

## Recent Trends: Exit Tax

### I TRENDS

The Netherlands' proposal for a peculiar exit tax<sup>1</sup> and the (in)congruency with its highly tax competitive image has caused surprise in Europe. It is a proposal for an exit tax on worldwide profits, including hidden reserves and dividends, to be applied as a withholding tax when the incoming state does not tax dividends. It also covers gains accrued from restructuring operations and is limited to companies with a turnover of EUR 750 billion, therefore, allegedly targeting specific Dutch companies.

Submitted to consultation, this proposal may well be incompatible with the fundamental freedoms under the Treaty on the Functioning of the European Union (TFEU) due to its discriminatory scope. This is so even if it is possible for Member States to enact measures going beyond Article 5 of the EU Anti-Tax Avoidance Directive (ATAD)<sup>2</sup> (as the ATAD contains *de minimis* rules).

The Netherlands' afore-mentioned proposal is an example of the waves affecting national tax policy options in 2020. Struck by the unexpected pandemic, public decision-makers are beginning to address the challenge of spending more and finding ways to raise tax revenue in sectors or companies that are not overly affected by the economic crisis.

Articles published in Intertax 2020 have reflected the ongoing tax debates and policies in the international, European, and other regional scenes: Base Erosion and Profit Shifting (BEPS) 2.0, the role of regulatory taxes, Coronavirus disease 2019 (COVID-19) and tax measures, implementation of BEPS 1.0, and tax transparency, among others.

### 2 IN THIS ISSUE

In this issue 12, the reader may find two articles on the interplay between international and EU tax law. Both

focus on the concept of beneficial ownership in international law and in EU law, taking as an example the Danish cases on interest decided by the Court of Justice of the European Union (CJEU).<sup>3</sup> Their perspectives are different and complementary.

Carla de Pietro's article (*Beneficial Ownership, Tax Abuse and Legal Pluralism: An Analysis in Light of the CJEU's Judgment Concerning the Danish Cases on Interest*) focuses on the need for coordination between international tax treaty law and European Union (EU) tax law by addressing the relationship between these two systems. The author departs from the premise that conflicts may arise between different legal systems, causing a problem for subjects operating under more than one legal system at the same time. She takes as an example the concept of beneficial owner and claims that the judgment of the Court of Justice concerning the Danish cases on interest<sup>4</sup> illustrates discrepancies between EU tax law and international tax treaty law.

The author proposes that coordination involves institutional and non-institutional subjects being engaged in a process intending to find suitable solutions at the level of the EU and international systems.

Jeroen J.M. Janssen and Mónica Sada Garibay (*Abuse and the Beneficial Owner Concept*) examine the differences between the OECD beneficial owner concept and the EU concept as determined by the CJEU in the Danish cases and being recently interpreted in the EU as an anti-abuse instrument. The authors analyse the implications of both approaches for recipients, taking as examples the parties to (secured) financial transactions, limited recourse loans, or prescheduled repayment schemes in private equity structures.

They conclude that beneficial ownership under international and EU tax law are interpreted differently and that the more 'economic' approach of the CJEU in respect of the beneficial owner concept leads to legal uncertainty in bona fide transactions.

### Notes

<sup>1</sup> Groenlinks, *GroenLinks lanceert wet tegen belastingontwijking*, (10 July 2020), <https://groenlinks.nl/nieuws/groenlinks-lanceert-wet-tegen-belastingontwijking> (accessed 2 Sept. 2020).

<sup>2</sup> Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (19 July 2016).

<sup>3</sup> CJEU, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*, ECLI:EU:C:2019:134.

<sup>4</sup> *N Luxembourg 1* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 3.

In this issue, the reader may also find a country note on *the Implementation of BEPS Recommendations in The New Advanced Pricing Agreements (APA) and Transfer Pricing Rules* (by Melanie Astuti); a case note on international trade and VAT by Anne Janssen; and two literature reviews: one regarding the *Critical Theory of International Tax Law* (Tarcisio Magalhães) reviewed by

Marcus Livio Gomes and the other on '*Taxation of Foreign-Source Income of Resident Individuals: A Structural Enforcement through Automatic Exchange of Tax Information*' (Niels Diepvens) reviewed by Vokhid Urinov.

Ana Paula Dourado  
Editor-in-chief