

Briefing

International briefing for October

Speed read

Some further detail, albeit limited, on US tax reform has been released. The OECD is consulting on the tax challenges of digitalisation, has published peer reviews on how tax authorities are administering MAP and activated automatic exchange relationships in relation to country by country reporting. New tax proposals have been published in the Netherlands and Poland. In France, the 2018 draft Budget has been published and the 3% surcharge on dividend payments has been found to be unconstitutional and is therefore repealed. At the EU, some significant state aid rulings have been published and a new Directive on dispute resolution has been approved.



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This month, as has been the case so often over the last year, I will start with the latest developments in the US. In my last update we were still waiting for the outline of the tax reform legislation to be released. On 27 September, the 'Unified Framework for Fixing Our Broken Tax Code' ('Unified Framework') was published by the White House, Republican leaders of the US House and Senate, and the chairs of the House and Senate tax-writing committees. Disappointingly, the Unified Framework is a brief statement of US federal tax reform principles rather than a comprehensive tax legislation proposal.

The Unified Framework is expected to be the starting point for tax-writing committees as they flesh out the details of the tax legislation. Currently, it does not include significant technical details or specify effective dates for most proposals. Elements of the Unified Framework's proposals can be expected to be modified, as details are formulated over the course of the legislative process but, given the usual uncertainties associated with this, it remains to be seen whether significant tax legislation will be enacted in the near or even medium term. For many multinationals, waiting to make long term investment decisions, this continuing uncertainty is highly frustrating.

Some key highlights from a business tax perspective are:

- Lower US federal corporate top marginal tax rate from 35% to 20%;
- Lower maximum federal income tax rate of 25% applied to 'business income' of pass-through entities;
- Mandatory repatriation tax on historical accumulated profits of foreign subsidiaries;
- Shift towards a quasi-territorial system featuring a full exemption for dividends paid by foreign subsidiaries relating to post-reform earnings (i.e., a European-style 'participation exemption' regime) but a new 'minimum tax' on foreign earnings;

- Modification of CFC anti-deferral rules;
- Immediate expensing of new capital investments in depreciable assets (other than structures) for at least five years;
- Partial limitation of deductibility of net interest expense (at least for C corporations); and
- Elimination of many business deductions and credits, but preservation of the R&D credit.

BEPS/OECD update

Another development that occurred just after I finished my last article was the release of a 'request for input' on the tax challenges of digitalisation from the OECD. This followed hard on the heels of the European Commission (EC) communication on the digital economy which I did discuss last month. The OECD's request for input is broad, ranging from the impact on operating models, the impact on cross-border and multi-jurisdictional transactions, and the likely future direction of developments in digitalisation. It also sets out the potential tax responses – for example, the introduction of a 'virtual permanent establishment' (PE) concept; a withholding tax on digital transactions; and an equalisation levy – and requests views on these. Comments have been requested by 13 October 2017. European businesses will be hoping for some coordination between the EU and the OECD on this complex topic.

As part of BEPS Action 14, the OECD established a series of peer reviews to assess the performance of participating tax authorities, in relation to administering the mutual agreement procedure (MAP) article of their respective tax treaties, against an agreed minimum standard. On 26 September the first six of these peer reviews were published including one on the UK. The reports were broadly positive and should encourage taxpayers to engage with the MAP process. However, the countries selected for the first batch of reviews all have a good reputation on MAP so we are quite likely to see more critical reports in some future peer reviews. Staying on the topic of dispute resolution, the European Council this month approved a new Directive which seeks to improve access to dispute resolution, make the process quicker and more effective, and address gaps in the European Arbitration Convention such as determining the existence of PEs and thin capitalisation. The Directive must be implemented by member states by 30 June 2019 so its applicability to the UK will depend upon possible transitional arrangements for Brexit currently under negotiation.

The OECD also announced, on 11 October, the activation of automatic exchange relationships under the multilateral competent authority agreement (MCAA) on the exchange of country by country (CBC) reports. Over 1000 automatic exchange relationships have now been established between jurisdictions which are committed to exchanging CBC reports as of mid-2018. It is expected that more jurisdictions will nominate partners for automatic exchange in the coming weeks.

Global update

Netherlands: coalition tax proposals

On 10 October, the political parties that have formed the new coalition government in the Netherlands presented the results of their coalition negotiations, the 'Confidence in the Future' agreement, which sets out the measures the new Cabinet intends to implement. This included a number of

tax proposals, the majority of which will take effect in 2019, although many details are still outstanding. Some of the key proposals from a business perspective are:

- The normal corporate income tax rate will be reduced in steps from 25% to 21% by 2021.
- The effective tax rate for innovation box income will be increased from the current 5% to 7% from 2018.
- The corporate interest restriction included in the EU Anti-Tax Avoidance Directive (ATAD) that takes the form of an earnings-stripping rule will be introduced from 2019. It will be introduced with a €1m threshold but without a group escape. Some existing interest limitation measures will accordingly be repealed, but not the interest limitation deduction that counteracts base erosion.
- Loss carry forwards will be limited to six years from the current nine years, but the timing and any grandfathering rules are currently unknown.
- Dividend withholding tax will be abolished from 2020 (except for payments to low tax jurisdictions and abuse situations).
- A new withholding tax on interest and royalties to low tax jurisdictions will be introduced, likely in 2023.

France: 3% surcharge on dividend payments

The ongoing legal disputes around the 3% surtax imposed on dividends paid by French companies to foreign parent companies have been mentioned in previous articles in this series on a number of occasions. Last summer the French High Court referred a number of questions for judgment to the French Constitutional Court and to the Court of Justice of the European Union (CJEU) and on 6 October this year the French Court issued its decision (2017-660). It declared the tax to be unconstitutional which has the effect of completely repealing the tax (and not simply limiting its application), the practical implications of which are far broader than all prior court decisions.

The court also concluded that its decision would take immediate effect and would apply to all currently pending litigation. This means that the 3% dividend distribution tax no longer has any legal existence in France and there is a potential refund opportunity for taxpayers in relation to payments of this tax since the beginning of 2015 if a claim is filed by the end of 2017.

While the French Ministry of Finance has not yet officially commented on the decision, it seems likely that the French tax authorities will now withdraw from any pending cases. As the potential cost to the French Treasury of refund claims is estimated to be in the billions of Euros it is possible the French government will quickly introduce a new tax or increase the rate of an existing tax to compensate for, at least in part, the lost revenue that is likely to flow from this decision.

France: 2018 draft Budget

Another topic I have mentioned a few times previously is President Macron's tax plans. We now have some more detail as the French government unveiled the draft Budget for 2018 on 27 September. As previously announced, one of the main tax measures is a progressive reduction of the corporate tax rate to 25% and, following the Budget, we now know how that reduction will be scheduled (note: the 3.3% surtax on the standard corporate income tax will remain unchanged):

- In 2018, a 28% rate will apply for taxable profit up to €500,000 and 33.33% above that amount.
- For financial years commencing on or after 1 January 2019, the standard rate will be reduced to 31%, and for the first €500,000 of profit, the 28% rate will apply.

- For financial years commencing on or after 1 January 2020, the 28% rate will be the new standard rate (for all profits).
- This standard rate will then be decreased to 26.5% and then to 25% for financial years commencing on or after 1 January 2021 and 1 January 2022, respectively.

Some of the other main business measures include:

- Repeal of the provision prohibiting the deductibility of interest on acquisition of shares not controlled by a French entity, commonly known as the 'amendement Carrez'.
- Repeal of the 3% tax on distribution of dividends from 1 January 2018, although this has been superseded by the decision of the French Constitutional Court mentioned above.
- A reduction in the CICE rate (this is a tax credit on salaries below a certain threshold) in 2018 followed by its replacement in 2019.

Poland: revised tax proposals

A new version of a draft Bill to amend Poland's tax legislation was submitted to parliament on 4 October. A main objective of the Bill is to prevent the use of 'aggressive tax planning' mechanisms. Compared to the original draft version of the Bill (presented in July), certain measures have been liberalised, such as thin capitalisation rules and the taxation of intangible services. New provisions have also been introduced, including measures regarding debt push-down structures. Some of the main proposed business tax measures are:

- The introduction of two sources of income to be shown separately on the tax return. These are income of a capital nature and income from business activities.
- Changes to the thin capitalisation rules including the introduction of a limitation on the deduction of net interest expense to 30% of EBITDA.
- A restriction on the deductibility of interest on debt incurred to acquire shares. This is aimed at preventing debt push-down arrangements.
- A limit on the deductibility of payments to related parties or entities resident in tax havens for certain intangible services and fees for the use of copyrights, industrial property rights, or know-how.
- Changes to the controlled foreign company rules. The amendments are anticipated to have an effective date of 1 January 2018.

EU: state aid rulings

The EC announced its final decision this month on its state aid investigations into transfer pricing rulings granted by Luxembourg to the Amazon group. It concluded that the rulings in question may underestimate the taxable profits of the group by deviating from the arm's length principle, and therefore constitute illegal state aid. The Luxembourg tax authorities are now required to determine the amount (estimated at around €250m, plus late payment interest) and to recover the perceived illegal aid. In a separate announcement, the EC also announced its decision to refer Ireland to the CJEU for failure to recover up to €13bn in tax benefits deemed by it to be illegal state aid in August 2016. ■

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- ▶ The EC's communication on digital taxation (Zoe Wyatt & Miles Dean, 5.10.17)
- ▶ Implementation of BEPS around the world (Philip Greenfield, 2.8.17)
- ▶ News: EC concludes Amazon received illegal state aid from Luxembourg (4.10.17)