



UPCOMING EVENTS & LIKELY DATES

December 2017
NEWSLETTER

2017

Q 3	FII (dividends from controlled interests)	Supreme Court Permission to Appeal
DECEMBER	Fidelity Funds (WHT on dividends to non-resident UCITS)	Opinion of the Advocate General

2018

FEBRUARY	Prudential (Portfolio Dividends)	Supreme Court Hearing
MARCH	Danish Beneficial Ownership cases	Opinion of the Advocate General
JULY	BAT Industries (45% WHT on Restitution Interest)	Upper Tribunal Appeal
Q 2	Test Claimants in the CFC and Dividend GLO (Jurisdiction for Tax Claims)	High Court Hearing

Brexit: EU Council Guidelines – moving to phase two of the negotiations

Cristiana Bulbuc

Today, the EU Council has concluded that sufficient progress on the first phase of the Brexit talks has been made, which allows for the negotiations to move on to discussing UK's future relationship with the bloc.

The Council has also adopted a set of guidelines, four pages long, listing the terms for a transition period, and a rough timetable for the next few months. In the first instance, the second phase of the negotiations will be dominated by discussions on the transition period, during which the UK must abide by and comply with all EU laws, including continuing to be under the ambit of the jurisdiction of the EU Court of Justice, till circa 2021, but it will not be involved in any decision-making process of the EU bodies.

In the Guidelines, the Council reiterates that an agreement on a future relationship can only be finalised and concluded once the UK has become a third country and noted UK's stated intention to no longer participate in the Customs Union and the Single Market after the end of the transition period.

The Council called on the EU Commission to put forward appropriate recommendations and on the Council to adopt additional negotiating directives on transitional arrangements in January 2018. Also, the Council added that it will adopt additional guidelines in March 2018, particularly in relation to the framework for the future relationship between EU and UK.

C-382/16 Hornbach-Baumarkt – AG Opinion – Freedom of establishment and transfer pricing

Ramsey Chagoury

The German tax authorities carried out a tax assessment on Hornbach and found that the free of charge comfort letters the company sent to banks and creditors, containing a guarantee for the benefit of its foreign subsidiaries from which it did not receive any remuneration, had not been granted on arm's length terms, thereby increasing Hornbach's business tax. Hornbach challenged the assessment before the referring court, arguing that German legislation providing for the adjustment of taxation of transactions between related companies to reflect arm's length terms violates the EU Treaty provisions on freedom of establishment. The referring court asked whether the relevant rule under German law is compatible with the EU Treaty provisions on freedom of establishment, but more specifically, whether a Member State can prevent companies from shifting profits out of its jurisdiction by requiring income to be declared on the basis of 'arm's length conditions'? And can it impose such a requirement only in relation to cross-border transactions and not domestic ones without falling foul of the Treaty rules on freedom of establishment?

The Advocate General answered yes to both questions and concluded that the German transfer pricing legislation did not violate the EU concept of freedom of establishment, and even if it were a restriction on the freedom of establishment it was justified on the basis of the preservation of the balanced allocation of powers. The Advocate General also considered the discrimination approach and the restriction approach when analysing situations of alleged infringement of freedom of establishment in the area of direct taxation, and invited the CJEU to articulate which approach applies and said that he favours the discrimination approach. If the CJEU adopts the discrimination approach, then the analysis should stop at the stage of comparability.

JHA BLOG

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- Simon Whitehead
- Paul Farmer
- Michael Anderson
- Ray McCann
- Philippe Freund
- Helen Mc Ghee
- Ibar Mc Carthy
- Cristiana Bulbuc

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