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# EU Tax Policy Report

## July – December 2019

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CFE's EU Tax Policy Report provides a detailed analysis of primary tax policy developments at EU level of interest to European tax advisers. It also includes an overview of relevant CJEU case-law European Commission decisions covering the first half of 2019.

# Highlights

In the second semester of 2019, the Brussels-bubble was focused on the the announcement and subsequent hearings of new Commissioners designated by President Ursula von der Leyen after the EU elections, and the EU institutions were in a transition period, meaning there were fewer policy developments than usual from the EU institutions. CFE Tax Advisers Europe took the opportunity to review the tax and professional affairs policy issues it identifies as significant concerning taxation and the future whilst EU institutions were considering the policy priorities for the next mandate, and published an Opinion Statement that sets out the policy priorities of European tax advisers for the 2019 – 2024 mandate of the EU Institutions.

The elected European Commission/College of Commissioners led by President Ursula von der Leyen took over from Jean Claude Juncker on 1 December 2019, becoming the first woman to lead the EU 'government'. As concerns tax priorities Ms von der Leyen has committed to introducing a carbon border tax, to achieve fair taxation of "big tech companies" as a "priority" by working "hard to ensure the proposals [for an EU digital tax] currently on the table are turned into law" on the basis that "by the end of 2020 [if] there is still no global solution for a fair digital tax, the EU should act alone." Ms von der Leyen has also vowed to "make use of the clauses in the Treaties that allow proposals on taxation to be adopted by co-decision and decided by qualified majority voting in the Council" for progressing a European common consolidated corporate tax base and in the fight against tax fraud. A New Green Deal for Europe that includes introducing Carbon Border Tax, revised Energy Taxation Directive and extension of the European Emissions Trading System (ETS) to reduce the airline carbon allowances is also a high priority for the new Commission.

As to the files to watch in the upcoming semester, Croatia, who hold the Presidency of the Council of the European Union from 1 January 2020 to 30 June 2020, recently published documents setting out its priorities for the Presidency period. In relation to specific taxation priorities, the Presidency Programme sets out Croatia's aims that "current international tax rules should be adapted to globalisation and digitalisation in order to ensure fair and just taxation where value is created. Additionally, the tax system should fight activities and introduce higher taxes on products whose adverse effects significantly contribute to climate change. A modern tax system should be based on transparent, efficient and sustainable taxation procedures that ensure legal certainty for all stakeholders." Additionally, Croatia is committed to bolstering customs administration on the EU external borders. As always, CFE Tax Advisers Europe will be involved in the developments.

# Contents

# Taxation of the Digital Economy

# 01

# Taxation of the Digital Economy: A Whole New World...Order for Taxation under the OECD Pillars?

## OECD Pillar One & Two Proposals & Public Consultations

**Pillar I**

In October 2019, the OECD published Secretariat proposals for taxation of the digitalising economy on basis of a 'unified approach' under Pillar One. Under the proposed approach, new taxation rights for market jurisdictions are recognised as a matter of novelty. Conversely, under present international tax rules, zero profit could be allocated to any nexus not based on physical presence. The new rules are intended to apply to companies that derive value from consumer-interaction with users in market jurisdictions. Under the new profit allocation rules, a share of the deemed residual profits of the 'consumer-facing' multinational companies will be reallocated to market jurisdictions, through formulary apportionment and use of proxies such as sales.

A public consultation took place at the OECD in Paris on 21 November where attendees addressed the substantive issues arising from the proposal, in particular scope and nexus, elimination of double taxation as well as dispute prevention and resolution. There was an emerging consensus that the new challenges arising from digitalisation were conducive to a shift toward formulary apportionment, however, discussions could not agree on the precise principles underpinning such a shift. In addition, there was criticism concerning the lack of clear principles justifying the departure from the arm's length principle; that the absence of a coherent rationale might potentially undermine the goal to achieve fairness with the new profit allocation rules. Generally, clarity is lacking on definitions such as residual profits, business within scope of the proposal, the viability of the proposed coexistence of the two systems (existing tax rules under Amount B and C vs. new nexus and taxing rights under Amount A), as well as guarantees for robust and effective dispute prevention and resolution mechanisms. Suggestions for a central coordinating jurisdiction or one-stop-shop, with a possibility for a single jurisdiction to collect and remit the tax due for the other jurisdictions involved were also discussed.

CFE issued an Opinion Statement responding to the consultation highlighting a number of key elements that should be embedded as part of this process, calling for more clarity and early consensus at political level as to the outcome of the process. CFE's statement emphasises the significance of departing from well-established principles of international tax law towards a more complex international tax system which partly introduces formulary apportionment.

**Pillar II**

The OECD on 8 November published a further public consultation document concerning Pillar Two of its two-pillar approach to addressing the taxation challenges of the digitalising economy, the so-called "Global Anti-Base Erosion Proposal", or "GloBE" proposal, which seeks to address outstanding BEPS issues by introducing a global minimum tax and providing "jurisdictions with a right to "tax back" where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of effective taxation". The approach seeks to apply an income inclusion rule and deduction denial in tandem to achieve the intended aim of global anti-base erosion.

A second public consultation took place at the OECD in Paris on 9 December concerning the OECD Global Anti-Base Erosion Pillar 2 Proposal. CFE issued an Opinion Statement responding to the consultation setting out its view that there are too many variables in the GloBE proposal, with ramifications that could arise from the open policy and key design questions, calling for more certainty, simplicity and absence of double or multiple taxation. Issues were identified relating to double tax treaties, lack of dispute resolution and, significantly, possible EU law challenges.

Additionally, to evaluate the full effect of the existing BEPS standards, some of which are still under implementation in most countries of the Inclusive Framework, stakeholders have generally stated that a longer-term perspective seems more appropriate to appreciate the entirety of the remaining BEPS issues. Within the EU a number of anti-BEPS policy and legislative measures have been introduced with the ATAD directives, which significantly reduce the incentives to shift mobile tax bases to low-tax jurisdictions. Consequently, more time should be allowed to evaluate the full effect of the BEPS-related anti-avoidance measures, before any such complex rules are introduced.

**Trade Wars, Threats & Safe Harbours…**

Work at government representative level is ongoing at the OECD, with the Secretariat proposal serving as a blueprint for further negotiations. However, the anticipated timeline for progress concerning the OECD proposals may be compromised by the recent position adopted by the US in its letter to the OECD in December 2019, suggesting the Pillar 1 proposals should apply merely as a safe-harbour.

Were the Pillar 1 proposals to take the form of a safe harbour, this would allow governments to choose to adopt the regime, as opposed to it being mandatory to adopt it. If the approach were to be mandatory for the countries signing up, as was planned up until the US letter being sent, this would become mandatory for example by way of signing a new MLI. It would appear that the US is now proposing the measure be designed as a "safe harbour", meaning that companies could choose to apply or ignore Pillar 1.

In her response to the US letter, Angel Gurria, Secretary-General of the OECD, stated that "throughout the extensive consultation process, however, we had so far not come across the notion that Pillar 1 could be a safe-harbour regime", emphasising that the public consultations held to date "clearly identified the need for greater tax certainty and administrability", noting that this "is why the OECD proposal on a "Unified Approach" contains a very strong tax certainty dimension". The letter notes that the US raising this issue may impact on the ability of the OECD to adhere to the deadlines agreed by the Inclusive Forum. The US proposition to make Pillar One optional by allowing companies to 'opt out' of the newly proposed profit allocation rules continues to create tensions among governments and "will not fly politically", OECD Tax Director Pascal Saint- Amans has said.

All eyes are following the developments closely, especially in Europe. President Von der Leyen has made fair taxation a priority for her Commission, promising the EU will act alone should work at OECD level fail to result in an international agreement on how to tax digital companies.

In the meantime, tariffs have been threatened by the US against France following a French digital tax being signed into law on 24 July 2019, which imposes a 3% digital services tax on resident and non-resident companies with a global turnover above 750 million Euros, and a national turnover above 25 million Euros. Following meetings between French, EU and US officials at the margins of the World Economic Forum elite gathering in Davos in January 2020, Bruno Le Maire, Minister of Finance of France, and Steven Mnuchin, the US Treasury Secretary, alongside OECD Secretary-General Angel Gurria agreed to avoid a potential trade war following the introduction of the French Digital Services Tax. The US side agreed to suspend the imposition of tariffs on French goods whilst France agreed not to collect the digital tax until the end of 2020, subject to an OECD agreement by the end of year.

Similarly, the US threatened to scrap trade negotiations for a post-Brexit free trade agreement after the UK published a policy paper in July 2019 concerning a digital services tax to apply to businesses making search engines, social media platforms or online marketplaces available to UK users.

Progress on the issue of taxation of the digital economy in both the EU and at the OECD level will remain an ongoing priority for CFE.

# EU Policy – Direct Tax Files

02

# Carrot & Stick: Company Law & Whistleblowers Directives Become EU Law

**Company Law Directive Enters into Force**

On 18 November 2019, the Council of the EU adopted the second of two Commission proposals initially published in April 2018 on reforming and digitalising EU company law, which aim to make it easier for companies to merge, divide or move within the EU Single Market, whilst preventing fraud and abusive behaviour in cross-border operations. The proposals were adopted by the EU Parliament in April 2019.

The rules allow companies to register, set up new branches or file documents online. As concerns cross-border conversions, mergers and divisions, the EU rules for cross-border conversions and divisions aim to update existing ones to facilitate reorganisation, provided that the operations are genuine. Companies will be required to inform employees on the legal and economic consequences of a cross-border operation, and the Directive introduces mandatory anti-abuse control procedures to prevent cross-border operations which have abusive, criminal or fraudulent aims. This requires companies to demonstrate genuine economic activity at the place of registration, in line with the decision of *Cadbury Schweppes*. National authorities will be enabled by the provisions of the Directive to block any cross border operations carried out for fraudulent aims.

The Directive was published in the Official Journal of the European Union on 12 December, and entered into force on 1 January 2020. Member States will have 36 months to adopt necessary measures for implementation of the Directive, i.e. until 31 January 2023.

**EU Whistleblowers Directive Enters Into Force**

The European Parliament and Council Directive on the protection of persons who report breaches of Union law entered into force on 16 December 2019. The Directive establishes EU-wide rules for the protection of whistleblowers who report on breaches of EU law, including those reporting on issues related to tax fraud and money laundering.

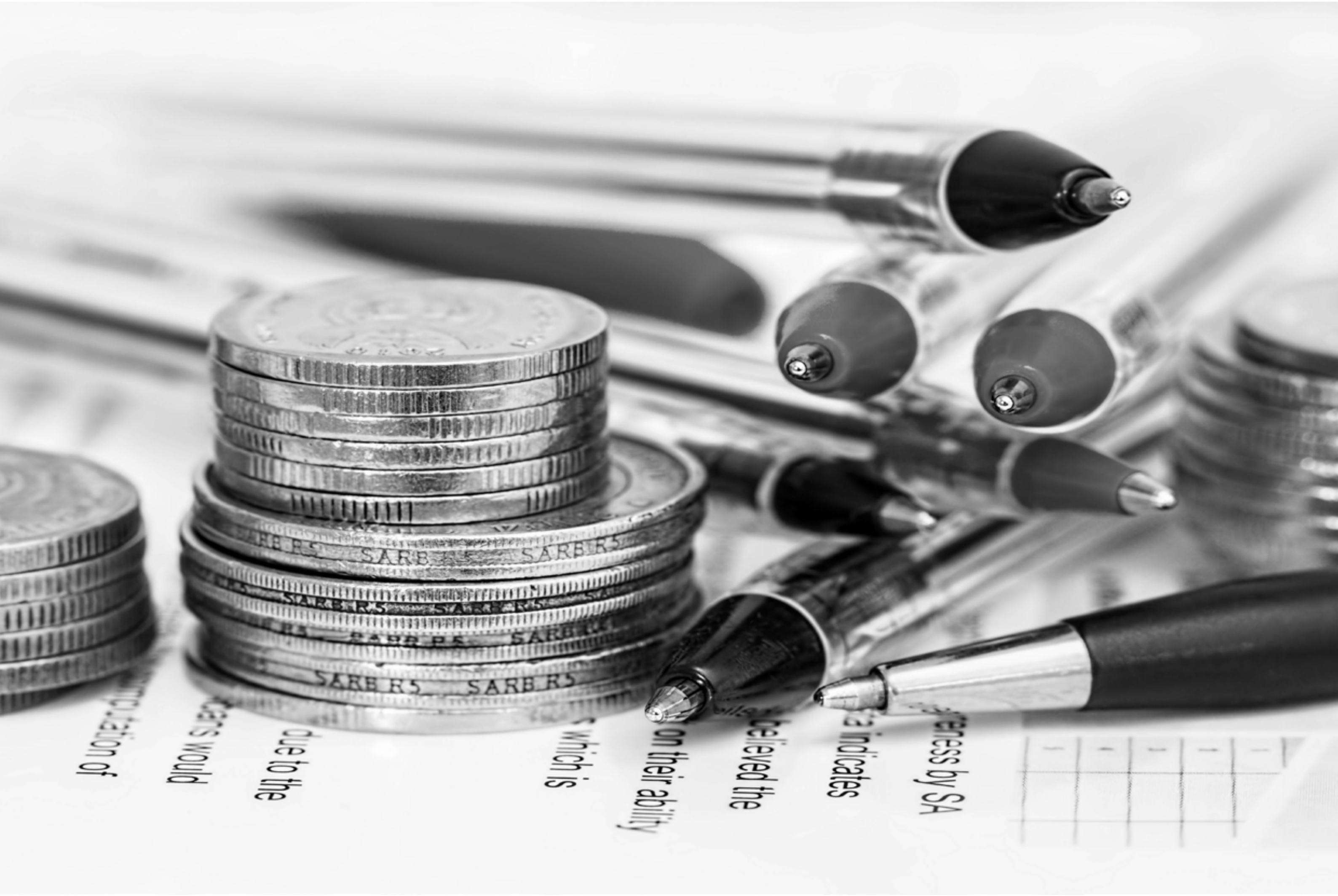
The Direcitive states that in respect of disclosures concerning taxation, the Directive aims to “add to recent Commission initiatives aimed at improving transparency and the exchange of information in the field of taxation, and creating a fairer corporate tax environment within the Union with a view to increasing Member States’ effectiveness in identifying evasive and/or abusive arrangements, and would help deter such arrangements.”

The directive will provide those persons reporting on breaches of EU legislation with internal and external reporting procedures for whistleblowing, subject to the size of the company. Companies and authorities will also have feedback obligations, such that they have 3 months to respond to whistleblower reports under the proposal.

The directive also includes provisions which forbid all forms of retaliation, to be enforced by means of sanctions. Whistleblowers are also to be provided with access to free independent information, advice, legal aid and remedies in instances where retaliation is experienced, with the burden of proof to be reversed such that the organisation or person must prove they are not acting in retaliation against the whistleblower, as well for as financial and psychological support to be provided to the whistleblower.

In July 2018, the CFE issued an Opinion Statement on the EU Commission proposal, which set out CFE's support for proposals that seek to establish horizontal rules for protection of whistleblowers, as well as their role in advancing public policy interests, specifically reporting tax fraud, corruption, abusive and illegal practices.

Member States have until 17 December 2021 to implement the Directive into national law. Concerning companies in the private section with 50 to 249 employees, Member States have until 17 December 2023 to implement rules into national legislation, to comply with the obligation to establish internal reporting channels.



# Public Country-by-Country Remains on Council to-do List...

Despite the Finnish Presidency's intent to re-enliven discussion on the Romanian EU Presidency presidency compromise text on the revised proposal for public country-by-country reporting (CbCR) in the EU, no significant progress appears to have been made at Council level.

However, the European Parliament voted on 24 October 2019 a resolution backing EU-wide public country-by-country reporting of taxes paid by large multinational companies. The impetus came from the European Parliament hearings of the European Commission President Ursula von der Leyen, and Vice-Presidents Vestager and Dombrovskis, who have promised that public country-by-country reporting would become reality with respect to taxation. The adopted European Parliament resolution "urgently calls" on the the Member States to finalise the legislative process as soon as possible and prioritise work on the public CbCR proposal on the basis of the Parliament's text.

The CbCR proposal does not introduce significant amendments compared to the compromise reached earlier in the negotiations. Considering that no significant action has been taken since the EU Parliament vote in 2017, the Member States are still assessing the situation.

Progress on public CbCR came to a halt when the Council Legal Service issued its opinion in November 2016. The Opinion concluded that public CbCR was a taxation matter and not a matter falling within the ambit of the Accounting Directive, as was initially found by Commission legal services. The Opinion is based on the premise that the purpose of the proposals is the protection of the functioning of the internal market and prevention of tax avoidance rather that the protection of shareholders and the public interest under Article 50 TFEU. In order for the public CbCR proposals to be characterised a "tax file" by the EU Commission, Member States must unanimously request that the Commission do so, therefore the legal Opinion alone has limited practical consequences without subsequent action. Some Member States continue to challenge the proposed legal basis in the original proposal, suggesting that it relates to taxation matters therefore falls within the ambit of Article 115 TFEU.

The European Parliament appears to be maintaining its steadfast support and went a step further in its initial opinion. The parliamentary Rapporteurs originally proposed the reduction of the 750 million euro threshold to 40 million and extending the scope of the publication of the information beyond that relating to EU countries to every country in which they operate. The question of the legal basis was also assessed. After the vote on the report in a joint committee meeting on 12 June 2017, the amendments were adopted by Plenary on 4 July 2017 (including a compromise on the 750 million euro threshold) and the file was referred back for inter-institutional negotiations.

CFE Tax Advisers Europe will closely monitor developments in relation to this file.

# DAC Implementation Update

The DAC6 directive entered into force on 25 June 2018, introducing complex mandatory disclosure rules for intermediaries across the EU. Intermediaries who design and/or promote reportable tax planning schemes will be required to disclose them to their national tax administrations, who will then automatically exchange the information with other Member States through a centralised database.

Members States had until 31 December 2019 to implement the Directive into domestic legislation, and disclosure requirements will apply to intermediaries from 1 July 2020, with all arrangements initiated after 25 June 2018 that fall within the scope of the Directive being reportable.

Luxembourg, The Netherlands and Estonia all published draft legislation in late 2019 concerning the implementation of the EU Mandatory Disclosure Rules Directive (DAC6). All three countries have drafted the implementing legislation broadly in line with the Directive, and have not sought to Gold-plate the Directive. However, the Netherlands and Estonia have sought to provide some guidance on the scope and hallmarks of the Directive.

The maximum penalties that may be imposed vary significantly between the draft legislation of the countries, with a maximum penalty amount of 3,300 Euro in the draft Estonian legislation, 250,000 Euro in the Luxembourgish legislation and 830,000 Euro in the Dutch legislation. Further, the draft Estonian legislation provides for the privilege against self-incrimination to be considered in assessing compliance with reporting obligations, and does not require taxpayers to disclose information about their use of the arrangements. The Luxembourgish legislation, on the other hand, does require taxpayers to disclose the use of the arrangement in their tax returns.

According to the Directive, intermediaries who design and/or promote reportable tax planning schemes will be required to disclose information on reportable cross-border arrangements the first step of which was implemented after 25 June 2018. National tax administrations will then automatically exchange the information with other Member States through a centralised database. Penalties will be imposed on intermediaries who do not comply with the new reporting measures. The initial automatic exchange of information between member states should take place on 31 October 2020.

The European Commission has also published an evaluation document concerning Council Directive 2011/16/EU on Administrative Cooperation, and the five subsequent amendments made to the directive which expanded the scope of the cooperation and exchange of information. The evaluation examines the effectiveness, efficiency, relevance, coherence and EU added-value of the directive.

The evaluation concludes that it is difficult to ascertain whether the directive has been effective or efficient in its aims, given that data is extremely limited concerning monetary benefits derived from having introduced the directive in terms of demonstrated reduced tax evasion. However, the evaluation concludes that the administration cooperation is useful, and that furthermore there is scope to enhance the use of the information exchanged, and means of tracking the value the cooperation produces.

# Anti-Money Laundering – New Supranational Risk Assessment

In July, the European Commission adopted four reports concerning the monitoring and implementation of EU anti-money laundering and countering terrorism financing rules. The reports included: a 2019 Supranational Risk Assessment report; a Financial Intelligence Units assessment report; an assessment report of recent money laundering cases involving EU credit institutions; and a report on the interconnection of central bank account registries.

Notably, the updated 2019 Supranational Risk Assessment report categorises the risk of tax advisers and accountants' services being used in money laundering as "significant", and identifies that despite being well organised, there are weaknesses in the manner in which checks are carried out and risk is managed by the profession. The Assessment recommends the Commission carry out transposition checks concerning the AML Directives on Member States, and that Member States ensure obliged entities are compliant with the requirements of the Directives, as well as issue guidance concerning the topics of risk factors involving accountants and how to interpret and apply legal privilege.

The 6th EU AML Directive (legislation in force, but with national law implementation deadline of 3 December 2020), introduces:

- An extended definition of money-laundering offence (aiding and abating),
- predicate offences (such as cybercrime), extension of criminal liability to legal persons
- tougher fines,
- tax crimes related to both direct and indirect taxes as covered by the definition of criminal activity, in line with the revised FATF recommendations. This raises the issue of divergent definitions of tax crimes in national law, which is not subject to EU law harmonisation.

Following on from the Risk Assessment reports adopted in July, the Council of the EU on 5 December also adopted conclusions setting out priorities for the EU's new anti-money laundering framework, seeking to guide the EU Commission in introducing harmonised EU anti-money laundering rules as well as enhanced anti-money laundering supervision across the EU, primarily addressed to the financial sector.

The Council in its recommendations urges Member States to transpose the AML legislation as soon as possible into national law. The conclusions also invite the Commission to explore further possible means of improving AML rules, such as further enhanced cooperation between authorities involved in anti-money laundering. The Council also recommends further harmonizing AML rules by upgrading AML directives into a Regulation (a piece of EU law directly enforceable across all Member states without further need of domestic implementing national laws) and conferring specific AML supervisory tasks to an EU body.

CFE will be following policy developments in this area closely.

# Environmental Taxes

The new President of the European Commission Ursula von der Leyen presented an ambitious climate-change related policy proposal, the 'New Green Deal', under which every aspect of the EU economy will be revaluated to address the shortcomings of the European framework, which are compounded by the climate emergency. The European leaders endorsed the policy goal of making Europe a climate-neutral by 2050, with a dissenting opinion from Poland that it could not commit to this goal, as a result of which the EU leaders will revaluate the matter in June 2020. On the taxation policy front, the EU intends to use tax reforms to absorb climate-policy related shocks aiming to facilitate a just transition to a greener economy, specifically by sending the right pricing signals and incentives to producers, users and consumers.

At the informal ECOFIN meeting in Helsinki in September 2019, Ministers discussed the Commission report concerning the Energy Taxation Directive, which notably highlighted that divergent implementation of the Directive and use of tax exemptions by Member States had led to fragmentation within the Single Market. In addition to revision of the Energy Taxation Directive (by qualified majority voting, if necessary), the European Green Deal relies on removing subsidies for fossil fuels and shifting the tax burden from labour to pollution. In order for Member states to be able to rely on targeted VAT rates to reflect the green ambitions, for example to support organic fruit and vegetables, a rapid adoption of Commission's proposal on VAT rates is encouraged.

The State aid guidelines concerning the environmental goals and energy will also be revised by 2021 to facilitate a meaningful transition to climate neutrality by 2050, specifically by phasing out fossil fuels and encouraging clean energy sources.

A proposal for a European carbon border tax is anticipated in the coming months as part of the agenda of EU Commission President Ms von der Leyen. Adding impetus to the Commission actions, on 15 January the European Parliament adopted a resolution concerning the Green Deal, noting the "urgent need for ambitious action to tackle climate change and environmental challenges", and calling for a legally binding "Climate Law" with a domestic and economy-wide legally binding target for becoming a climate-neutral society by 2050, i.e. net-zero emissions by 2050.

# EU Tax Policy – Indirect Tax

# 03

# Definitive VAT Regime Progress

On Friday 8 November, EU finance ministers sitting at Council level (ECOFIN) reached agreement on a number of significant indirect tax files, concerning: transmission and exchange of VAT-relevant payment data; amendment of the VAT system as regards the special scheme for small enterprises (SMEs); and the administrative burden for trade in goods subject to excise duty.

The proposals as regards the exchange of VAT-relevant payment data, aimed at reducing VAT fraud, will introduce requirements for records to be kept by payment service providers concerning cross-border payments related to e-commerce. A central electronic system will be established for storage of the information, which will also be accessed and processed by Member States' anti-fraud officials.

The proposals concerning the VAT special schemes for SMEs will revise existing VAT rules for SMEs, to address the fact that SMEs at present face disproportionate VAT compliance costs, which as a result distorts competition on both domestic and EU markets. The compromise text provides for qualifying businesses to be able to use the SME exemption across the EU, subject to annual turnover thresholds, namely a national threshold of €85,000 and an EU threshold of €100,000, coinciding with the European Commission proposals. Ahead of the ECOFIN meeting, the Council services noted that a number of Member states insisted that these thresholds should not be higher, and the Presidency reflected this in the compromise text. The 30 October 2019 COREPER meeting saw some Member states indicating a preference for thresholds of 100 000 and 115 000 EUR, respectively. Issues concerning the amounts of the thresholds were resolved in order for the proposals to be agreed.

Additionally, in November the EU Commission published draft Explanatory Notes on EU VAT changes in respect of call-off stock arrangements, chain transactions and the exemption for intra-Community supplies of goods ("2020 Quick Fixes"), which the Commission prepared for input and discussion at the VAT Expert Group.

The explanatory notes set out guidance on Commission's view as to interpretation of Council Directive (EU) No 2018/1910 amending Council Directive 2006/112/EC and Council Implementing Regulation (EU) No 2018/1912 amending Implementing Regulation (EU) No 282/2011 concerning the VAT Quick Fixes. The explanatory notes will not be legally binding on the Member States or the European Commission.

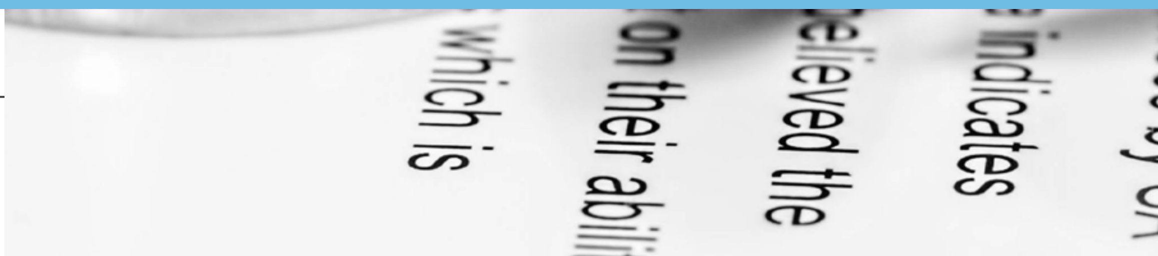
The "Quick Fixes", aimed at rectifying a number of issues in relation to the day-to-day running of the EU VAT system, apply from 1 January 2020. The fixes were designed to address specific issues with EU VAT rules, pending the introduction of a definitive EU VAT Regime, concerning: call-off stock arrangements – simplification and harmonisation of rules regarding call-off stock arrangements, where a vendor transfers stock to a warehouse at the disposal of a known acquirer in another Member State; VAT identification numbers – by the introduction of an identification number for a customer as an additional condition for VAT exemption for intra-EU supplies of goods; chain transactions – simplification and harmonisation of rules regarding chain transactions; and proof of intra-EU supply – introduction of a common framework of criteria of documentary evidence required to claim a VAT exemption for intra-EU supplies.

Discussions between Members States at the EU Council concerning the proposed directive as regards the introduction of the detailed technical measures for the operation of the definitive VAT regime system are ongoing. Discussions are also ongoing in relation to the Commission's proposed Directives on reform of VAT rates, to create a simplified list of products subject to the standard rate, and to allow Member States to have two separate reduced rates, one reduced rate and one exemption. The above proposals will remain a focus of the Indirect Taxes Subcommittee of CFE.

# EU Policy –

# Blacklist & Code of Conduct

04



# Tax Good Governance Standards: EU Blacklist & Code of Conduct Group

The EU's list of non-cooperative jurisdictions for taxation purposes was updated in October and November 2019. In October, the Council of the EU endorsed removal from the EU black and/ or greylist of a number of jurisdictions, including the United Arab Emirates, Albania, Costa Rica, Serbia, Switzerland, Mauritius and the Marshal Islands, establishing that those countries have implemented reforms to comply with EU tax good governance standards.

Additionally, in October the EU's Code of Conduct Group (Business Taxation) concluded on 24 October 2019 that North Macedonia has fulfilled the tax good governance criteria set out by the EU and as a result would be removed entirely from the Annex II jurisdictions. The General Secretariat of the Council of the EU recommended delisting in a note to the EU Member states for ECOFIN Council, which was approved on 8 November. The Council also endorsed the removal of Belize from the blacklist to the grey list, after establishing that it had implemented reforms to comply with EU tax good governance standards. It will be removed from the Annex II grey list in the future, subject to implementation of further changes concerning its foreign source income exemption regime.

Eight jurisdictions now remain on the EU blacklist: American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

In November, the Council of the EU also adopted a report of the Code of Conduct Group (Business Taxation), which sets out a detailed 6-monthly progress report on achievements of the Code of Conduct Group, and the status of jurisdictions that have been examined under the list.

Notably, the report details that the Code of Conduct Group reached agreement at its meeting on 14 November concerning guidance for Members States on defensive measures that can be taken in the tax field concerning non-cooperative jurisdictions.

The guidance sets out co-ordinated actions for Members States to take of a legislative nature, to encourage compliance with the Code of Conduct screening criteria as well as other international standards. Member States are recommended to apply at least one of the measures, which include non-deductibility of costs, CFC rules, withholding tax measures and denial of participation exemption on profit distribution.

Monitoring the work of the Code of Conduct Group and changes to the EU list of non-cooperative jurisdictions for tax purposes will remain an ongoing priority for CFE Tax Advisers Europe.

# International Policy – OECD, IMF & UN

# 05

# OECD Update

**Signatories to OECD’s MLI Tax Treaty & Inclusive Framework Continue to Increase**

The second half of 2019 saw Bosnia and Herzegovina, Kenya, Oman as well as Jordan become signatories to the OECD’s Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The jurisdictions of Canada, Denmark, Iceland, Latvia, Liechtenstein, Mauritius, Norway, Qatar, Switzerland and Ukraine have also all deposited instruments of ratification concerning the convention. The multilateral tax treaty allows jurisdictions to update their existing double tax treaties and transpose measures agreed in the BEPS project without further need for bilateral negotiations.

Further jurisdictions also joined the OECD’s BEPS Inclusive Framework, with Albania, Bosnia and Herzegovina, Eswatini, Gibraltar, Honduras, Jordan, Montenegro, Namibia all joining in the second half of 2019. Members of the Inclusive Framework have the opportunity to work together on an equal footing with other OECD and G20 countries on implementing the BEPS package consistently and on developing further standards to address remaining BEPS issues. There are now 137 jurisdictions that are participating in the project.

In addition, Benin, Bosnia and Herzgovina, Cabo Verde, Guinea, Honduras, Mongolia, Namibia and Oman all joined the Global Forum on Transparency and Exchange of Information for Tax Purposes in the second half of 2019.

**Significant Progress on CbCR**

The OECD has observed significant progress in the implementation of the minimum standard on Country-by-Country Reporting (CbC), providing tax administrations with an unprecedented level of information and transparency on activities of multinational companies (MNCs). These conclusions are contained in the outcomes reported in September concerning the second phase of peer reviews of the BEPS Action 13 Country-by-Country reporting initiative, demonstrating strong progress in the efforts to improve the taxation of multinational companies worldwide. CbC reporting as a minimum standard of the BEPS project requires tax authorities to collect and share detailed information on MNCs operating within their jurisdiction, collection data on revenues, profits, taxes paid and accrued, as well as the capital, accumulated earnings, number of employees and tangible assets, broken down by jurisdiction.

As a follow-up of BEPS Action 13, the OECD /G20 Inclusive Framework on BEPS also released updated guidance on the implementation and operation of Country-by-Country Reporting (CbCR). The new guidance includes the treatment of dividends, the operation of local filing, the use of rounded amounts in Table 1 of an MNE Group’s CbC report and the information that must be provided with respect to the sources of data used.

**Mandatory Disclosure Rules on CRS Avoidance Arrangements**

In late June 2019, the OECD released the International Exchange Framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures. The publication sets out an international framework to govern MDR exchanges, from a legal and an operational perspective.

The publication also contains a draft of the Multilateral Competent Authority Agreement (MCAA), which will enable jurisdictions that receive information about a CRS Avoidance Arrangement or Opaque Offshore Structure under the MDRs to exchange such information with the relevant jurisdictions where the concerned taxpayers are residents.

**MAP Peer Reviews under Action 14 of BEPS**

In the second half of 2019, the OECD invited public input on taxpayer questionnaires undertaen as part of the peer review process under Action 14 of the BEPS Action Plan concerning taxation dispute resolution and the Mutual Agreement Procedure (MAP), aimed at making dispute resolution mechanisms more effective.

In August, the OECD also published the first set of Stage 2 Mutual Agreement Procedure Monitoring Peer Reviews for the jurisdictions of Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States. The stage 2 peer reviews examine the progress of jurisdictions in implementing recommendations set out in their stage 1 peer review reports.

The reports demonstrate that positive steps had been taken by all six jurisdictions, with most jurisdictions updating MAP guidance and allocating more resources to the competent authorities to increase efficiency in handling MAP cases. Additionally, each jurisdiction had either maintained or decreased the timeframe within which MAP cases were resolved, and the majority of jurisdictions were also using the MLI to ensure treaties were in line with the standard.

**Forum on Harmful Tax Practices**

In July, the OECD released a report, approved by the Inclusive Framework on BEPS, as part of implementation of Action 5 of the OECD/G20 Base Erosion and Profit Shifting Project, concerning assessments undertaken by the Forum on Harmful Tax Practices (FHTP) of 56 preferential tax regimes.

The Forum on Harmful Tax Practices has reviewed 287 regimes since the commencement of the BEPS Project. The Forum will continue its review of the regimes and in 2020 will begin reviewing the implementation of recommendations.

# Platform for Collaboration on Tax

The Platform for Collaboration on Tax, a joint initiative of the IMF, OECD, UN and World Bank Group, issued a draft toolkit in October 2019 designed to help developing countries in the implementation of effective transfer pricing documentation requirements. Input on the draft toolkit was due by 8 November 2019. The Global Tax Advisers Platform, of which CFE Tax Advisers Europe is a founding member, was pleased to submit a response.

The consultation sought specific input concerning: whether the draft toolkit addresses all the relevant considerations for the design of an effective transfer pricing documentation regulatory system; whether particular approaches (e.g. penalties or compliance incentives) are especially beneficial for limited capacity developing countries, in terms of enforcement of transfer pricing documentation; whether there other transfer pricing documentation requirements not covered in this toolkit that should be considered; and what additional considerations and/or tools can be included to assist developing countries to implement effective transfer pricing documentation.

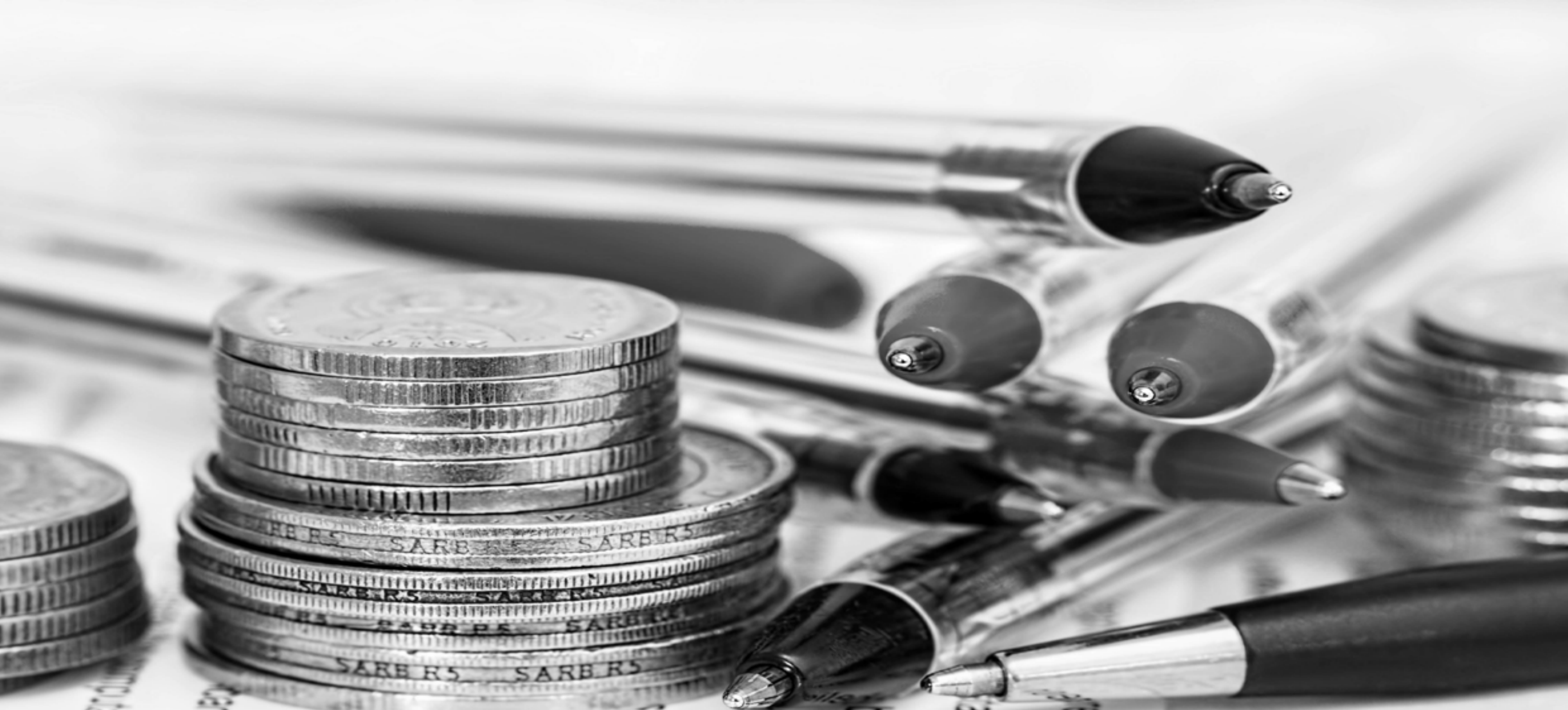
GTAP welcomed the draft toolkit, and set out its view that the toolkit has significant potential impact in terms of developing uniformity in practice across jurisdictions. GTAP's responses to the consultation questions were based on responses compiled by fellow founding GTAP member, the West African Union of Tax Institutes and its member organisation, the Chartered Institute of Taxation of Nigeria (CITN).

# UN Tax Committee Publishes Updated Model Double Taxation Convention

The United Nations published an updated version of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries in the second half of 2019. The manual was updated during the 15th Session of the UN Committee of Experts on International Cooperation in Tax Matters, which was held in October 2017 in Geneva, to take into account changes made to the UN Model Convention and developments in the OECD BEPS project.

A revised draft version of the manual was presented in October 2018, and adopted by the Committee in New York in April 2019. The experts in attendance at that meeting included representatives of CFE Tax Advisers Europe, who also discussed the report of the subcommittee on updating the United Nations Model Double Taxation Convention, including: taxation of royalties; taxation of collective investment vehicles; tax and the Sustainable Development Goals; environmental tax issues and lastly, the tax consequences of the digitalising economy, with particular focus on issues of relevance for developing countries.

The 19th Session of the UN Committee of Experts on International Cooperation in Tax Matters held in Geneva on 15- 18 October saw a debate on the relevance of taxation policy for the attainment of Sustainable Development Goals (SDGs), among other topics. Other agenda items included the tax challenges of the digitalisation of the economy, update of the UN Nations Model Double Taxation Convention between Developed and Developing Countries, production of a UN Handbook on Tax Dispute Avoidance and Resolution as well as an update of the UN Transfer Pricing Manual.



# Case Law & EU State Aid Update

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# Apple Has Its Day in Court in Selective Advantage Case...

Apple's €14 billion Euro appeal against the EU Commission's 2016 decision that Ireland's tax authorities granted Apple a "selective advantage" in contravention of EU State aid law proceeded to hearing before the EU's General Court in September 2019.

The Commission issued its preliminary decision in August 2016 after a three-year long investigation into Apple's tax arrangements in Ireland. The Commission found Ireland granted a selective advantage to Apple as it did not employ appropriate profit allocation methods to calculate the Irish source income of the Irish Apple branches. Apple in its appeal documents claims that there is no legal requirement that profit allocation is compliant with the arm's length principle and that it is furthermore not an applicable standard of assessment under European law. Apple and Ireland also argue that the Commission fundamentally erred in failing to recognise that profit creating activities, including development of IP, are attributable to the United States, rather than Ireland.

Apple's lawyers argued that the fact that Apple's products and services were developed in the United States exposed flaws in the primary line of the Commission's arguments which defied logic, saying the two branches simply could not be responsible for generating all of Apple's profits outside the US. Lawyers for the Commission argued that Ireland had not carried out any assessment of the subsidiaries' activities, risks or assets, arguing that accepting the arbitrary method of calculating profits suggested by Apple without carrying out any assessment in itself gave rise to a presumption of advantageous treatment.

The General Court's decision is expected in the coming months, no doubt to be followed by an onward appeal by the losing party to the Court of Justice for final determination. The outcome of the appeal will be significant in testing the Commission's analysis of the arm's length principle as applied in other ongoing cases, including Starbucks and Amazon.

# EU General Court Delivers Fiscal State Aid Judgments & Commission Decides Not to Appeal *Starbucks* Loss ...

In September, the General Court of the EU delivered the long-anticipated first instance judgments in the fiscal State aid cases of Starbucks and Fiat. In the case *Netherlands v Commission* (Starbucks), the Court annulled the Commission decision, which had originally established that the Netherlands had awarded State aid to Starbucks by way of selective fiscal benefits. In *Luxembourg v Commission* (Fiat), the Court dismissed the action for annulment and upheld the Commission decision establishing State aid to Fiat Finance and Trade (now Fiat Chrysler Finance Europe).

However, the Court confirmed Commission’s competence to scrutinise individual tax rulings (including transfer-pricing rulings, Advance Pricing Agreements - APAs) that national tax administrations conclude with taxpayers. The judgments further indicate that the General Court accepts Commission’s interpretation of the ‘arm’s length’ principle as a ‘yardstick’ for assessment of the EU law compliance of individual tax rulings with Article 107(1) of the Treaty. The Court also set limits to the Commission’s powers in the review of national fiscal State aid measures, by stating that at this stage of development of EU law, the Commission does not have ‘autonomous competence’ to define ‘normal taxation of a company’, outside the scope of national taxation rules of each Members state.

In November, the European Commission confirmed it had decided not to appeal the judgment of the General Court in the fiscal State aid case *Netherlands v Commission (Starbucks)*. A spokesperson for the European Commission stated: "After carefully assessing the General Court judgment of 24 September 2019 concerning the tax treatment of Starbucks in the Netherlands, the Commission has decided not to appeal the Court’s ruling to the European Court of Justice," confirming comments by Commission Vice-President Vestager given in an interview.

# UK Seeks Annulment of European Commission Decision in CFC Cases

In August, an application filed by the United Kingdom with the Court of Justice of the European Union seeking that the decision of the European Commission in the CFC cases be annulled was published in the Official Journal of the European Union.

In April, the European Commission concluded an investigation into the compliance of the UK's Controlled Foreign Company (CFC) legislation with EU State aid rules, declaring that the application of the Group Financing Exemption contained in the Finance Act 2012 partly constituted unlawful State aid to certain multinational companies. Between 2013 and end-2018, the UK CFC rules included a Group Financing Exemption that allowed multinational companies to benefit from a full or partial exemption on interest payments from loans, i.e. on payments related to certain financing income. According to the European Commission, the exemption is compliant with the State aid rules where the financing income is derived from non-UK activities. Conversely, the Group Financing Exemption on financing income derived from UK activities was considered to be in breach of the State aid rules. As a consequence, the Commission concluded that beneficiaries of the measure received an undue advantage over UK competitors who were not able to rely on the exemption and were subject to the headline corporate tax rate.

The UK in its application relies on four pleas in law: that the Commission made a manifest error in its assessment by identifying the wrong system for an examination of comparability; that the Commission made a manifest error in determining that the exemptions are a derogation; that the Commission made a manifest error in its assessment regarding selectivity; and that the Commission erred in determining that the UK CFC rules granted a benefit which would give an unfair advantage and thus affect intra-EU trade. The UK is seeking an order from the Court of Justice annulling the decision with costs.

# Commission Announces In-Depth Investigation into Belgian Excess Profit Exemption Cases

Appeal documents concerning the decision of the General Court to annul the Commission's decision in the Belgian 'excess profit" State aid cases were published in the second semester of 2019, which detail the Commission's appeal against the General Court's judgment which annulled the Commission's decision in the cases. The Commission argues that the Court incorrectly classified the "excess profit" tax ruling practice as a scheme under Article 1(d) of Regulation 2015/1589, and misinterpreted the first, second and third condition of Article 1(d) in its decision. The European Commission also announced in September it had launched in-depth to determine whether Belgian "excess profit" tax exemptions granted to 39 multinational companies amounted to illegal State aid.

These investigations concern a decision originally taken by Commission in 2016 that a so-called Belgian "excess profit" tax scheme had allowed multiple European MNEs in Belgium to benefit from a corporate tax base reduction for the generated excess profits. Commission's State aid investigation found that Belgium had established an “aid scheme”, derogating from Belgian tax law and the “arm's length principle” as interpreted by the European Commission. The "excess profit" scheme was marketed by the Belgian government under the strapline "Only in Belgium".

The alleged error in law brought up by the Belgian government and the beneficiaries amounted to competence issues and methodology-related arguments. Belgium challenged European Commission competence to assess the State aid compliance of administrative measures in the direct tax area (tax rulings), invoking national sovereignty prerogative and methodological arguments related to the assessment of the alleged aid as an “aid scheme”. The General Court dismissed the first plea, reaffirming Commission’s competence to assess the State aid compliance of national direct tax measures, including administrative decisions such as tax rulings. The Court noted that while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law, in particular primary EU law (fundamental freedoms and State aid rules). Accepting the second plea, the Court disagreed with the Commission’s assessment that the tax rulings constituted an “aid scheme”. Significantly, the Belgian tax authorities had influence over the essential elements of the tax rulings system, which precludes the existence of an aid scheme. Further, it was established that the Procedural Regulation (EU/2015/1589) defines aid beneficiaries “in a general and abstract manner” for an infinite period of time, which was not the case with the Belgian “excess profit” rulings.

The decision in the Belgian excess profit rulings cases (Cases T-131/16 and T-263/16 Kingdom of Belgium v European Commission) was a highly anticipated decision considering that the Court for the first time had an opportunity to interpret the Commission’s understanding of the arm’s length principle under EU State aid law and the competence of the Commission to assess individual tax rulings. The decision did not invalidate Commission’s substantive interpretation of the State aid rules, but challenged the methodology of assessment and the classification of the aid as a “scheme”.

As the General Court did not rule on whether the exemptions gave rise to illegal State aid, the Commission launched investigations into each of the companies on the basis that the compatibility of the rulings must be assessed against EU State aid rules.

The outcome of the appeal is eagerly anticipated.

# EU Tax Policy Report

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