Briefing

International review for October

Speed read

The US Treasury has released proposed regulations on the Corporate Alternative Minimum Tax that will do little to alleviate taxpayer concerns about the complexity of the regime. In Europe, the CJEU has annulled the finding of unlawful State aid in the UK Finco case and in a separate case has ruled that Dutch interest deduction limitation anti-profit shifting rule is permissible under EU law. The Irish Finance Bill 2024 seeks to provide administrative simplification and certainty for businesses via a new participation exemption for dividends. The European Commission has updated its list of non-cooperative tax jurisdictions, meanwhile the OECD has taken steps to progress Amount B of Pillar One by publication of a Model Competent Authority Agreement. Finally, we look at Pillar Two news from Switzerland, the US and Brazil.

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US: proposed regulations on Corporate Alternative Minimum Tax

On 12 September 2024 the US Treasury Department and IRS released REG-112129-23 (proposed regulations) on the Corporate Alternative Minimum Tax (CAMT) created by the Inflation Reduction Act 2022. As a reminder, CAMT generally imposes a 15% minimum tax on the adjusted financial statement income (AFSI) of 'applicable corporations': those who are part of groups whose three-year average annual AFSI exceeds $1bn.

A comprehensive analysis of the proposed regulations is outside the scope of this article. However readers should be aware that this latest tranche of CAMT guidance does little to alleviate taxpayer concerns about the complexity of the regime. Multiple provisions in the proposed regulations cause enormous administrative and compliance burdens, lend themselves to varied interpretations, and leave many issues unclear. Furthermore a number of the rules could increase the number of applicable corporations or increase, perhaps materially, an existing applicable corporation's CAMT liability. These results may arise in situations that would be surprising to both the Congressional drafters of CAMT and taxpayers.

The preamble to the proposed regulations includes at least 40 requests for comments. Comments must be submitted within 90 days after the date of publication in the Federal Register (i.e. by 12 December 2024). Taxpayers should carefully study the proposed regulation package and consider making representations by this deadline.

CJEU annuls finding of unlawful State aid in UK Finco case

In my April 2024 article (*Tax Journal*, 25 April 2024), I reported on the Advocate General (AG) of the CJEU opinion that the European Commission's (EC) finding of State aid should be annulled in joined Cases C-555/22, C-556/22 and C-564/22 (also known as the UK FinCo case). On 19 September 2024, the CJEU followed the opinion of the AG and annulled the EC's decision.

By way of reminder, in April 2019 the EC ruled that the UK Controlled Foreign Company (CFC) group financing exemption (FinCo) regime constituted State aid incompatible with the internal market and had been unlawfully put into effect by the UK for the period from 1 January 2013 to 31 December 2018. The UK CFC FinCo rules were changed from 1 January 2019 and the EC confirmed it considered the amended rules to be State aid compliant.

The UK government and several affected taxpayers applied to the General Court of the European Union (General Court) for the EC's State aid ruling to be annulled for pre-2019 periods. In June 2022, the General Court upheld the EC's ruling. An appeal against this decision was lodged with the CJEU.

The CJEU has found that the EC and the General Court erred in law in finding that the rules applicable to CFCs constituted the appropriate reference framework for examining whether a selected advantage had been conferred. Rather, as argued by the UK, the reference framework is the general corporation tax system, which is largely based on the principle of territoriality, of which the rules applicable to CFCs form part. The rules applicable to CFCs are not severable from the UK's general corporation tax system and therefore cannot constitute the relevant reference framework.

A number of multinationals will note this decision with interest, having received charging notices and paid sums over to HMRC in respect of the purported State aid. It will now be for the UK government to bring forward legislation (by way of regulations) to put those affected by the legislation that clawed back the purported State aid into the position they would have otherwise been in.

CJEU decides Dutch anti-abuse case

On 4 October 2024, the CJEU rendered its decision in Case C-585/22 (the Dutch anti-abuse case). The case concerns a referral from the Dutch Supreme Court to the CJEU regarding the compatibility with EU law of the Dutch interest deduction limitation anti-profit shifting rule.

The CJEU has held that the rule under dispute is permissible under EU law. It found that, whilst the Dutch interest limitation rule represents a de facto restriction on the freedom of establishment, this restriction is justified as it aims to combat tax fraud and evasion.

This ruling is in line with the March 2024 opinion of the AG. On the question of whether loans contracted at arm's length could still be considered purely artificial or fictitious arrangements, the AG noted his view departed from the CJEU's ruling in Case C-484/19 (concerning the Swedish interest deduction limitation rules).

The CJEU did not follow the AG's advice to revisit its judgement in Case C-484/19. Instead, the CJEU provided a nuanced interpretation of Case C-484/19, by taking the view that its decision in that case cannot be read as inferring that the mere fact that a loan follows the terms that independent companies would agree upon automatically rules out the existence of a wholly artificial arrangement.

It is now clear that the deduction of interest can be denied in full, if a loan would never have entered into existence in an at arm's length situation, notwithstanding the arm's length interest rate.

In light of the concept of wholly artificial arrangement, the CJEU reiterated their abuse of law principles from settled case law, among which:

- a restriction of the freedom of establishment can only be justified by combatting tax fraud and tax evasion, if such restriction prevents conduct creating purely artificial arrangements, devoid of economic reality, with the aim of evading the tax normally due on profits generated by activities carried out on national territory; and
- the principle of the prohibition of abusive tax practices also applies, when the pursuit of a tax advantage constitutes the essential aim of the transactions concerned.

The fact that a taxpayer pursues the most advantageous tax regime, cannot, as such, give rise to a general presumption of fraud or abuse; however a taxpayer cannot benefit from a right or advantage arising from EU law where the transaction concerned is purely artificial in economic terms and is intended to evade the influence of the legislation of the Member State concerned.

Irish Budget and Finance Bill 2024

On 1 October 2024, the Irish Minister for Finance introduced the 2025 Budget, with further details included in the Finance Bill published on 10 October 2024. Of particular interest to businesses will be the introduction of a participation exemption for dividends, providing much-needed administrative simplification and greater certainty for businesses.

Currently, distributions from a company which is not Irish tax resident are taxable in Ireland. Under certain complex tax rules, taxation relief may be available for such distributions in the form of a credit for foreign tax. The new measures will exempt foreign distributions from Irish corporation tax where certain conditions are met, negating the necessity for a parent company to claim foreign tax relief in respect of relevant distributions received from a relevant subsidiary. The exemption will apply to distributions received on or after 1 January 2025 from companies resident for tax purposes in the EU/EEA, or jurisdictions with which Ireland has a double tax agreement.

Other business tax measures announced include a corporate tax deduction for listing expenses of up to €1m relating to the first listing on an Irish/EEA stock exchange; extending the existing bank levy for an additional year; increasing the first-year payment threshold under the R&D regime from €50,000 to €75,000 and reducing the CO_2 emission thresholds for capital allowances on business cars effective 1 January 2027.

EU: updated list of non-cooperative tax jurisdictions

On 8 October 2024, the EC announced that EU Member States have updated the list of non-cooperative tax jurisdictions, removing one jurisdiction, Antigua and Barbuda, from Annex I (the so-called 'blacklist') and two jurisdictions, Armenia and Malysia, from Annex II (the 'grey list'). However, Antigua and Barbuda will remain on Annex II (the 'grey list'), pending the results of review.

The update reduces the number of countries on Annex I to 11 (American Samoa, Anguilla, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, US Virgin Islands, and Vanuatu) and on Annex II to nine (Antigua and Barbuda, Belize, the British Virgin Islands, Costa Rica, Curaçao, Eswatini, Seychelles, Turkey, and Vietnam).

OECD: MCAA on application of Amount B

On 26 September 2024, the OECD's Inclusive Framework published a Model Competent Authority Agreement (MCAA) on the application of Amount B of Pillar One, the OECD's recommended simplified and streamlined approach to transfer pricing for 'baseline' marketing and distribution activities. The MCCA is intended to assist countries in resolving potential double taxation in connection with the application of Amount B when there is a bilateral tax treaty in effect. In addition, the MCAA may be customised via bilateral negotiations in particular cases, and it provides a mechanism for the Contracting States to agree amendments from time to time.

Although the publication of the MCAA demonstrates that the OECD's continued commitment to implement Amount B, the optionality of Amount B continues to create complexity and uncertainty over the ultimate success of the initiative. In addition, although Amount A and B of Pillar One are not formally intertwined, some countries may view them as such and are therefore awaiting further developments on Amount A before committing themselves to Amount B.

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Pillar Two implementation update

On 4 September 2024, Switzerland announced that it will implement an income inclusion rule effective 1 January 2025 to complement the domestic minimum top-up tax that was introduced on 1 January 2024. The Federal Council also announced that it will not be implementing an undertaxed payments rule (UTPR) for the time being.

In a different type of Pillar Two news, on 17 September 2024, Republican members of the US House of Representatives Ways and Means Committee sent a letter to the OECD Secretary-General expressing their opposition to Pillar Two. The letter states: 'The United States enacted a strong global minimum tax seven years ago, and the U.S. Congress will not replace that proven policy with the version pieced together in the OECD global tax deal ... Should foreign governments seek to target Americans through the [UTPR] or other mechanisms in the OECD global tax deal, we will be forced to pursue countermeasures'. As I said last month (*Tax Journal*, 26 September), we can expect to hear more said on US tax policy as we draw closer to the presidential election on 5 November 2024. Ultimately, the future of Pillar Two in the US will rest on the political make up of Congress, rather than on which party's candidate wins the White House.

Finally, on 3 October 2024, Brazil issued Provisional Measure 1,262, introducing an additional Social Contribution on Profits to establish a Qualified Domestic Minimum Top-up Tax in Brazil with effect from 2025. ■

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