ADDRESS
Av.de Tervueren 188
1150 Brussels
www.taxadviserseurope.org

CONTACT
T: + 32 2 761 00 92
+ 32 2 761 00 91
E : info@taxadviserseurope.org

EU Tax Policy Report

Semester I 2021

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 2021.

AUTHORS

Brodie McIntosh and Aleksandar Ivanovski

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Highlights

The end of the first half of 2021 was marked by the historic tax policy development that 130 of the 136 inclusive framework countries signed a global agreement on international tax reform, based on a two-pillar solution which allows multinational companies to pay more tax in the countries where they operate as well as a global minimum tax rate. It is expected that a total amount of USD 100 billion of profits per year will be reallocated to the market jurisdictions, under the rules agreed in Pillar One.

The Republic of Slovenia took over the rotating presidency of the European Union on 1 July. The Slovenian Presidency of the Council will focus on a number of priority areas in the economic and taxation sphere. Particular focus will be given to the post-pandemic economic recovery, strengthening the rule of law throughout Europe, anti-money laundering, the Capital Markets Union Package, implementation of the Basel III standards and the EU budget for 2022.

In the coming months, digital tax will remain at the centre of direct tax policy discussions, as more details concerning the OECD agreement become known, and plans for the EU digital levy proposal are revealed. Further work is expected on EU Commission legislative proposals regarding shell companies, debt-to-equity tax bias (DEBRA), BEFIT- the new corporate tax proposal - as well as on the forthcoming update on the EU blacklist scheduled for the ECOFIN Council of October 2021. An update and revision of the mandate of the Code of Conduct Group for Business Taxation has also been planned by the Slovenian Presidency.

In the area of indirect taxation, the 'Fit for 55 Package' as part of the European Green Deal is expected to be published in July, containing revisions of the Energy Taxation Directive and Carbon Border Adjustment Mechanism (CBAM). VAT proposals on rates and 'Buy and Donate' will also be tabled.

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Digital Tax Developments

01

Landmark Agreement on International Tax Reform Reached

On 1 July, the OECD announced that 130 countries had signed a global agreement on international tax reform, based on a two-pillar solution which allows multinational companies to pay more tax in the countries where they operate as well as a global minimum tax rate.

It is estimated that a total amount of USD 100 billion of profits per year will be reallocated to the market jurisdictions, under the rules agreed in Pillar One. Companies within scope include the largest MNEs with global turnover above 20 billion euros and profitability above 10% (profit before tax/revenue) with the turnover threshold to be reduced to 10 billion euros over time, subject to conditions. Financial services and extractive industries will be excluded from the agreement.

The agreement creates new nexus rules for a market jurisdiction where the MNE derives minimum 1 million euros in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than 40 billion euros, a minimum of 250 000 euros is required to trigger the new nexus and bring the MNE within scope. In terms of revenue allocation, according to the agreement 20-30% of the residual profit (profit in excess of 10%) will be allocated to market jurisdictions using a revenue-based allocation key. Profitability of the in-scope companies will be determined with reference to financial accounting income, and loss carry-forward will be allowed.

The global minimum corporate income tax under Pillar Two, set at 15%, will generate USD 150 billion in additional global tax revenues annually. The OECD also estimates there will be additional revenue due to the stabilisation of the international tax system after years of uncertainty and the patchwork of newly introduced rules concerning the digitalising economy. The global minimum tax is intended to be applied via a specific sets of rules:

- **Income Inclusion Rule:** top-up tax on a parent company concerning the low-taxed income of the subsidiary/constituent entity;
- **Undertaxed Payment Rule:** which allows adjustments or denies deduction if the low-tax income of the subsidiary/constituent entity is not subject to tax under an income-inclusion rule;
- **Subject to Tax Clause:** a double tax treaty-based rule that allows source jurisdictions to impose source taxation on associated party payments below the minimum rate. These amounts will be creditable as a covered tax for tax treaty purposes.

The effective tax rate will be calculated on a jurisdictional basis using a common definition of covered taxes and a tax base determined by reference to financial accounting income. The rules provide for de minimis exemptions and substance carve-out that will exclude income of 5 – 7.5% of the carrying value of tangible assets and payroll. Further technical detail is yet to be discussed, with further updates expected in October 2021.

Commenting, the new OECD Secretary-General Mathias Cormann said: *"After years of intense work and negotiations, this historic package will ensure that large multinational companies pay their fair share of tax everywhere. This package does not eliminate tax competition, as it should not, but it does set multilaterally agreed limitations on it. It also accommodates the various interests across the negotiating table, including those of small economies and developing jurisdictions. It is in everyone's interest that we reach a final agreement among all Inclusive Framework Members as scheduled later this year"*.

The international community welcomed the agreement, facilitated by the recent proposals from US President Biden. Countries that refused to sign the agreement include Estonia, Hungary, Ireland, Kenya, Nigeria, Sri Lanka, Barbados, St Vincent & the Grenadines. Peru abstained due to absence of government. Cyprus announced that it will veto the adoption via EU directive. Harmonised EU implementation could be hampered due to the unanimity requirement for tax-related directives at EU level.

The path to reaching agreement was complicated, particularly given the uncertainty of the US administration during Presidential elections, with Pascal Saint-Amans stating the Inclusive Framework was "in waiting mode for the signals from the US." However, after the new US Secretary of Treasury Dr Janet Yellen confirmed that President Biden's administration was ready to drop the 'safe harbour' requirement, a key obstacle to an international agreement on Pillar One concerning taxation of the digital economy, and after President Biden unveiled tax proposals to introduce a minimum corporate tax rate of 21%, agreement came within reach.

Members of the Unites States Senate Committee on Finance expressed concerns with President Joe Biden's proposal at the OECD table of negotiations, urging the President to reconsider the approach and not to cede taxing rights to other countries without comparable concessions in return. Concerns were also raised by economists and governments that smaller countries that rely on tax policy to compensate for advantage of scale, resources and location enjoyed by larger countries were presumed to lose significant revenue under the US proposals for digital tax. For example, under the Stability Programme Update for 2021 of the Irish Department of Finance published on 14 April, Ireland stands to lose 2 billion Euros in corporate tax revenue by 2025.

An agreement at OECD level was all but certain after Finance Ministers from the G7 nations of Canada, France, Germany, Italy, Japan, the UK and the US reached an agreement on standards for minimum corporate taxation rates at their meeting which took place in London in early June. The G7 Ministers, as set out in their Communiqué, agreed to a global minimum corporate tax rate of 15% on a country-by-country basis, and to allocate taxing rights where profits in a market jurisdictions exceed a 10% margin. Jurisdictions allocated taxing rights under the agreement would be entitled to tax 20% of the profits, at a minimum. The agreement also provides for the *"coordination between the application of the new international tax rules and the removal of all Digital Services Taxes, and other relevant measures, on all companies."*

Critics of the deal argue that agreeing a minimum tax rate of 15%, down from the 21% proposed by US President Biden, would not result in significant changes in practice. Oxfam said of the agreement, *"It's absurd for the G7 to claim it is 'overhauling' a broken global tax system by setting up a global minimum corporate tax rate that is similar to the soft rates charged by tax havens like Ireland, Switzerland and Singapore. They are setting the bar so low that companies can just step over it."*

However, Pascal Saint-Amans, OECD's Tax Policy and Administration Director, said that countries are looking at $150 billion in extra revenue across the world, solely due to introduction of the global minimum corporate tax rate. "*This is not an anecdotal amount. In some ways, this is the end of the work on regulating globalisation for greater tax justice",* Pascal Saint-Amans said.

Analysing and commenting on further details of the international agreement as they become known will be a priority for CFE in the second half of 2021.

EU Digital Levy Delayed – Ad Infinitum?

In January, the EU Commission's DG TAXUD published an inception impact assessment roadmap revealing that a proposal for a digital levy will be introduced later in 2021, intended to sit alongside any multilateral digital tax measures agreed at OECD level, in order to introduce an EU-own revenue source and to aid in the recovery from the economic impact of the COVID-19 virus.

The Commission set out that "parameters indicate that the OECD agreement will focus on large, multinational enterprise groups and a limited number of pre-defined activities linked to digitalization", and that the EU digital levy will instead aim to be a "measure that allows for a fairer contribution from the companies that operate in the digital sphere" in line with the Digital Services Act package recently introduced addressing the dominance of digital companies, particularly in the platform economy. The inception plan indicates that the options for the digital levy being considered include:

- A corporate income tax top-up to be applied to all companies conducting certain digital activities in the EU;
- A tax on revenues created by certain digital activities conducted in the EU;
- A tax on digital transactions conducted business-to-business in the EU.

Speaking after the March ECOFIN meeting on behalf of the Commission, Executive Vice-President Dombrovskis stated *"…as mandated by the European Council, we are continuing preparations for proposing an EU digital levy, to serve as an EU own resource by 2023. We will ensure that this will complement the OECD process and be WTO-compatible. The crisis makes it even more important to agree on the taxation of digital businesses and other issues such a minimum tax rate. This is both in order to secure much-needed tax revenues and to make sure that everyone pays their fair share of tax."*

A European Parliament Resolution adopted at the end of April called on the European Commission and the Council to "go ahead alone" should the negotiations on an international digital tax agreement fail at OECD level. One of the key demands of the European Parliament was a 21% global minimum tax rate, in support of the proposals from President Biden's administration. Members of the Parliament sought to support a minimum effective tax rate set at a "fair and sufficient level to discourage profit shifting and prevent damaging tax competition."

CFE issued an Opinion Statement on the EU Digital Levy Roadmap, setting out its concerns that there are numerous turnover digital tax measures being introduced at national level worldwide, and that the complete technical aspects of the proposed OECD solution are not yet known. How a EU digital levy would sit alongside those measures is unclear, and is a matter of concern for tax advisers, business and tax administrations alike. CFE fears that in absence of the measures being connected, there will inevitably be double, triple and quadruple taxation on companies as a result of these multiple digital tax measures. CFE observes that corporate income top-up taxes are being proposed in a number of Member States at present, also with the aim of aiding the economic recovery from the COVID-19 impact.

CFE believes that establishing tax certainty in the international taxation framework as well as the protection of taxpayers' rights and the avoidance of double taxation is of utmost importance and must be a priority for policymakers. Accordingly, CFE believes that the focus should remain on an international solution, and on minimising the enormous administrative burdens that will accompany any agreed solution. Latest reports indicate that the EU has delayed the digital levy until at least autumn, pending further discussion with the US and all technical details of the OECD Two-Pillar Solution being agreed.

EU Commission’s Corporate Tax Plan

02

EU Commission's Corporate Tax Plan: Business Taxation for the 21st Century

In mid-May, the EU Commission published the long-anticipated Communication on Business Taxation for the 21st Century, setting out the Commission's plan for reforming EU corporate taxation to be "fit for the realities of the modern global economy".

The Communication identifies issues such as adapting to the challenges of digitalisation, post-COVID economic recovery, an aging population, sustainable green taxation policies and the patchwork of corporate tax systems in the Single Market leading to tax competition as underpinning the strategy in the Communication. The main pillars of the Commission proposal are set out as follows:

- Common rulebook for a better business environment in the Single Market "Business in Europe: Framework for Income Taxation" (or BEFIT) intended to cut red tape, reduce compliance costs and minimise tax avoidance;
- Ensuring greater public transparency: requiring certain large companies to publish their effective tax rates;
- Supporting businesses to recover from COVID-19: recommending Member States allow companies to offset their 2020 and 2021 losses against taxes they paid before 2020;
- Tackling the abusive use of shell companies: monitoring and reporting requirements for shell companies so tax authorities can better respond to aggressive tax planning;
- Addressing the debt-equity bias in corporate taxation: Encouraging companies to seek finance through equity rather than debt: DEBRA proposal;
- "On the road to 2050: Rethinking the EU tax mix", a proposal in support of EU's green and digital ambition.

The Commission as part of the plan have already adopted a Recommendation on the tax treatment of losses, allowing loss carry-back for companies that were profitable in the tax periods prior to 2020 – that companies would be able to offset their 2020 and 2021 losses against profits of the earlier years.

A key element of the longer-term EU tax policy strategy is a 2023-planned proposal entitled "Business in Europe: Framework for Income Taxation" (BEFIT) that would replace the CCCTB proposal already on the table. BEFIT intends to introduce a common tax base and formulary apportionment on basis of the conclusions of the discussion on Pillar 1, and a single rulebook for the application of Pillar 2. It is not yet clear what the elements of the formula would entail and to what extent the BEFIT proposals would differ from the now withdrawn CCCTB. The European Commission Communication indicates that BEFIT would enable a single pan-EU corporate tax return for an MNE, amounting to significant administrative simplification for companies doing business in the Single Market.

Commenting, EU Commissioner for Economy (and Taxation), Paolo Gentiloni, said: *"It's time to rethink taxation in Europe. As our economies transition to a new growth model supported by NextGenerationEU, so too must our tax systems adapt to the priorities of the 21st century. The renewal of the transatlantic relationship offers an opportunity to make decisive progress towards a global tax* *reform. We must work to seize that opportunity, while ensuring that an international agreement protects Europe's key interests. Today we set out how a global deal will be implemented in the EU - and the other steps we will take over the coming three years to increase tax transparency and help businesses small and large to recover, grow and invest".*

Fighting the Use of Shell Entities for Tax Purposes

As part of the corporate taxation plan, on 4 June the European Commission launched a public consultation questionnaire on tax avoidance and fighting the use of shell entities for tax purposes. The questionnaire responses will be used to prepare a proposal for a directive planned to be published in the last quarter of 2021.

The Inception Impact Assessment concerning the proposed initiative sets out that the Commission aims to address "the use of legal entities with no or minimum substance and no real economic activities, by taxpayers operating cross-border to reduce their tax liability."

The policy solution might involve a directive that will establish minimum standards on tax related substance to decide whether entities in a Member State are deemed shell entities and, if so, to deny them tax advantages in the Member State in order to tackle the erosion of the tax base of the Member States through tax avoidance and evasion.

The Inception Impact Assessment refers to *Le Monde* investigations published in early 2021 which highlighted the lack of EU legislative measures which define substance requirements for tax purposes to be met by entities within the EU, and the pressing need identified by the public to act concerning this deficiency. The document sets out that as part of its policy considerations relating to the proposed policy solution, the Commission will consider:

- Current national practices and legislation (where existing) providing for anti-tax avoidance rules, including those deriving from the transposition of existing EU rules (e.g. the Anti-Tax Avoidance Directive – ATAD);
- To what extent the existing (e.g. the Code of Conduct on Business Taxation) or new soft-law instruments may eventually achieve the objectives;
- Whether a directive that defines new tax related substance requirements and new mechanisms is needed;
- Possible new substance requirements and indicators of "real economic activity" for the purpose of taxation rules;

Options for enhanced cooperation, monitoring and enforcement of the new rules will equally be explored, including enhanced cooperation and monitoring of the existing legislation in the field of taxation, for legal entities and arrangements operating in the EU.

The public consultation questionnaire sets out questions related to the above points. The consultation will run until 27 August, and responses to the questionnaire and any additional comments on the questionnaire can be submitted via the Have Your Say portal.

Addressing the Debt - Equity Tax Bias (DEBRA)

The European Commission also launched a public consultation in July seeking feedback on the initiative to reduce the debt- equity tax bias in the EU, as part of the recent corporate tax reform proposal within the Communication for Business Taxation of the 21 Century.

It is widely acknowledged in academic literature that the debt-equity tax bias is highly distortive of investment decisions. Interest as a return on debt is tax planning efficient, whereas similar tax benefits are ordinarily not in place for equity investment. As a result, companies often become highly leveraged for taxation purposes, which hinders innovative investment through equity whilst piling debt. At present tax legislation of only six EU Member States includes some form of allowance for corporate equity (ACE). An ACE would retain the deduction for interest expenses but would also add a similar deduction for the normal return on equity.

The Commission is seeking feedback on two proposed options:

- Disallowing the deductibility of interest payments, or creating an allowance for equity (ACE) by enabling the tax deductibility of notional interest for equity;
- Introducing allowance for a notional interest deduction on all corporate equity, new corporate equity or corporate capital (equity and debt).

The consultation will run until 7 October, and responses to the questionnaire and any additional comments on the questionnaire can be submitted via the Have Your Say portal.

EU Blacklist & Code of Conduct Group Update

03

EU Parliament Urges Stricter EU Tax Blacklist Process

The EU Parliament adopted a resolution in January calling for a wider scope, tougher criteria and a more transparent listing process concerning the EU's list of non-cooperative tax jurisdictions. The Parliament in its resolution noted that *"jurisdictions currently on the list cover less than 2 % of worldwide tax revenue losses, making the list confusing and ineffective"* and called for *"increased transparency and consistency, stricter and more impartial listing criteria, and stronger defensive measures against tax avoidance"*. The Parliament also expressly noted that it "*deplores the removal of countries with a clear record of promoting BEPS, such as the Cayman Islands, from the list"*.

Chair of the EU Parliament's Subcommittee on Tax Matters, Paul Tang, said of the resolution: *"By calling the EU list of tax havens "confusing and inefficient", the Parliament tells it like it is…The truth is, the list is not getting better, it's getting worse… the Parliament strongly condemns the recent delisting of the Cayman Islands and calls for more transparency and stricter listing criteria. However, if we focus on others, we also need to look ourselves in the mirror. The picture is not pretty. EU countries are responsible for 36% of tax havens."*

At the February meeting of the European Parliament Subcommittee on Taxation (FISC), Lyudmila Petkova, Chair of EU's Code of Conduct Group (Business Taxation), informed Members of the European Parliament that the EU finance ministers have not given her mandate to improve the governance structure of the Code of Conduct Group. Ms Petkova noted, however, the progress in reforming the assessment framework designed to assess Member states' corporate tax systems.

The Committee members expressed their concern on the lack of progress on reviewing the Group's governance structure, highlighting recent positive developments in taxation policy coming from the administration of President Biden. A number of MEPs noted that the positive change in Washington might facilitate reforms in the EU and inspire a more progressive approach towards corporate taxation.

In April, the European Parliament members discussed a draft report prepared by Aurore Lalucq MEP on reforming the EU policy on harmful tax practices (including the reform of the Code of Conduct Group). The report recommends ways in which national tax practices would become subject to an EU level of 'minimum level of economic substance', as well as an introduction of a simplified system to identify harmful tax regimes. In addition, the report recommends a reform of the Code of Conduct on Business Taxation in order to improve its governance, transparency and scope of work. Plenary discussion is at present scheduled for September, preceded by Committee vote on the meeting of 13 July 2021.

Ms Lalucq, MEP rapporteur, said at the Committee meeting: *"The code of Conduct on Business Taxation has had its successes but harmful tax practices have evolved. Because of this, the Code must also adapt. There has been progress on tackling preferential harmful tax practices but now it is time to also deal with general harmful tax practices"*.

Council of EU Updates EU Tax Blacklist

The EU's list of non-cooperative jurisdictions for taxation purposes was updated by the Council of the EU on 22 February 2021.

Dominica was added to the Blacklist following on from its OECD Global Forum peer review report on transparency and exchange of information, in which its compliance rating remained partially compliant. Barbados was removed to Annex II of the EU Blacklist pending the outcome of a supplementary review by the Global Forum.

Following commitments made to reform tax policies, the following 9 jurisdictions are now listed in the Annex II "grey-list" of non-compliant countries who have undertaken to reform their tax policy: Australia, Barbados, Botswana, Eswatini, Jamaica, Jordan, Maldives, Thailand and Turkey. Turkey has been asked to resolve exchange of information issues with Member States in order to avoid being moved to the blacklist.

Twelve jurisdictions remain on the EU blacklist: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu. Morocco, Namibia and Saint Lucia have now been removed completely from the list after fulfilling all commitments.

EU Policy – Direct Tax Update

04

EU Parliament & Council Reach Agreement on Public Country-by-Country Reporting

At a Competitiveness Council meeting in early 2021 of the EU's Industry and Internal Market Ministers, a clear majority of EU countries endorsed the latest proposal for a directive on public country-by-country reporting (CbCR), which seeks to add further transparency to the taxation affairs of multinational companies doing business in the Single Market. The Council invited the Council Presidency to start negotiations with the European Parliament on enacting this directive.

Thereafter, at the beginning of June, representatives of the Council of the EU Presidency from Portugal reached a provisional agreement with the EU Parliament negotiating team on the proposed directive on public country-by-country reporting of tax information disclosure (CbCR). Under the agreement, MNEs or standalone enterprises with a total consolidated revenue of more than €750 million in the last two consecutive financial years will be required to disclose publicly their income tax information in each Member State, whether headquartered in the EU or not. Additionally, the enterprises will be required to disclose income tax information from any third country listed in the EU Blacklist and Greylist of non-cooperative jurisdictions for tax purposes. Reporting will be required to take place within 12 months from the date of balance sheets for financial years in questions. The directive will provide for a complete and final list of information required to be disclosed.

Pedro Siza Vieira, Portuguese Minister of State for the Economy and Digital Transition, said of the provisional agreement, *"Corporate tax avoidance and aggressive tax-planning by big multinational companies are believed to deprive EU countries of more than 50 billion euros of revenue per year. Such practices are facilitated by the absence of any obligation for big multinational companies to report on where they make their profits and where they pay their tax in the EU on a country-by-country basis."*

The provisional text will now be submitted to the Council and the Parliament for political endorsement. If endorsed, Council will then adopt its position at first reading on the basis of the agreed text. The European Parliament should then approve that Council's position and the directive will be deemed to have been adopted. Member States will have eighteen months to transpose the directive into national law. Four years after the date of its transposition, the Commission shall report on the application of the directive.

The so-called 'trialogue' negotiations on this file, which began in July 2017, were blocked in Council by Member States opposing public CbCR. In October 2019, the Parliament passed a resolution calling on Member States to conclude the first reading on public CbCR and enter inter-institutional negotiations with the Parliament.

These developments at EU level coincide with UN International Financial Accountability, Transparency and Integrity Recommendations on how to strengthen the global fight against illicit financial flows and tax avoidance, with a key recommendation for governments to introduce public CbCR.

DAC7 Digital Platform Reporting Legislation Strengthened & Adopted by EU Council

In March, the EU Parliament adopted proposed amendments to the Commission's proposal to revise the directive on administrative cooperation to introduce reporting obligations for digital platforms, ("DAC7"), recommending the legislation be toughened.

The Parliament voted for a shorter period of compliance for information requests, mandatory registration for non-EU platforms, sanctions for failing to comply with reporting requirements, and harmonised penalties.

Rapporteur, Sven Giegold, stated of Parliament's recommended amendments: *"Extending the directive to cover digital platforms will close one loophole, but others remain wide open. Exchange of information will only be effective once all types of income and assets are consistently included under this directive. Unfortunately, the Council has already decided its position without waiting for the European Parliament's proposals and has decided to postpone implementing improvements by one year to January 2023. It is irresponsible to forego urgently needed tax revenues in this time of crisis. The EU Commission must take its responsibility in a time of public deficit seriously and propose a strong review of the directive."*

The European Council in March then adopted an amendment to the Directive on administrative cooperation and exchange of information in the field of taxation (DAC7), expanding the mandatory reporting requirements to digital platforms. As a result, platforms doing business in the Single Market and non-EU digital platform operators will be required to report relevant information about sellers of certain goods and services. DAC7 has an implementation deadline of 31 December 2022, with digital platform operators required to report from 2024, concerning material information of 2023.

Other DAC amendments include the possibility to gather information on groups of taxpayers, rules on the organisation of joint audits and on allowing tax inspectors to be present in another member state during an inspection, to become operational in from 2024 at the latest.

Commenting, a Portuguese Minister on behalf of the EU Presidency said: *"This is an important update of the EU rules, which will help to ensure that sellers who are active on digital platforms also pay their fair share of tax. It is particularly welcome at a time when more and more sales are made online and the COVID-19 pandemic is putting pressure on public finances. By extending its automatic exchange of information rules to the digital platform economy, the EU is setting an example to the world.", João Leão said.*

EU Tax Observatory Launched to Identify Means to Combat Tax Avoidance in the EU

The EU Tax Observatory, a European Union project with a EU grant budget of EUR 1.2 million, is aimed at identifying and analysing means of combatting tax avoidance practices, and supporting the fight against tax abuse through academic research, analysis and data sharing. The EU Tax Observatory was launched on 1 June by Commissioner Gentiloni, FISC Chair Paul Tang and other EU officials. The Observatory will be led by Professor Gabriel Zucman and based at the Paris School of Economics. The launch of the Tax Observatory was one of the planned actions contained in the Commission's 2020 Tax Package to tackle the fight against tax evasion and avoidance and to promote fairer taxation in the EU and beyond. The Tax Observatory's research will complement the Commission's reflection process on the future of taxation in the EU, which will conclude in a Tax Symposium on the "EU tax mix on the road to 2050" in 2022. A report issued by the Tax Observatory at its launch sets out simulations of amounts that could be collected in tax revenues based on taxing multinational companies under three scenarios: the EU imposing minimum corporate taxation, an international minimum taxation, and unilateral taxation. The report estimates that 25% minimum tax would increase corporate income tax revenues in the European Union by about €170 billion in 2021.

Paolo Gentiloni, Commissioner for Economy, said of the newly established Observatory: *"Today more than ever, we need to clamp down on tax abuse. It's vital that we protect the public revenues necessary to support the recovery and the massive investments needed for the green and digital transitions. I count on the European Tax Observatory to conduct research of the highest level, to bring forward innovative ideas and to promote an inclusive and pluralistic debate on taxation policies across the EU."*

Public Consultation on DAC8 EU Exchange of Information on Crypto-Assets & e-Money

The EU Commission conducted a public consultation in the beginning of 2021 on expanding the current directive on administrative cooperation, to provide for the exchange of information in the field of taxation to include crypto-assets and e-money.

The questionnaire gathered information to *"provide tax administrations with information to allow for the proper taxation of income and revenues related to new means of payment and investment, notably cryptoassets and e-money. It would also ensure consistency with ongoing work at EU level, such as the Digital Finance Strategy adopted on 24 September 2020 and the proposal for a Regulation on Markets in Cryptoassets (MICA), as well as the future legislative initiative on anti-money laundering and terrorism financing expected for the 1st semester 2021"*.

On the basis of the outcome of the public consultation, the Commission will consider whether/which assets should be subject to any proposed expansion of DAC, including how to define crypto-assets and how to identify the relevant intermediaries for tax and reporting purposes. Responses to the public consultation will be used in forming the proposed Directive.

EU Commission Extends Temporary COVID State Aid Framework

The EU Commission extended the duration and scope of the Temporary State Aid Framework, first adopted in March 2020 to assist Member States in dealing with the economic impact of the COVID-19 outbreak. The Commission consulted with Member States on the action. The Framework allows Member States to provide aid by: providing grants, selective tax advantages and advance payments; providing State guarantees for loans taken by businesses; subsidising public loans to companies, putting in place safeguards for banks providing State aid to the economy; and providing short-term export credit insurance.

The Commission has now extended the Framework to apply until 31 December 2021, and increased the amounts of aid that can be granted to companies. The extended scope also now enables Member States to convert repayable loans provided into grants at a later stage, and the Commission has temporarily removed all countries from the "marketable risk" countries list under the short-term export-credit Insurance Communication.

Executive Vice-President Margrethe Vestager stated of the earlier consultation and reasons for extending the Framework, *"As the second wave of the coronavirus outbreak continues to deeply affect our lives, businesses across Europe are in need of further support to weather the crisis. That's why we are proposing to prolong the State aid Temporary Framework until 31 December 2021 and to increase the aid amounts available to companies under certain measures to ensure that effective support remains available. We will decide on the way forward taking into account the views of all Member States and the need to preserve effective competition in the Single Market."*

EU Policy - Indirect Tax Update

05

New EU VAT E-Commerce Rules Come Into Force

The new e-commerce rules entered into force on 1 July, creating a simplified VAT regime for cross-border supplies of goods (B2C) and distance sales. The new rules provide for a system to declare and pay VAT in the EU using the Import One-Stop Shop and also level the playing field between EU businesses and non-EU sellers.

Online sellers, including online marketplaces and platforms can now register in one EU Member State and this will be valid for the declaration and payment of VAT on all distance sales of goods and cross-border supplies of services to customers within the EU. According to the European Commission, online marketplaces will now benefit from a reduction in red tape of up to 95% by registering with the new One Stop Shop (OSS).

EU Commission Consultation on VAT Rules for Financial & Insurance Services

The EU Commission conducted a public consultation in the second quarter of 2021 concerning VAT rules for financial and insurance services. The initiative to review the VAT rules for financial and insurance services was contained in the Commission's 2020 Tax Package Action Plan, based on the fact the existing rules have been criticised for being complex and difficult to apply, leading to uncertainty, high compliance costs and lack of VAT neutrality. An impact assessment is also being prepared on the implications of either removing the existing exemption or keeping it and modifying the scope, as well as concerning issues caused by the current exemption such as cost-sharing and issues with calculating VAT on high-frequency trading.

Input from the public consultation will be used to feed into a proposal for a directive to "address the competitive disadvantage faced by financial and insurance operators… caused by irrecoverable VAT". CFE issued an Opinion Statement responding to the public consultation, setting out its view that the view that current exemption works well in general in the sector. However, CFE are of the view it is unfortunate the CJEU case law precludes the application of the cost sharing exemption and, particularly on transactions between Member States, there are problems with VAT-grouping. The exemptions have the benefit of avoiding problems which will otherwise arise when determining how to charge VAT on financial transactions. We are also concerned that the restrictive interpretation and ambit of the exemptions causes problems with outsourcing. This is in particular an issue with insurance, and is a possible reason for extending the scope of the exemptions.

If the exemptions are retained, ideally the entire supply chain would be exempted, and definitions would be provided of what falls under the scope of insurance, i.e. whether it extends to back-office outsourcing and the like. CFE are of the view that the lack of cross-border grouping/cost-sharing exemption also hinders the development of cross-border supplies of insurance/financial services. Implementing any changes in a regulation will have the benefit of increasing harmonisation, which in turn should assist in simplifying the analysis of transactions between member states.

A proposed directive is anticipated to be published in the fourth quarter of 2021.

EU Commission Publishes Mind the VAT Gap Roadmap

The EU Commission published a Roadmap concerning a planned Communication entitled “Mind the VAT Gap” which highlight administrative practices in Member States which have reduced their national VAT gap. The Communication will also identify financing or other tools the Commission can provide in order for Member States to implement the practices identified in the Communication. The initiative was contained in the Commission’s 2020 Tax Package Action Plan and will build on the statistical information contained in the most recent VAT Gap study.

The Roadmap sets out that Member States have already been consulted in the process of preparing the Communication, and that no public consultation will be carried out, given the focus of the Communication is on tax administration.

EU Political Agreement Reached on 1 Billion Euro Customs Control System

The EU Parliament and EU Member States reached provisional political agreement on approving the Customs Control Equipment Instrument for 2021 – 2027, making over 1 billion Euros available for state of the art customs control equipment and processes aimed at identifying weak points at EU borders and reducing evasion of EU taxes and customs.

The Customs Control Equipment Instrument forms part of the Commission’s Customs Action Plan. Commissioner for the Economy, Paolo Gentiloni, said of the agreement: “As our societies and economies evolve, customs authorities are facing new challenges such as the huge increases in international trade volumes, heightened risks of fraud and a growing number of imports of dangerous goods. Once up and running, the €1 billion package agreed today will support Member States with cutting-edge tools to help front-line customs officials deal efficiently with these challenges to our Customs Union.

Professional Standards Update

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CFE Discussion Paper: An Ethics Quality Bar for All Advisers

In June, against the backdrop of recent actions by governments and lawmakers, such as the G7 agreement on minimal global corporation tax and anti-tax avoidance initiatives of the EU, CFE issued a discussion paper founded on its commitment to high professional standards in tax advice seeking to promote ethical professional judgment across all tax advisers in Europe. While tax advisers play a valuable role in the proper functioning of tax systems, this role can be undermined by the promotion of abusive tax arrangements within legal parameters.

“If it is legal, is it acceptable?” is the central ethical question which inspired this paper. It is distinct from criminal tax evasion – breaking the law – which CFE unequivocally condemns. The question comes down to whether there is manipulation and artificiality in tax planning. CFE has issued this paper to stimulate discussion on how to tackle this problem among all who have an interest in how our tax systems function in Europe, not just tax specialists. We are actively seeking stakeholder feedback.

Setting an Ethics Quality Bar

This paper is focused on the future, noting that tax systems will play a key role in repairing the strained public finance conditions after the COVID-19 pandemic, as well as the growing transformational impact of technology on tax services and tax administration overall. The principal objective of the paper is to seek feedback on a proposed “ethics quality bar” based on five questions that all tax advisers should reflect on when undertaking their advisory role in the overall tax system.

CFE seeks views on whether the questions can help to steer all advisers in the direction of an appropriate balance between the rights and obligations of taxpayers, avoiding abusive planning. To that end, a series of stakeholder events will be announced in due course.

EU Professional Services Regulation Roadmap Published

In March, the European Commission published a Roadmap concerning a planned Communication which will recommend reform of the EU framework on the regulation of professional services. The Communication will update a Recommendation issued by the Commission in 2017 to reform regulation for professional services, in particular for lawyers, accountants, architects, engineers, patent agents, tourist guides and real-estate agents. The new Communication will also extend to cover notaries. The Commission aims to “assist Member States in creating a regulatory environment that is conducive to growth, innovation and job creation”.

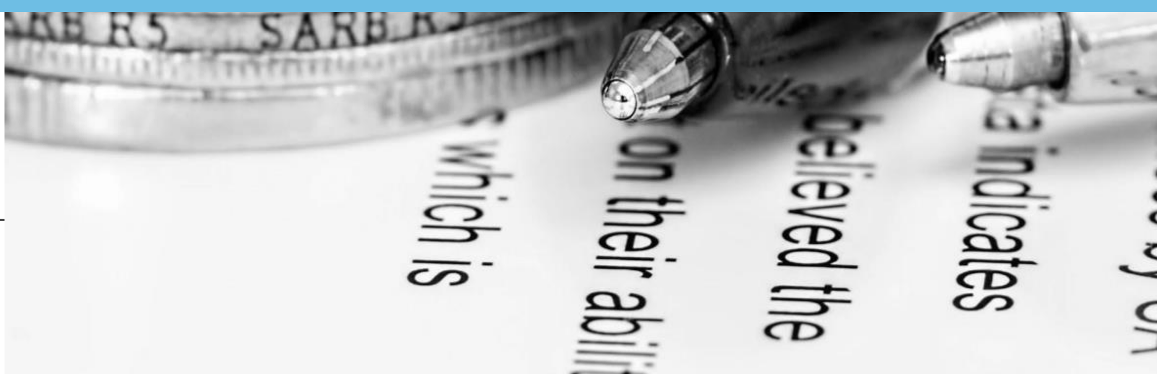
According to the Commission, the economic potential that remains unrealised due to excessively restrictive regulation for professional services has been estimated at 85 billion Euros over 2010-

2018, and “a well-functioning professional-services sector can be a significant source of economic growth and welfare, and the smooth functioning of this sector will be important for achieving a robust economic recovery from the COVID-19 crisis”.

The new Communication will accordingly update the 2017 recommendations to reflect developments in Member States’ regulatory framework, and encourage reform it sees as necessary, taking into account developments in digitalisation and innovation within individual sectors. No formal public consultation is planned, but competent authorities of the Member States will be consulted.

The Communication will be published in the coming months.

Taxpayers’ Rights 07



EU Commission's Taxpayers' Rights Consultation

Over the second quarter of 2021, the European Commission conducted a public consultation concerning a planned Recommendation to Member States to facilitate the implementation of taxpayers' rights and simplify tax obligations to ensure better tax compliance.

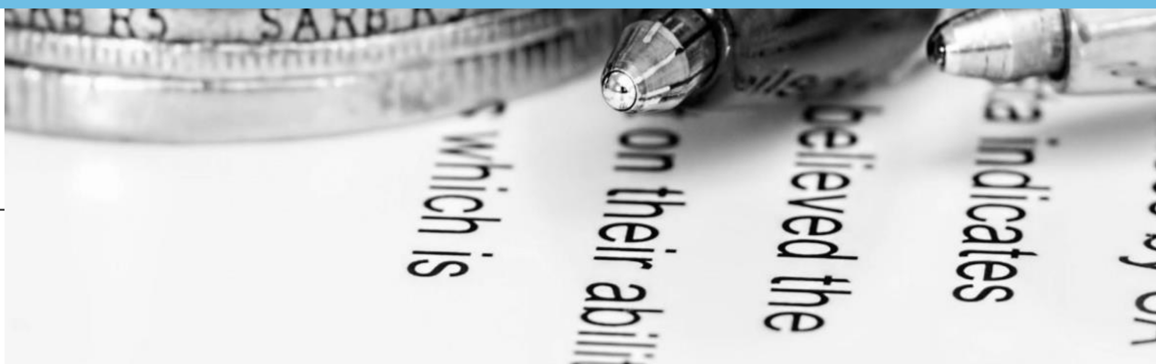
The Recommendation forms part of the Commission's Tax Package Action Plan, and aims to improve awareness of taxpayers' rights throughout the EU. The Recommendation will discuss how Member States may improve their tax administration related to cross-border operating entities vis-à-vis those who are active in only one Member State. By collecting the information directly from EU citizens, the Commission aims to identify the remaining problems and come up with solutions which are best suited for the European citizens. In spite of the fact that much has been achieved in the past, EU citizens continue face excessively complex administrative procedures, other barriers or divergent interpretation of tax treaties.

From a CFE perspective, double taxation continues to be an issue in spite of positive developments such as the enactment of the EU Dispute Resolution Mechanisms Directive. Relief of double taxation should continue to be a priority for Member states and the European Union in areas of shared competence. Therefore, we agree with the proposed exercise of the European Commission to embark on these highly practical, but also principled bases project that can significantly improve the cross-border activity of the EU citizens. From CFE perspective it is not acceptable to for citizens to subject to double or multiple taxation due to lack of coordination by two or more member States.

However, from CFE perspective, a project on taxpayers' rights should be focused on promoting taxpayers' rights, either via legislation or via codes or charters. To that end, CFE reiterates the importance taxpayers' rights for tax good governance, and the role that clear statements of taxpayer, and tax administration, rights and obligations, can play in this respect. We support the Commission project of November 2016 on Guidelines for a Model for A European Taxpayers' Code, that such focus can enhance the efficiency and effectiveness of a tax system and can also increase the tax morale of Europe's citizens. CFE stands ready to continue working with the European Commission on the project of Taxpayers Rights and welcome the renewed focus of the European Commission on taxpayers' rights.

International Tax Policy Updates

08



OECD Publish Inheritance Tax Report

The OECD has published a report on Inheritance Tax in OECD Countries comparing inheritance tax, estate and gift taxes across OECD countries, analysing the roles these taxes have to play in raising tax revenues, and identifying means of reforming the taxes for countries to improve the function of inheritance, estate and gift taxes.

Wealth inequality, economic recovery from the COVID-19 pandemic, an ageing population and wealth concentration amongst older age groups will reinforce inequality, and highlights the need for tax administrations to examine the issue of inheritance, estate and gift taxes. The report aims to assist tax administrations in this process.

Tax Inspectors Without Borders Mobilises Over 1 Billion USD in Tax Revenues for Developing Countries

The Tax Inspectors Without Borders, a joint OECD and UN initiative launched in 2015 to assist developing countries with their auditing capacity and in increasing compliance of MNEs worldwide, has now aided in the collection of over 1 Billion USD in developing countries.

The initiative has over 42 successfully completed programmes, with 45 more projects in progression assisting developing countries in effectively collecting tax from multinational entities, which is vital in light of the coronavirus crisis.

Mr. Angel Gurría, OECD Secretary-General said of the Tax Inspectors Without Borders initative: "With our partners, we have exceeded the USD 1 billion milestone, making a direct contribution to the domestic resource mobilisation needs of some of the poorest countries in the world. It has been an honour to champion the TIWB model of development co-operation for the 21st century."

OECD BEPS Action 14:Country-by-Country Reporting Public Consultation

The OECD held an online public consultation on 1 February on the 2020 review of BEPS Action 14 on dispute resolution minimum standards and improving the mutual agreement procedure (MAP). Public comments received concerning the consultation were addressed by way of panel discussions covering input topics.

Speakers discussed issues surrounding preventing disputes, access to MAP, resolution of MAP cases, implementation of MAP agreements, statistics concerning the use of MAP and suggestions for its improvement.

The consultation is available to replay via the OECD website.

Tax and Gender: Developments in International Tax Policy

The OECD is revisiting the gender-related aspects of tax policy. According to the OECD, "while tax policy measures play a crucial role in supporting individuals and businesses as we navigate this crisis, the gender impact of taxation is often overlooked – with serious consequences for gender equality. To ensure that the tax system does not inadvertently reinforce gender biases in society, governments need to include the impact of taxes on gender as a key policy dimension in their tax policy responses to COVID-19.", OECD states. A recent OECD webinar explored these progressive developments in the fiscal policy debate.

CFE and the Global Tax Advisers Platform (GTAP) strongly advocate for policy makers to integrate the gender element into tax policy, in particular by reference to the potential of increased tax morale. In a statement issued in May 2019, we endorsed the UN- led projects that have recently promoted the awareness of gender mainstreaming in the field of public finance management through its gender responsive taxation and budgeting initiatives. By promoting gender-neutral distribution of resources and raising of revenues, governments contribute to more equitable societies and more opportunities for all.

CFE and GTAP wholly endorse the OECD proposition to focus on gender-responsive policies, as a means for both improving the perception of fairness and establishing fiscal equality among all citizens, regardless of gender.

OECD Calls on Countries to Target Professional Enablers of Tax Crimes

A recent OECD Report entitled "Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes" calls on governments to target professional enablers of tax crimes and other white collar crime, facilitated through complex legal and tax structures.

The report notes that whilst the vast majority of intermediaries such as tax advisers, lawyers, notaries and financial institutions contribute to making complex tax and legal systems work, the small minority of professional enablers continue to play key role in defrauding governments and help clients evade their tax obligations. The means of doing so continue to be focused on non-transparent structures and schemes seeking to conceal the identity of individuals behind the activities.

Key elements of the report call on countries to develop strategies that would:

- ensure that tax crime investigators are equipped to identify the types of professional enablers operating in their jurisdiction, and to understand the risks posed by how they devise, market, implement and conceal tax crime and financial crimes;
- ensure the law provides investigators and prosecutors with sufficient authority to identify, prosecute and sanction professional enablers, both to deter and penalise;
- implement multi-disciplinary prevention and disruption strategies, notably through engagement with supervisory, industry and professional bodies, to prevent abusive

behaviour, incentivise early disclosure and whistle-blowing and take a strong approach to enforcement;
- ensure relevant authorities proactively maximise the availability of information, intelligence and investigatory powers held by other domestic and international agencies to tackle sophisticated professional enablers operating across borders;
- appoint a lead person and agency in the jurisdiction with responsibility for overseeing the implementation of the professional enablers strategy, undertake a review of its effectiveness over time and devise further changes as necessary.

UN Tax Committee Agrees Digital Services Model Tax Treaty Amendment

In March, the subcommittee of the UN Tax Committee of Experts on International Cooperation on Tax Matters dealing with issues relating to the digitalisation of the economy agreed on amending the UN Model Tax Convention to include an Article which will attribute a taxing right for source jurisdictions for payments for automated services.

The finalised text is available on the Tax Committee's webpage.

UN Releases Updated Transfer Pricing Manual

The United Nations has published the 2021 update to the Practical Manual on Transfer Pricing for Developing Countries adopted by the UN Tax Committee of Experts on International Cooperation in Tax Matters ("Tax Committee"), at its 22nd Session in April 2021.

The third edition of the Transfer Pricing Manual incorporates feedback received on the previous 2017 version, and also includes new content on financial transactions, profit splits, centralised procurement functions and comparability issues.

State Aid & Case Law Updates

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European Court of Justice (ECJ) Judgment in C-403/19 *Société Générale* (Double Juridical Taxation of Dividends)

In February, the Court of Justice delivered a judgment concerning elimination of double juridical taxation of dividends in case C-403/19 Société Générale SA. The case concerned a request for preliminary ruling from the Conseil d'État (France) regarding the case of *Société Générale SA v. Ministre de l'Action et des Comptes publics.* Conseil d'État question concerned interpretation of Article 63 of TFEU, and whether compensation for the double taxation of dividends paid to a company liable for corporation tax in the Member State of residence by a company resident in another Member State is liable to create a disadvantage of foreign companies, by virtue of the exercise by that Member States of the power to withhold tax.

The Court of Justice, recalling its well-established case-law in *Kerkhaert-Morresand Gilly*, ruled that Article 63 of the Treaty does not preclude the application of the credit method provided by a double tax treaty. The disadvantage of which the company complained was a result of the difference of tax base as applied in the source State for purposes of withholding tax and the tax bases in the residence State for purposes of corporate income tax. According to settled case-law, ECJ stated, such computation of the basis for tax assessment (regarding the shareholder who receives dividends) is not in breach of the free movement of capital. Different treatment which occurs as a result of parallel exercise of taxation powers by different Member states, to the extent it is not discriminatory, does not constitute a restriction to the free movement of capital protected by the Treaty.

Citing settled case-law (paragraph 46 *Gillly-* paragraph 39 of the judgment), ECJ reiterated that the that "the objective of a double tax treaty is to prevent the same income from being taxed (twice)- in each of the two States. It is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which they would be subject to in the other", the ECJ concludes.

ECJ Dismisses EU Commission's Appeal in Turnover Tax Cases

The Court of Justice of the European Union has dismissed the European Commission's appeal against the decision of the General Court that progressive turnover taxes imposed by Hungary and Poland on online retailers are not in breach of EU rules.

The ECJ dismissed the Commission's grounds of appeal as manifestly unfounded, holding that the Commission had failed to demonstrate that imposition of a progressive turnover tax resulted in a manifestly discriminatory element, necessary to prove that a selective advantage was conferred in a breach of Article 107(1) TFEU.

The decision may well open the door for other domestic taxes to be imposed on digital activities. Significantly, the Court of Justice held in paragraph 41 that *"EU law thus does not preclude progressive taxation from being based on turnover, including where such taxation is not intended to offset the negative effects likely to be caused by the activity being taxed. Contrary to what the Commission maintains, the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay (see, to that effect, judgments of 3 March 2020, Vodafone Magyarország, C-75/18, EU:C:2020:139, paragraph 50, and Tesco-Global Áruházak, C-323/18, EU:C:2020:140, paragraph 70). It does not follow from any rule or principle of EU law, including in the field of State aid, that progressive rates may apply only to taxes on profits. Moreover, like turnover, profit in itself is merely a relative indicator of ability to pay. The fact that it may constitute, as the Commission contends, a more relevant or more precise indicator than turnover is irrelevant in matters of State aid, since EU law on that matter seeks only to remove the selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. The same is true of the possibility of economic double taxation, linked to the combined taxation on turnover and taxation of profits"*.

Grounds of Appeal in Apple State Aid Case Published

The grounds of appeal of the EU Commission in its appeal against the General Court decision in the €14 billion Apple State Aid case have now been published in the Official Journal of the European Union.

The General Court annulled the Commission's decision that Ireland's tax authorities granted Apple a "selective advantage" by failing to employ appropriate profit allocation methods to apportion income of the Irish Apple branches, in contravention of EU State aid law.

The final determination of the case will be made by the Court of Justice of the European Union. The Court of Justice has repeatedly disagreed with the General Court on substantive issues concerning fiscal State aid (cf. Gibraltar, World Duty Free), where the ECJ subsequently annulled General Court judgments in particular regarding the interpretation of the notion of 'selectivity'.

EU Commission Refers UK to the ECJ on State Aid Matters

The European Commission referred the United Kingdom to the European Court of Justice for failure to recover tax assessed as State aid with a Commission decision related to Gibraltar. The assessment concerns the period when the UK was a Member state of the EU. Under Article 87 the Withdrawal Agreement, the Commission is entitled to pursue this action, with the Court of Justice as the relevant body having jurisdiction in these cases. The case concerns State aid of approximately €100 million, granted as a tax exemption for passive interest and royalties in Gibraltar, and relates to a factual situation that took place before the UK left the European Union.

Commission Vice-president Margrethe Vestager, in charge of competition policy, said "The aid granted by Gibraltar in the form of corporate tax exemption for passive interest and royalties gave an unfair advantage to some multinational companies and had to be recovered by the United Kingdom and the Gibraltar authorities. However, more than two years after the Commission adopted this decision, the aid has still not been recovered in full and sufficient progress has not been made in restoring competition. That is why we have decided to refer the United Kingdom to the Court of Justice for failing to implement this decision."

General Courts Confirms EU's State Aid Assessment in *Engie*, Dismisses Amazon Case in Luxembourg

The General Court has upheld the European Commission decision of January 2017, which established that the GDF Suez Group (now Engie) received a selective tax advantage in Luxembourg in breach of EU State aid law. The *Engie* case concerned discretionary double non-taxation of interest i.e. tax treatment of debt and equity in relation to zero-interest loans (ZORA). The tax rulings that the Commission looked into treated two financial transactions as both debt and equity, which was found to be inconsistent with the tax treatment of the said transactions. Such a treatment gave rise to double non-taxation, as the borrowers could reduce their tax liability in Luxembourg by deducting deemed interest payments as expense. Under the terms of the convertible zero-interest coupon the borrower can record a provision for deemed interest payment without an interest payment actually taking place.

With this case the European Commission addressed the cases of inconsistent application of national tax law that gave rise to discretionary double-non taxation. In a similar vein, the Commission opened the *McDonald's* case and the interpretation of the double tax treaty between the US and Luxembourg, where the group's income was exempt from taxation on the basis of a confirmatory ruling that concerned evaluation of the permanent establishment in the US from a Luxembourg perspective. The McDonald's case was later dismissed by the European Commission, alongside a statement issued by Commissioner Vestager stating that the double non-taxation of the franchise income of McDonald's Europe Franchising was no longer seen as problematic from an EU perspective.

On the *Amazon* case, which concerned profit allocation and application of TNMM as transfer-pricing method, the General Court found that the Commission did not prove the existence of State aid to the requisite legal standard and annulled the Commission decision. From a transfer-pricing perspective, the Court found that even if the 'arm's length' royalty should have been calculated using the Commission's designated group company as the 'tested party' in the application of the TNMM, the Commission still did not establish the existence of an advantage since the Commission did not take into account the evolution of the intangible assets and the cost sharing agreement, ie. the subsequent increase in value of said intangible assets.

EU Tax Policy Report

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