UPDATE

Luxembourg Confirms Gibraltar Exclusion from the Benefit of the EU Parent Subsidiary Directive

The Luxembourg tax authorities have confirmed, via a new tax circular[1], the exclusion of Gibraltar companies from the benefits of the EU Parent Subsidiary Directive ("PSD") under Luxembourg domestic law as from 1 January 2021[2]. The circular confirms the Luxembourg tax authorities' administrative tolerance which allows Luxembourg companies with a Gibraltar company as a parent or subsidiary to benefit from the PSD for the remainder of 2020, but confirms that this will not be the case as of 1 January 2021.

The position as of 1 January 2021 is in line with a recent European Court of Justice ("ECJ") decision[3] which ruled that the PSD concepts of "companies incorporated in accordance with the law of the UK" and of "corporation tax in the UK" do not apply to companies incorporated in Gibraltar and which are subject to Gibraltar corporation tax.

As of 1 January 2021, the Luxembourg participation exemption for dividends received or capital gains from a company listed in Article 2 of PSD (i.e., EU tax resident subsidiaries) will no longer apply to Gibraltar companies. However, dividends or capital gains derived from a Gibraltar company by an eligible Luxembourg company could still, under certain conditions, be exempt if the Gibraltar company is subject to income tax comparable to Luxembourg corporate income tax.

Similarly, for net wealth tax purposes, shares in a Gibraltar company will no longer benefit from the tax exemption applicable to companies covered by Article 2 of the PSD. However, they will remain eligible to the exemption applicable, under conditions, to capital companies subject to income tax comparable to Luxembourg corporate income tax.

Finally, dividends distributed by a Luxembourg company to its Gibraltar parent company will no longer benefit from the withholding tax exemption regime in 2021, even if the Gibraltar parent company is subject to income tax comparable to Luxembourg corporate income tax as this exemption requires, in addition, that the parent company is a resident in a country which has a tax treaty with Luxembourg, which is currently not the case for Gibraltar.

For assistance on any of the above matters, please liaise with your usual Maples Group contact or the below.

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[1] Grand Ducal Circular "L.I.R. n° 147/2, 166/2 et Eval. n° 63, 1 December 2020

[2] EU Parent Subsidiary Directive (2011/96/EU)

[3] ECJ, Case C-458/18, 2 April 2020

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