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EU Tax Policy Report

Semester II 2022

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 second half of 2022.

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Highlights

The Czech Republic held the Presidency of the Council of the EU for the second semester of 2022, and presided over many challenging tax negotiations at ECOFIN level during that period, eventually succeeding in making progress on all tax priorities set out in its Work Programme.

Under the auspices of the Czech Presidency of the EU, the European Union formally adopted the directive on minimum taxation of multinational groups, after Poland granted its consent in the formal written procedure on 15 December and Hungary agreed to support the Commission proposal on 12 December.

The Czech Presidency also focussed on unjustified tax exemptions, strengthening tax transparency. In November 2022, EU Finance ministers approved the revised Code of Conduct on Business Taxation, setting out stricter criteria for evaluation of harmful tax regimes. The revised Code of Conduct introduces scrutiny on 'tax features of general application', thus expanding the existing focus on 'preferential measures'. In October, the EU List of Non-Cooperative Jurisdictions for Taxation Purposes was also updated, adding the jurisdictions of Anguilla, The Bahamas & Turks and Caicos Islands to the so-called "Blacklist".

The Czech Presidency also presided over the successful negotiations on the Carbon Border Adjustment Mechanism (CBAM) at Council and, thereafter, trialogues level, with political agreement reached just prior to Christmas on this file under its Presidency. Thus, the EU became the first jurisdiction to pioneer carbon border taxation.

In 2023, files to watch include: the BEFIT proposal on reform of EU corporate taxation; progress at Council level on the VAT in the Digital Age legislative package; a legislative proposal seeking to implement Pillar 1 into EU law once sufficient progress has been made at international level; the EU SAFE proposals seeking to clamp down on enablers of tax abuse; EU Customs Union reform proposals, amongst others. CFE will monitor developments closely and engage with various stakeholders vis-à-vis these important files.

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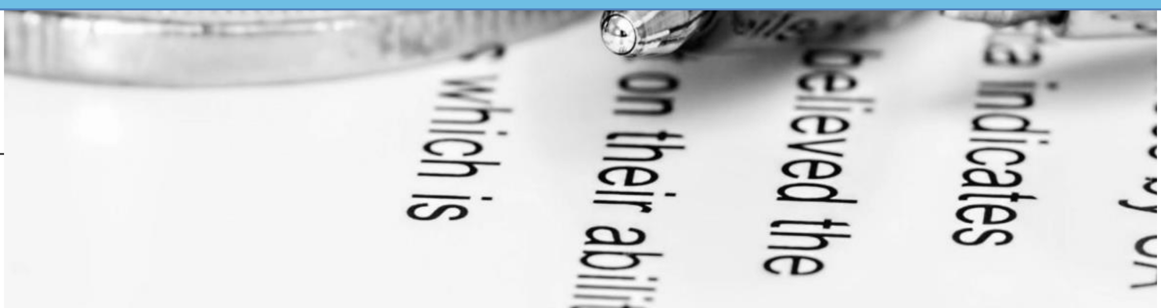
EU Directive on Minimum Tax

01



Christmas Miracle: Pillar 2 EU Minimum Corporate Tax Directive Agreed

The European Union formally adopted the Directive on minimum taxation of multinational groups, after Poland granted its consent in the formal written procedure on 15 December and Hungary agreed to support the Commission proposal on 12 December, under auspices of the Czech Presidency of the EU.

The adoption makes the European Union a leader in the international adoption of Pillar Two of the OECD/ G20 Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, which aims to introduce 15% minimum taxation for international groups via complex mechanisms of international tax law. On adoption, EU ministers reaffirmed the commitment to the Two-Pillar and invited all members of the OECD/G20 Inclusive Framework on BEPS to live up to their commitment on both pillars.

The Czech Finance Minister, Zbyněk Stanjura, currently chairing the Council said: "I am very pleased to announce that we agreed to adopt the directive on the Pillar 2 proposal today. Our message is clear: The largest groups of corporations, multinational or domestic, will need to pay a corporate tax that cannot be lower than 15%, globally." The European Commission also welcomed the Council adoption, calling it a win for fairness and a win for diplomacy.

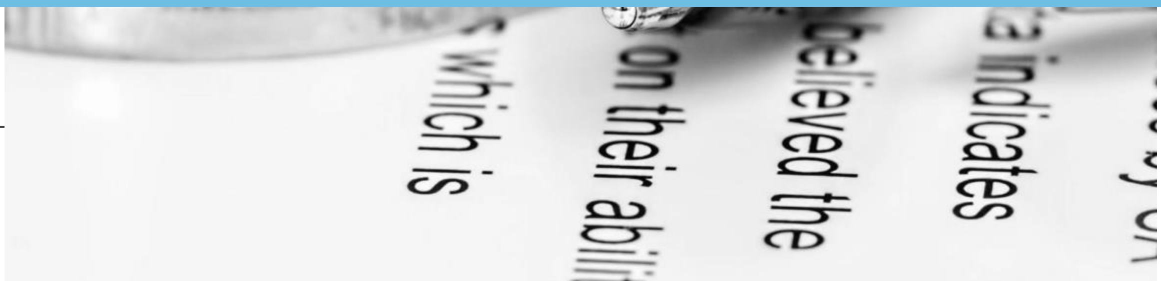
Agreement stalled at ECOFIN meetings which took place earlier in the semester as the Directive was blocked by Hungary, following on from months-long opposition from Poland under the French EU presidency. In September, prior to an informal ECOFIN taking place, France, Germany, Italy, The Netherlands and Spain increased pressure on reaching agreement by issuing a joint statement reaffirming their commitment to swiftly implement the global minimum effective corporation taxation in their jurisdictions in order for the tax to be effective as of 2023, should agreement not be reached at Council-level.

Hungary's Prime Minister Victor Orban cited concerns over job losses, saying "This is a job killing tax hike, which, if implemented with Hungary's approval, would wipe out tens of thousands of jobs. Taxation falls under national jurisdiction." It was widely viewed that Hungary's veto was unrelated to tax policy goals, but was being used as leverage in the 'rule of law' dispute between the European Commission and Hungary. Paul Tang, Chairman of the European Parliament Taxation Subcommittee in an opinion piece published 2 December called on the EU to break Hungary's veto, suggesting that: "National vetoes seriously call into question the viability of the unanimity voting in tax matters and the EU's credibility in general. Europe urgently needs ambitious and fair tax policies to deliver tax justice. This vital objective must not be held hostage to a power play between one against 26 other EU countries."

Member states must implement the agreed Directive by 31 December 2023. It will apply to MNEs and domestic groups with a combined financial revenue of over 750 million Euro per year.

Regulation of the Tax Adviser Profession

02



EU Commission Launches Consultation on Improving Tax Intermediaries Regulatory Framework (“SAFE”)

In July 2022, the EU Commission launched its highly anticipated public consultation on the policy options being considered to improve tax intermediaries' regulatory framework, for a legislative proposal referred to in the consultation document as “SAFE”, a proposal to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the European Union (Securing the Activity Framework of Enablers – SAFE).

The Call for Evidence accompanying the consultation stated that a legislative proposal is planned for publication in early 2023. The consultation documents set out that the options currently being considered by the Commission for the proposed Directive include:

- **Option 1:** Requirement for all enablers to carry out dedicated due diligence procedures - to perform a self-assessment test to demonstrate that the tax schemes do not lead to tax evasion or aggressive tax planning.
- **Option 2:** Prohibition to facilitate tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for enablers to register in the EU - this would combine the above due diligence procedure requirements with either mandatory registration for enablers in order to be able to provide tax advice or optional registration that gives access to certain benefits (e.g. submitting tax return on behalf of their clients).
- **Option 3:** Code of conduct for all enablers - that would prohibit the enablers who design, market, organise or assists in the creation of tax evasion and aggressive tax planning schemes without any complementary mandatory measures.
- **New reporting requirements:** In addition to the above options, the Commission is also considering the introduction of new reporting requirements as part of the proposal, introducing mandatory reporting for EU taxpayers of participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means in a non-listed company outside the EU.

The Call for Evidence detailed that the legislative basis being considered for the planned proposal are Article 115 and Article 50(2)(g) of the Treaty on the Functioning of the European Union (TFEU). It is likely Article 115 is being considered as the legal basis for the Code of Conduct, Due Diligence and Register aspects of the proposal, which would require unanimous approval at Council level from the Member States, and Article 50 would likely apply to the reporting requirements, which would follow the ordinary legislative procedure.

The consultation also contained questions on the issue of the measures being enforced via monetary penalties as a means of deterring facilitating evasion and sanction enablers, either as a proportion of their fees, a proportion of the amount of tax evaded or absolute fixed amounts. Additionally, the consultation included questions on the possibility of preventing enablers who would fit the criteria from providing further services as a means of a deterrent.

CFE Tax Advisers Europe issued an Opinion Statement responding to the public consultation, noting that CFE and its Member Organisations have always been supportive of reasonable and proportionate initiatives of the European Union. CFE noted the Commission's view that despite all of the measures taken by the EU and Member States in this area, tax evasion and aggressive tax planning continue to be a substantial problem in the European Union. However, CFE set out in the statement that it is very concerned that this view is based on pre-BEPS project data, which is not reflective of the impact of the very considerable volume of new legislative measures that have been introduced on foot of BEPS. CFE opined it seemed inappropriate to introduce further measures without first fully evaluating the impact of the measures already recently introduced.

CFE strongly recommended that no additional legislative action be taken by the Commission until such analysis had been performed and noted the study commissioned by the European Parliament, Permanent Committee on Taxation (FISC), which also discussed that the impact of recent EU regulations on tax compliance across the Single Market was uncertain.

CFE drew attention to the CFE paper on 'Professional Judgment in Tax Planning', which sets out a framework to help steer all advisers in the direction of an appropriate balance between the rights and obligations of taxpayers, thereby raising standards in tax advice and reducing incentives for aggressive tax avoidance.

At the CFE's 15th European Conference on Tax Advisers' Professional Affairs in Zagreb, Croatia, which took place on 2 December 2022, Mr Benjamin Angel, Director in the European Commission, DG TAXUD, said that the European Commission will try to establish a legal definition of aggressive tax planning, thus providing clarity to tax professionals on the so-called 'grey zone' in tax planning. Whereas DAC6 already mandates reporting of aggressive tax planning arrangements, the SAFE proposal would potentially seek to provide a clear definition of what is aggressive tax planning and, as such, would be made illegal. This will depend on establishing clear, workable, predictable rules which tax advisers would be able to understand and abide by ex ante.

The progress on the draft proposal is a matter that CFE will follow closely in 2023.

EU BEFIT Proposals

03

Is it Be-Fitting? : European Commission Public Consultation on the Introduction of a New Corporate Taxation System in Europe (“BEFIT”)

The European Commission held a public consultation in late 2022 on establishing a new corporate income taxation framework in Europe, known as the Business in Europe: Framework for Income Taxation (BEFIT). This consultation follows on from discussions organised by the European Commission with key stakeholders within the Platform for Tax Good Governance, where CFE presented its preliminary views on the matter.

The European Commission call for evidence concerning the BEFIT project set out the policy considerations behind the project, stating: *"While the principles of a common tax base and of formulary apportionment already featured in the previous proposals for a common consolidated corporate tax base, BEFIT will reflect the significant changes that occurred, in the meantime, in the economy and the international framework. The new proposal will build on the Inclusive Framework two-pillar approach of the Organisation for Economic Co-operation and Development (OECD) and the G20 since the formula for allocating profits of pillar 1 and the rules developed for pillar 2 will be a source of inspiration for the design of the BEFIT policy framework."*

The CFE issued an Opinion Statement on the European Commission’s plans to overhaul Europe’s business taxation rules by introducing a single corporate tax rulebook, recommending that the following factors are taken into consideration by the European Commission:

- BEFIT would represent a fundamental shift in the corporate tax landscape, and CFE would encourage the European Commission to defer further consideration of BEFIT until the rules for the implementation of Pillar Two have had sufficient time to be operational in practice. Only then should the European Union proceed with a process to analyse whether BEFIT would provide a benefit to tax authorities and MNEs.

- The Commission should take into account the subsidiarity principle of EU law and conduct a thorough quantitative and qualitative assessment of the impact of investment and revenue for all Member states, including sustainable revenue for the EU budget.

- Taxpayers have invested heavily over the last number of years to ensure that they comply with OECD Transfer Pricing requirements. The European Commission has not provided a rationale for moving away from that approach.

- The system will not eliminate the Arm’s Length Principle (“ALP”) and transfer pricing as we know it; it will only apply within the EU for the companies coming within the ambit of the legislation. MNEs will still be subject to traditional transfer pricing rules outside of the EU. This will create a two-tier system, which will lead to increased complexity and compliance costs for companies and tax authorities.

- The proposed ‘risk-based’ approach to transfer-pricing does not address these concerns, and instead focuses on one non-traditional transfer-pricing method, which might be controversial from the perspective of policy and practice.

- The BEFIT proposal envisages that tax authorities would operate two different tax systems in parallel, which would not meet the stated objective of administrative simplification.

- In addition to tax authorities, a two-tier system could increase the administrative burden for companies balancing on the ‘application edge’ of the BEFIT rules – i.e. if local non-BEFIT rules and BEFIT rules would deviate to a large extent, it would make moving from one system to another difficult for taxpayers (such as an SMEs).

- If BEFIT rules would be introduced, it would not be just a one-off transition from current system(s) to the new BEFIT era. Going forward there would be a number of taxpayers balancing between the two systems each year.

- If there is an objective to prevent certain companies from abusing the ALP and the transfer-pricing provisions, certain provisions must be included to deter MNEs from engaging in formula-factor manipulation.

A legislative proposal following on from the consultation is expected to be adopted by the Commission in Q3 2023. CFE and its Member Organisations stand ready to assist the Commission in considering the issues above in the course of the policy dialogue and public consultation.

EU Policy – Direct Tax Update

04

GREEN TAXES

Progress on Landmark EU Agreement on Carbon Taxation

In December, the European Parliament and the Council agreed on progressing the Carbon Border Adjustment Mechanism (CBAM) agreement, which is a climate policy measure aimed at preventing the risk of carbon leakage thus protecting the Single Market from the effects of distortive and carbon-intensive imports. In order to become EU law, the CBAM proposal must be formally adopted by the co-legislators, the European Parliament and the Council.

The CBAM requires companies to pay tax on certain imports considered carbon-intensive. The proposal aims to reinforce efforts to reduce greenhouse gas emissions of the EU and prevent relocation of production to non-EU countries with lax climate policy, thus placing a higher price on imports of carbon-intensive products. Ultimately the policy will level the playing field with the rest of the world and contribute to Europe's ambitious climate agenda. Commenting, the Czech Industry and Trade Minister, Jozef Sikela, currently presiding with the Council said: *"I am very pleased that we reached this agreement today. The Carbon Border Adjustment Mechanism is a key part of our climate action. This mechanism promotes the import of goods by non-EU businesses into the EU which fulfil the high climate standards applicable in the 27 EU member states. This will ensure a balanced treatment of such imports and is designed to encourage our partners in the world to join the EU's climate efforts."*

For its part, the European Commission also welcomed the provisional agreement: *"The Commission welcomes the political agreement reached this morning between the European Parliament and the Council on the Carbon Border Adjustment Mechanism (CBAM). The CBAM is the EU's landmark tool to put a fair price on the carbon emitted during the production of carbon intensive goods that are entering the EU, and to encourage cleaner industrial production in non-EU countries. Today's agreement will be complemented by the revision of the Emissions Trading System (ETS), with negotiations taking place later this week, and that will align the phase-out of the allocation of free allowances with the introduction of CBAM to support the decarbonisation of EU industry."*

EU Approves Windfall Energy

In September 2022, European Union leaders approved a regulation with measures aimed at redistributing the energy sector's surplus revenues to final customers. The package includes a windfall tax on excess profits of certain energy companies, infra-marginal revenue cap on non-fossil fuel energy companies as well as measures to reduce consumption of electricity. The EU stopped short of setting a cap on gas prices, as requested by some Member states.

The windfall energy profits tax, or in the EU language, "a mandatory temporary solidarity contribution on the profits of businesses active in the crude petroleum, natural gas, coal, and refinery sectors", would be calculated on excess profits, as determined under national tax rules in the fiscal year starting in 2022 and/or in 2023, which are above a 20% increase of the average yearly taxable profits since 2018. The windfall levy will apply as a top-up tax to regular taxes and levies applicable in all member states.

"We live in exceptional times and are working in an exceptionally fast, coordinated and solidary manner to form a united front against Russia's continuous weaponizing of energy supplies. The agreement will bring relief to European citizens and companies. Member states will flatten the curve of electricity demand during peak hours, which will have a direct positive effect on prices. Member states will redistribute surplus profits from the energy sector to those who are struggling to pay their bills.", said Jozef Síkela, Czech minister of industry and trade, on behalf of the Czech EU Presidency.

The revenue will go to Member states to support households and companies and to mitigate the cost-of-living crisis. Member states will be allowed to keep national measures already in place that are equivalent to the windfall tax, provided they are compatible with the objectives and are proportionate. EU Member states such as Ireland expect to collect between €1bn-€2bn on the lower end of what should be possible to raise under the EU approved windfall energy profits levy.

In the UK, former Chancellor of Exchequer Rishi Sunak introduced in May this year a similar tax to EU's levy, which was entitled Energy Profits Levy and applies to excess profits on entities extracting UK oil and gas, excluding 'green' electricity from nuclear or wind power. In spite of the widely criticised tax cuts announced by the new Prime Minister Liz Truss, the 'mini-budget' of the new Chancellor contained no reference to abolishing the energy profits levy nor were there any changes to the rate of corporation tax and charges applicable to oil and gas companies.

TAXATION & REPORTING OF CRYPTO & E-ASSETS

OECD Presents New Crypto-Assets Transparency Framework

In October, the OECD published its Crypto-Asset Reporting Framework ("CARF"), following on from a public consultation process which took place in Spring 2022. CFE at the time issued an Opinion Statement setting out its reservations and views on the proposed Framework.

The CARF will provide for annual automatic exchange of information with the jurisdictions of residence of taxpayers, in a manner similar to the Common Reporting Standard, targeting digital representation of value relying on secured distributed ledger technology to validate and secure transactions. The CARF will accordingly introduce reporting requirements for entities or individuals providing services effecting exchange transactions in crypto-assets.

OECD Secretary-General Mathias Cormann said of the newly published Framework, *"The Common Reporting Standard has been very successful in the fight against international tax evasion. In 2021, over 100 jurisdictions exchanged information on 111 million financial accounts, covering total assets of EUR 11 trillion. Today's presentation of the new crypto-asset reporting framework and amendments to the Common Reporting Standard will ensure that the tax transparency architecture remains up-to-date and effective."*

The Crypto-Asset Reporting Framework was presented to the G20 Finance Ministers at their meeting on 12-13 October 2022 for review and discussion, and work is being progressed on the legal and operational instruments needed to facilitate the exchange of information collected on the basis of the CARF.

EU Proposes DAC8 Directive: Crypto-Assets Reporting

In December, the European Commission published its proposals for amendments to the Directive on Administrative Cooperation (DAC) to include exchange of information on crypto-assets (DAC8). EU's crypto-assets reporting is largely based on the OECD's CARF Framework, thus insuring international compatibility. According to the European Commission, DAC8 and the rules of the reporting framework will enter into force on 1 January 2026, and all jurisdictions that have agreed the OECD CARF, the United States included, will follow a similar calendar.

Paolo Gentiloni, EU Commissioner for Economy said of the publication: "*The fight against tax evasion and avoidance is what prompted the latest amendment to the Directive on Administrative Cooperation, also known as DAC8. Today, we are proposing new tax transparency rules for all service providers facilitating transactions in crypto-currencies for customers who reside in the EU. The cover of anonymity, the fact that there are more than 9,000 different crypto-assets currently available, and the inherent digital nature of the trade means that many crypto-asset users that are making huge profits fall under the radar of national tax authorities. So our proposal will mean that Member States get the information they need to ensure that taxes are paid for gains made in trading or investing crypto-assets, as they would be for any other financial assets.*

In practice, this means that crypto-asset service providers, irrespective of their size or location, will need to report transactions of clients residing in the EU, whether these transactions are domestic or cross-border. The DAC8 proposal aims, in addition, to further close loopholes and improve administrative cooperation among EU Member States in support of fair taxation, by requiring financial institutions to also report on e-money and on central bank digital currencies.

And to ensure that rules are followed, we are setting a common minimum level of penalties for the most serious non-compliant behaviours.", the Commissioner said.

EU Parliament & Council Reach Deal on Rules for Tracing Crypto-Assets

Also in Semester II, the European Parliament and Council reached a provisional deal on legislation forming part of the 2021 EU anti-money laundering package that aims to ensure that transfers of crypto-assets can be traced in the same way as traditional money transfers. Under the legislation, the "travel rule" will now apply to crypto-assets, such that information on the source of an asset and its beneficiary is sent with a transaction and stored. Crypto-assets service providers will also be obliged to provide this information to competent authorities if an investigation is conducted into money laundering and terrorist financing.

Co-rapporteur on the file, MEP Ernest Urtasun, said of the agreement: *"This new regulation strengthens the European framework to fight money-laundering, reduces the risks of fraud and makes crypto-asset transactions more secure. The EU travel rule will ensure that CASPs can prevent and detect sanctioned addresses and that transfers of crypto-assets are fully traceable. This regulation introduces one of the most ambitious travel rules for transfers of crypto assets in the world. We hope other jurisdictions will follow the ambitious and rigorous approach the co-legislators agreed today."*

Further information concerning the agreed rules is available here.

28 Jurisdictions Sign Agreement on Reporting Income from Digital Platforms

The plenary meeting of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes was held from 9 - 11 November in Seville, Spain. At the periphery of the plenary meeting, a multilateral competent authority agreement (MCAA) for the automatic exchange of information under the OECD Model Rules for Reporting by Digital Platforms was signed by 22 jurisdictions. The agreement provides for the automatic exchange of information from operators of digital platforms of transactions and income by sellers using these platforms.

Additionally, 15 jurisdictions signed a further multilateral competent authority agreement for the Model Mandatory Disclosure Rules on Common Reporting Standard Avoidance Arrangements and Opaque Offshore Structures (CRS Mandatory Disclosure Rules), enabling an annual automatic exchange of information identifying arrangements that aim to circumvent the CRS or which seek to disguise beneficial owners of assets.

The jurisdictions who became signatories for the two agreements and further information can be found here: Digital Platforms MCAA and the Mandatory Disclosure Rules MCAA.

OECD PILLAR 1 & 2 DEVELOPMENTS

Inclusive Framwork on BEPS Releases Progress Report for Public Consultation

To mark the one-year anniversary of the landmark agreement on the two-pillar solution to reform the international tax rules to address the tax challenges arising from globalisation and digitalisation, the OECD/G20 Inclusive Framework on BEPS released a Progress Report of the Administration and Tax Certainty Aspects in October 2022 by way of public consultation document.

The report set out rules agreed under Pillar 1 for administration of taxing rights under this pillar, including tax-certainty aspects, and built on the first progress report published in July 2022. The two reports are intended to be read together to provide an overview of the design of the rules and their planned operation.

The revised timeframe now sets out the detail on finalising the new Multilateral Convention, which the Inclusive Framework should agree by mid-2023, for entry into force in 2024. This revised timeline, according to OECD Secretary-General Mathias Corman, will allow for better stakeholder participation.

Since publication of the report, the OECD also sought public input on the main design elements of Amount B under Pillar One, within the G20 mandated process of addressing the tax challenges of the digitalising economy. The Amount B sets out a new approach to the application of the arm's length principle to in-country baseline marketing and distribution activities. The OECD has noted that this is a Secretariat proposal which is not agreed by the Inclusive Framework and does not reflect the final views of the IF.

According to the OECD, the scope of Amount B defines the controlled transactions that would be subject to these rules and sets out criteria to help that determination. If the scoping criteria are met and the taxpayer is therefore within the scope of Amount B, the Amount B pricing methodology would be applied to establish the arm's length price for the in-scope transaction, subject to potential exemptions currently under consideration. On-going work with regards to the Amount B pricing methodology focuses on the benchmarking criteria, the net profit indicators and the comparability adjustments that would need to be considered in pricing transactions in scope of Amount B.

USA & Pillar 2: A Minimum Tax But Not The OECD Minimum Tax

Over the summer of 2022, after many months of negotiation, US Congress passed legislation titled the Inflation Reduction Act 2022, under which a 15% corporate minimum tax is imposed on corporations with profits exceeding US 1 billion, in tax years from 2023 onwards, arguably, partially implementing Pillar 2 of the OECD's 2-Pillar Agreement into national legislation. Under the legislation corporations can claim net operating losses and tax credits against the minimum corporate tax, and tax credits against the tax for minimum tax paid in previous years, if this exceeded 15% of the corporation's income in any given prior year. President Biden signed the act into law on 16 August.

In order to be deemed compliant with OECD's Pillar 2 proposal, an adaptation of the US GILTI was required, going further than the original top-up tax of 10,5% applied to profits of subsidiaries of US companies in low-tax jurisdictions. Under the original proposal of President Biden, approved by the House, the low-tax intangible income was supposed to be taxed at 15%, which would have made the US a Pillar 2 compliant jurisdiction.

However, following the Build Better Act reshaping into the Inflation Reduction Act 2022, the corporate tax of 15% will now apply solely to book income of MNEs with revenue of $1bn or higher, as reported in financial accounts and applied at a group level, rather than on a country-by-country basis. The impact of this, arguably, is partial implementation by the US as compared to other jurisdictions, and indeed, further implementation of Pillar 2 by the US is at present unknown. However, given the design of Pillar 2, the difference of 4,5% (between the OECD agreed minimum of 15% and the US approved 10,5%) can be captured by other jurisdictions.

G20 Summit Leaders' Statement on OECD's Two-Pillar Solution

Following on from the 17th G20 Summit, held in Indonesia from 15 - 16 November 2022, the G20 leaders issued a G20 Bali Leaders' Declaration reaffirming their commitment to the implementation of the OECD Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

In the declaration, the G20 welcomed progress on Pillar One and Two, and reaffirmed their commitment to completing the GloBE Implementation Framework establishing administrative and safe-harbour rules for MNEs and tax authorities. The leaders further called on the Inclusive Framework to finalise the outstanding work packages under Pillar One, and sign the Multilateral Convention in the first half of 2023, as well as to complete negotiations on the Subject to Tax Rule under Pillar Two to allow the development of a multilateral instrument for implementation.

The leaders also expressed their commitment to "strengthen the tax and development agenda in light of the July 2022 G20 Ministerial Symposium on Tax and Development", as well as to implementing internationally agreed tax transparency standards, setting out their support for the Crypto-Asset Reporting Framework and called on the OECD to conclude work on the implementation packages, including timelines.

EU Policy - Indirect Tax Update

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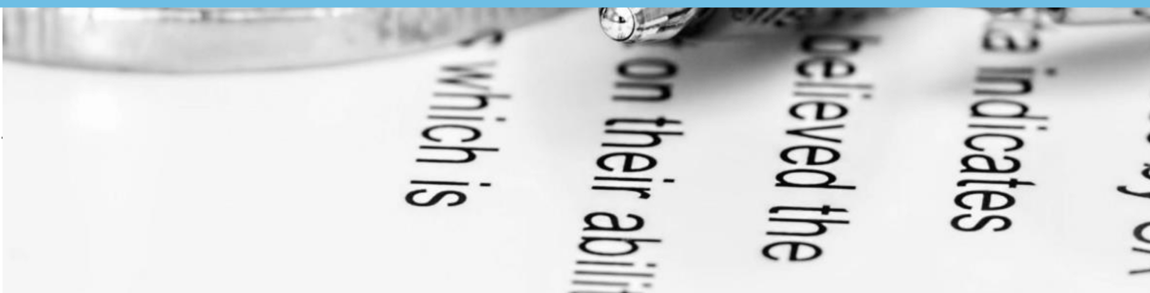

VAT in the Digital Age Proposals Published

On 8 December, the European Commission published measures to modernise the EU's Value-Added Tax (VAT) system by embracing digitalisation, in particular by addressing challenges in the area of VAT raised by the development of the platform economy.

According to the estimations of the European Commission, the newly proposed measures could potentially close a tax gap of €18 billion additional VAT revenue. Specifically, the new measures include:

- Real-time digital reporting based on e-invoicing for businesses that operate cross-border in the EU;
- Updated VAT rules for passenger transport and short-term accommodation platforms;
- Introduction of a single VAT registration across the EU.

According to Commissioner Gentiloni, this initiative of the EU brings the VAT system into the Digital Age: *"Our proposal will introduce an EU-wide standard for the real-time reporting of cross-border supplies, through transaction-based electronic invoicing. This means that each intra-EU business-to-business transaction in goods will need to be accompanied by an e-invoice, submitted to national authorities through an EU wide database. At a stroke, it will allow MSs to tackle fraud by giving them the real-time information they need to act on suspicious transactions. And by sharing this information, national authorities will be able to cooperate more efficiently.*

The second pillar is about VAT rules for the platform economy. Current VAT rules lead to many transactions for short-term accommodation and passenger transport services supplied via a platform going untaxed, which means an unfair playing field for traditional hotels and taxis. It will also simplify compliance for SMEs and individual users of these intermediaries, in that they will not have to worry about their VAT obligations going forward, because it will be the platform to do so.

And the third pillar is the single VAT registration. Many businesses still find it difficult to sell to consumers in multiple MSs because of the administration and compliance hurdles involved in registering for VAT separately in each country. So we want to extend the already successful new online system for VAT on e-commerce, which came into force in 2021, to other businesses that want to sell to consumers across the Single Market."

More detail regarding the legislative texts and proposals is available on the EU Commission webpage.

In Semester II, the European Commission also published a Summary Report providing an overview of the public input received to DG TAXUD's VAT in the Digital Age consultation which ran from 20 January to 5 May. 193 responses were submitted, from 22 Member States and 5 non-EU countries. Notably, the majority of respondents agreed that EU action was necessary in ensuring a more widespread adoption of digital reporting and e-invoicing requirements and over two-thirds of respondents believed that it should be a high priority for the European Commission to take further action to reduce the need for taxpayers to hold multiple VAT registrations.

Multiple issues were identified in relation to the platform economy, and the majority agreed that the OSS should be extended to cover all B2C supplies of goods and services by non-established suppliers. Further statistical analysis is set out in the report.

CFE issued an Opinion Statement during the consultation process concerning the planned legislation. We invite you to read the statement.

EU Commission Launches Public Consultation on Revision of the EU Customs Code

The European Commission launched a consultation in Semester II concerning a planned legislative proposal to revise the EU Customs Code. The legislation will aim to address challenges posed by the rise of e-commerce, uneven facilitation and simplifications for legitimate trade, enforcing prohibitions and restrictions, management of information, data fragmentation, analytical capacity, co-operation between customs authorities and governance of the Customs Union by Member States.

In the Call for Evidence on the consultation webpage, the following are listed as measures being considered for the legislation by the Commission:

- *Strengthening common risk management, for example by, leveraging partnerships with trusted traders and other competent authorities and reinforcing the advance cargo information.*
- *Simplifying customs formalities for reliable and trusted traders established in the EU, for example by making more use of commercial information rather than of burdensome administrative requirements.*
- *Enhancing the co-operation between customs and non-customs authorities (such as market surveillance authorities, law enforcement authorities, tax agencies). This could cover, for example, joint policy elaboration, operational coordination, enforcement and information exchange.*
- *Reforming the EU customs governance to provide for an EU layer which could, for example:*
- *Better implement the "risk appetite" or risk priorities identified at policy and political level.*
- *Better deliver on activities where "acting as one" would add value (e.g. EU-wide risk management, information technology management, training of customs officers, financing of customs equipment, supporting simplifications and services for trade, handling EU crisis response, as well as "protecting as one" by driving joined-up co-operation between the customs and other authorities).*
- *Providing for a fully-fledged EU customs information environment, putting emphasis on data management capabilities for better risk management, and including simplified provision of data (e.g. enabling re-use of data, avoiding duplications, etc.) in reduced customs processes, streamlined handling of non-customs formalities (building on the concept of "single window"), more tailored services for trade, other public authorities and consumers.*
- *Adapting customs legislation to e-commerce transactions, for example by strengthening supervision of business-to-consumer flows and liability of involved actors for all fiscal and non-fiscal rules.*
- *Integrating the green agenda in the customs agenda and traders behaviours.*

EU Blacklist & Code of Conduct Update

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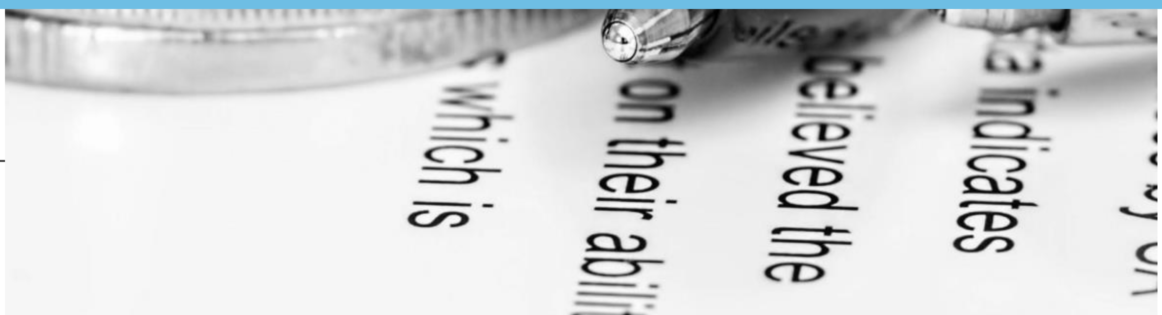

EU Council Updates 'Blacklist' of Non-Cooperative Jurisdictions

In Semester II of 2022, the Council of the EU added the jurisdictions of Anguilla, The Bahamas & Turks and Caicos Islands to the so-called "Blacklist", the List of Non-Cooperative Jurisdictions for Taxation Purposes.

Following the Code of Conduct Group meetings on 9, 15 and 20 September 2022 and the High Level Working Party on Tax Questions meeting of 20 September 2022, Anguilla, The Bahamas and Turks and Caicos Islands were added to the list based on concerns that *"these three jurisdictions, which all have a zero or nominal only rate of corporate income tax, are attracting profits without real economic activity (criterion 2.2 of the EU list). In particular, they failed to adequately address a number of recommendations of the OECD Forum on Harmful Tax Practices (FHTP) in connection to the enforcement of economic substance requirements, something to which they committed earlier this year"*. The state of play in Annex II of the Blacklist also detailed steps taken by various jurisdictions to undertake reforms in order to comply with tax good governance standards. More detail on this can be found in the Code of Conduct (Business Taxation) report to the Council of the EU.

In addition, the Council recommended that certain states engage with the EU to bring their tax practices in line with EU law and policy, notably:

- In the area of tax transparency: Turkey, Barbados, Botswana, Dominica, Seychelles;
- In the area of fair taxation: Costa Rica, Hong Kong, Malaysia, Qatar, Uruguay;
- On technological economic zones with preferential taxation: North Macedonia, Jamaica, Jordan, Armenia;
- In the area of preferential tax regimes/ holding companies: Russia.

The following jurisdictions are now on the Blacklist:

- American Samoa
- Anguilla
- The Bahamas
- Fiji
- Guam
- Palau
- Panama
- Samoa
- Trinidad and Tobago
- Turks and Caicos Islands
- US Virgin Islands
- Vanuatu

The Blacklist is reviewed twice per year and will next be reviewed in February 2023.

EU Adopts Revised Code of Conduct on Business Taxation

In November 2022, EU Finance ministers approved the revised Code of Conduct on Business Taxation, setting out stricter criteria for evaluation of harmful tax regimes. The revised Code of Conduct introduces scrutiny on 'tax features of general application', thus expanding the existing focus on 'preferential measures'.

Per the revised rules, when assessing whether a tax feature of general application of a Member state is harmful, the evaluation will focus on tax features of general application which are not accompanied by appropriate anti-abuse provisions, and which lead to double non-taxation or allow the double or multiple use of tax benefits in relation to the same expense, income or transactions. The Code also introduces scrutiny on the tax measures of general application of the tax system that affect the location of business activity in the European Union.

Some of the tax measures covered by the Code will fall within the scope of the provisions on State aid (Articles 107 - 109 TFEU). Given that application of primary Union law takes precedence, in cases where the Commission has initiated State aid proceedings, the Code of Conduct Group shall suspend its examination of the tax measures until the end of that State aid procedure.

EU Parliament Draft Report on Tax-Related Revelations

The European Parliament held a hearing in November 2022 on the findings of MEP Niels Fuglsang (S&D, DK) in the draft report on tax-related revelations finalised in October 2022, which discusses the "Lessons learnt from the Pandora Papers and other revelations".

Key-findings include a recommendation for EU Member states to introduce cooling-off periods for tax authority officials in order to address the issue of revolving doors between legislators, authorities, multinational companies and global professional services firms in the tax advisory area; as well as full implementation of EU's Whistleblower Directive of 2019, among other issues.

The own-initiative report, once adopted by the European Parliament in a form of a resolution, shall be directed at the Council of the EU and the European Commission. The Economic and Monetary Affairs Committee (ECON) vote is now scheduled for 3 March 2023.

International Tax Policy Updates

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OECD Appoints New Director of Centre for Tax Policy & Administration

The OECD has appointed Ms. Manal Corwin as the new Director of its Centre for Tax Policy and Administration, taking over the role from Pascal Saint-Amans, who served as Director for 12 years and resigned from his role in the fall of 2022.

Manal Corwin is presently the Partner-in-charge of the National Tax Office and Lead Director of the Board of Directors for KPMG, LLP in the United States and previously worked in the Office of Tax Policy in the US Department of Treasury as Deputy Assistant Secretary for International Tax Affairs, working on Base Erosion and Profit Shifting initiative and headed up the US delegation for various tax treaty negotiations. As delegate to the OECD Committee on Fiscal Affairs, Ms Corwin also participated on the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, the Forum on Harmful Tax Practices, the Report on the Transfer Pricing Aspects of Business Restructurings, and the launch of the work to address aggressive tax planning.

Ms Corwin will take up her duties from 1 April 2023, relieving Grace Perez-Navarro, who served in the role on an interim basis after Pascal Saint-Amans' departure and who will retire at the end of March 2023.

OECD's Global Forum Publishes Progress Report on Tax Transparency

During the plenary meeting of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, the 2022 Global Forum Annual Report and the Peer Review of the Automatic Exchange of Financial Account Information 2022 were made available. The Peer Review report sets out that of the 99 jurisdictions subject to peer reviews, almost all had now implemented a framework for the exchange of information and had started exchanging information.

Additionally, Peer Review Reports on the Exchange of Information on Request for the jurisdictions of Barbados, the British Virgin Islands, Iceland, Israel, Kuwait, the Maldives, Morocco, Slovenia, South Africa and Turkey were made available during the meeting. Six jurisdictions were deemed "Largely Compliant", and the British Virgin Islands was rated as "Partially Compliant".

Chair of the Global Forum, Maria Jose Garde, stated of the progress report and peer review reports: "*The Global Forum is working to guarantee that all its members are supported to implement the tax transparency standards, and to use them to fight tax evasion and mobilise domestic resources. No jurisdiction can be left behind. This is the idea that has defined the spirit in which our 165 members work together to keep advancing tax transparency, and it shall continue to be the case.*"

OECD: Tax Morale Revisited – Building Trust Between Tax Administrations & Taxpayers

The OECD has published a second report in its focus on the tax morale topic, entitled "Tax Morale II: Building Building Trust between Tax Administrations and Large Businesses". The report examines levels of trust between tax administrations and large businesses, based on a survey carried out on tax administration perceptions of MNEs and previous research on MNE perceptions of tax administrations. The OECD in its summary concerning the report says:

"The survey shows that while MNEs are generally seen to demonstrate a formal commitment to co-operation with tax administrations, notably through on-time payment, perceptions of MNE transparency and trust in the information provided by them are less positive. There are strong regional differences, with tax administrations' perceptions of MNE behaviour generally poorer in Latin America and the Caribbean, and to a lesser extent Africa, when compared with Asia and OECD countries.

The survey also reflects tax administrations' perceptions of the behaviour of the Big Four professional services networks (Deloitte, EY, KPMG, PricewaterhouseCoopers) on tax matters. It shows similar patterns of positive perceptions of their willingness to follow the letter of the law and formal compliance, but less positive perceptions of following the spirit of tax laws."

The report can be accessed here.

OECD's Publishes Updated Mutual Agreement Procedure Statistics

In Semester II of 2022, the OECD made available the updated 2021 Mutual Agreement Procedure Statistics ("MAP") concerning 127 jurisdictions, covering almost all MAP cases worldwide. The information forms part of the BEPS Action 14 Minimum Standard, Making Dispute Resolution Mechanism More Effective, which contained a commitment by jurisdictions to implement a minimum standard to resolve treaty-related disputes in a timely, effective and efficient manner, and timely and complete reporting of MAP statistics pursuant to an agreed reporting framework.

The OECD summary sets out that the 2021 MAP Statistics show the following trends:

- **Significantly more MAP cases were closed in 2021.** Approximately 13% more MAP cases were closed in 2021 than in 2020, with both transfer pricing cases (+22%) and other cases (almost +7%) closed being significantly more than in 2020. Competent authorities were able to close more cases in 2021 due to the greater use of virtual meetings, the prioritisation of simpler cases and greater collaboration to solve common issues collectively that could be applied across multiple MAP cases. Further, jurisdictions noted that increases in staff and the experience of these staff are now reflected in their ability to be able to resolve more cases.

- **Fewer new cases in 2021.** The number of new MAP cases opened in 2021 decreased (almost -3%) (see trends since 2016) compared to 2020. This is attributed to a significant decrease in new transfer pricing cases being opened (almost -10.5%), while the number of other cases opened increased (almost +4%) compared to 2020.
- **Outcomes remain generally positive.** Around 75% of the MAPs concluded in 2021 fully resolved the issue both for transfer pricing and other cases (similar to 76% for transfer pricing cases and 74% for other cases in 2020). Approximately 2% of MAP cases were closed with no agreement compared to 3% in 2020.
- **Cases still take a long time**. On average, MAP cases closed in 2021 took 32 months for transfer pricing cases (35 months in 2020) and approximately 21 months for other cases (18.5 months in 2020). Some jurisdictions experienced delays, especially for more complex cases, and the COVID-19 crisis affected the quality of their communication with some treaty partners.
- **Competent authorities have continued to adapt.** MAP continued to be available throughout the pandemic with several actions taken by competent authorities. Jurisdictions noted that, especially towards the end of 2021, there has been an increase in MAP engagement with treaty partners. Further, while jurisdictions welcomed the resumption of face-to-face meetings, the continued use of virtual meetings has allowed for opportunities to progress individual cases in between face-to-face meetings. This hybrid approach is a welcome practice that many jurisdictions continue to apply to expedite MAP resolutions and improve the efficiency and effectiveness of their MAP programmes.

Forum on Tax Administration Publishes Tax Capacity Building Guide

In Semester II 2022, the OECD's Forum on Tax Administration published a guide developed to "assist tax administrations globally in designing and carrying out their tax capacity building programmes", the Tax Capacity Building: A Practical Guide to Developing and Advancing Tax Capacity Building Programmes. The Forum on Tax Administration is comprised of tax administration officials from over 50 OECD and non-OECD countries.

United Kingdom’s HMRC Deputy CEO and Second Permanent Secretary, Angela MacDonald, said of the Guide, *“Building tax capacity and capability is a central component of many OECD member countries’ development programmes. This guide by the FTA’s Capacity Building Network is aimed at supporting tax administrations at any stage of their capacity building programme, and with differing resource levels”*.

The Tax Capacity Building Guide can be accessed here.

OECD Releases Update on 2022 Tax Database

In the seond half of 2022, the OECD published a document summarising the updated 2022 Tax Database Key Tax Rate Indicators.

The document presents comparative information on a range of statutory tax rates and tax rate indicators in OECD countries, encompassing personal income tax rates and social security contributions, corporate income tax rates and value added taxes.

Further information and the data summarized in the 2022 update document can be accessed here.

UN Committee of Experts on International Cooperation in Tax Matters: 25th Session

The UN Committee of Experts on International Cooperation in Tax Matters held their 25th Session from 18 to 21 October in Geneva. At the Session, the topics of taxation and sustainable development goals, taxation of crypto-assets, wealth and solidarity taxes, taxation issues related to the digitalised and globalised economy were discussed, amongst other topics.

Papers summarising the outcomes on the agenda item topics discussed at the 25th Session have been made available, and can be accessed here.

State Aid & Case Law Updates

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CFE ECJ Task Force Opinion Statement on the EFTA Court Decision in Case E-3/21, *PRA Group Europe*

In semester II of 2022, the CFE ECJ Task Force issued an Opinion Statement on the EFTA Court decision of 1 June 2022 in Case E-3/21, PRA Group Europe, on the discriminatory interaction between the "interest barrier" and group contributions.

At issue in *PRA Group Europe* was the interaction of the Norwegian "interest barrier rule" ("interest limitation rule"), which generally limit the deductibility of interest payments to affiliated resident and non-resident entities to 30% of EBITDA, and the group contribution rules, which permit tax effective transfers between group members, but are limited to Norwegian entities. As group contributions also increase the EBITDA of the recipient Norwegian entity (and decrease it at the level of the paying Norwegian entity), companies in the Norwegian tax group can achieve interest deductions under the interest barrier rules where profits ("tax EBITDA") and interest expenses are distributed unevenly between the companies in the group, while a similar opportunity to escape (or lessen the impact of) the interest barrier rules is not available to cross-border groups. The EFTA Court took a combined perspective on the interaction of those rules and found them to constitute an unjustified restriction of the freedom of establishment under Articles 31 and 34 of the EEA Agreement. The EFTA Court's decision is particularly interesting from an EU law perspective, as the interest barrier rule of Article 4 of the Anti-Tax Avoidance Directive (ATAD) similarly foresees the option for Member States to introduce a domestically-limited "interest barrier group" to permit a calculation of exceeding borrowing costs and the EBITD at the local group level.

The CFE ECJ Task Force welcomes the EFTA Court's progressive impetus on fundamental freedoms doctrine: *PRA Group Europe AS* makes it clear that for purposes of identifying a restriction, for establishing comparability and for justification, a combined perspective on the interaction of two sets of rules – here the interest barrier on the one hand and the group contribution regime on the other – is necessary. From that perspective, the interaction of the Norwegian rules on the "interest barrier" and on group contributions leads to unjustified discrimination in cross-border situations.

However, if asked to decide on a similar case, the CJEU might take a different approach. First, the CJEU could take a different perspective on the available grounds of justifications and, e.g., accept the coherence of the tax system as such ground. Second, Article 4 ATAD gives the Member States the option to treat an "interest barrier group" as a single taxpayer and to limit the group perspective to domestic settings. Even if such an option in the ATAD is not viewed as "exhaustive harmonization", one could wonder if the mere existence of the ATAD and the value judgments made by the EU legislature therein could lead to a different outcome in the EU (CJEU) vis-à-vis the EEA (EFTA Court).

We invite you to read the statement and remain available for any queries you may have.

ECJ Delivers Judgment in Fiscal State Aid Case *Fiat Finance*

In July, the Grand Chamber of the Court of Justice of the European Union annulled the General Court judgment in the joined C-885/19 *P | Fiat Chrysler Finance Europe v Commission* and C-898/19 *P | Ireland v Commission*, concerning State aid in a form of preferential taxation allegedly granted by Luxembourg to Fiat Finance.

According to the Court of Justice, the General Court committed an error of law in the application of Article 107(1) TFEU by failing to take account of the requirement arising from the case-law, according to which, in order to determine whether a tax measure has conferred a selective advantage on an undertaking, it is for the Commission to carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, interaction and concrete effects of the rules applicable under the national law of that State. The General Court was wrong to endorse the approach consisting in applying an arm's length principle different from that defined by Luxembourg law, confining itself to identifying the abstract expression of that principle in the objective pursued by the general corporate income tax in Luxembourg and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular.

By dismissing the Commission's understanding of the benchmark, the Court left Member states with more freedom to choose the reference framework under which they might adopt rules or administrative practices deviating from common rules without falling foul of the State aid prohibition in primary Union law.

Legal commentators have noted, however, that not all is lost for the Commission's scrutiny of discriminatory and/or preferential taxation in Member states given that in paragraph 122 of the judgment the Court states: *"the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies, whether integrated or not, pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to integrated companies or to certain of them, such as finance companies, as compared to market prices for comparable transactions carried out by non-integrated companies"*.

ECJ Rules Public Access to Beneficial Ownership Registry Information Invalid – Joined Cases C-37/20 & C-601/20

In November, the European Court of Justice ruled in joined cases C-37/20 & C-601/20 *WM and Sovim SA v Luxembourg Business Registers* that a provision in Luxembourg's national legislation implementing the EU Anti-Money Laundering Directive (Directive (EU) 2018/843) rules requiring that information contained in the beneficial ownership registry be made accessible online for all members of the public was invalid.

The Court held that the provision was invalid in light of its serious interference with the fundamental rights to respect for private life and to the protection of personal data, enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. The Court held that the interference of the anti-money laundering legislative provision with the above rights guaranteed by the Charter was neither limited to what was strictly necessary nor proportionate to the objective pursued by the anti-money laundering legislation. As such, the Court has by its decision struck down the requirement under AML rules that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public.

The decision of the Court to strike down the anti-money laundering legislative provision may have implications for EU tax legislation in future decisions of the Court, in the instance that any provision in existing or proposed tax legislation also infringes upon articles within the Charter of Fundamental Rights of the European Union.

ECJ: Certain Elements of DAC6 Incompatible with Primary EU Law (‘*Vlaamse Balies*’)

The Court of Justice of the European Union found certain elements of the Directive on Administrative Cooperation to be incompatible with primary EU law, i.e. the Charter of Fundamental Rights. EU courts are empowered to invalidate secondary EU law (such as directives) or any EU legislation deemed contrary to the Charter. In the Case C-694/20, *Orde van Vlaamse Balies*, the Court found Article 8ab(5) of the Directive on Administrative Cooperation in the EU (Directive 2011/16/EU) invalid as it infringes the rights enshrined in Article 7 of the Charter of Fundamental Rights of the European Union.

In a preliminary question addressed to the Court of Justice, the Belgian Constitutional Court queried whether fundamental rights guaranteed with Articles 7 and 47 of the Charter are infringed if the tax intermediary is a lawyer, and the reporting requirement with respect to third party intermediaries would violate legal professional privilege (LPP).

With this judgment the Court of Justice recognised that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the European Union for the purposes of Article 52(1) of the Charter, which can indeed place a limitation on the exercise of the fundamental rights guaranteed by Article 7 of the Charter (primary Union law).

However the mechanism in which the DAC6 Directive imposes obligations for tax intermediaries, notably Article 8ab(5), infringes the right to a communication between a lawyer and their client, guaranteed in Article 7 of the Charter, in so far as it provides, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary (who is not their client) of the other intermediary's reporting obligations.

The Grand Chamber judgment of the Court of Justice of the European Union will now be followed-up by a legislative initiative of the European Commission to amend the Directive, bringing it in line with the requirements of primary EU law, as set out by the Court.

CFE Opinion Statement on Case C-538/20 (*W AG*): Foreign Final Losses

CFE has issued an Opinion Statement on the ECJ decision of 22 September 2022 in Case C-538/20, *W AG*, on the deductibility of foreign final losses.

At issue in *W AG* was the ability of a German company to deduct the final losses which it had incurred in its UK permanent establishment (PE) because Germany as the State of residence had waived its power to tax the profits (and losses) of that PE under the Germany/UK tax treaty. The CJEU ruled that when the State of residence refrained from exercising its power to tax the profits (and losses) of the foreign PE under a double tax treaty, the situation of a company with a foreign PE was not objectively comparable to the situation of a company with a domestic PE. As such, there was no different treatment of comparable situations and as a corollary, no breach of the freedom of establishment.

CFE acknowledges the different views on the CJEU's "final loss" doctrine previously established in *Lidl Belgium* for treaty-exempt permanent establishments, but also notes that the reasoning of that case has been implicitly renounced by the Court in *Timac Agro* and in *W AG*.

The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, exemption has the same economic effects regardless of whether is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court would have made this explicit. Finally, it remains to be seen if *Marks and Spencer* is still "good law" or if W AG was one of the final nails in the coffin of the "final loss" doctrine.

ECJ: *Airbnb Ireland & Airbnb Payments UK* – Case C-83/21

The ECJ issued its decision in Case C-83/21 *Airbnb Ireland & Airbnb Payments UK* in late December 2022. The Court was asked to decide whether Italian legislation requiring the platform to collect a 21% flat-rate withholding tax from users as well as information used to compile "a special database of accommodation and buildings intended for short-term rental located in the national territory" was in line with EU rules, including whether imposing tax measures on property intermediation services providers to collect and transmit information to the Member State were within the terms of "technical regulation" and "rules of services" in Directive 2015/1535, and whether the requirement to collect these measures contravened the freedom to provide services as set out in Article 56 of the TFEU.

In its decision, the Court held that:

1. *Article 56 TFEU must be interpreted as meaning that:*

   - *first, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it does not preclude legislation of that Member State requiring providers of property intermediation services – irrespective of their place of establishment and the manner in which they intervene – to collect and then transmit to the national tax authority the data relating to the rental contracts concluded following their intermediation, and, where those service providers have received the corresponding rents or consideration or intervened in their collection, to withhold at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Treasury of that Member State;*

   - *second, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it precludes legislation of that Member State requiring providers of property intermediation services, where those providers have received the corresponding rents or consideration or have intervened in their collection and where they reside or are established in the territory of a Member State other than the State of taxation, to appoint a tax representative which resides or is established in the territory of the Member State of taxation.*

2. *Article 267 TFEU must be interpreted as meaning that, where a question concerning the interpretation of EU law is raised by one of the parties to the main proceedings, the determination and formulation of the questions to be referred to the Court is a matter for the national court alone and those parties may not impose or alter their wording.*

The full decision can be accessed here.

EU Tax Policy Report

Semester II 2022

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