First published in Tax Journal on 26 April 2024. Reproduced with permission.

Briefing

International review for April

Speed read

A bit like the British weather in April, this month's update is a diverse mix. Further guidance has been released on the new US 1% excise tax on repurchases of corporate stock. Yet another Advocate General opinion has concluded that an EC finding of state aid be overturned, this time in the UK Finco case. The European Parliament has adopted an opinion on the FASTER Directive, recommending various amendments. The EC has issued a Communication inviting consideration of Qualified Majority Voting in EU tax matters. Efforts to enhance public tax reporting transparency in Australia continue, with the legislation for the new public disclosure of tax residency requirements receiving royal assent. Finally, Pillar Two implementation continues to progress across the globe.

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US: release of guidance on new 1% excise tax on repurchases of corporate stock

On 9 April 2024, the US Treasury department released two proposed sets of regulations (REG-115710-22 and REG-118499-23), addressing the new non-deductible 1% excise tax on repurchases of corporate stock made after 31 December 2022.

The proposed regulations set forth procedural guidance on the reporting and payment requirements of the new tax. They also address the application of the tax to US subsidiaries of publicly-traded foreign corporate parents: these differ from the rules contemplated by the initial guidance in Notice 2023-2 (the Notice) which significantly expanded the scope of the excise tax with respect to foreign corporations. In other respects, the regulations largely follow the approach of the Notice with a few changes and additions. The Notice will be obsolete for repurchases, issues and provisions of stock of a covered corporation occurring after 12 April 2024 (the date the proposed regulations were published in the Federal Register). There is a short window during which comments can be submitted on both regulations.

Running to 325 pages, a detailed analysis of the regulations is outside the scope of this article. Overall, they provide a significant amount of meaningful guidance, particularly for foreign entities; however, they have also created ambiguities and uncertainties. The excise tax – which on its face appears to be relatively simple and straightforward – has become complicated. Congress has imported a subchapter C into the excise tax to define what constitutes a repurchase, and in doing so it appears to have opened the door to the attendant complexities of subchapter C. The 'funding rule' – seemingly tailor-made to generate controversy – has been layered on to prevent what the US Treasury perceives to be the potential for foreign-controlled US subsidiaries to surreptitiously fund their foreign parents' stock repurchase while avoiding the excise tax. The net result is a complex series of proposed rules, and new recordkeeping and tax filing obligations.

EC state aid cases: Advocate General's opinion on UK Finance Company (Finco) partial exemption rules

On 11 April 2024, the Advocate General (AG) of the Court of Justice of the European Union (CJEU) issued its opinion on the UK tax treatment of multinational groups under the Controlled Foreign Company regime (*UK v Commission and others* (Cases C-555/22 P, C-556/22 P, and C-564/22 P also known as the UK Finco case). The case concerns the compatibility of the UK's Group Finance Company partial exemption rules with EU state aid rules.

By way of reminder, on 2 April 2019 the European Commission (EC) found that the UK granted illegal state aid to certain multinational enterprises (MNEs) between 2013 and 2018 by unduly granting them an exemption from the UK Controlled Foreign Company (CFC) rules for certain financing income of MNEs active in the UK. The UK and one of the taxpayers challenged the EC decision before the General Court, but that court dismissed their actions on 8 June 2022. The UK and two other taxpayers then appealed to the CJEU.

> The AG concluded that the correct reference framework ought to have been the general UK corporation tax system as a whole

The AG's opinion is that the decision of the EC be annulled. The AG has concluded both the EC and the General Court erred in determining that the UK CFC rules constituted the correct reference framework for examining whether a selective advantage had been granted. Instead, the correct reference framework ought to have been the general UK corporation tax system as a whole. The CFC rules form part of that system and cannot be severed from it. Indeed, the CFC rules can only be fully understood when considering the UK corporate tax system as a whole.

Remember that AG opinions are non-binding on the CJEU. The CJEU will now begin their deliberations in this case, with a judgment to be given at a later date. However, this is the latest in a string of recent AG opinions that have recommended findings of state aid be annulled, and the CJEU recently agreed with the AG's opinion that the EU had erred in concluding there was state aid in the high profile *Engie* (joined cases Cases C-451/21 and C-454) and *Amazon* (Case C-457 /21) cases.

European Parliament adopts opinion on FASTER

On 28 February 2024, the European Parliament adopted its opinion on the EC's proposed Directive on Faster and Safer Relief for Excess Withholding Taxes (FASTER), which aims to establish more efficient and secure withholding tax procedures in the EU.

The parliament proposed several amendments to the EC's proposal. Key takeaways include:

- digital tax residence certificates (eTRC): Member States should issue the eTRC within three working days from submission of a request (compared to one day in the EC's proposal);
- certified financial intermediaries: Member States should ensure that a financial intermediary is registered in their national register of certified financial intermediaries within two months from submission of a request (compared to three months in the Commission's proposal) and inform all other Member States about rejections of registration as soon as possible;
- request for relief at source and quick refund: Member States should ensure that certified financial intermediaries requesting relief on behalf of a registered owner verify the

risks of residence and citizenship by investment schemes that present a potentially high risk; and

- Monitoring and exchange of information: Member States shall introduce coordinated cooperation and mutual assistance between national competent authorities, tax authorities and other law enforcement bodies, such as the European Public Prosecutor's Office (EPPO) to detect and prosecute illegal withholding tax reclaim schemes – the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) shall regularly monitor the risk for cum-cum and cum-ex in the Union to ensure the integrity of the internal market.

Parliament's changes will now be submitted to the Council which must consider them before it finally adopts the legislation; however, the Council and Commission are not bound to adopt any of the Parliament's proposals. Unanimity will be required in the Council to adopt the Directive.

EC communication on pre-enlargement reforms and policy reviews

Sticking with the thorny subject of unanimity on EU tax matters, on 20 March 2024 the EC adopted a Communication as part of an ongoing discussion about internal reforms needed to prepare for the accession of additional European countries to the EU ('pre-enlargement reforms').

The EU currently recognises Albania, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia, Ukraine and Turkey as candidate countries for EU membership. The Communication recognises that in a larger Union, reaching an agreement will be even more challenging due to the unanimity requirement in tax matters in the Council. Readers may remember this was a high profile issue in 2022, with Poland and Hungary exercising their veto's in the negotiations to finalise the EU Minimum Tax Directive.

The EC is therefore inviting the other institutions to consider introducing qualified majority voting (QMV) for the legislative process in EU tax matters. The Communication refers to the 'passerelle' clauses in the EU Treaties. These clauses allow the decision-making process to switch from unanimity to QMV in the Council in cases where the clause is unanimously activated by a decision from the Council of the EU or the European Council.

To protect the interests of individual Member States, the Communication proposes that activating the passerelle clause could be accompanied by European Council conclusions. These would act as a safeguard to allow one or more Member States to invoke exceptional national interest grounds to continue discussions to reach a satisfactory conclusion, or to require the European Council to deliberate on the matter.

QMV for tax is not a new debate: the EC has been consistently supporting the move since the 2002 Convention on the Future of Europe. Ironically, since agreement to such a change would itself require unanimity, it seems that QMV on tax will remain stuck on the EU's wish list for the foreseeable future. The practical alternative to achieve majority voting may be to frame files as non-tax Directives wherever possible – as was the case with the EU Public County-by-Country reporting Directive, which was introduced as an amendment to the Accounting Directive meaning that QMV, rather than unanimity, applied.

Australia: new public disclosure of tax residency requirements

As part of the Australian government's continued efforts to enhance public tax reporting transparency, the legislation containing new public disclosure requirements for large MNEs received royal assent on 8 April 2024.

Under the rules, Australian public companies (broadly defined as a company other than a proprietary company or corporate collective investment vehicle) that are required to prepare consolidated financial statements, must report subsidiary information including tax residence, in their annual financial statements.

In addition, the existing directors' declaration under the Corporations Act 2001 will be expanded to include a declaration that the disclosures are in their opinion 'true and correct' at the end of the financial year. Note that a 'true and correct' declaration is a more onerous requirement than the requirement that financial statements give a 'true and fair' view which would otherwise apply. The new requirement will apply to financial statements prepared by public companies for each financial year commencing on or after 1 July 2023.

Determining a subsidiary's tax residence will require judgement and an application of the tax laws of at least one country (and potentially multiple countries). Australian public companies will now need to work with their auditors to determine what type of audit report can be obtained for 30 June 2024 to meet these new requirements, and the level of support required to meet this more onerous standard of 'true and correct'.

Pillar Two national implementation update

Finally, the obligatory round up of Pillar Two implementation updates. On 21 March 2024, Australia released its draft legislation, which broadly follows the OECD Model Rules. The Income Inclusion Rule (IIR) and Domestic Minimum Top-up Tax (DMTT) would apply for periods starting on or after 1 January 2024, and the Undertaxed Profits Rule (UTPR) would apply 12 months later from 1 January 2025. While the rules include charging and framework provisions for the UTPR, no further details have been released. The Treasury has also published a consultation paper in relation to the interaction of the new rules with existing Australian tax law such as the hybrid mismatch and CFC rules.

On 15 March 2024, the UAE launched a public consultation on implementation of Pillar Two, which closed on 10 April 2024.

Meanwhile in Europe, on 6 March 2024 Belgium released draft amendments to its Pillar Two rules that were published on 28 December 2023. Among other things, the proposed amendments incorporate the July and December 2023 OECD Administrative Guidance, including the transitional UTPR and permanent QDMTT safe harbours. The changes would apply for periods starting from 31 December 2023. On 19 March 2024, Sweden released similar draft amendments to its legislation that was published on 14 December 2023. Public comments on the draft bill are requested by 20 May 2024. Continuing the theme, on 28 March 2024 Liechtenstein published further guidance on its Pillar Two rules, which confirmed the legislation must be interpreted and applied in accordance with OECD Commentary and Administrative Guidance. On 14 March 2024, Cyprus issued draft legislation. This introduces an additional set of tax rules to be applied alongside the existing corporate income tax (currently at a rate of 12.5%) and other relevant taxes for MNEs in scope. ■

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- EU withholding tax: will things move FASTER? (P Radcliffe, R Devisscher & R Bashir, 26.7.23)
- Multinational top-up tax: an overview (M Mortimer & T Ruiz, 20.9.23)