

## Editorial

Welcome to the latest issue of Moore Stephens *European Tax Brief*. This newsletter summarises important recent tax developments of international interest taking place in Europe and in other countries within the Moore Stephens European Region. If you would like more information on any of the items featured or would like to discuss their implications for you or your business, please contact the person named under the item(s). The material discussed in this

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## Denmark

### Denmark must allow relief for final losses of foreign PE

The Court of Justice of the European Union (CJEU) has held that Denmark must allow tax relief for the final losses of a closed Finnish permanent establishment under the freedom of establishment article in the Treaty on the Functioning of the European Union. In so doing, it confirmed the continuing validity of the 2006 Marks & Spencer decision and its applicability to permanent establishments.

The case – *A/S Bevola, Jens W Trock ApS v Skatteministeriet* (C-650/16) – concerned the losses of a Finnish permanent establishment (PE) of the Danish company *A/S Bevola*, which is a member of a group whose ultimate parent is *Jens W Trock ApS*, another Danish company. The Finnish PE was closed in 2009 with unrelieved tax losses in Finland, which *Bevola* claimed against its own income taxable in Denmark. Under Danish law, there was no tax relief in Denmark available on those losses, because neither profits nor losses of a foreign PE are recognised in Denmark unless the group opts for joint international taxation. As the group had not so opted, the claim was rejected. *Bevola* appealed on the grounds that article 49 TFEU (Treaty on the Functioning of the European Union), which guarantees the freedom of establishment, as interpreted by the CJEU in *Marks & Spencer v Halsey* (Case C-446/03), required relief to be given for the PE's losses as there was no longer any possibility that they might be relieved in Finland. This issue was referred to the CJEU.

In its judgment, the CJEU first observed that in a situation where a Danish company could not deduct in Denmark the losses of a foreign PE that could no longer be deducted in the PE's home state, whereas the Danish company would be in a position to deduct the losses of a Danish PE, constituted a less favourable treatment. This situation was not mitigated by the potential availability of international joint taxation, since the conditions for opting for this system were extremely strict. A Danish company's exercise of its freedom of establishment was therefore discouraged. The Court then went on to rule that the situation where a Danish company had a foreign PE whose losses could no longer be deducted in the PE's home state was objectively comparable to that of a Danish company with a domestic PE, from the point of view of the objective of preventing the double deduction of losses, which was one of the two objectives of the Danish legislation in this area (the other being to prevent double taxation).



The CJEU finally held that although the difference in treatment could be justified by the need to ensure the balanced allocation of taxing powers among Member States and the need to preserve the cohesion of the tax system, the Danish legislation went beyond what was necessary to achieve those objectives in a situation where the losses in question were 'definitive' (i.e. final, as the PE had been closed down), as established by the judgment in *Marks & Spencer*, i.e. there was no longer any possibility of their being relieved in the PE's home state. Although *Marks & Spencer* had concerned the losses of subsidiaries, the principle was applicable by analogy to the losses of permanent establishments.

Accordingly, in the fact pattern of the *Bevola* case, the Danish legislation was in breach of the freedom of establishment.

Although the judgment was specific to the Danish law on PE losses, it is important not only in reaffirming the continuing validity of the *Marks & Spencer* judgment but also clarifying that it is applicable to the losses of permanent establishments.

Danish companies that are members of a tax group along with foreign PEs of resident companies should therefore consider applying for their assessments to be reopened where the losses of the foreign PEs have not been recognised in similar circumstances.

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## Denmark must allow losses of Danish PE of a foreign subsidiary

In another judgment of the CJEU in broadly similar circumstances to *Bevola* (see above), it has been held that Denmark must allow the loss of a Danish permanent establishment (PE) of a Swedish subsidiary of a Danish parent company in the group (joint) taxation of the Danish parent, where it was no longer possible for the loss to be deducted in Sweden.

In *NN A/S v Skatteministeriet* (Case C-28/17), a Danish parent company (NN) owned two Swedish subsidiaries, both of which had a PE in Denmark. One of the PEs was transferred to the other subsidiary, with the result that only one PE

remained. In Sweden, the group chose for the transaction to be treated as a tax-free restructuring. As a consequence, the transfer of the goodwill of the merged branch could not be written off in Sweden. In Denmark, however, the transaction was treated as a transfer of assets at market value, which allowed the acquisition of the goodwill to be written off, resulting in a tax loss. The Danish tax authorities refused to allow relief for the loss. The group appealed on the grounds that denying relief for the loss in Denmark where it could not be deducted in Sweden was a breach of the freedom of establishment.

Along the lines of its judgment in *Bevola*, the CJEU first determined that there was an unfavourable difference of treatment, since a Danish company with a Danish PE would have been able to deduct the loss from its profits, hence there was a *prima facie* breach of the freedom of establishment. Furthermore, since the Danish provisions were intended to prevent the double deduction of losses, the situation of a Danish PE of a non-resident company was objectively comparable to that of a Danish PE of a resident company. Finally, although the difference in treatment was justifiable by the need to prevent double deduction of losses, the Danish rules went beyond what was necessary to achieve this objective, because they prevented a deduction even where a deduction was no longer possible in the home state of the non-resident company.

Danish companies that are members of a tax group along with the Danish PEs of non-resident companies should therefore consider applying for their assessments to be reopened where the losses of the Danish PEs have not been recognised in similar circumstances.



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## European Union

### EU will require intermediaries to report 'aggressive' cross-border tax-planning arrangements

The European Union's Directive on the mandatory exchange of information on tax matters has been amended to impose new transparency rules for 'intermediaries' that design or sell what the European Union considers to be potentially harmful or aggressive cross-border tax-planning arrangements.

Intermediaries are defined as firms or persons, such as consulting firms, banks, lawyers, tax advisers, accountants etc advising clients on cross-border transactions. The definition may also

include professionals involved in managing the implementation of transactions, such as providers of trust services or family offices.

The Directive (2011/16/EU), often referred to as the Directive on Administrative Cooperation (abbreviated to 'DAC') already provides for automatic exchange of tax information between Member States' tax authorities. The latest amendments, made by Directive 2018/822/EU ('DAC6'), now impose a reporting requirement on intermediaries who have been involved in the

design, management and/or implementation of arrangements bearing any one or more of a series of defined hallmarks.

The new rules are the latest step in the European Commission's agenda of tackling what it sees as tax abuse and ensuring 'fairer' taxation.

The new rules are intended to provide tax authorities with information about existing 'potentially aggressive' tax-planning schemes. In this way, it is envisaged that the authorities will be enabled to scrutinise intermediaries' activities and increase their effectiveness in tackling aggressive tax planning.

Intermediaries will have to report any cross-border arrangement that contains one or more of the following characteristics, which might indicate that the arrangement is set up for the purpose of tax avoidance. They must do so within 30 days of the earliest of:

- The day after the arrangements are made available for implementation
- The day after the arrangement is ready for implementation and
- The day when the first step in the implementation has been taken

An arrangement has to be reported if it bears at least one of the hallmarks outlined in DAC6. Examples include arrangements that:

- Involve a cross-border payment that is deductible at source to a recipient resident in a no- or low-tax country
- Involve a jurisdiction with inadequate or weakly enforced anti-money laundering legislation
- Are set up to avoid reporting income as required under EU transparency rules
- Circumvent EU information-exchange requirements for tax rulings

- Have a link between the intermediary's fee and the amount of the tax advantage from the arrangement, provided that the main benefit of the arrangements is to obtain a tax advantage
- Ensure that the same asset benefits from depreciation rules in more than one country
- Enable the same income to benefit from tax relief in more than one jurisdiction or
- Do not respect EU or international transfer-pricing guidelines.

These hallmarks are quite broad, as was the intention, and may include arrangements that have no tax-avoidance motivation. Nevertheless, non-compliance carries with it the risk of substantial penalties, and taxpayers and their advisers must now put in place procedures to track and record a wide range of arrangements that are potentially within the purview of DAC6.

The Member State in which the arrangements are reported must automatically share this information with all other Member States, in a standard format, through a centralised database and on a quarterly basis.

The Commission will have limited access to the information exchanged between Member States, in order to monitor the implementation of the rules.

Member States must implement the Directive before 31 December 2019. The disclosure requirements will apply as from 1 July 2020 (although they potentially cover arrangements implemented from 25 June 2018) and the initial automatic exchange of information between Member States will occur as from 1 October 2020.

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#### **Denmark must allow losses of Danish PE of a foreign subsidiary**

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## France

### Social security contributions on income derived from French real estate



When an individual derives income or capital gains from immovable property in France, such as a house, not only is income tax charged on the income or capital gain but also social security contributions. In 2012, the charge to social security contributions was extended to individuals (non-residents, for example, but also resident expatriates) who are not registered with any French social security regime. The combined rate of the social security charge was 15.5%.

In 2015, however, the Court of Justice of the European Union (CJEU) ruled (in the *De Ruyter* (C-623/13) case, on which we reported in *European Tax Brief*, Vol. 5 Issue 1) that imposing French social security contributions on an individual who was already subject to social security contributions in another EU Member State, an EEA state or Switzerland is contrary to the EU Social Security Regulations (Regulation 1408/71 in this case, but replaced since 2010 by 883/2004). The outcome of the case was that such an individual, even if resident in France for tax purposes (as Mr De Ruyter, a Netherlands national, was) could file a claim for a refund of French social security contributions paid by him between 2012 and 2015 in respect of his income or gains from assets such as immovable property.

A key element of the CJEU's judgment was that the social security contributions in question, however called, had to have

a 'direct and sufficiently relevant link' to the social security system in order to come within the scope of the judgment.

Rather than forgo the revenue from such social security contributions, therefore, the French government instead purported to sever the link between the contributions and the social security system as from 1 January 2016. The Social Security Financing Act for 2016 reassigned these contributions to agencies of the global social assistance system, theoretically out of the scope of the EU Regulation.

As from 1 January 2018, the total combined rate of contributions tax increased to 17.2%.

Not surprisingly, taxpayers have again appealed to the courts on the grounds that even as recast these contributions are still in breach of the EU Regulation on social security.

The Administrative Court of Appeal of Nancy has recently held (in case No 17NC02124) that the new provisions do indeed fail to comply with the applicable EU legislation. The Court decided that the major part (14.05% of the taxable income) of the combined charge, allocated to the *Fonds de solidarité vieillesse* (FSV) (Old Age Solidarity Fund) and to the *Caisse d'amortissement de la dette sociale* (CADES) (Social Security Debt Fund)

should be immediately reimbursed to the taxpayer.

According to the Court, since these contributions finance social security benefits, the contributions fall within EU Regulation 883/2004 and may not therefore be imposed on an individual who is subject to social security contributions in another EEA state or in Switzerland.

As to the remaining part of the social security charge, being 1.45% (now 3.15%) of taxable income, which finances the *Caisse nationale de solidarité pour l'autonomie* (CNSA), the National Solidarity Fund for Independent Living, the Court has referred to the CJEU the question of whether the services rendered by the CNSA, being the independence social allowance (APA) and the disability compensation allowance (PCH) '(...) are illness benefits covering additional expenses of everyday life, in which case they would also be in the scope of Regulation<sup>o</sup>883/2004, or whether they are welfare benefits since the beneficiary's income is taken into account when granting them, and thus outside the scope of the EU Regulation.

We recommend affected taxpayers under a European (or Swiss) social security scheme file a protective claim for a refund of these social contributions paid after 1 January 2017. It is important to note that claims must be filed no later than the end of the second year after the date of payment of the social contributions. For example, concerning income received in 2016, for which social contributions have been paid in 2017, the deadline is 31 December 2018.

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## Germany

### Active income condition for trade-tax dividend exemption unlawful

The Court of Justice of the European Union (CJEU) has held that the additional conditions for exempting third-country dividends from Germany's trade tax (*Gewerbesteuer*) that, inter alia, require the dividends to be derived from active income is in breach of European law.

In addition to corporate income tax, German companies (and unincorporated businesses) also pay a trade tax, the rate of which is determined locally. The rules concerning deductions and exemptions from taxable income differ slightly as between the two taxes. Under the German participation exemption for corporation tax, dividends from foreign countries in which the recipient company holds at least 10% of the shares are exempt to the extent of 95%. For the purposes of trade tax, however, the threshold for exemption is a 15% holding, and the distributing company must additionally derive active rather than passive income (e.g. income from mere investment). There is no such activity requirement for dividends received from German companies.

In *EV v Finanzamt Lippstadt* (Case C-685/16), a German partnership limited by shares received dividends from a wholly owned Australian subsidiary. The tax authorities allowed the exemption from corporation tax but denied the trade-tax exemption for the dividends on the grounds that they were paid out of passive income of the Australian company. One of the German partnership's grounds of appeal was that the additional criteria for the trade-tax exemption were contrary to the free movement of capital guaranteed under article 64 TFEU (Treaty on the Functioning of the European Union). This question was referred to the CJEU.

Unlike the freedom of establishment, the free movement of capital applies vis-à-vis not only other EU Member States but also third countries, such as Australia. An important proviso is, however, that restrictions already in place before 1 January 1994 cannot be challenged, unless they have undergone material change since that date.

Given that the active-income criterion was not applicable to German-source dividends, the CJEU had no difficulty in finding that it and other additional conditions for the trade-tax exemption were indeed a restriction on the free movement of capital.

As to the tax authorities' argument that the restrictions already existed prior to 1 January 1994, the CJEU observed that not only had the participation threshold been raised from 10% to 15% since that date, but the entire system for the taxation of dividends in Germany had changed from an imputation system

to a shareholder-relief system. These changes were fundamental enough, in the Court's view, to render the pre-existing restrictions defence ineffective.

Finally, the CJEU held that the restriction could not be justified on the grounds that it was necessary to prevent abusive tax planning, since taxpayers had no possibility of demonstrating that abuse was not present.

For all these reasons, the additional restrictions imposed on foreign dividends were in breach of the free movement of capital guaranteed under EU law.

Companies and other entities in a similar position to EV should therefore lodge appeals where it is still open to them to do so.

The judgment is unlikely to have much impact outside Germany but is a strong reminder that the free movement of capital is not restricted as between EU Member States and that only minor changes will be overlooked if tax authorities mount the defence that any additional restrictions at issue were already in place before 1994.

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## Transfer-pricing rules not unlawful if there is an opportunity to prove commercial reasons

In another recent judgment on Germany's tax legislation, the CJEU has held that Germany's transfer-pricing rules, which apply only to transactions with foreign related companies are not in breach of the freedom of establishment as long as they provide taxpayers with a viable mechanism to prove the commercial basis for non-arm's length treatment and that the reasons it may advance include its status as a shareholder.

In *Hornbach-Baumarkt AG v Finanzamt Landau* (Case C-382/16), the taxpayer company had two indirectly held Netherlands subsidiaries. The two subsidiaries were in negative equity and in order for them to obtain bank loans, Hornbach had to provide them with letters of comfort, which it did for no charge. The German tax authorities ruled that a company acting at arm's length to the two subsidiaries would have charged them a guarantee fee and accordingly adjusted Hornbach's taxable income by an amount representing the hypothetical fee. Hornbach appealed on the grounds that since no transfer-pricing adjustment would have been made had the subsidiaries been resident in Germany, the rules constituted a restriction on its freedom of establishment. Citing the CJEU judgment in the SGI case (*Société de Gestion Industrielle v Etat belge* (Case C-3611/08)), Hornbach argued the rules were disproportionate as they did not provide for the opportunity to provide

commercial justification in order to defeat the adjustment. The German government countered that although there was no such express provision in the legislation, it was nevertheless open to taxpayers to advance reasons of commerciality.

The CJEU noted that it is established case law that transfer-pricing rules of this nature constituted a restriction on the freedom of establishment but could be justified on the need to ensure the balanced allocation of taxing powers. However, they had to be proportional, i.e. could not go beyond what was necessary to achieve that objective. This in particular required taxpayers to be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction. Furthermore, contrary to the position taken by the German government, that justification had in the present case to include economic reasons resulting from Hornbach's position as a shareholder of the non-resident subsidiary. It was for the German courts to decide whether this requirement had been met.

It remains to be seen how the German courts will rule in this situation.

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## Ireland

### Apple pays disputed tax of EUR 13 000 million



Apple has now paid the Irish Revenue the final instalment of the disputed sum of EUR 13 100 million plus around EUR 1200 million of interest, which the European Commission has ruled was granted by Ireland to Apple by way of unlawful State Aid.

As we have reported in previous issues of *European Tax Brief*, (most recently in Vol. 7 Issue 3), both Apple and the Irish Government dispute the ruling and have appealed, but last year, the Commission brought a case against Ireland to the Court of Justice of the European Union on the grounds that Ireland had taken insufficient steps to recover the tax in question, which Ireland is now requesting be withdrawn.

The payment has been deposited in an escrow account pending final resolution of the appeal.

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## Italy

### Real-time VAT invoices to be mandatory

Starting from 1 January 2019, real-time electronic sales invoice issuance and reporting will be mandatory in Italy. All relevant invoices have to be issued and submitted to the Italian Revenue Agency's e-invoicing platform, Sistema di Interscambio (SdI).

The measure is being extended in 2019 to all resident taxable persons for B2B (business-to-business) and certain B2C (business-to-consumer) domestic supplies. It has been required of B2G (business-to-government) transactions since 2014.

#### Scope of e-invoices starting from Jan 2019

- The requirement applies to resident VAT-registered businesses.
- Non-resident VAT-registered businesses are not obliged to submit live invoices; but they must continue to complete and send the *spesometro* (list of customers and suppliers)
- B2B transactions
- Certain B2C transactions are also to be included but only where an invoice has been requested by the customer. Invoices for a domestic supply of taxable goods or services are included
- Exports and zero-rated EU intra-Community supplies of goods or services are excluded. However, detailed invoice information of foreign sales and purchases will still have to be submitted to the tax authorities as usual with a *spesometro* and/or an EC Sales List where applicable. This is due by the end of the month following the reporting period
- Small taxpayers and those using the flat-rate VAT schemes within the *regime di vantaggio* and *regime forfettario* are excluded.

#### XML-format invoices

XML, PDF, JPG, and TXT e-invoices have to be submitted on a similar basis to that already used with invoices sent to government bodies, based on Italian Decree No 55 or similar EU standards. Invoices will include (optionally) a digital signature. Invoice details within existing ERPs or invoicing platforms will therefore have to be extracted, converted and relayed to SdI. The approved invoice is then transmitted from the SdI to the customer. Any rejected invoice can be corrected and resubmitted within five days of the notification of rejection. The format needs to be in according with the following electronic specification: <http://www.fatturapa.gov.it/export/fatturazione/en/normativa/f-2.htm?l=en>.

#### Penalties

Invoices not submitted through the SdI system attract penalties of between 90% and 180% of the VAT due. However, the tax authorities will initially accept a minor delay given the complexity of sending live invoices to SdI.



#### Next Steps

In the next days or weeks Moore Stephens Professionisti Associati will implement a web platform on which the client can prepare and receive e-invoices or in any case provide a proxy to us in order to deal with the process. Where clients have their own internal software, it could also be possible to receive client invoices in XML for us to send them to SdI. Instructions how to register at the SdI website portal will also be provided where necessary.

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## Luxembourg

### No State Aid for McDonald's from Luxembourg, rules EU

In contrast to recent investigations that have concluded State Aid was unlawfully given by means of 'sweetheart' tax rulings, the European Commission's Competition Directorate announced on 19 September that, in its view, Luxembourg had not provided State Aid in the tax rulings it had given the Luxembourg subsidiary of McDonald's in relation to the treatment of its US branch.

The fact pattern under investigation concerned two rulings from the Luxembourg tax authorities. Under the first ruling, the tax authorities confirmed that the profits of the US branch were exempt from tax in Luxembourg under the

tax treaty with the United States as being allocated to a US permanent establishment, but under the assumption that those profits would be taxable in the United States. The second ruling confirmed the exemption but this time without adding the proviso that the profits had to be taxable in the United States.

As the Commission discovered, it was in fact the case that the profits were also exempt from US tax. An investigation was opened to determine whether the Luxembourg authorities had misapplied the treaty by allowing exemption in Luxembourg without requiring taxation of those profits in the United States.

The Commission has concluded, however, that Luxembourg had applied the treaty correctly and that double non-taxation of the branch profits resulted from a mismatch in the tax legislation of the two countries. The text of the final decision has not yet been released.

It is precisely this sort of mismatch at which the OECD's BEPS initiative is aimed and the Luxembourg government has introduced a draft bill into Parliament to address this type of double non-taxation relating to permanent establishments.

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### Luxembourg must recover State Aid tax relief from Engie

In contrast to the McDonald's decision (see above), the European Commission has confirmed that Luxembourg must recover EUR 120 million of tax from Engie (formerly GDF Suez) as it is judged to have provided unlawful State Aid to the French utilities group by means of favourable tax rulings.

The text of the final decision has not yet been made public, but the Commission's press release in June 2018 stated that two sets of rulings had endorsed two complex financing structures put in place by Engie that treat the same transaction in an inconsistent way, both as debt and as equity. This, according to the

Commission, artificially reduced Engie's tax burden. As a result, Engie paid an effective corporate tax rate of 0.3% on certain profits in Luxembourg for about a decade.

In 2008 and 2010, respectively, Engie implemented two complex intra-group financing structures for two Engie group companies in Luxembourg, Engie LNG Supply and Engie Treasury Management. These involved a triangular transaction between Engie LNG Supply and Engie Treasury Management, respectively, and two other Engie group companies in Luxembourg.

The Commission concluded that Luxembourg's tax treatment of these financing structures did not reflect economic reality. On this basis, the Commission concluded that the tax rulings granted a selective economic advantage to Engie by allowing the group to pay less tax than other companies subject to the same national tax rules.





According to the press release, in 2008, Engie put in place a complex hybrid convertible-loan structure between three Engie group companies. This triangular structure financed Engie LNG Supply's acquisition of Engie's existing gas trading business in Luxembourg. In particular:

- The financing was provided by Engie LNG Holding to Engie LNG Supply via an intermediary.
- Engie LNG Supply treated this transaction as a debt: it made significant deductions from its taxable profits, by way of interest under a loan. These deductions accounted for 99% of Engie LNG Supply's profits
- However, no payments were actually made to the intermediary or Engie LNG Holding
- Instead, these profits were 'parked' in Engie LNG Supply until Engie decided to convert the loan
- At that moment, the intermediary received these 'parked profits' in the form of shares, which they would then pass on to Engie LNG Holding
- Engie LNG Holding then cancelled these shares to receive in cash the profits made by Engie LNG Supply

This structure enabled the treatment of the same financing both as debt (from the perspective of Engie LNG Supply) and as an investment in return for shares (from the perspective of Engie LNG Holding). As a result, LNG Supply paid Luxembourg taxes on about only 1% of its profits. The remaining 99% were not taxed either at the level of LNG Supply or at the level of Engie LNG Holding, which received these profits in the form of shares. As in many other states, income from shares is exempted from taxation in Luxembourg.

In 2010, Engie put in place the same structure between Engie Treasury Management and Compagnie Européenne de Financement (C.E.F). This was also endorsed by Luxembourg under a separate tax ruling.

The Commission concluded that this represented a more favourable treatment than under the standard Luxembourg tax rules, which exempt from taxation income received by a shareholder from its subsidiary, provided that income is in general taxed at the level of the subsidiary.

On this basis, the Commission decided that the tax rulings in question gave a selective advantage to the Engie group which could not be justified and was thus unlawful under EU State Aid rules.

Engie considers that it has fully complied with all the applicable Luxembourg tax legislation and was fully transparent in its dealings with the tax authorities in seeking and obtaining the tax rulings. It will challenge the Commission's decision in the courts.

The Luxembourg government is of the same opinion. It said it had cooperated fully with the Commission, shared its objective of fighting harmful tax avoidance and had taken initiatives designed to prevent situations such as those mentioned by the Commission. However, Engie had been taxed in accordance with tax rules applicable at the relevant time, without selective treatment, so no illegal State Aid was involved.

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## Romania

### Distribution of interim dividends now allowable

Since 1 July 2018, companies may now make distributions of interim dividends out of current-year earnings to their shareholders, following amendments to the Accounting and Companies Acts.

Companies that choose to do so may make quarterly distributions of interim dividends out of a pool of earnings calculated as follows:

- the net profit booked up to the end of the quarter *plus*
- profits carried forward from previous years *plus*
- amounts withdrawn by a reversal of available reserves *less*
- losses carried forward *less*
- amounts used for building up reserves

If at the end of a quarter a company has a profit in the current year, but the whole result including previous years is negative, then the distribution of dividends is permissible only after previous losses are covered.

Companies that opt for dividend distribution during the year have to prepare interim financial statements. These interim financial statements are subject or not to external audit according to the same criteria as apply to annual financial statements. Companies that use IFRS have to perform an inventory of all their assets and to book the inventory results in their accounting.

Payments of interim dividends have to be adjusted based on the annual financial statements. In this respect, if during the year the value of dividends paid to shareholders is greater than the amount that it is permissible to distribute to shareholders according to the annual financial statements, the shareholders concerned must reimburse the excess to the company within the 60 days

following the date when the annual financial statements are approved. Failure to do so will render those shareholders liable to penalty interest payable to the company at a rate at least equivalent to the rate of the National Bank of Romania (NBR) for monetary interest. As at August 2018, this NBR interest is 2.50%. A higher rate of penalty interest could be agreed by a Resolution of the General Meeting of Shareholders or fixed in the company's articles of association.

These amendments are good for small companies (which usually have a sole shareholder and no employees) because of the amounts of money that become available to them to use, but it is a

sensitive issue in the case of companies that are in profit during some part of the year but record an overall loss for the year. As an example, we can mention a company that grants trade discounts, the corresponding expense of which must, according to Romanian law be booked in the financial year in respect of which these discounts are granted and not in the financial year in which these discounts are actually granted. Apart from that, it should be taken into account that there are cases when certain amounts are booked wrongly as revenues instead of deferred incomes, which would cause a distortion in the final result.

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## Russia

### Tax authorities will have right to demand previously professionally privileged auditor documents



From 1 January 2019, the Russian tax authorities will have the right to demand certain client-related documents that have previously been protected by auditor professional privilege.

Hitherto, the tax authorities' right to demand information from third parties in relation to a tax audit has been restricted in the case of documents relating to clients' affairs over which lawyers and auditors could claim were confidential under the doctrine of legal or professional privilege. Under a new law of 29 July 2018, however, auditors' professional privilege will no longer be effective against a demand from the tax authorities on the basis of a decision made by the Head or the Deputy-Head of the Russian Federal Tax Service. Legal professional privilege remains in full force.

As from 1 January 2019, the tax authorities will be entitled to demand that audit firms or individual auditors disclose documents and information received from clients when conducting audits or providing related consultancy services, such as tax, legal and

accounting services. Auditors will be required to keep all documents received from clients for three to five years (three in the case of consultancy and other services; five in the case of auditing services).

It is envisaged that when conducting a filed tax audit, the tax authorities must first try to obtain the necessary documents directly from the taxpayer. If the taxpayer fails to provide the documents, the tax authorities on the basis of a decision made by the Head or Deputy Head of the Tax Service (and not the local tax inspector) will then have the option to demand the necessary information from the taxpayer's auditors. If they do so, they must specify:

- The date of submission of the request
- The deadline for providing the documents
- Information on the consequences of failure to provide the documents within the time allowed
- Information on the auditor and
- A description or other information allowing the auditor to identify the documents in question

The new law also authorises the tax authorities to demand audit documents on the request of competent foreign tax authorities relating to the withholding or transfer of tax, within the parameters of international agreements for the exchange of information. The auditors may inform the relevant client of the foreign authorities' request, unless the request prohibits this.

These measures have been taken in response to the OECD's recommendations resulting from the first review of Russian legislation under the auspices of the Global Forum on Transparency and Information Sharing for Tax Purposes. The fact that the request for information may only come from the highest echelons of the tax authorities indicates that the power is intended to be exercised sparingly; nevertheless, there is concern that it may lead to the forced disclosure of consultations on tax issues the interpretation of which is disputed or open to doubt.

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## Switzerland

### Parliament approves revised corporate-tax reform package

On 28 September, the Swiss parliament approved a final draft of the tax reform package formerly known as Tax Proposal 17, on which we previously reported in *European Tax Brief*, Vol. 7, Issue 3 (October 2017). The package involves the abolition of several preferential tax régimes (the régimes for holding companies, domiciliary companies and finance branches) and their replacement at the cantonal level by internationally acceptable measures, such as a patent box, a super-deduction for research and development expenditure, a notional-interest deduction, relief for net worth tax and reductions in the corporate income tax rate. The patent box, under which net profits from domestic and foreign patents and similar IP are to be taxed separately at a rate up to 90% lower than the standard rate of corporate income tax, are to be mandatory, whereas most other measures are optional. The overall relief provided by the patent box, the R&D super-deduction and the notional-interest deduction are to be limited to 70%.

The decision to increase the cantonal share of federal direct tax from 17% to 21.2% will allow the cantons scope to cut their rates of corporate income tax to remain competitive after the loss of the preferential régimes; the majority are likely to reduce their rates so as to keep the combined federal and cantonal rate to between 12% and 18%.

Although the package has the support of most political parties and the business community, some parties have called for a referendum to be held. If the necessary signatures are collected, the package will be put to a referendum in the first half of 2019. If there is no referendum, the measures will be introduced gradually in 2019 and 2020.

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## United Kingdom

### Foreign investors will pay tax on capital gains on disposals of UK property interests

Legislation published in draft for inclusion in the forthcoming Finance Bill will bring foreign investors disposing of interests in UK commercial property into the charge to tax on capital gains as from April 2019, as first announced in the November 2017 Budget speech.

Currently, the basic rule is that non-residents are not liable to tax on capital gains unless they have a permanent establishment in the United Kingdom. However, since April 2015, by way of exception, non-residents (both individuals and closely held companies) disposing of UK residential-property interests have been subject to non-resident capital gains tax ('NRCGT'), but only if the property was let on a commercial basis as part of a UK property business. Furthermore, since April 2013, high-value UK residential property (by which is now meant property valued at more than GBP 500 000) held by a 'non-natural person' (a company, a collective investment scheme or a partnership including a company) has been charged to the annual tax on enveloped dwellings (ATED) and capital gains arising to a non-natural person (whether resident or non-resident) from the disposal of property that has been within the ATED régime ('ATED-related gains') have been subject to capital gains tax. Finally, a non-resident company, with or without a UK permanent establishment, has since July 2016 been subject to corporation tax on profits from dealing in or developing UK land.

Under the new draft rules, non-residents (individuals and companies, including diversely held companies) will be chargeable to CGT or corporation tax, as the case may be, on their gains from disposals of all UK property (whether residential or commercial) and interests in 'property-rich' entities. The rules will apply to gains arising from April 2019 only.

Interests in 'property-rich' entities will be subject to the new rules where 75% or more of the gross asset value of the entity derives from UK land and the non-resident making the disposal has held (with or without connected persons) a direct or indirect interest of 25% or more in the entity at any point in the two years immediately preceding the disposal (unless it was held for an insignificant amount of time). Where all of an entity's land (or all of it except an insignificant amount) is used for trading purposes, the entity will not be treated as deriving 75% or more of its value from UK land for this purpose.

As a corollary to the all-inclusive new rule, the complex provisions on ATED-related gains will be abolished, but ATED itself (which effectively functions as a property tax) will continue in force.

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## Currency table

For ease of comparison, we reproduce below exchange rates against the euro and the US dollar of the various currencies mentioned in this newsletter. The rates are quoted as at 25 October 2018 and are for illustrative purposes only.

Currency	Equivalent in euros (EUR)	Equivalent in US dollars (USD)
Euro (EUR)	1.0000	1.1196
Pound sterling (GBP)	1.1371	1.3048
Romanian leu (RON)	0.2184	0.2445

Up-to-the-minute exchange rates can be obtained from a variety of free internet sources (e.g. <http://www.oanda.com/currency/converter>).

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