multinationals that reach the above mentioned threshold need to ensure compliance with the Dutch CbyC requirements. It should be noted, that in certain circumstances (for example when the tax jurisdiction of the ultimate parent has not yet adopted CbyC rules), the Dutch entity may be responsible for the submission of the CbyC report.

MASTER FILE AND LOCAL FILE

(Consolidated turnover in excess of €50m)

A Dutch entity, which is a member of a multinational group with consolidated revenue in excess of €50m, is required to prepare transfer pricing documentation consisting of a Masterfile and a Local file.

The Masterfile should contain an overview of the business of the multinational group, its general transfer pricing policy and the worldwide allocation of income and economic activities. This is in order to assist tax authorities to identify and assess substantial transfer pricing risks. The required information can be grouped into five main aspects:

- Organization structure;
- Business description;
- Intangibles;
- Intercompany financial activities; and
- Financial and tax positions.

The Local file should include information with respect to the specific cross-border transactions the Dutch entity is involved in, including an economic analysis supporting the arm's length nature of such transactions.



TIMELINE

The new documentation requirements are in force for financial years starting on or after 1 January 2016.

Masterfile and Local File are to be prepared and be in the administration of the taxpayer before filing the tax return for the same financial year.

The CbyC report is to be submitted to the tax authorities within 12 months from the last day of the respective financial year.



CONSEQUENCES OF NON-COMPLIANCE

Failure to comply with the transfer pricing documentation requirements will shift the burden of proof to the taxpayer. In addition, administrative fines, as well as criminal sanctions (for non-compliance with the CbyC reporting) may be imposed.

3. LETTER FROM SILICON VALLEY TAX DIRECTORS GROUP

The Silicon Valley Tax Directors Group (“SVTDG or the “Group””), a group of representatives from various leading high-technology firms, has written a letter to the Dutch government on how the Netherlands could maintain and improve its favorable business tax regime.

Please refer to the following link for the full letter:

http://www.svtdg.org/docs/svtdg_letter_to_ministry_of_general_affairs.pdf

CURRENT NETHERLANDS REGIME

According to the SVTDG, the most attractive features of the Dutch tax regime are:

- easy access to the Dutch tax authorities;
- the possibility to obtain advance tax rulings to obtain legal certainty on a tax position;
- the favorable participation exemption regime;
- the wide tax treaty network;
- the absence of a withholding tax on interest and royalties;
- the 30% tax ruling for expatriates; and
- incentives for R&D related activities.

In order for the Netherlands to maintain and improve the attractiveness of their fiscal investment climate, the Group has stipulated some of their views in a letter. Next to suggestions relating to the improvement and maintenance of the Dutch fiscal investment climate, the Group also focusses on certain specific concerns such as grandfathering clauses, permanent establishment exposure, State Aid, the Anti-Tax Avoidance Directive (“ATAD”) and Public Country by Country Reporting.

GRANDFATHERING AND PE EXPOSURE

One of the suggestions made by the Group, relates to legislation covering the rapid changes in the tax world. In order for companies to adjust to the new rules, the Group suggests the Netherlands should provide for grandfathering (or transitional) rules.

The SVTDG is also quite concerned about the impact of the introduction of the UK Diverted Profits Tax (“UK DPT”) on Principal Companies located in the Netherlands. The SVTDG believes it would be appropriate for the Dutch government to question the legitimacy of the UK DPT since the UK DPT violates the tax treaty between the UK and the Netherlands and it is a breach of EU fundamental law.

STATE AID SUPPORT

Another distress for the SVTDG is the recent State Aid investigations initiated by the European Commission (“EC”). These investigations have created uncertainty in the use of rulings as an instrument to manage risks. However, the SVTDG is pleased to see that the Dutch government has appealed against the EC’s decision in the Starbucks case of unlawful State Aid.

IMPROVE AND MAINTAIN INVESTMENT CLIMATE

In light of the BEPS (“Base Erosion and Profit Shifting”) Action Plan and related initiatives, the Netherlands should provide clarity on maintaining and improving the competitiveness of the Dutch tax systems to attract foreign investors. By doing so, it could eliminate existing uncertainty about the future of the Dutch fiscal investment climate. Also, according to the SVTDG a competitive tax rate could be achieved by the Netherlands if they lower their corporate tax rate, which should be comparable to the UK, Ireland and Switzerland.

ANTI-TAX AVOIDANCE DIRECTIVE

The SVTDG is also concerned that the scope of ATAD (EU) goes beyond the outcomes of the OECD BEPS Action Plan (global). The ATAD requires minimum standards, but subsequently allows Member States to be stricter than the minimum standard. Therefore, a cohesive implementation of the BEPS Action Plan may not be achieved, only more uncertainty within the EU, i.e. more uncertainty for non-EU companies dealing with the EU.

According to SVTDG, the Netherlands should maintain two important cornerstones of their tax system to attract foreign investments: (i) adherence to the principle of capital import neutrality (ii) the absence of a withholding tax on interest and royalties and the objective to eliminate, through the use of tax treaties, withholding taxes on dividends.

PUBLIC COUNTRY BY COUNTRY REPORTING

The SVTDG believes that the EC proposals of country by country reporting will harm the business environment in the EU. It will harm the EU’s ability to attract investment. The public report of data can be misunderstood and misinterpreted, which will result in reputational damages for companies.

4. EU PARENT SUBSIDIARY DIRECTIVE

The aim of the EU Parent-Subsidiary Directive is to prevent tax measures of the Member States that constitute a disadvantage to cooperation between companies of different Member States compared to cooperation between companies of one Member State.

In accordance with the EU Parent-Subsidiary Directive, profits distributed by a subsidiary in one Member State to its parent company in another Member State will be exempt from withholding tax provided that the parent company holds at least 10% of the subsidiary.

The EU Parent-Subsidiary Directive has been adopted by all Member States of the European Union.

The member states may require that the parent company maintain a holding for an uninterrupted period of up to 2 years. They are allowed to require the payer to withhold tax provisionally or lodge a security equal to the tax until the parent company proves that the minimum holding period has been met.

Amendments to the Directive were proposed with the intention of reducing tax avoidance in Europe by closing loopholes which some companies have been using to escape taxation. In particular, companies will no longer be able to exploit differences in the way intra-group payments are taxed across the EU to avoid paying tax at all. Therefore, the EU Parent-Subsidiary Directive is strengthened by these new general anti-abuse rules.

On 27 January 2015, the European Council formally adopted a binding general anti-abuse rule (GAAR) to be included in the EU Parent-Subsidiary Directive (PSD). Member States had until 31 December 2015 to implement the GAAR to their own national law. While the original version of the PSD only allowed Member States to apply domestic or agreement-based provisions required by anti-abuse rules, the PSD will now contain a mandatory GAAR. This means the Member States are required to deny the dividend withholding tax exemption under PSD in cases of tax avoidance.

The objectives under the introduction of the PSD GAAR is to encourage corporate groups to further align their businesses toward an operating model where operational and management structures more loosely match the holding structure.

The existence of the new rule has significant implications. As of 1 January 2016 the PSD GAAR affects new and also existing international holding structures. Specifically, this impacts those cases where a withholding tax exemption could have been available, with cash-strapped European tax authorities now relying on the subjective interpretation of the PSD GAAR clause to deny such exemption. In terms of double taxation, this may also mean that access to the participation exemption regime may also be denied in cases where abuse is perceived to have occurred.



5. APPLE RULING: EUROPEAN COMMISSION DEMANDS €13BN IN BACK TAXES

The European Commission issued a negative decision in the Apple State Aid case.

Ireland has been instructed by the European Commission to recover up to €13bn of alleged state aid from the company covering a ten year period. The European Commission has stated that *“This decision does not call into question Ireland’s general tax system or its corporate tax rate”*. No other companies are subject to this decision by the European Commission.

Following the announcement, the Irish Minister for Finance said *“I disagree profoundly with the Commission’s decision. Our tax system is founded on the strict application of the law, as enacted by the Oireachtas, without exception.....It is important that we send a strong message that Ireland remains an attractive and stable location of choice for long-term substantive investment. Apple has been in Ireland since the 1980s and employs thousands of people in Cork. The company has continued to expand its operations in Ireland in recent times.”*

In its decision, the Commission stated that the amount to be recovered by Ireland could be reduced if the US authorities were to require Apple to pay larger amounts of money to their US parent company for this period to finance research and development efforts.

Notwithstanding the right of appeal, Ireland is legally obliged to recover the alleged State Aid from Apple in the interim. Given that this money may ultimately have to be returned, the Irish government has confirmed that the money can be held in escrow until the case has concluded.

Ireland has indicated that it will appeal the Commission’s decision. However, any such appeal will most likely take a number of years to conclude.

THE APPLE RULING: HOW IT ALL STARTED

In 2014, the European Commission announced that it was opening investigations into the tax arrangements of Apple in Ireland, Starbucks in the Netherlands and Fiat and Amazon in Luxembourg. The EU Commission contended that the relevant Member States offered illegal State Aid to the US companies involved. Essentially, it was being argued that these companies were being offered deals which were overly generous and not available to other companies.

The focus of the EU Commission was on so-called “tax rulings” issued by the Irish Revenue Commissioners to Apple in 1991 and 2007. A preliminary decision was issued by the Commission in 2014 stating that it believed that Ireland offered Apple State Aid.

The European Commission has similarly issued adverse findings in respect of cases taken against the Netherlands (Starbucks) and Luxembourg (Fiat and Amazon). Both jurisdictions have appealed the Commission’s findings.

IMPACT ON IRISH FDI LANDSCAPE

While this recent announcement is disappointing, it was not unexpected. Similar negative announcements have been previously issued by the Commission to the Netherlands and Luxembourg. This highly anticipated announcement has been expected since 2014. It needs to be kept in mind that the alleged State Aid relates to so called rulings issued as far back as 1991. In the subsequent years, a suite of new legislation has been enacted by Ireland. These BEPS compliant provisions advocate transparency, while continuing to be best in class.

Companies who have been looking at coming into Ireland have done so with the knowledge of the Apple investigation. IDA Ireland, the inward investment agency of the Irish Government, reports a strong first half to 2016. Ireland continues to be one of the strongest performers in Europe in the FDI sector. Technology and Business Services and International Financial Services were amongst the strongest performers in the first half of 2016. This was followed by Life Sciences. The US remains Ireland's key market.

The recent UK referendum decision to leave the European Union (Brexit) presents opportunity for Ireland. We are already witnessing increasing levels of queries, particularly from groups in the mobile technology and financial services sectors.

Overall, the Irish FDI space looks positive.



LUXEMBOURG

6. AUTOMATIC EXCHANGE OF ADVANCE CROSS-BORDER RULINGS AND ADVANCE PRICING

The Law concerning the automatic exchange of information with respect to tax rulings (ATRs) and advance pricing agreements (APA) was voted on 14 July 2016 and has been published.

It aims to amend and supplement the Law of 29 March 2013 on the exchange of tax information.

CONTEXT

The European Council has expressed the need for further measures to combat against cross-border tax avoidance, aggressive tax planning and harmful tax competition, both at global and European Union levels. Therefore, in order to increase transparency, the Tax Administration of an EU Member State will have to automatically exchange information about cross-border ATRs and APAs with all other EU Member States and to a lesser extent with the European Commission.

This measure is based on the principle that it is the other Member States who are best placed to assess the potential effects and the relevance of a decision, rather than the Member State which issues the ATR and/or APA.

SCOPE OF AUTOMATIC EXCHANGE

The scope of the automatic exchange of the cross-border ATRs and APAs issued, amended or renewed to a particular person or group of persons upon which that person or group of persons is entitled to rely, should cover any material form (irrespective of their binding or non-binding character). As a result, the Law n°6972 defines cross-border ATRs and APAs in such way to cover a wide range of situations.

The automatic exchange of information is mandatory for the below cross-border ATRs and APAs:

- 1) Issued, amended or renewed after 31 December 2016.

Deadline for exchange - within three months following the end of the half of the calendar year during which the ATR or APA have been issued, amended or renewed.

- 2) Issued, amended or renewed within a period beginning five years before 1 January 2017, as follows:

- If the ATR or APA were issued, amended or renewed between 1 January 2012 and 31 December 2013, such communication shall take place under the condition that they were still valid on 1 January 2014;
- If the ATR or APA were issued, amended or renewed between 1 January 2014 and 31 December 2016, such communication shall take place irrespective of whether they are still valid.

Deadline for exchange - before 1 January 2018.

The scope of the automatic exchange of information does not cover:

- Information on cross-border ATRs and APAs issued, amended or renewed before 1 April 2016 to a particular person or a group of persons with a group-wide annual net turnover (as defined in Article 48 of the Law 19 December 2002 on the Register of Commerce and Companies and the accounting and annual accounts of Undertakings) of less than EUR 40.000.000 (or the equivalent amount in any other currency) in the fiscal year preceding the date of issuance, amendment or renewal of those ATRs and APAs. This exemption does not apply for persons or a group of persons conducting mainly financial or investment activities.
- The tax rulings which exclusively concern and involve the tax affairs of one or more natural persons.
- The tax rulings and arrangements related only to Luxembourg transactions.

INFORMATION EXCHANGED

The main information to be communicated by a Member State to all other Member States include the following:

- a) the identification of the person, other than a natural person, and where appropriate the group of persons to which it belongs;
- b) a summary of the content of the ATR or APA, including a description of the relevant business activities or transactions or series of transactions provided in abstract terms, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy;
- c) the dates of issuance, amendment or renewal of the ATR or APA;
- d) the start and end date of the period of validity of the ATR or APA, if specified;
- e) the type of the ATR or APA;
- f) the amount of the transaction or series of transactions, if such amount is referred to in the ATR or APA;
- g) the description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an APA;
- h) the identification of the method used for determination of the transfer pricing or the transfer price itself in the case of an APA;
- i) the identification of the other Member States, if any, likely to be concerned by the ATR or APA;



- j) the identification of any person, other than a natural person, in the other Member States, if any, likely to be affected by the ATR or APA (indicating to which Member States the affected persons are linked); and

The information to be communicated to the European Commission does not include points a), b), g) and j) mentioned above.

Furthermore, the Member States may request additional information, including the full text of the cross-border ATR or APA.

PRACTICALITIES

It is the Luxembourg Tax Administration that should provide the required information to all other Member States and the European Commission. Nevertheless, the Tax Administration will rely on the assistance of the companies concerned by the automatic exchange of information.

In this respect, Form 777 E which summarises the information to be exchanged with other Member States in English is already available on the website of the Luxembourg Tax Administration: <http://www.impotsdirects.public.lu/formulaires/collectivites/>.

In addition, as of 1 January 2016, Form 777 E must be completed and attached to each new ATR/APA request and the Tax Administration has already started approaching companies regarding the ATRs and APAs issued before 2016.

OUR ASSISTANCE

Please contact us should you need additional information or require our assistance regarding the automatic exchange of information on cross-border ATRs and APAs.

In particular, we could help you to identify which ATRs/APAs issued for your company(s) fall within the scope of the exchange. Furthermore, we could assist you in determining the modalities of completing the Form 777 E for your selected ATRs/APAs.

7. REVISION FOR OFFSETTING TAX LOSSES FOR CORPORATIONS

With the draft bill of 23 August 2016, the German federal government initiated a process to develop the offset of corporate tax losses. The present regulation of § 8c KStG, introduced to avoid any shell company purchase, was mostly seen as too restrictive. Even after the implementation of the corporate group clause and the hidden reserves provision, many corporations faced a forfeiture of tax loss carry-forwards (TLCF).

A need for relief was identified in particular in regard of those cases in which the business activities of a company are not affected by the change of its shareholders, but remain consistent even after the transfer of shares. This is the point at which the new § 8d KStG (draft) shall tie up.

THE EXISTING §8C KSTG

§ 8c KStG provides that if a transfer of shares is (i) made to only one purchaser, related parties of such purchaser or a group of purchasers acting in concert and (ii) exceeds a certain percentage within a period of five years, the corporation's TLCF's and current tax losses will be forfeited (pro rata if more than 25% and up to 50% of the shares are being transferred, or entirely if the transfer exceeds 50%). The forfeiture can only be avoided if the corporation has adequate hidden reserves (hidden reserves provision) or for specific transfers within a group. The regulations of § 8c KStG apply as well for trade tax losses.

THE NEW §8D KSTG (DRAFT) – OPPORTUNITIES AND RISKS

§ 8d KStG, as drafted, aims to eliminate the tax barriers regarding the corporate financing through changes in shareholders and to offer the option of using TLCF's and current tax losses independently from the prejudicial acquisition of shares.

The requirement for the use of this regulation is that historically, more precisely during the last three fiscal years (before the application was filed) or since beginning of business and in the future, the corporation has been undertaking the same kind of business operations.

§ 8d KStG (draft) shall however not apply in the case of the following events:

- business activities are put on hold
- business activities' purpose changes
- corporation undertakes an additional business
- the corporation joins a partnership
- the corporation becomes a parent company (acc. to § 14 (1) KStG)
- assets are being transferred to the corporation and recognized with a lower value than the fair market value

To prevent a misuse of structural alternatives, none of the previous events should have occurred in the three fiscal years prior to the prejudicial acquisition of shares.

Each corporation decides for itself whether or not to use the regulations of § 8d KStG (draft) by filing an application along with its tax return. While § 8c KStG still is the current legal standard for the limits on the use of tax losses, § 8d KStG (draft) proposes an alternative. If the application is allowed, a separate, continuation-bound TLCF is determined by the tax authorities. This TLCF is to be used first, before the general TLCF according to § 10d (4) EStG.

A cessation of the business operations or the occurrence of one of the previously defined damaging events, are leading to a total forfeiture of the continuation-bound TLCF, except for those with hidden reserves in the same amount.

The new regulations shall be applicable to all transactions conducted after 31 December 2015.

POINTS OF DISCUSSION

The strict separation of regimes according to § 8d KStG (draft) and § 8c KStG could lead to unsystematic results. Therefore, a pro rata forfeiture according to § 8c KStG (e.g. 35%) could turn into a total forfeiture by choosing the regulations of § 8d KStG (draft).

Furthermore, delimitation problems similar to those with the former regulation in § 8 (4) KStG could come up during the practical implementation.



UNITED KINGDOM

8. BREXIT – TAX IMPLICATIONS FOR MULTINATIONALS

As the UK will remain a member of the EU for at least another two years it is not necessary to take any immediate action, especially since we do not know yet what action will be taken by the UK Government. However, now certainly is the time to start identifying and assessing the tax impact of Brexit on your businesses and start to plan what might be possible solutions or opportunities.

Repatriation of profits

It is important to businesses to eliminate or reduce double taxation. For businesses operating within the EU there are two important EU directives upon which businesses rely to reduce the withholding tax in the paying jurisdiction: The Parent Subsidiary Directive allows dividends to be paid between EU Member States without incurring withholding tax. In the absence of the EU Directive, UK shareholders would need to rely on the UK's double tax treaty network to benefit from reduced withholding tax. The UK has an extensive network of treaties but they do not all reduce the withholding tax to zero.

The Interest & Royalties Directive eliminates withholding taxes on interest and royalties paid between EU Member States. In the absence of a suitable treaty or an EU Directive, payments of interest and royalties from the UK would be subject to withholding tax at 20%. Businesses would need to rely on the UK's treaty network but, as with dividends, they do not all eliminate the withholding taxes – some only reduce the rate that needs to be applied. It is likely that the UK will seek to renegotiate a deal which will maintain these beneficial arrangements, as it will be in the interests of both the UK and EU Member States to facilitate international trade.

UK as a holding company location

The UK is often used as a holding company location. Brexit could potentially have a significant impact on this form of international investment. How multinational businesses will react is likely to depend on the UK's negotiations with the EU post Brexit.

However, there are a number of other advantages which could mean the UK remains an attractive location for a holding company. Eg Extensive treaty network, membership of major international organisations such as the G8, G20, and OECD, dividend and capital gains exemption on share disposals, along with very attractive (and falling) headline corporate tax rate.

Transfer Pricing and the Arbitration Convention

The EU Arbitration Convention establishes a procedure to resolve disputes where double taxation occurs between companies of different Member States as a result of an upward adjustment of profits of a company of one Member State. On exit, this Convention will no longer apply unless specifically included in the negotiation. The lack of such a Convention could make it more difficult for companies to resolve such issues. However, in practice agreement is often sought through the mutual agreement procedure in the relevant double tax agreement.

Impact of EU law on UK tax policy

Recently, the European Commission has conducted a number of State Aid investigations into transfer pricing rulings granted by some Member States to multinational companies (Apple, Starbucks, McDonald's and Fiat). On

leaving the EU, the UK would no longer be bound by the State Aid rules. This would give the UK government the freedom to introduce more reliefs, offer advantages to selective industries, without having to be concerned about incompatibilities between the UK and EU law. However UK's membership of the G20 and the OECD may constrain what the UK can do in this area.

Leaving the EU could have other advantages such as not being bound by decisions of the Court of Justice of European Union and not having to participate in the EU's desire for a common consolidated corporate tax base.



Customs duty

Customs duty within the EU is almost entirely governed by EU directives. On exit the UK would no longer be part of the EU's Customs Union and as a result EU's customs duties could apply, making it more expensive for EU companies and consumers to import from the UK. Similarly, if the UK decides to introduce customs duty on imports from the EU, then UK businesses which rely on imports from the EU could find their costs increasing. Given the UK is a net importer from the rest of the EU, it seems highly likely that the UK would seek a Customs agreement with the EU, perhaps similar to those concluded between the EU and EEA or Turkey. However it is important that businesses review their supply chain and identify those parts which are affected.

VAT

As VAT is a European tax, UK VAT legislation has had to fall in line with the EU Principal VAT Directive. However, there is no practical chance that VAT will be abolished, as it is a major source of revenue for the UK. However, the UK would no longer be bound by European constraints. Whilst there may be more freedom for the UK government in formulating VAT policy in future, it is still likely that European VAT law would influence UK policy in order to deal with potential tax avoidance and uncompetitive double taxation.

There is widespread expectation that Brexit will not result in a significant change to the VAT treatment of cross border supplies of services. However, changes in the administration for cross border movements of goods are likely, especially if the UK does not retain direct access to the Single Market in an EEA type arrangement.

Employment tax and Share Plans

Many areas of employment law have substantial influence emanating from the European Union. The exit from the European Union is likely to have an impact on employment law but to what degree remains to be seen. In reality many of the fundamental employment protections will have to be retained to enable the UK to maintain strong trading relations with Europe.

Conclusion

This is clearly a period of considerable uncertainty for the UK, which is not good news for business. However, the full impact of Brexit may be softened by the UK renegotiating replacement deals with the EU. The UK is a member of the G8, G20 and OECD independently from its membership of the EU. It will thus continue to be a party to double tax treaties and other agreements that have their basis in these international organisations. We at Mazars can assist you with reviewing your commercial and corporate structure and identify the optimal tax strategy for your business as a result of Brexit.

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