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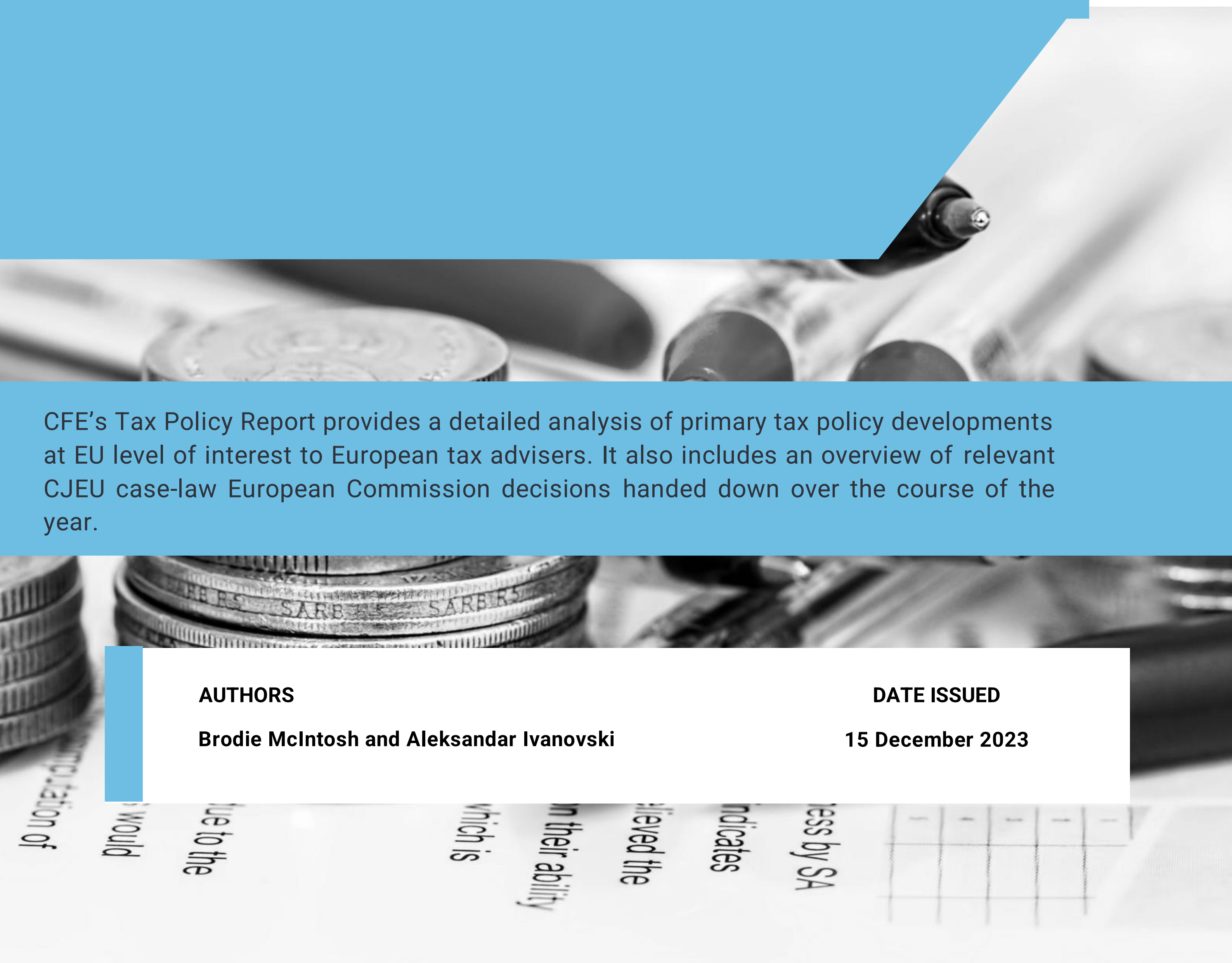
2023 Tax Policy Report



CFE's 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 handed down over the course of the year.

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Highlights

The year 2023 brought new tax policy developments with a potential to become the most significant changes in the global tax architecture. Just when the tax professional community thought the complexity with the taxation of the 'tech companies' could not get any worse, the whole picture got upended: BEPS, BEPS 2.0 and 'allocation' discussions are now almost back to square one.

Seeking a greater role for the United Nations, the UN General Assembly voted in favour of a Draft Resolution on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, directly challenging the OECD leadership in international tax matters. The vote on a resolution filed by Nigeria and other developing countries saw a clear divide between developed countries, such as the EU, US, UK and Japan, and the rest of the world.

The UN vote followed an earlier Report from the UN Secretary General, called for a greater role of the UN in setting the international tax affairs in order to achieve a "fully inclusive" international tax agenda. The report "Promotion of inclusive and effective international tax cooperation at the United Nations - Report of the Secretary-General", Antonio Guterres, UN Secretary-General, contended that enhancing the UN's role in tax-norm shaping and rule setting would make international tax cooperation "fully inclusive and more effective". The Report also noted that the rules developed at the OECD do not adequately address the needs and priorities of developing countries and/or are beyond their capacities to implement.

On the EU tax policy side, 2023 saw the introduction of further legislative proposals by the European Commission. These included:

- The much-anticipated BEFIT proposal aiming to reduce obstacles for cross-border investment in the Single Market and reform and simplify business taxation within the EU.
- A proposal to improve withholding tax relief procedures for cross-border businesses in the EU.
- A proposal for reform of the EU Customs Union seeking to strengthen its integrity by more effectively enforcing EU rules and standards at external border for goods.

Writing on the EU tax developments, the Director-General in DG TAXUD, Gerassimos Thomas, proclaimed that the Pillar 2 directive "will undoubtedly have a lasting effect on base erosion and profit shifting, and enhance the fairness of taxation globally"., with an implementing deadline of 31 December 2023. A lot of work to be done by Member states in translating these complex rules into national legislation and guidance within a short time framew. In implementing the directive, challenges will continue to arise, especially given the evolving guidance coming from the OECD, which the EU approved a priori as 'coherent with the EU Pillar 2 Directive'.

Not all countries who agreed to Pillar 2 will actually implement it any time soon, though. Global South jurisdictions such as India, Brazil, Nigeria and Colombia maintain reservations about the complexity and/or their capacity and ability to effectively raise taxes under such rules. Canada and Switzerland will also not implement Pillar 2.

Finally, the United States: stuck in the Republican – Democratic stand off and the ineffectiveness of the Congress to pass legislation to which US government signed up for. And this is probably not very surprising, given the reluctance of Congress to allow taxation of the US ‘tech companies’ in market jurisdictions. The US warned Canada of "significant consequences" should it proceed with unilateral taxation of US tech companies with introduction of a digital services tax on 1 January 2024, whilst the U.S. Treasury Secretary Janet Yellen said the United States will not be ready to sign the MLI by the end of 2023. *"The U.S. will conduct a consultation on the multilateral treaty with all relevant stakeholders for two months. It is critically important for a treaty of this level of importance and complexity to be shown to the American public, and for Congress and the business community to hear what their reactions are and to ensure that we have public support.",* Ms Yellen said.

In spite of these developments, the European Union (the ECOFIN Council and the European Commission), at the 9 November meeting expressed their continued support and commitment to Pillar 1 and Pillar 2.

Sweden and Spain were the EU presidency holders for the year 2023. Successful or not, we let you be the judge of that. And the next presidency, Belgium, will not be abler to delivery on an ambitious agenda considering the EU elections in May. As to already anticipated developments for 2024, the European Commission adopted its Commission Work Programme 2024. In terms of taxation, the Programme emphasises that progressing currently tabled legislative proposals will be the central focus, stating that the EU *"need to agree on the new rules on withholding tax procedures, the proposal to prevent the misuse of shell entities for tax purposes and a series of measures to modernise the EU’s ValueAdded Tax (VAT) system and make it more resilient to fraud by embracing digitalisation. Furthermore, we need to advance on the proposal to improve business taxation (BEFIT and transfer pricing) and the comprehensive reform of the EU Customs Union."* The Programme document claims that the BEFIT proposal could reduce tax compliance costs for businesses operating in the EU by up to 65%. It also emphasises as priority progressing the Commission’s regulatory fitness and performance programme (REFIT), establishing a Head Office Taxation system (HOT) to simplify rules and cut tax compliance costs for SMEs expanding their operations across borders as a key priority for 2024.

Last but not least, on the EU law enforcement side in relation to tax rulings and tax planning, the Commission witenessed some success and quite some setback in the judicial challenge of its State aid decisions. With the Fiat case, the Court of Justice introduced the ’manifest error’ doctrine, which significantly limits the possibility for the Commission to challenge past tax planning structures approved by Member states. Similar destiny was reserved for the Engie case, where the Court of Justice dismissed Commission’s reasoning and sided with Luxembourg.

However, the tax ruling saga does not seem to be over. The Advocate General in the Apple case, advised the Court to uphold Commission’s reasoning and fully dismiss Ireland’s and Apple’s arguments. In strike contrast to AG Kokott’s views on the Engie case, AG Petruzzela suggested that setting such a high burden of proof on the Commission will render primary EU law ineffective vis-à-vis the review of tax rulings and tax planning structures. Finally, in line with the guidance set by the ECJ, the General Court identified a number of State aid issues with the Belgian Excess Profit rulings scheme, which was declared contrary to EU law and ordered recovery of back taxes from a significant number of beneficiaries in Belgium.

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Pillar 1 & 2 Developments

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Pillar 2 - Global Minimum Corporate Tax

Just prior to the beginning of 2023, the European Union formally adopted the Directive on minimum taxation of multinational groups, under auspices of the Czech Presidency of the EU, making the European Union a leader in the international adoption of the OECD/ G20 agreed Pillar Two to introduce 15% minimum taxation for international groups. It applies to MNEs and domestic groups with a combined financial revenue of over 750 million Euro per year. Member states must implement the Directive by 31 December 2023.

In March, the OECD published comments received on the compliance and co-ordination aspects of the Pillar Two global minimum tax from the agreement of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. On 16 March 2023, a public consultation was then held concerning the responses received, with input relating to the *GloBE Information Return* consultation and to the *Tax Certainty for the GloBE Rules* discussed during the consultation meeting. Discussions also covered how to preserve consistent and co-ordinated outcomes for MNEs while minimising compliance burdens and avoiding the risk of double taxation. The OECD also published an update on the economic impact assessment of the Two-Pillar Solution, based on updated analysis using data and recently agreed design features of the two-pillar solution which was not accounted for in previous studies/analysis. The new analysis anticipates annual global tax revenue increases of around USD 220 billion due to the proposed global minimum tax from Pillar 2 implementation, a significant increase from prior estimates.

Notwithstanding this, the ECOFIN Council meeting of EU's finance ministers held on 9 November saw the adoption of two statements (by the Council and by the Commission) confiring their commitment to Pillar 1 and Pillar 2. On Pillar Two, the European Commission called on all EU Member States to *"proceed swiftly with the transposition of the Pillar Two Directive and will continue to support the efforts of Member States in this regard."* The Commission also expressed the view that the OECD administrative guidance of December 2022, February 2023 and July 2023 is compatible with the EU Directive on Minimum Tax (Council Directive (EU) 2022/2523 of 14 December 2022).

The European Commission also adopted a Regulation to introduce a temporary exception for deferred taxes arising from the implementation of the OECD's Pillar Two Model Rules, as well as certain disclosures for affected entities. As a result, MNE groups established in the Union will not have to recognise Pillar 2 increases as deferred taxes in their interim consolidated financial statements. The temporary exception is to be applied immediately upon the issue of those amendments by the IASB and retrospectively in accordance with International Accounting Standard 8: Accounting Policies, Changes in Accounting Estimates and Errors ('IAS 8'). The disclosure requirements are to be applied to annual reporting periods beginning on or after 1 January 2023. A company is not required to apply the disclosure requirements in interim financial reports for interim periods ending on or before 31 December 2023. Commission Regulation (EU) 2023/2468 of 8 November 2023 amending Regulation (EU) 2023/1803 as regards International Accounting Standard 12 is available here.

Pillar 1 – Global Reallocation Of Taxing Rights

In October, the OECD published a text of the multilateral convention (MLC) related to implementation of Amount A of Pillar One, agreed by the IF's Task Force on the Digital Economy. The text of the MLC published reflects the consensus achieved to date, with different views among countries on a "handful of items in footnotes by a small number of jurisdictions". The text "moves the international community a step closer towards finalisation of the Two-Pillar Solution to address the tax challenges arising from the digitalisation and globalisation of the economy", the OECD stated. A webinar on the key features of the MLI, in particular: applying Amount A rules; tax certainty framework for Amount A and related issues; and, removal and standstill of digital services taxes and relevant similar measures was thereafter held in late October. Slides from presentations made during the webinar are available here.

This followed on from an Outcome Statement being issued by the Inclusive Framework in mid-July 2023 announcing a series of deliverables on the Two-Pillar Solution. These deliverables included a framework for the simplified and streamlined application of transfer pricing rules to certain marketing and distribution activities (Amount B of Pillar One) and a Subject to Tax Rule (STTR) which will enable developing countries to update bilateral tax treaties to "tax back" in respect of certain intra-group income where such income is subject to low or no nominal taxation in the other jurisdiction. The OECD sought public comments on Amount B under Pillar One concerning the application of the arm's length principle to in-country baseline marketing and distribution activities. The public consultation document outlines the design elements of Amount B and the comments received were subsequently published by the OECD.

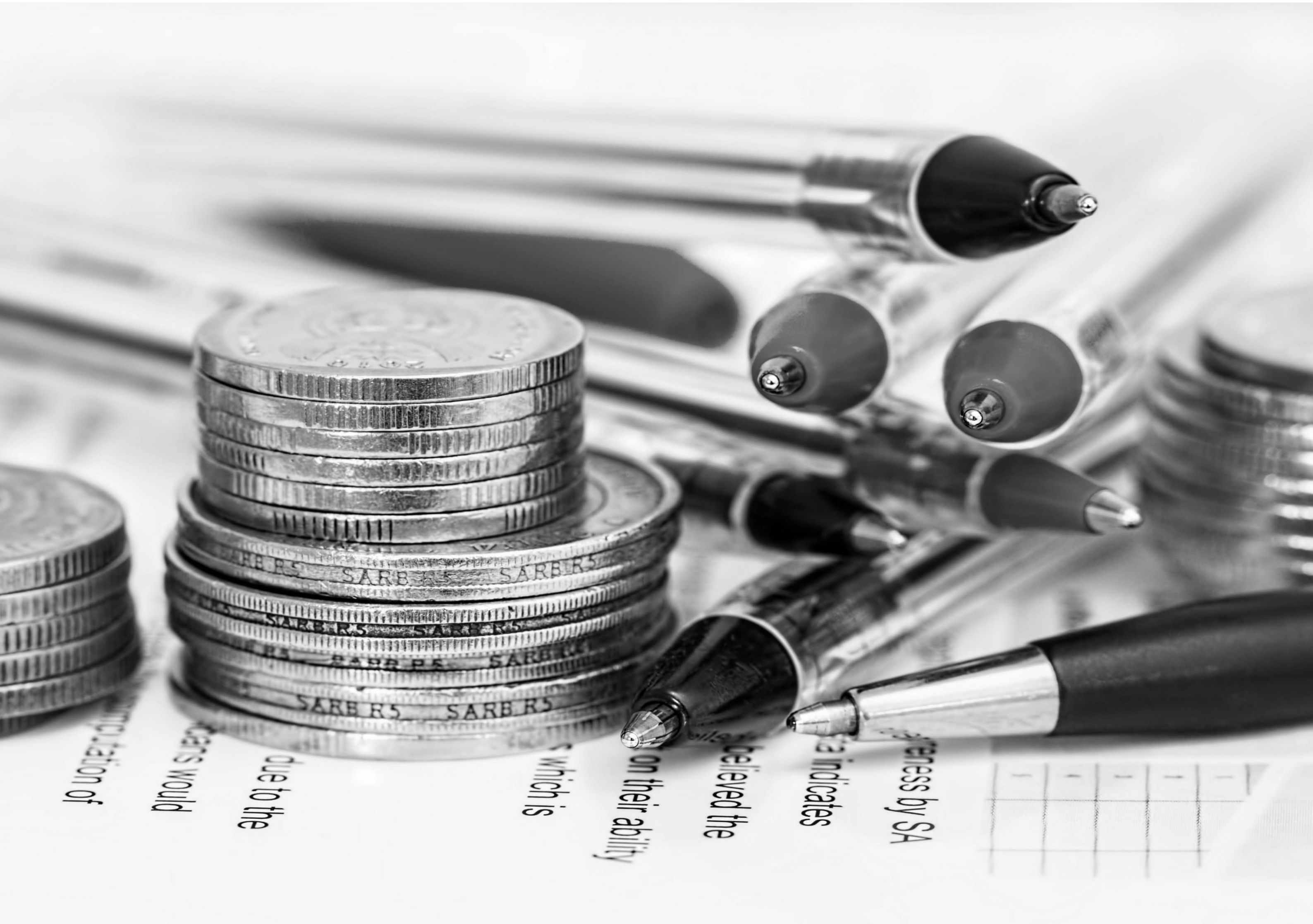
Members of the BEPS Inclusive Framework also agreed to extend the freeze on imposition of national digital services tax (DST) until the end of 2024, which allows more time for an international agreement on reallocation of digital economy taxing rights under Pillar 1 to be reached. The OECD also provided updated estimates of the economic and revenue impacts of Amount A.

However, the U.S. Treasury Secretary Janet Yellen speaking to reporters in Luxembourg said the United States will not be ready to sign the MLI by the end of 2023. *"The U.S. will conduct a consultation on the multilateral treaty with all relevant stakeholders for two months. It is critically important for a treaty of this level of importance and complexity to be shown to the American public, and for Congress and the business community to hear what their reactions are and to ensure that we have public support.",* Ms Yellen said. Missing the end of year deadline could mean introduction of further national digital services taxes that would effectively tax the U.S. tech companies in market jurisdictions. The U.S. Congress recently warned Canada of "significant consequences" should it proceed with unilateral taxation of US tech companies with introduction of a digital services tax on 1 January 2024.

Global South jurisdictions such as India, Brazil, Nigeria and Colombia also maintain reservations about the complexity and/or their capacity and ability to effectively raise taxes under such rules. The African Tax Administration Forum (ATAF) stated that some members have expressed concern about "continued loss of revenue from non-taxation of the digital economy and the length and complexity of the Amount A rules as the published MLC and Explanatory statement text is 850 pages long." The ATAF Executive Secretary, Logan Wort said of the developments: "It is vital that African countries effectively tax highly digitalised businesses, which is not possible under the current global tax rules. As indicated by our membership, Amount A is not only complex but more concerning is the uncertainty of when it will be implemented, meaning a continued lack of opportunity to tax the growing digital economy.", Mr Wort said.

For the MLC to enter into force, it needs to be ratified by at least 30 jurisdictions including the headquarters jurisdictions of at least 60% of MNEs currently expected to be within Amount A's scope. The Explanatory Statement (ES) which accompanies the MLC forms part of the context per customary international law for interpretation purposes. The MLC is also accompanied by an Understanding on the Application of Certainty (UAC) which contains further details on how aspects of the Amount A tax certainty framework will operate in practice.

For its part, on Pillar One, the Commission welcomed the release of the text of the Multilateral Convention and the technical agreement reached on key points of Amount A, which paves the way for implementing a partial reallocation of taxing rights. The Commission also underlined the importance of Amount B as a key component of the ongoing reform of international taxation, simplifying transfer pricing and enhancing legal certainty. The Commission called on Member States to swiftly sign and ratify the Multilateral Convention.



EU BEFIT Proposals

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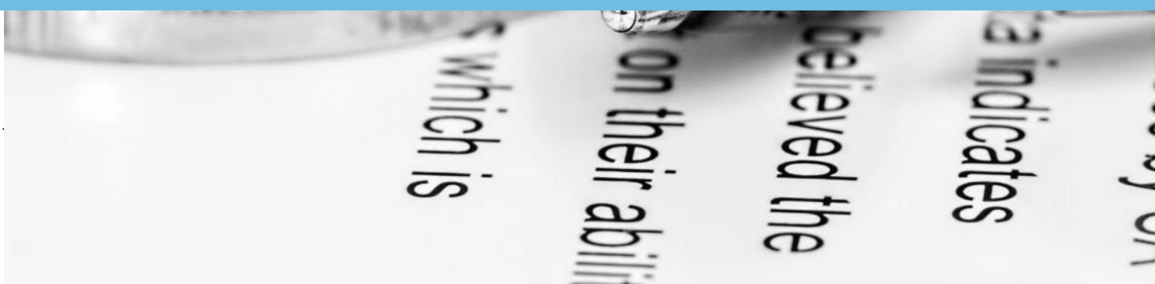


EU Commission Launches Proposals For A New EU Corporate Tax Framework

In October, the European Commission published the long-awaited proposals on the new corporate income taxation framework for Europe. The package contained two proposals for directives on BEFIT (Business in Europe: Framework for Income Taxation), and for the first time ever, a proposal for an EU directive on transfer-pricing. BEFIT aims to replace and thus repeal the 2011 and 2016 Commission proposals for a common consolidated corporate tax base (CCCTB), and replace the current 27 national corporate tax systems for MNE groups with combined revenue exceeding EUR 750 million. The approval of these proposals requires unanimity, given the shared competence in corporate taxation between the Union and its Member states.

The BEFIT Proposal

BEFIT establishes a common set of rules to determine the tax base of companies that are part of a group which prepares consolidated financial statements and which are subject to corporate income taxation in an EU Member State. The proposal does not contain sector-specific exclusions from its scope.

The directive proposes a hybrid scope for mandatory and optional application of the rules:

Mandatory scope: Comprises the Pillar 2 companies (i.e., groups with annual combined revenues of at least EUR 750 million) but is limited to the EU sub-set of entities that meet the 75% ownership threshold. For groups headquartered in third countries, their EU sub-set will need to additionally raise at least EUR 50 million annual combined revenues in at least two of the four fiscal years immediately preceding the fiscal year in which the group started to apply this Directive and this will have to account for at least 5% of the total revenues of the group.

Voluntary scope: Smaller companies can voluntarily opt-in, if they prepare consolidated financial statements. When a group applies or chooses to apply the rules under this Directive, the framework will apply to the whole 'BEFIT group', i.e., the sub-set of all EU tax resident companies and EU-located permanent establishments of the group that meet the ownership threshold of 75%, called the 'BEFIT group members'. The scope is contained within these entities.

Calculation of the preliminary tax result of each BEFIT group member

As in Pillar 2, the starting point is the financial accounts of the EU entities of the group. These financial accounts must follow the accounting standard of the UPE or, if the group is headquartered outside of the EU, those of the filing entity. The accounting standard must be accepted under EU law, which means either national generally accepted accounting principles (GAAP) of one of the Member States or the international financing reporting standards (IFRS). For simplification purposes, adjustments are kept to the minimum necessary, rather than putting together a detailed corporate tax framework. BEFIT thus comprises fewer tax adjustments compared to Pillar 2. Items which are included, i.e. added back in case they were deducted or not already recorded in the financial accounting statements, comprise: profit distributions; financial assets held for trading; borrowing costs that are paid to parties outside the BEFIT group in excess of the interest limitation rule of the ATAD; fair value adjustments and capital gains received by life insurance undertakings in the context of unit-linked/index-linked contracts; fines, penalties and illegal payments; and, corporate taxes that were already paid or top-up taxes in application of Pillar 2. The proposal contains a number of excluded items of income, which are subtracted from the financial net income or loss if they were in the financial accounts.

In respect of the rules on aggregation and allocation of the tax base, the preliminary tax results of all members of the BEFIT group will be aggregated into a single "pool" at Union group level, which will be the 'BEFIT tax base', with the following advantages: cross-border loss relief, allowing the BEFIT groups to set off losses across borders; no withholding taxes on transactions such as interest and royalty payments within the BEFIT group, as long as the beneficial owner of the payment is a BEFIT group member; as well certain transfer-pricing simplifications. To ensure Member states' competence in tax rate policies, the proposal aims to allow Member states to introduce further deductions, tax incentives, or base increases, to the extent these comply with the EU Directive on Minimum Tax/Pillar 2.

The transactions between a BEFIT group and associated entities outside the BEFIT group will continue to be governed by existing transfer-pricing rules, i.e. the arm's length principle. The proposal provides a risk assessment tool ('traffic light system') with benchmarks: this aspect of transfer-pricing concerns simplification of the formal compliance with the transfer-pricing rules (i.e. low risk activities that do not result in high residual profit), but not the substantive aspects of arm's length profit allocation.

Regarding the administration of the rules, "one-stop-shop" will allow the ultimate parent entity to file one tax return for the whole BEFIT group (the 'BEFIT Information Return') with one own tax administration (the 'filing authority'), which will share this with other Member States where the group operates.

The Transfer-Pricing Directive Proposal

The proposal for an EU Directive on transfer pricing covers the substantive rules, transposing the OECD Transfer Pricing Guidelines into the EU legal order. This aspect constitutes a significant milestone for the EU, as it would formalise the use of soft-law instruments agreed at OECD level as a matter of compliance with secondary EU law. Significantly, the proposal relies on the so-called EU Commitology procedures, under which the Commission is empowered by Member states to cater for any subsequent changes of the OECD rules and thus adopt an "ambulatory approach" to the application and interpretation of the OECD-derived transfer-pricing rules.

The Directive will seek to address the complexity of the transfer pricing rules and their different implementation in the national law of Member States, which according to the European Commission has led to significant profit shifting and tax avoidance, i.e. transfer prices which are manipulated to shift profit and be used in the context of aggressive tax planning schemes. On the other hand, simplified transfer-pricing rules can lead to less tax disputes, litigations and double-taxation, in particular in the context of bilateral and multilateral APAs and the ensuing adjustments.

Specifically, the Directive defines the Arm's Length Principle (ALP), as an international standard that prescribes that associated companies must transact with each other as if they were independent third parties: the transactions between two associated enterprises should reflect the outcome that would have been achieved if the parties were not related i.e. if the parties were independent of each other and the outcome (price or margins) was determined by (open) market forces.

The divergent interpretation on the definition and the scope of the Arm's Length Principle in the enforcement of EU law in tax rulings cases has been a subject of lengthy litigations between the European Commission, Member states and MNEs (Apple, Starbucks, Fiat, Amazon etc), notably with the Fiat case and the anticipated Apple judgment.

The CFE issued an Opinion Statement earlier in 2023, responding to the European Commission Public Consultation which took place prior to the legislative proposals being published, recommending that the following factors are taken into consideration by the European Commission:

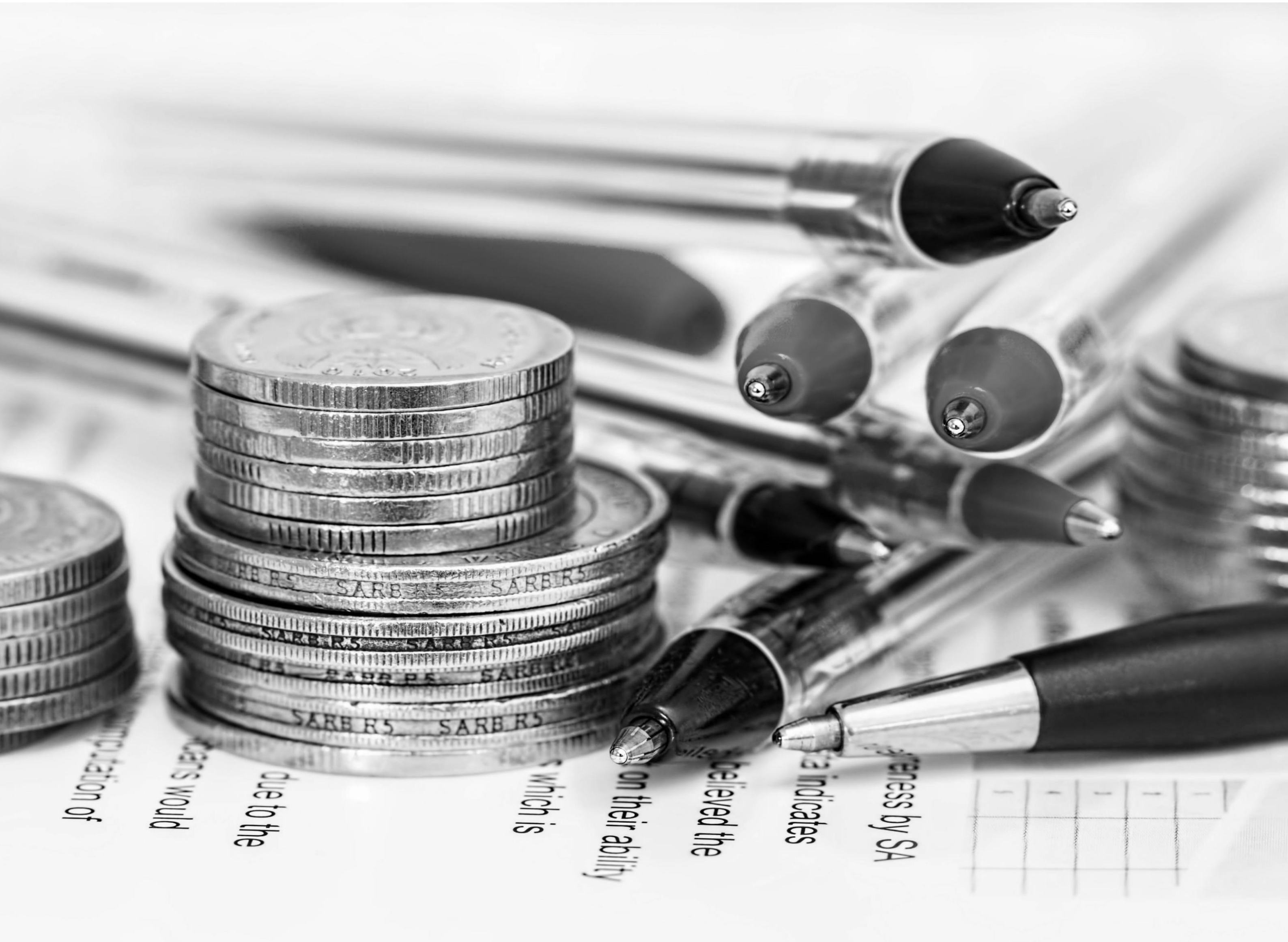
- CFE would encourage the European Commission to defer further consideration of BEFIT until the rules for the implementation of Pillar Two have had sufficient time to be operational in practice. Only then should the European Union proceed with a process to analyse whether BEFIT would provide a benefit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

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.

In late November, the European Parliament Economic and Monetary Affairs Committee (ECON) adopted a draft report on the European Commission proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), submitted by Evelyn Regner MEP. The report includes a number of key amendments to the Commission text regarding the threshold of application of the rules, notably by suggesting a lower threshold after the transition period has lapsed: "*The Committee proposes that the common framework of rules should be mandatory for groups with a taxable presence in the Union provided that they have annual combined revenues of EUR 750 000 000 or more based on their consolidated financial statements. Once the transition period lapses, such threshold should be set at EUR 40 000 000 or more, in line with the definition of large groups within the meaning of Directive 2013/34/EU of the European Parliament and of the Council1a . In this way, the scope would thus be targeted at businesses that are most likely to have cross-border activities and, thereby, can benefit from the simplification which a common legal* *framework would offer. The threshold would also provide alignment with Directive (EU) 2022/2523 for a consistent approach in the Union."*

The amendments also propose introduction of interest limitation rules applicable to the BEFIT group members in an attempt "to reduce the debt-equity bias that can occur via an over-reliance to intra-group debt financing and to reduce the scope for base erosion and profit shifting through excessive interest payments." To guarantee a minimal level of taxation of royalties, a royalties limitation rule for BEFIT group members should be introduced in accordance with the Subject to Tax Rule, as proposed by the OECD/G20 Inclusive Framework in Pillar II, the draft observes. The Commission proposal allows Member States to adjust their allocated share without a ceiling to ensure national policy choices (post-allocation adjustment). The European Parliament, on the other hand, wishes to see introduction of measures that would require Member states to refrain from offering output-based tax incentives such as patent boxes and other IP regimes.

It is expected that the BEFIT proposal, as well as the Transfer-Pricing Directive, will be tabled for discussion under the Belgian Presidency of the EU which starts on 1 January 2024.



EU BEFIT Proposals

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European Commission Publishes 'FASTER' Proposal - New Rules for Withholding Taxes in the EU

In June, the European Commission published a proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER), setting out proposed new rules for withholding taxes in the EU. The proposed legislation aims to simplify cross-border investment and taxation in the EU by introducing an EU-wide common system for withholding tax on dividend and interest payments and for tax authorities to exchange information and cooperate. The rules, once adopted by Member States, would come into force on 1 January 2027.

The key features of the proposed system are as follows:

A common EU digital tax residence certificate *will make withholding tax relief procedures faster and more efficient. For example, investors with a diversified portfolio in the EU will need only one digital tax residence certificate to reclaim several refunds during the same calendar year. The digital tax residence certificate should be issued within one working day after the submission of a request. At present, most Member States still rely on paper-based procedures.*

Two fast-track procedures complementing the existing standard refund procedure: *a "relief at source" procedure and a "quick refund" system, which will make the relief process faster and more harmonised across the EU. Member States will be able to choose which one to use – including a combination of both.*

- *Under the "relief at source" procedure, the tax rate applied at the time of payment of dividends or interest is directly based on the applicable rules of the double taxation treaty provisions.*
- *Under the "quick refund" procedure, the initial payment is made taking into account the withholding tax rate of the Member State where the dividends or interest is paid, but the refund for any overpaid taxes is granted within 50 days from the date of payment.*

A **standardised reporting obligation** *will provide national tax administrations with the necessary tools to check eligibility for the reduced rate and to detect potential abuse. Certified financial intermediaries will have to report the payment of dividends or interest to the relevant tax administration so that the latter can trace the transaction. In particular, large EU financial intermediaries will be required to join a national register of certified financial intermediaries. This register will also be open to non-EU and smaller EU financial intermediaries on a voluntary basis. Taxpayers investing in the EU through certified financial intermediaries will benefit from fast-track withholding tax procedures and avoid double taxation on dividend payments. The more financial intermediaries register, the easier it will be for tax authorities to* process refund requests, regardless of the procedure used.

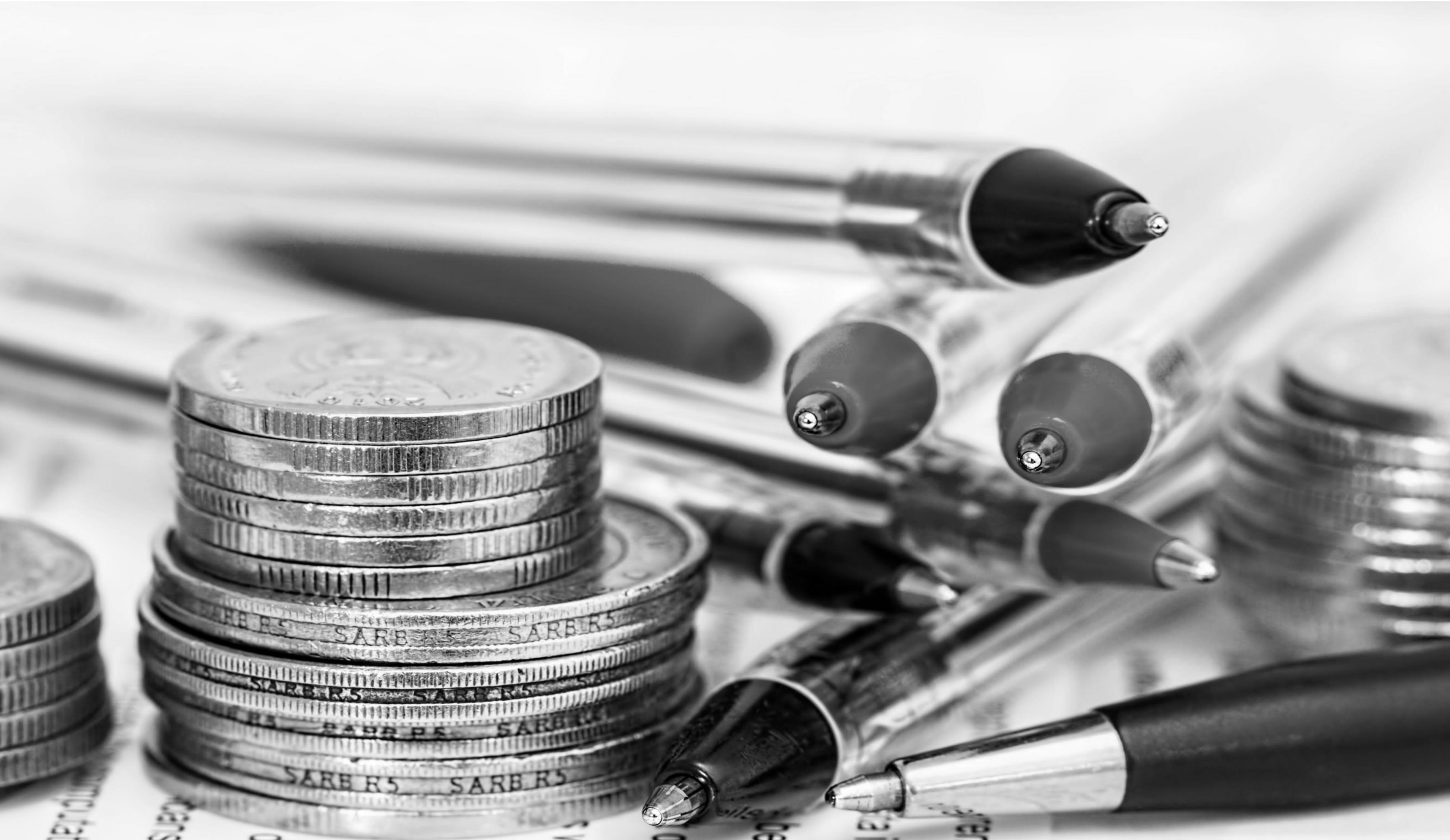
A public consultation was then launched inviting public input. CFE published an Opinion Statement concerning the proposal, reiterating earlier representations made to the Commission in June 2022, to a public consultation on the then-planned proposal.

As CFE set out in its initial representations, CFE is supportive of the initiative to introduce an EU-wide system for relief at source of withholding tax on dividend, interest, royalty payments and service fees, and for exchange of information and cooperation between tax authorities under the system.

CFE in the Statement set out its opinion that a tax residence certificate should be issued in a harmonized format within the EU, both in the local language and in English. Furthermore, it should certify the residence of the taxpayer under the applicable domestic law and not for the purposes of particular tax treaties. CFE also is of the view that the scope of the currently proposed directive is much too restricted, given the extremely limited application to only publicly traded bonds and shares which is much narrower than was originally envisaged at the time of the EU Commission's consultation process in 2022. CFE is disappointed that the proposed directive is limited in scope and does not address further issues which allow for relief of double taxation not addressed by the mechanism. CFE is of the view that relief at source via a digital certificate mechanism should be applicable to all types of dividend, interest and royalty payments and to service fees.

Whilst obviously recognising that Member States should effectively fight tax fraud and abuse, CFE set out its view that the right that they have in this respect should be exercised "after-the-facts" and not before. For that reason, CFE Tax Advisers Europe is of the view that a taxpayer should not have to provide information on the purposes of the certificate (this refers to Article 4(2)(g) of the Proposal) and that the financial intermediary should not be required to verify that information including undertaking a "risk assessment that takes into account the credit risk and fraud risk" as is notably provided by Article 10(1)(b) of the Proposal. More generally, the role of financial intermediaries should be revisited as set forth in section 4 of our Statement.

Finally, CFE observed that the currently proposed directive will not enter into force until January 2027, which is a relatively long transition period as compared with other direct tax proposals, for what would seemingly be a less complicated implementation.



EU Policy – Direct Tax Update

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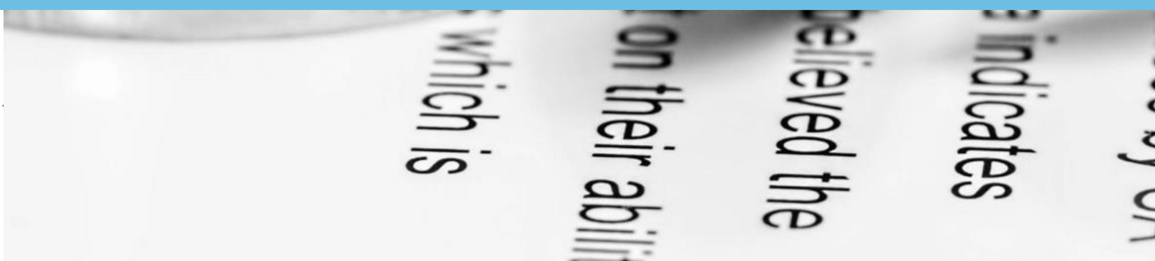


GREEN TAXES

European Parliament Approves Carbon Border Adjustment Mechanism & Emissions Trading Scheme Reforms

In April 2023, the European Parliament approved the provisional agreement reached with the European Council in December 2022 concerning the European Union's key legislative reforms to reduce greenhouse gas emissions by 55% by 2030, namely the Carbon Border Adjustment Mechanism ("CBAM"), reform of the Emissions Trading System ("ETS") and the Social Climate Fund.

Carbon Border Adjustment Mechanism

The CBAM aims to incentivise non-EU countries to increase their climate ambition and to ensure that EU and global climate efforts are not undermined by production being relocated from the EU to countries with less ambitious policies. The goods covered by CBAM are iron, steel, cement, aluminium, fertilisers, electricity, hydrogen as well as indirect emissions under certain conditions. Importers of these goods would have to pay any price difference between the carbon price paid in the country of production and the price of carbon allowances in the EU ETS. The CBAM will be phased in from 2026 until 2034 at the same speed as the free allowances in the EU ETS are being phased out.

Emissions Trading System

Under the reform to the ETC, emissions will be cut by 62% by 2030 compared to 2005-levels. It also phases out free allowances to companies from 2026 until 2034 and creates a separate new ETS II for fuel for road transport and buildings that will put a price on GHG emissions from these sectors in 2027 (or 2028 if energy prices are exceptionally high). It will also include emissions from the maritime sector and aviation, phasing out the free allowances to the aviation sector by 2026 and promote the use of sustainable aviation fuels.

Social Climate Fund

The deal with member states to set up an EU Social Climate Fund (SCF) in 2026 to ensure that the climate transition will be fair and socially inclusive was adopted with 521 votes to 75 and 43 abstentions. Vulnerable households, micro-enterprises and transport users who are particularly affected by energy and transport poverty will benefit from this. When fully in place, the SCF will be funded from auctioning ETS II allowances up to an amount of €65 billion, with an additional 25% covered by national resources (amounting to an estimated total of €86,7 billion).

The legal texts of the legislative proposals were then endorsed by the European Council, and published in the Official Journal of the European Journal in May 2023.

The European Commission thereafter held a consultation on the specific implementing rules and reporting obligations concerning the Carbon Border Adjustment Mechanism. The consultation concerned "*The rules governing the implementation of the Carbon Border Adjustment Mechanism (CBAM) during its transitional phase, which starts on 1 October of this year and runs until the end of 2025. The draft Implementing Regulation on which feedback is sought details the reporting obligations and information sought from EU importers of CBAM goods, as well as the provisional methodology for calculating embedded emissions released during the production process of CBAM goods.*

In the CBAM's transitional phase, traders will only have to report on the emissions embedded in their imports subject to the mechanism without paying any financial adjustment. This will give time for businesses to prepare and will provide the necessary information to fine-tune the definitive methodology by 2026.

The draft Implementing Regulation provides for some flexibility when it comes to the values used to calculate embedded emissions on imports. During the first year of implementation, companies will have the choice of reporting in three ways: (a) full reporting according to the new methodology (EU method); (b) reporting based on equivalent third country national systems; and (c) reporting based on reference values. As of 1 January 2025, only the EU method will be accepted.

This gradual approach will give producers time to adapt in a predictable manner. The Commission is also developing dedicated IT tools to help importers perform and report these calculations, as well as in-depth guidance, training materials and tutorials to support businesses when the transitional mechanism begins. While importers will be asked to collect fourth quarter data as of 1 October 2023, their first report will only have to be submitted by the end of January 2024.

The legislation was formally adopted by the Commission in August after a vote in the CBAM Committee, composed of representatives from EU Member States.

US vs EU's Green Subisidies Plan: EI Publishes Green Deal Industrial Plan

In February, the European Commission published the anticipated green industrial strategy, Europe's response to the US 'protectionist' green subsidies law enacted with the Inflation Reduction Act (IRA). The plan is based on a number of measures aimed at supporting Europe's net-zero industry and the transition to climate neutrality.

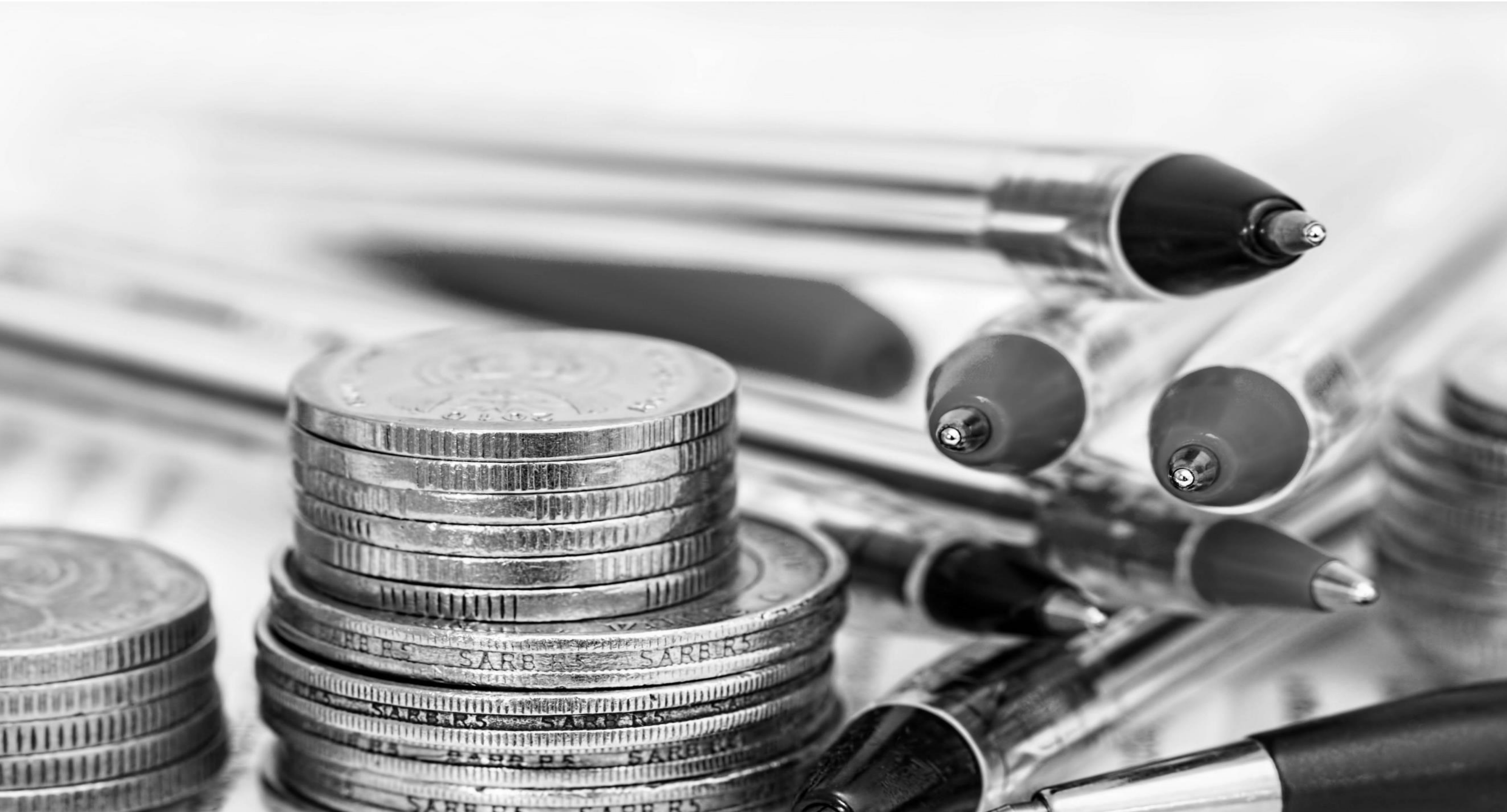
Similar to the US IRA, the EU intends to provide for tax breaks for the European industry focused on production of renewable such as hydrogen, on basis of an auction to be launched later in 2023. In addition, the temporary State Aid framework, enacted during the Covid pandemic, will allow for tax benefits to support new investment into industrial facilities with a clear green impact, i.e. in the strategic net-zero sectors. The EU will also facilitate the use of existing EU funds for financing clean tech innovation, manufacturing and deployment.

Commenting, President of the European Commission Ursula von der Leyen, said of the new measures: *"We have a once in a generation opportunity to show the way with speed, ambition and a sense of purpose to secure the EU's industrial lead in the fast-growing net-zero technology sector. Europe is determined to lead the clean tech revolution. For our companies and people, it means turning skills into quality jobs and innovation into mass production, thanks to a simpler and faster framework. Better access to finance will allow our key clean tech industries to scale up quickly.",* President von der Leyen said.

The European Commission thereafter decided to amend the General Block Exemption Regulation (GBER), allowing more scope for the grant of State aid and subsidies by Member states in response to the US Inflation Reduction Act (IRA). Alongside the Temporary Crisis and Transition Framework, this package now makes it much easier for governments to provide State support for key sectors in line with the Europe's Green Deal Industrial Plan.

Ursula von der Leyen, President of the European Commission, met US President Joe Biden in the US earlier in 2023, where much of the discussions were focused on these topics. President von der Leyen asked for equal treatment of EU raw materials with the US-subsidy eligible equivalents: *"We agreed that we will work on critical raw materials that have been sourced or processed in the European Union and to give them the access to the American market, as if they were sourced in the American market. We will work on an agreement what that is concerned."*

The joint statement with Joe Biden recognised the US commitment to this end, noting that both sides intend to immediately begin negotiations on a targeted critical minerals agreement for the purpose of enabling relevant critical minerals extracted or processed in the EU to count toward requirements for clean vehicles in the IRA Section 30D clean vehicle tax credit. This kind of agreement would further shared goals of boosting mineral production and processing and expanding access to sources of critical minerals that are sustainable, trusted, and free of labor abuse, the statement notes.



TAX TECHNOLOGY DEVELOPMENTS

48 Countries to Implement OECD Tax Transparency Standards for Crypto-Assets by 2027

48 countries and jurisdictions have committed to implementing the OECD's global tax transparency framework for the reporting and exchange of information with respect to crypto-assets by 2027. The Crypto-Asset Reporting Framework ("CARF") is a key component of the International Standards for Automatic Exchange of Information in Tax Matters developed by the OECD under a G20 mandate. It provides for the automatic exchange of tax-relevant information on crypto-assets and comes against the backdrop of a rapid adoption of the use of crypto-assets for a wide range of investment and financial uses.

Speaking concerning the commitments made by the jurisdictions, OECD Secretary-General Mathias Cormann said, *"Today's announcement of co-ordinated international action on crypto-assets is a major step forward, marking another important milestone towards the widespread and co-ordinated approach to combat tax evasion through greater transparency and exchange of information. We strongly welcome the extensive support being shown for quick action to make the international exchange of information collected under the OECD standard on crypto-asset reporting a reality. The international community can count on the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes to ensure that the tax transparency architecture remains both up-to-date and effective going forward."*

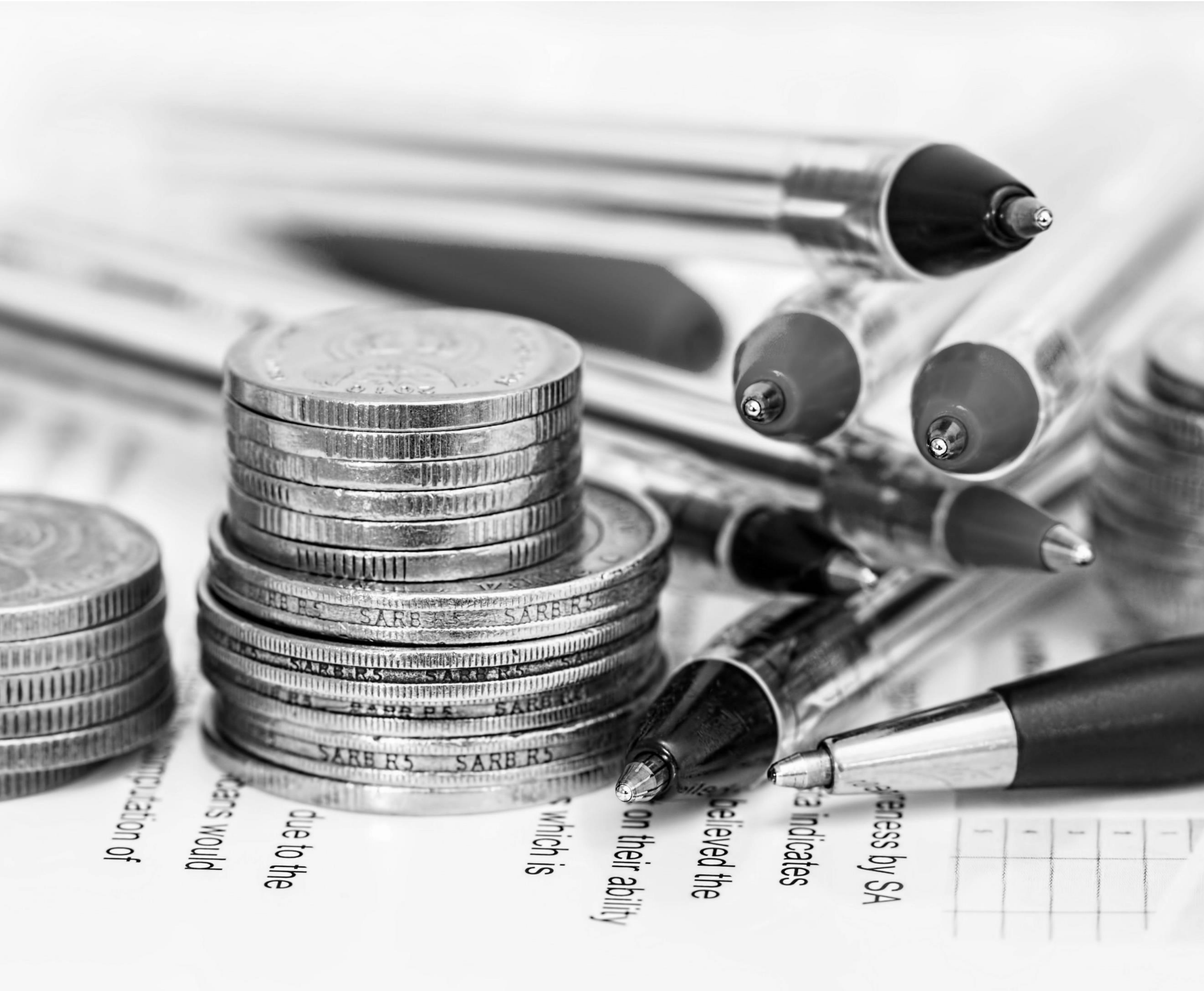
EU Agrees DAC8 Directive: Crypto-Asset Reporting

In October 2023, EU Finance Minisers adopted the DAC8 Directive on administrative cooperation in the field of taxation. The Directive strengthens the EU's existing legislation in the field, by enlarging the scope for registration and reporting obligations and overall administrative cooperation of tax administrations.

The Directive largely follows the text as laid out in the CARF framework as agreed at OECD level, and sets out new reporting requirements related to the Crypto-Asset Reporting Framework (CARF) and amendments to the Common Reporting Standard (CRS). The G20 endorsed the CARF and the amendments to CRS, both of which it considers to be integral additions to the global standards for automatic exchange of information.

The EU DAC8 Directive also extends the scope of the current rules on exchange of tax-relevant information by including provisions on exchange of advance cross-border rulings concerning high-net-worth individuals, as well as provisions on automatic exchange of information on noncustodial dividends and similar revenues, in order to reduce the risks of tax evasion, tax avoidance and tax fraud, as the current provisions of DAC do not cover this type of income.

Speaking after the ECOFIN Council meeting, Elisabeth Svantesson, Minister for Finance of Sweden said*: "Today we are strengthening the rules for administrative cooperation and closing loopholes that have previously been used to avoid taxation of income. This reduces the risk of crypto-assets being used as a safe haven for tax avoidance and tax fraud. The agreement is yet another example of the EU as a leader in the implementation of global standards."*



EU Approves Artificial Intelligence Act

In 2023, the European Parliament and the Council of the EU provisionally approved the proposal on harmonised rules on artificial intelligence (AI), the Artificial Intelligence Act (AAI), making it the world's first regulatory standard for AI.

Following the provisional agreement, work will continue at technical level in the coming weeks to finalise the details of the new regulation. The provisional agreement provides that the AI act should apply 2 years after its entry into force, with some exceptions for specific provisions. The key elements include:

- rules on high-impact general-purpose AI models that can cause systemic risk in the future, as well as on high-risk AI systems;
- a revised system of governance with some enforcement powers at EU level;
- extension of the list of prohibitions but with the possibility to use remote biometric identification by law enforcement authorities in public spaces, subject to safeguards;
- better protection of rights through the obligation for deployers of high-risk AI systems to conduct a fundamental rights impact assessment prior to putting an AI system into use.

The European Commission welcomed the political agreement, President Ursula von der Leyen, said of the occasion: *“Artificial intelligence is already changing our everyday lives. And this is just the beginning. Used wisely and widely, AI promises huge benefits to our economy and society. Therefore, I very much welcome today's political agreement by the European Parliament and the Council on the Artificial Intelligence Act. The EU's AI Act is the first-ever comprehensive legal framework on Artificial Intelligence worldwide. So, this is a historic moment. The AI Act transposes European values to a new era. By focusing regulation on identifiable risks, today's agreement will foster responsible innovation in Europe. By guaranteeing the safety and fundamental rights of people and businesses, it will support the development, deployment and take-up of trustworthy AI in the EU. Our AI Act will make a substantial contribution to the development of global rules and principles for human-centric AI.”*

The AI agreement was criticised by French President Emmanuel Macron who said the regulations, which are the 'toughest in the world', will constrain European tech companies compared to their rivals in the US, UK and China. *“When I look at France, it is probably the first country in terms of artificial intelligence in continental Europe. We are neck and neck with the British. They will not have this regulation on foundational models. But above all, we are all very far behind the Chinese and the Americans.”*, Mr. Macron said for the FT.

ANTI-MONEY LAUNDERING DEVELOPMENTS

EU Parliament MEPs Adopt Position on EU AML Legislation

In March, EU Parliament MEPs from the Economic and Monetary Affairs and Civil Liberties, Justice and Home Affairs committees adopted positions on the proposed new EU Anti-Money Laundering and Countering the Financing of Terrorism legislation.

The package consists of:

- The EU "single rulebook" Regulation - with provisions on conducting due diligence on customers, transparency of beneficial owners and the use of anonymous instruments, such as crypto-assets, and new entities, such as crowdfunding platforms. It also includes provisions on so-called "golden" passports and visas. The text was adopted with 99 votes to 8 and 6 abstentions.

- The 6th Anti-Money Laundering Directive - containing national provisions on supervision and Financial Intelligence Units, as well as on access for competent authorities to necessary and reliable information, e.g. beneficial ownership registers and assets stored in free zones. The text was adopted with 107 votes to 5 and 0 abstentions.

- The Regulation establishing the European Anti-Money Laundering Authority (AMLA) with supervisory and investigative powers to ensure compliance with AML/CFT requirements. The text was adopted with 102 votes to 11 and 2 abstentions.

Paul Tang (co-rapporteur for the Anti-Money Laundering directive - S&D, NL) said of the proposals: *"We are losing the battle against money laundering, which costs society up to two trillion US dollars annually worldwide. That is why parliament worked together on finding effective ways to fight money laundering, by demanding the registration of expensive cars, boats and planes and by obliging the disclosure of all goods stored in free zones. We have also restored access to beneficial ownership data for journalists and civil society organisations, introduced strong safeguards like a Fundamental Rights Officer in every Financial Intelligence Unit. I am hopeful the Council will join us in beefing up the EU's fight against money laundering and terrorist financing."* Further detail on the agreed provisions can be found here.

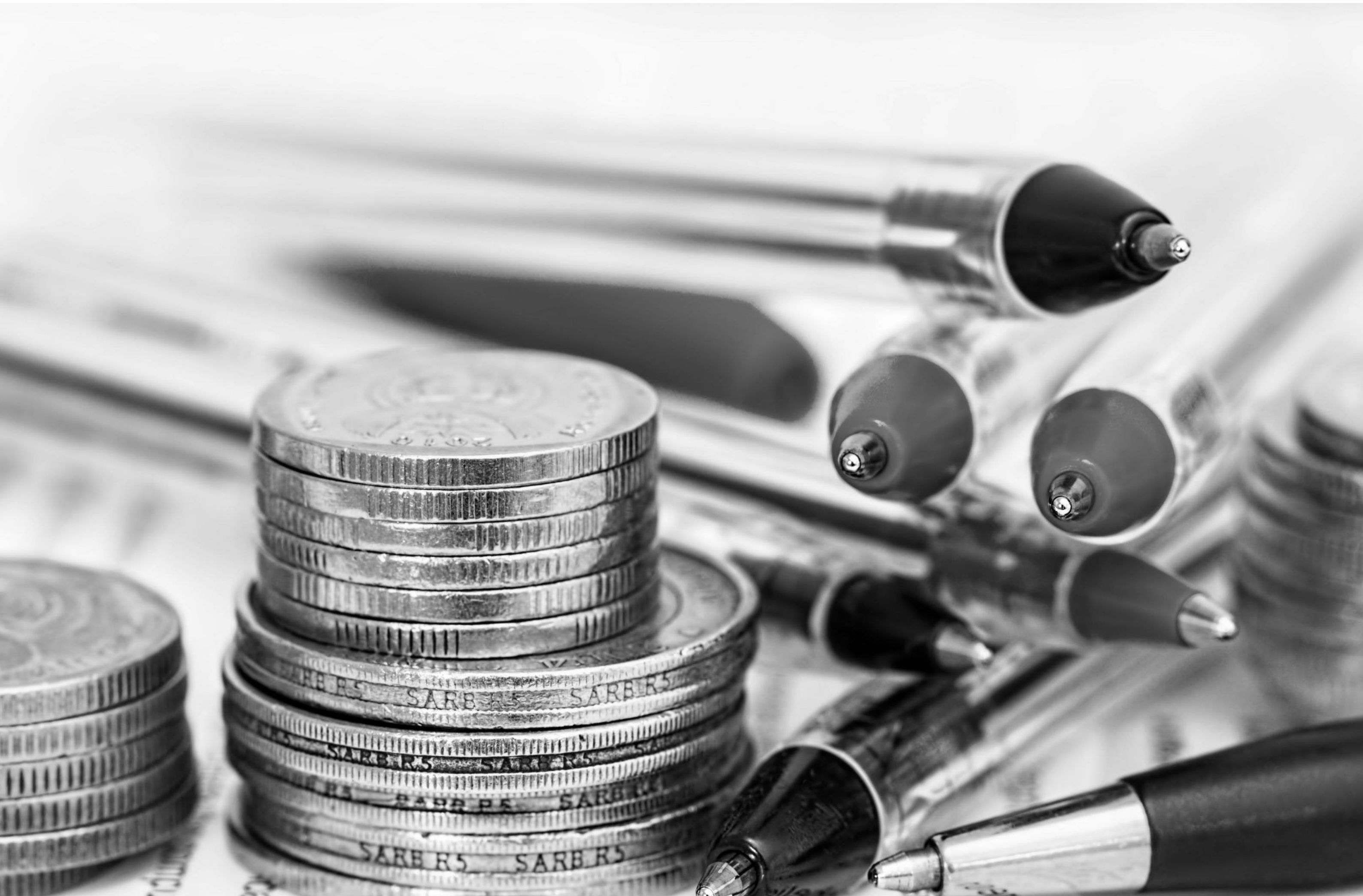
The European Parliament started negotiations on the the legislative package after the decision was confirmed during the plenary session in April and these negotiations are ongoing.

FATF Updates List of Jurisdictions Under Increased AML Monitoring

Global money laundering and terrorist financing watchdog, FATF, the Financial Action Task Force, provided updates on its List of High-Risk Jurisdictions & List of Jurisdictions Under Increased Monitoring at its Plenary meeting held in February 2023.

South Africa and Nigeria were added to the List of the Jurisdictions Under Increased Monitoring at the Plenary meeting, and have made commitments to work with FATF to strengthen their AML/CFT regimes, with further details of steps to be taken set out in the List. Cambodia and Morocco were removed from the List based on their *"progress in improving their respective AML/CFT regimes covered by their individual action plans. Each country has addressed its technical deficiencies to meet the commitments of its action plan on strategic deficiencies that the FATF identified in February 2019 and 2021 respectively."* The jurisdictions will continue to further strengthen their AML/CFT regimes through cooperation with regional watchdog bodies.

Also at the Plenary, FATF voted to suspend the membership of the Russian Federation, stating that the *"Russian Federations continuing and intensifying war of aggression against Ukraine runs counter to FATF's principles of promoting security, safety and the integrity of the global financial system and the commitment to international cooperation and mutual respect upon which FATF Members have agreed to implement and support the FATF Standards."*



EU Policy - Indirect Tax Update

05

ECOFIN Progresses Debate on ViDA Proposals

Finance Ministers from the Council of the European Union met on 16 June at the Economic and Financial Affairs Council, where discussions were held on the VAT in the digital age policy debate on this legislative package and gave political guidance on a number of key issues which had so far been the subject of discussions at the level of experts of the Member states. The ViDA package includes proposals for:

- single VAT registration for businesses across the EU;
- VAT rules for the platform economy, related to passenger transport and short-term accommodation rental;
- digital reporting obligations based on e-invoicing for businesses operating across borders in the EU.

The European Commission also recently adopted its Commission Work Programme 2024, setting out priorities and legislative proposals that will form the focus of the upcoming year. The Programme emphasises that progressing currently tabled legislative proposals will be the central focus, stating that the EU *"need to agree on a series of measures to modernise the EU's ValueAdded Tax (VAT) system and make it more resilient to fraud by embracing digitalisation."*

At the last ECOFIN meeting of the year for 2023, EU's Finance Ministers approved the Report to the European Council on Tax Issues which includes an overview of the state of play of the most important tax files: "VAT in the Digital Age" package; the Faster and Unshell proposals i.e. proposal on faster and safer relief of excess withholding taxes and proposal to prevent the misuse of shell entities for tax purposes; the HOT proposal for Council Directive establishing a Head Office Tax system for micro, small and medium sized enterprises; Council Directive on Transfer Pricing and Council Directive on Business in Europe: Framework for Income Taxation (BEFIT); as well as update to the EU blacklist of non-cooperative jurisdictions for tax purposes.

Regarding the ViDA package Progress Report, the Council noted that further technical discussion are needed to agree on the electronic invoicing and digital reporting requirements, as well as the entry into force. On the Single VAT registration, the report notes that discussions at technical level have been concluded.

CFE Tax Advisers Europe issued an Opinion Statement setting out further comments on the EU Commission's VIDA Proposals of 8 December 2022. CFE initially submitted representations on 4 April 2023 to the European Commission on the legislative proposals. Since those representations were submitted the CFE held a Forum on the proposals in Brussels on 20 April 2023. This in turn has stimulated further debate within the CFE on the proposals.

As we explained in our initial representations, the CFE broadly welcomes the proposals. We also greatly appreciate the contribution that Agnes Fekete, from the Commission, made to the discussions at the CFE Forum in 2023. However, there are a number of issues that we continue to have considerable concerns about. Many of these concerns are set out in our earlier Statement.

CFE reiterates its position that it welcomes the work of the European Commission in seeking to review the appropriateness of current VAT rules in the EU in light of changes brought about by digitalisation of the economy.

EU Customs Reform Proposals Published

In May, the European Commission published proposals setting out plans for the most comprehensive overhaul of the EU Customs Union system since its being established in 1968. The reform aims to respond to modern pressures on the Union, including hugely increased trade volumes, e-commerce and the number of EU standards that must be checked at the EU Customs border.

According to the Commission, *"The measures proposed present a world-leading, data-driven vision for EU Customs, which will massively simplify customs processes for business, especially for the most trustworthy traders. A new EU Customs Authority will oversee an EU Customs Data Hub which will act as the engine of the new system. Over time, the Data Hub will replace the existing customs IT infrastructure in EU Member States, saving them up to €2 billion a year in operating costs. The new Authority will also help deliver on an improved EU approach to risk management and customs checks."*

The **three pillars of EU Customs Reform** are comprised of:

A new partnership with business - businesses that want to bring goods into the EU will be able to log all the information on their products and supply chains into a single online environment: the new **EU Customs Data Hub**. This cutting-edge technology will compile the data provided by business and – via machine learning, artificial intelligence and human intervention – provide authorities with a 360-degree overview of supply chains and the movement of goods. At the same time, businesses will only need to interact with one single portal when submitting their customs information and will only have to submit data once for multiple consignments. In some cases where business processes and supply chains are completely transparent, the most trusted traders ('Trust and Check' traders) will be able to release their goods into circulation into the EU without any active customs intervention at all. The Trust & Check category strengthens the already existing Authorised Economic Operators (AEO) programme for trusted traders.

A smarter approach to customs checks - Member States will have access to real-time data and will be able to pool information to respond more quickly, consistently and effectively to risks. Artificial intelligence will be used to analyse and monitor the data and to predict problems before the goods have even started their journey to the EU. This will allow EU customs authorities to focus their efforts and resources where they are needed most: to stop unsafe or illegal goods from entering the Union and to uphold the growing number of EU laws that ban certain goods that go against common EU values – for example in the field of climate change, deforestation, forced labour, to give just a few examples. It will also help to ensure proper collection of duties and taxes, to the benefit of national and EU budgets. To help Member States prioritise the right risks and coordinate their checks and inspections – especially during times of crisis – information and expertise will be pooled and assessed at EU level via the new **EU Customs Authority** acting on the data provided through the EU Customs Data Hub.

A more modern approach to e-commerce - Platforms will be responsible for ensuring that customs duties and VAT are paid at purchase, so consumers will no longer be hit with hidden charges or unexpected paperwork when the parcel arrives. With online platforms as the official importers, EU consumers can be reassured that all duties have been paid and that their purchases are safe and in line with EU environmental, safety and ethical standards. At the same time, the reform abolishes the current threshold whereby goods valued at less than €150 are exempt from customs duty, which is heavily exploited by fraudsters. Up to 65% of such parcels entering the EU are currently undervalued, to avoid customs duties on import. The reform also simplifies customs duty calculation for the most common low-value goods bought from outside the EU, reducing the thousands of possible customs duty categories down to only four.

CFE Statement of VAT Treatment of Compensation Payments

In March, the CFE issued an Opinion Statement on the VAT Treatment of Compensation Payments.

It is clear from the case law of the Court of Justice that not all compensation payments are subject to VAT. The difficulty is determining the demarcation line between cases that give rise to a liability and those that do not. The demarcation is not just potentially significant in determining whether a payment paid to a supplier is subject to VAT but also on the related question of whether a compensation payment made by a supplier should be considered to result in a reduction in the consideration for a supply.

The decisions in Case C-222/81 *BAZ Bausystem AG v Finanzamt München für Körperschaften* and Case C-277/05 *Société Thermale d'Eugénie-les-Bains v Ministère de l'Économie*, *des Finances et de l'Industrie* make it clear that not all payments paid for compensatory reasons can be considered consideration for supplies. They also make it clear that there are two issues that need to be considered. The first is whether the taxable person can be considered to have rendered a supply. The second is whether there can be considered a sufficiently direct link between the payment and the alleged supply. Because of the harmonised basis of the tax, these issues cannot be purely determined by reference to concepts of national law, although they clearly form part of the context against which the issues need to be assessed.

Penalty and prepayment charges can in some cases be taxable if they are consideration for a supply. However, it is important to observe that in the facts of the cases considered by the CJEU concerning this issue there was clearly a supply, being the seat in the aircraft, access to the telephone networks or parking facilities. The Court also considered that the payments could be viewed as being consideration for those supplies, rather than purely compensatory. Therefore, different considerations may apply when these conditions are not satisfied. The fact sensitivity of these issues is also important to emphasise, because some tax authorities have sought to suggest that prepayments or cancellation payments, for example for a supply of goods, can be taxed even though no goods have been supplied.

In the generality of cases, the decision of C-107/13 *FIRIN OOD* also suggests that it cannot be correct to view a prepayment for the supply of goods as also resulting in a supply of services, since *FIRIN OOD* would then have had a right of recovery for that reason if its payment could be considered a payment for a supply of services. This conclusion is also consistent with the Court's reasoning in Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*, where the Court considered that on the facts of that case it would be wrong to view the deposit as consideration for a reservation service.

The *Apcoa* case makes it clear that some penalty payments may be consideration for a supply. However, we also do not consider that it would be correct to view all penalty payments as consideration. Each case will depend on its facts. However, it will clearly be significant if the payment does not impact on the quality of what is supplied to the customer and does not result in the customer obtaining any additional rights.

With both compensatory and penalty payments, both these points will support the conclusion that there is an insufficiently direct and immediate link between the payment and any supply. For these reasons, the payment of a penalty when there is nothing corresponding to a supply should not give rise to a liability.

We also do not consider that all prepayments should be considered as consideration. In particular no charge should arise when it is not realistic to analyse the customer as receiving anything.

European Commission Publishes 2023 VAT Gap Report

In November, the European Commission published the [2023 VAT Gap Report], which shows that the EU VAT Gap decreased by around 38 Billion Euro, an unprecedented improvement as compared to previous years, with most Member States demonstrating a decrease in the VAT Gap. Some Member States demonstrated particularly notable reductions in the national VAT Gap figures, in particularly Poland and Italy. The smallest gaps observed were in the Netherlands, Finland, Spain and Estonia.

The report concludes that revenues lost through the VAT Gap were mainly due to VAT fraud, evasion and avoidance, non-fraudulent bankruptcies, miscalculations and financial insolvencies, but that targeted policy were having an impact, particularly those concerning digitalisation of tax systems, real-time reporting of transactions and e-invoicing.

CFE Opinion Statement on VAT Groups

In 2023, the CFE issued an Opinion Statement on VAT Groups.

The Court of Justice's decision in C-812/19 *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket* considered the question of how the provisions relating to VAT Groups in Article 11 of the Principal Directive interrelate with the decision of the Court of Justice in C-210/04 *Ministero dell'Economia e delle Finanze v FCE Bank plc*.

In the *FCE Bank* case, the Court considered that no VAT was chargeable on supplies of services between the head-office of the Bank in the UK and its fixed establishment in Italy. The Court considered that the Italian branch was not performing an independent economic activity because it was the Bank as a whole, rather than the branch, that was incurring the risk and any charges agreed between the branch and head office could not be considered to be negotiated between independent parties. FCE Bank was a member of the UK VAT group of Ford, the car manufacturer. However, that fact was not highlighted to the Court.

As in the earlier decision of C-17/13 *Skandia America Corp (USA), filial Sverige v Skatteverket*, the reference in Danske Bank related to a Member State, Denmark, that considered that only fixed establishments within its jurisdiction could form part of a VAT group. The Court considered that taxable supplies were made when the head office in Denmark, which was part of a VAT group, made taxable supplies in providing services to its Swedish fixed establishment. In reaching this conclusion, the Court was following the reasoning of the Court in the earlier *Skandia America case*. However, one significant difference between the *Skandia America case* and the *Danske Bank* case is that the *Danske Bank* case also raised the issue of whether the Swedish authorities were obliged or entitled to recognise the existence of a VAT Group in another Member State.

On this additional issue the Court, at paragraph 33, observed that:

"The fact remains that the existence of a VAT group in that Member State must, where appropriate, be taken into account for the purposes of taxation in other Member States, in particular when the latter assess the tax obligations of a branch established in their territory".

Here, the Court was clearly recognising that there may be a need for tax authorities to recognise the existence of VAT groups in other Member States. However, the use of the words "where appropriate" leaves open the possibility that there may be limitations on this obligation.

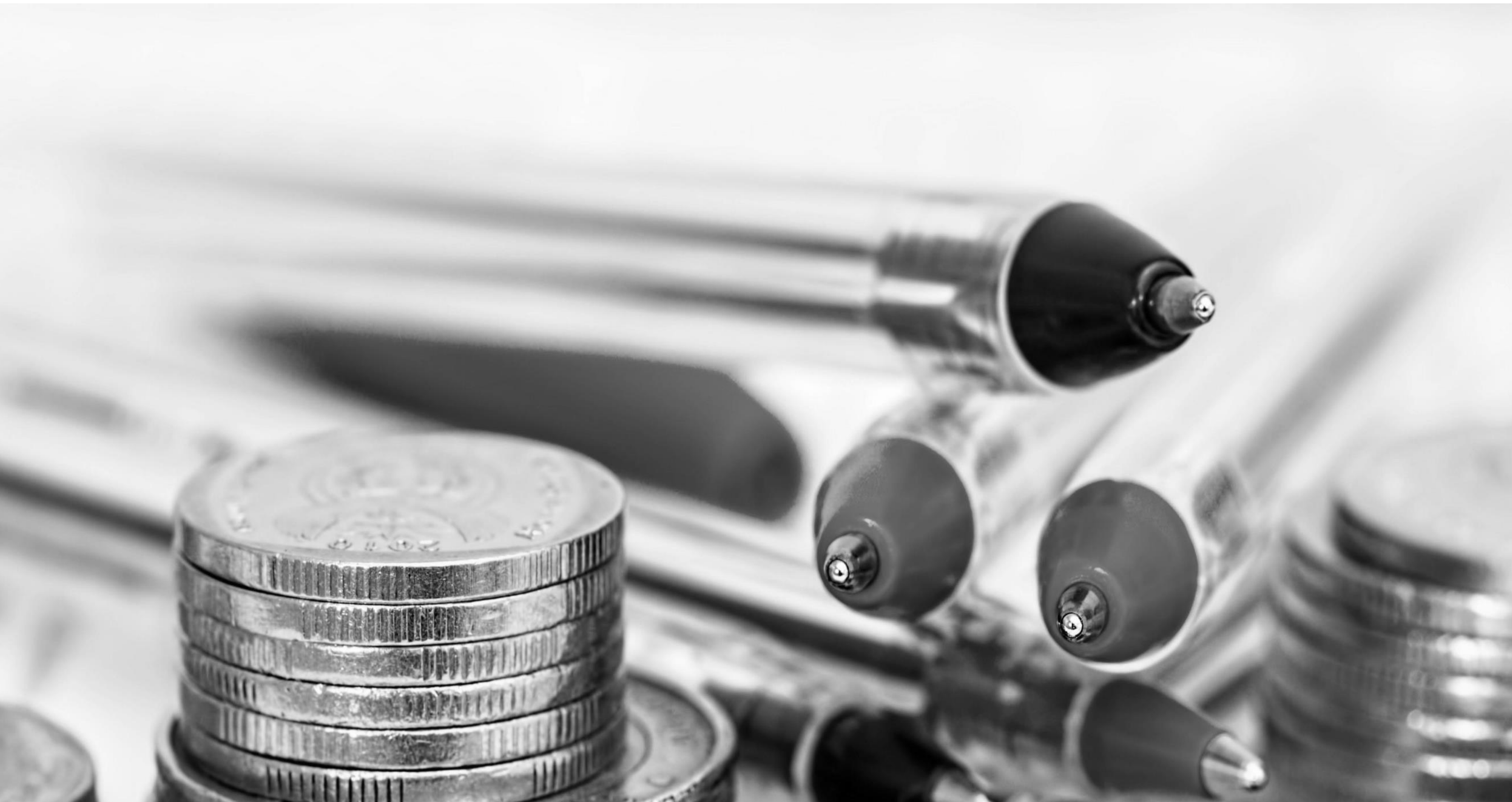
Many Member States have adopted a similar approach to Sweden and Denmark and consider that only fixed establishments that are within that state can form part of a VAT group. However, there have also been Member States that have favoured the whole entity approach, so that on joining a VAT group in those states the entire entity, including any foreign establishments, form part of the grouping for the purposes of imposing VAT in that Member State.

This approach accords with the literal reading of Article 11 which talks about "persons" and not "fixed establishments" in a Member State forming part of the grouping. It also accords with the legal and economic realities, because as the Court recognised in the *FCE case,* fixed establishments cannot generally be considered distinct taxable persons.

One issue that arises from the *Danske Bank* case is whether it remains open to a Member State to adopt the whole entity approach. There are comments in the *Danske Bank* case which could be read as rejecting a whole entity approach. However, those comments were made in the context of a Member State that adopted the national establishments only approach. There is in fact nothing in the explicit wording of Article 11 which prevents the adoption of a whole entity approach. Indeed, if anything the contrary is the position, since Article 11 refers to "persons" rather than "establishments" joining the grouping. While the Court in *Skandia America* clearly accepted that a national establishment only approach could be adopted, it certainly did not question the legitimacy of the whole entity approach.

It could also be suggested that the fact that the Court in *Danske Bank*, at paragraph 33, considered that Member States were required to recognise VAT groups in other Member States also supports the conclusion that the Court was rejecting the whole entity approach to VAT grouping. The *Danske Bank* decision illustrates how the process of recognition can have VAT consequences in other Member States that are required to recognise the grouping, in that case a VAT charge in Sweden on services rendered by the Danish head-office which only arose because Sweden recognised the Danish VAT group. It could also impact on the ability to recover input tax. If the whole entity approach is acceptable, these consequences potentially become more complex.

CFE considers that there would be considerable merit in developing the idea of EU wide VAT groupings. The effect of a national establishment only approach is effectively to discourage the provision of cross-border services within a commercial grouping within the EU, which we consider to be unfortunate and inconsistent with the idea of an EU wide single market.



EU Parliament, Blacklist & Code of Conduct Update

06

EU Parliament Report on Lessons Learned from the Pandora Papers

On 15 June 2023, MEPs of the European Parliament sitting in Plenary adopted the Report on Lessons Learned from the Pandora Papers and Other Revelations, with 465 votes in favour, 5 votes against and 36 abstentions.

The report makes recommendations on regulation for intermediaries, reporting and information sharing, beneficial ownership, reducing conflicts of interest, addressing practices and regimes which reduce tax collection and whistle-blowers. The report also recommends changes to the EU's tax haven blacklist and the mandate of the Code of Conduct Group.

The CFE issued an Opinion Statement on the Report ahead of the EU Parliament plenary debate and vote. CFE Tax Advisers Europe values the continued efforts and contribution of the European Parliament, in particular the Subcommittee on Tax Matters (FISC) and the Committee of Economic and Monetary Affairs (ECON) in promoting better transparency, accountability and integrity of our tax systems.

CFE has contributed to the public debate and the expert hearings organised by the European Parliament in exploring ways in which tax professionals can contribute to these objectives as well as to strengthen the integrity and robustness of the fiscal systems for the benefit of the European economy, society, its citizens and taxpayers. We will continue to support the EU institutions in these important endeavours.

CFE in the statement acknowledges the change in attitudes and practices which has been driven by policy-makers in the last decade, and achieved via cumulative steps at international level, particularly through the OECD and then through EU and national measures. They were undoubtedly bolstered by the need to respond to the 2008 financial crisis and its aftermath, which introduced austerity for many. Policymakers were prompted by a dual concern: the revenue lost to national treasuries from such tax planning and the growing concerns among electorates about accountability for fair and equal treatment of taxpayers and the “social contract” that exists between companies, their employees and the public services they avail of.

CFE believes that it is possible to make a substantive contribution to addressing the problem of abusive tax arrangements by setting a quality bar for ethical judgment in tax advice. The focus of the quality bar is on the qualitative reflections of tax advisers when exercising their professional judgment. Taking into consideration the many differences in national contexts across Europe in relation to the roles and responsibilities of tax advisers, as well as the tax and legal systems and national cultures in which they operate, achieving a single, Europe-wide code or piece of professional guidance on ethical judgment in the provision of tax advice could be difficult to achieve. However, the concept of a quality bar would be sufficiently agile as well as practically adaptable to make a real impact across different environments and over time.

CFE believes that an ethics quality bar could help to ensure that ethics is appropriately considered in the exercise of professional judgment. Specifically, it can assist in relation to the question "If it is legal, is it acceptable?" by ensuring that the exercise of professional judgment is steered against advice which is abusive within legal parameters. CFE envisages that this steering can be achieved via tax advisers' asking themselves the five key questions, as set out in our paper, when preparing and providing advice to clients – on the basis that the advisers respond to the answers generated by the questions appropriately. The key questions will be particularly relevant in situations where client expectations of tax planning denote an enhanced risk of potentially abusive arrangements.

It is important to bear in mind not only that tax advisers do not work in a vacuum but also that there are significant differences between tax advisers. While many are members of a professional body, such as the members of CFE member bodies, some are subject to mandatory regulation, some accept voluntary regulation, and a significant number are unregulated and without affiliation to a professional body, in a context where most European countries do not impose market access rules for the provision of tax advice. Our paper concerns the professional behaviour of all advisers, whatever their status.

EU List of Non-Cooperative Jurisdictions for Tax Purposes Updated

In October, Finance Ministers sitting at the Council of the EU added Antigua and Barbuda, Belize and Seychelles to the so-called "Blacklist", the EU List of Non-Cooperative Jurisdictions for Tax Purposes. In February, the Council added the jurisdictions of the British Virgin Islands, Costa Rica, Marshall Islands and Russia to the list.

The British Virgin Islands were added to the list for not sufficiently complying with the OECD standard on exchange of information on request. Costa Rica was added for failing to fulfil its commitment to abolish or amend the harmful aspects of its foreign source income exemption regime. The Marshall Islands were added due to concerns over the jurisdiction having a zero or only nominal rate of corporate income tax and lacking in the enforcement of economic substance requirements. Russia was added for failing to address the harmful aspects of a special regime for international holding companies and following the Russian aggressive against Ukraine.

In February, the following jurisdictions were recognised for fulfilling their commitments and were removed from Annex II: Barbados, Jamaica, North Macedonia and Uruguay. Hong Kong and Malaysia were given an extension to complete reforms concerning foreign source income exemption regimes for capital gains. Qatar was granted an extension due to constitutional reform constraints.

Aruba and Curaçao were featured in Annex II for undertaking to improve their Global Forum determinations as regards the automatic exchange of information on financial accounts. Belize and Israel also made this commitment criteria and Albania committed to amend or abolish its potentially harmful regime.

At the October 2023 meeting, the Council removed the British Virgin Islands, Costa Rica and Marshall Islands from the list.

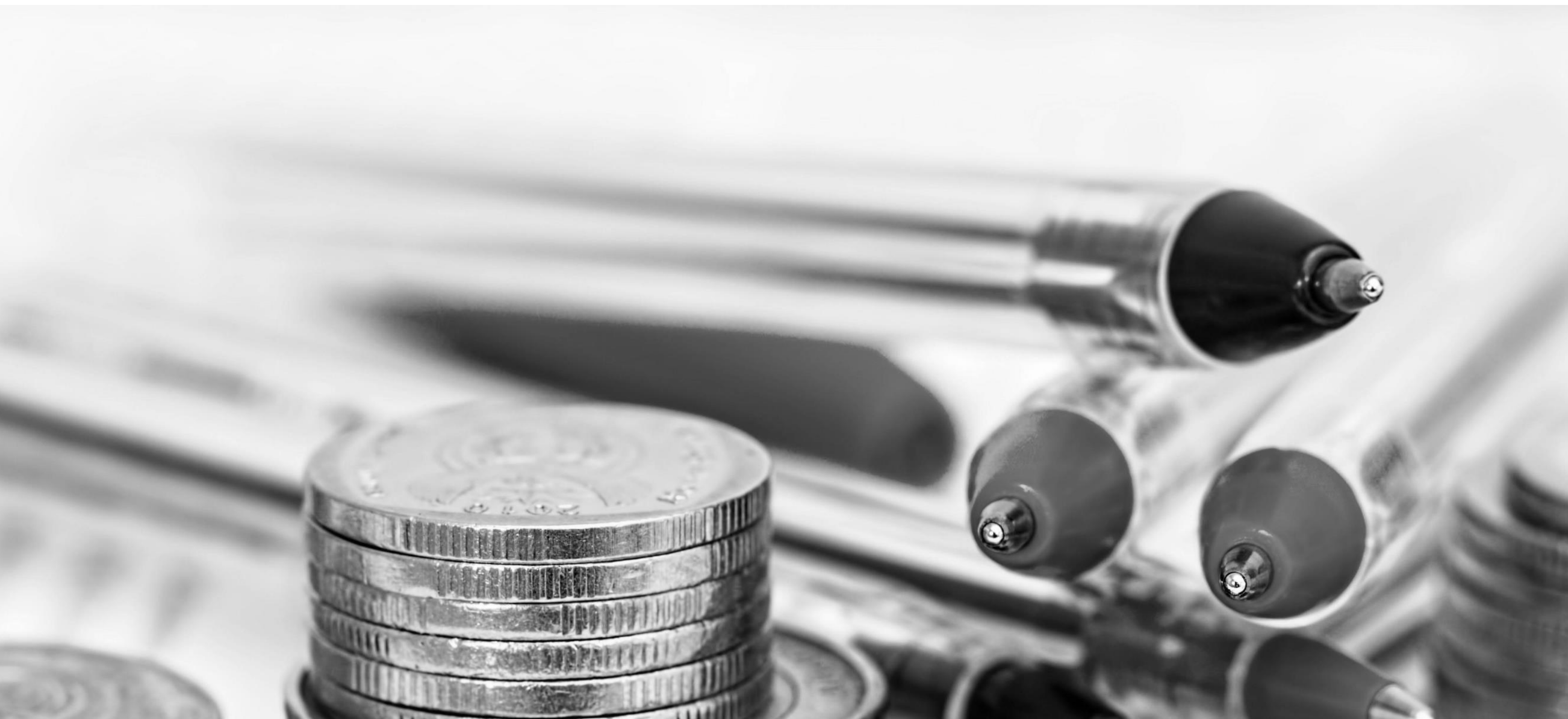
The following 16 jurisdictions remain on the list: American Samoa, Antigua and Barbuda, Anguilla, Bahamas, Belize, Fiji, Guam, Palau, Panama, Russia, Samoa, Seychelles, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

European Parliament Adopts Resolutions on Role of Tax Policy & Reform of Corporate Tax Policy

The European Parliament's Committee on Economic and Monetary Affairs adopted two resolutions concerning taxation issues in 2023, one concerning the role of tax policy in times of crisis and the other concerning reform of corporate taxation rules.

The resolution concerning tax policy in times of crisis highlights issues surrounding excess profits made by multinationals due to times of crisis, and the fact that environmental taxation remains low in terms of total tax revenue in the EU. It calls for increased taxation of air and sea transport. The resolution also identifies issues posed to tax systems by cross-border working and the need to reduce tax fraud, avoidance and evasion, calling for solutions to issues surrounding these topics.

The resolution concerning reform of corporate taxation rules focuses on making recommendations on how Member States can ease the burdens on SMEs through the use of corporate tax rules. It recommends that Member States enact temporary measures to mitigate high energy costs and use revenues to provide relief to SMEs. Further, it calls on the Commission to evaluate action taken since 2011 in relation to corporate taxation with a focus on how best to ease administrative burdens on businesses. It also recommends the Commission propose further enhanced cooperation between tax authorities on best practices concerning the use of technology in improving tax related administrative procedures.



International Tax Policy Updates

07

UN Seeks Greater Role In International Tax

In November, the Second Committee of the UN General Assembly voted in favour of a Draft Resolution on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, directly challenging the G20-mandated OECD leadership in international tax matters. The vote on a resolution filed by Nigeria saw a clear divide between developed countries, such as the EU, US, UK and Japan, and the rest of the world.

The resolution was carried by 125 countries in favour to 48 against, with 9 abstentions. Votes in favour or abstentions included Columbia, Chile, Iceland, Mexico and Norway, who are OECD members. Nigeria's diplomats at the United Nations, who introduced the draft resolution on behalf of Africa, said it represents "a beacon of hope for developing nations." *“The decades-long fight of Global South countries to establish a fully inclusive process at the United Nations to participate in agenda setting and norm setting on international tax is now a reality. The African Union looks forward to agreeing an effective UN Framework Convention on International Tax Cooperation to urgently mobilise resources for our development”,* the African Union stated.

The vote followed from a Resolution adopted at the General Assembly on 30 December 2022 calling for *"intergovernmental discussions in New York at United Nations Headquarters on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process."*

The Resolution requested the Secretary-General, Antonio Guterres, to prepare a report on all relevant international legal instruments, other documents and recommendations that address international tax cooperation and outline potential next steps, such as the establishment of a Member State-led, open-ended ad hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation.

In the report that followed, the Secretary General called for a greater role of the UN in setting the international tax affairs in order to achieve a "fully inclusive" international tax agenda. In the report, entitled "Promotion of inclusive and effective international tax cooperation at the United Nations - Report of the Secretary-General", Mr Guterres contended that enhancing the UN’s role in tax-norm shaping and rule setting, taking into account existing multilateral and international arrangements, would make international tax cooperation "fully inclusive and more effective". The report also noted that the rules developed at the OECD do not adequately address the needs and priorities of developing countries and/or are beyond their capacities to implement.

A public consultation was held thereafter to provide input on the Resolution. The European Union and its Member states submitted a joint response to the *Note Verbale* related to the United Nations (UN) resolution on promoting inclusive and effective international cooperation on tax matters at UN level. Whilst welcoming the UN efforts to contribute to more effective international cooperation on tax matters, the EU and its Members states cautioned against stalling the existing work of the OECD Secretariat on Pillar 1 and 2 by duplication of efforts at UN level.

The UN General Assembly is aiming for the "establishment of a Member State-led, open-ended ad hoc intergovernmental committee to elaborate a comprehensive UN Tax Convention". The matter is being approached as one of high priority, with a tentative deadline to finish the UN Tax Convention by June 2025. The proposed international cooperation is to have a *"comprehensive UN Tax Convention with a holistic scope and sufficient flexibility and resilience to continuously ensure equitable results as the international tax cooperation landscape evolves, establishing clear links between international taxation and other key UN agendas and ensuring the full and effective participation of civil society in the intergovernmental UN tax process to develop a new UN Tax Convention"*. A concept note setting out international support for the UN Tax Convention can be found here.

It is anticipated that the new ad hoc intergovernmental body would be open to participation to all UN member states, supported by a bureau. The options offered are based on a compulsory and voluntary model, including the drafting of a framework convention.

The OECD issued a statement related to the UN developments in which the Secretary General said they are proud of OECD's record on addressing tax evasion and tax avoidance and supporting developing countries. The statement reads: *"The OECD is proud of its record of achieving consensus-based solutions to address tax evasion and avoidance, stabilise the international tax system and support developing countries. The BEPS Inclusive Framework, now consisting of 145 countries and jurisdictions, has agreed a consensus-based groundbreaking international tax agreement – to make international tax arrangements fairer and work better in a digitalised and globalised world economy. The Two-Pillar solution is designed to help prevent tax avoidance, protect against the erosion of domestic tax bases and tackle illicit financial flows. The OECD remains committed to completing this critically important work and to ensuring the broad and effective implementation of this agreement. The OECD was born from a spirit of cooperation among nations. Building on the widely shared benefits achieved in ending bank secrecy, reducing tax evasion and avoidance and tackling illicit financial flows, we are committed to continue to collaborate with global partners – including at the UN – to strengthen inclusivity and continue to deliver a better and fairer international tax system."*

OECD: MNEs Continue Reporting Low-Taxed Profits Even In High-Tax Jurisdictions

The OECD Report on corporate tax rates indicates that tax incentives and other concessions in jurisdictions with high statutory and average tax rates enable some MNEs to continue paying low effective tax rates (ETRs). The OECD's latest Corporate Tax Statistics report and accompanying working paper, *Effective Tax Rates of MNEs: New evidence on global low-taxed profit*, provide new data on global low-taxed profit, a key issue for determining the impact of the global minimum tax. According to the OECD, "the findings highlight how the introduction of a global minimum tax rate would create new opportunities for domestic resource mobilisation for high-tax and low-jurisdictions alike."

The Corporate Tax Statistics Report, however, estimates that high-tax jurisdictions – jurisdictions with statutory and average tax rates above 15% – account for more than half (56.8%) of all global profits currently taxed below 15%. High-tax jurisdictions even account for more than 20% of very low-taxed profits – those with an ETR below 5%. These low-taxed profits in jurisdictions with high tax rates, are likely the result of tax incentives and other targeted advantages, the OECD report finds, highlighting the need for further measures like global minimum tax.

OECD Publishes Revised Mutual Agreement Procedure

The OECD published an updated Assessment Methodology for peer review processes carried out under the BEPS Action 14 Mutual Agreement Procedure. Under the new Assessment Methodology, certain jurisdictions will be able to use a simplified peer process, with the aim of the jurisdiction moving to use a more robust programme in future MAP cases. Jurisdictions with significant experience with MAP procedures will go through a full peer review process, from January 2024. Jurisdictions using the full peer review process will be reviewed once every four years. A schedule for the simplified process is available here.

Jurisdictions will also be required to provide data on the break down of the average time to close cases in the unilateral and bilateral stages of MAP and identification of the age of pending cases as part of their MAP Statistics Reporting Framework. The data collected will be included in the 2023 MAP Statistics onwards. Similarly, where jurisdictions have Advance Pricing Agreement programmes, annual statistics will be reported and published on the OECD website in a common format from 2024 onwards. More details are available here.

Global Forum Develops Model Administrative Compliance Strategy for Automatic Exchange of Information

As part of its Strategy to unleash the potential of AEOI for developing countries, the Global Forum Secretariat is developing toolkits and e-learning courses to facilitate the implementation of the AEOI standard. As such, it has developed a Model Administrative Compliance Strategy in order to "*assist jurisdictions in developing, improving and implementing their own administrative compliance strategy to ensure the effectiveness of the* Standard for Automatic Exchange of Financial Account Information in Tax Matters *(AEOI)*."

The Model Strategy, the CRS Notification Tracking tool, and the Methodology for implementation of the risk-based approach have all been launched this year, and complement the Toolkit for the Implementation of the Standard for Automatic Exchange of Financial Account Information, which was released in 2021.

OECD Launches New BEPS Multilateral Convention Matching Database

The OECD has launched an updated version of the BEPS MLI Matching Database. The database assists tax authorities and other interested parties in relation to how the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "BEPS MLI") MLI will apply and modify a specific tax treaty.

The updated database *"includes significant improvements that will enhance user experience and provide additional features to support the implementation and application of the BEPS MLI. One of the key updates is the inclusion of historical data, which allows users to view the application of the BEPS MLI at specific points in time. The upgrade also offers a more intuitive interface that makes it easier for users to search for and access information."*

The database was first published in 2017 and presents detailed up-to-date information on the application of the BEPS MLI to tax treaties. In particular, the database presents the "matching results" under the BEPS MLI in respect of each covered tax treaty. The text of the BEPS MLI, the explanatory statement, background information, positions of each Signatory and Party, and the updated database are available here.

EU Tax Observatory Calls for Global Minimum Wealth Tax

The EU Tax Observatory has called for a global minimum tax of wealthy individuals in its Global Tax Evasion Report 2024, citing statistics that the effective tax rates of billionaires is equivalent to 0% to 0.5% of their wealth, far less than ordinary citizens.

The report also takes aim at the effectiveness of the OECD BEPS measures in fighting international tax evasion and harmful tax competition, stating that the proposed 15% minimum corporate tax rate for multinational companies is not only "far too low" but "has been made largely toothless by a series of loopholes and “carveouts”.

The report examines trends in global offshore tax evasion, global corporate profit shifting, new forms of international tax competition, tax deficits in high net worth individuals and sets out proposed policies to collect the tax deficit of multinationals and wealthy individuals.

State Aid & Case Law Updates

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European Commission's Assessment in Apple Case Upheld in Opinion of ECJ's Advocate General

Advocate General (AG) Giovanni Pitruzzella in the Opinion delivered on 9 November 2023 in Case *C-465/20 P European Commission v Ireland, Apple Sales International and Apple Operations International*, found that the General Court in its first instance judgment erred in law by overruling the Commission's assessment in the Apple case. The AG opinion, relevant for the EU law assessment of "tax rulings" cases, serves to advise the Court of Justice in its deliberations.

The AG found that the judgment of the General Court puts an "unjustifiably excessive burden of proof on the Commission" and that the General Court erred in the definition of the standard of proof incumbent on the Commission. The AG considers the threshold set for the Commission "impossible" given the requirement to *"prove the existence of negative facts which, by their nature, cannot be demonstrated, but only deduced from presumptions based on established positive facts or by evidence of a positive fact to the contrary, paragraph 304 of the judgment under appeal imposes an unjustifiably excessive burden of proof on the Commission"*, the AG argues.

The AG considers that the General Court erred in law when it concluded that the Commission had adopted an 'exclusion' approach in its primary line of reasoning, an error which vitiates the conclusions reached by the General Court with regard to application of Irish law (Section 25 of the TCA 97), the findings in relation to the taxation of profits under Irish tax law, the findings concerning the Arm's Length Principle (ALP) and the authorised OECD approach. On the basis of the same error of interpretation, the AG believes the General Court wrongly dismissed the methodology applied by the Commission. Given the relevance of the functions performed by Apple Inc. in the context of the Commission's primary line of reasoning which led the General Court to uphold the actions brought by ASI and AOE and Ireland, the AG considers that the General Court failed to state reasons which in effect prevents the ECJ from knowing the basis for rejecting the Commission's analysis.

As the AG contends, fundamental errors in the determination of the methodology applicable to the profit allocation for the purposes of calculating the tax base of a non-resident company operating through a branch may necessarily lead to an undervaluation of those profits compared to an arm's length result, and are therefore inherently or manifestly capable of reducing the tax burden of that company compared with normal taxation. In such cases, the Commission, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, may rely on proof of the existence of such an error and on the fact that the Member State concerned has failed to demonstrate that it has no effect on whether the level of profits thus calculated corresponds to an arm's length value. The General Court therefore incorrectly assessed where the standard of proof lies, in the case of decisions such as that at issue, the AG contends.

The AG also accepted the Commission's submission that the General Court's conclusions are based on an incorrect classification of ASI's Irish branch as a routine logistical risk-free service provider. In so far as that classification depends on the correct application of the principles laid down in the OECD Transfer Pricing Guidelines on which Apple and Ireland relied to justify *ex post* the advance decisions as well as the appropriateness of the operating costs as the profit level indicator of the

ASI branch, the arguments raised by the Commission do not fall outside the limits of the Court's review of the facts at the appeal stage, the AG argues.

With relation to the applicability of the recent *Fiat* case, where the Court stated that without harmonisation the methods and criteria for determining an arm's length outcome rest with Member states, the AG stressed that the *Apple* case differs from *Fiat Chrysler*, therefore rejecting that paragraph 95 of the *Fiat* judgment applies to the *Apple* case.

The European Commission legal representative at the Apple case hearing said the future of fiscal state aid depends on the European Court of Justice position in the Apple case. Paul-John Loewentlal said it depends on the ECJ whether certain EU Member states will still be allowed to grant MNEs preferential tax deals in return for jobs and investment.

On the basis of the above analysis, the AG's opinion contends the Commission's appeal is well founded thus advising the ECJ to set aside the General Court judgment.

The decision of the Court is expected to be handed down in the coming months.

AG Kokott Considers State Aid Law Should Only Apply to Outlier Tax Cases

The Advocate General Kokott issued an Opinion in Case C-454/21 *P | Engie Global LNG Holding and Others v Commission* and C-451/21 *P | Luxembourg v Commission*. AG Kokott's Opinion largely disagrees with the General Court judgment which confirmed the European Commission' approach in this fiscal State aid case, suggesting that the EU institutions should not use State aid law to shape an EU Member state (ideal) tax system.

AG Kokott considers that the European Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of advantageous tax rulings, and that only manifestly inconsistent tax rulings may constitute a selective advantage following a 'plausibility check'.

The Opinion argues that the Commission can only look at the 'outliers' to asses tax rulings under State aid law: the discretion enjoyed by the Member States in tax assessment would exceed its limits if they abused their tax law in order to grant advantages to individual undertakings in circumvention of the rules on State aid, only when there is manifest error or inconsistency as happened in the case of Gibraltar. Compliance with State aid law should be a concern only with *manifestly discriminatory issues*, to avoid the EU courts becoming supreme tax courts.

Pointing to the notion of legal certainty, AG Kokott further argues that a limited review of national tax law under State aid rules is required in the light of taxpayers' interest in legal certainty. Both the principle of legal certainty and the binding/ final nature of administrative acts under national law would be brought into question if every erroneous tax assessment (advance tax rulings as well as normal tax assessments) might be considered an infringement of State aid law, AG Kokott argues.

ECJ Annuls Tax Findings in Engie State Aid Case

The Court of Justice of the EU in Joined Cases C-451/21 *P | Luxembourg v Commission* and C-454/21 *P | Engie Global LNG Holding and Others v Commission* annulled a General Court judgment which confirmed European Commission's finding of State aid granted by Luxembourg to Engie, in relation to a financing tax avoidance structure. In 2018, the European Commission found that the Luxembourg approved a complex corporate and tax arrangement of the Engie group which enabled the company to avoid taxation on almost all of the profit made by its Luxembourg subsidiaries. Engie and Luxembourg brought actions before the General Court, which dismissed their actions.

Engie and Luxembourg then brought an appeal before the Court of Justice, where the Commission was found to have erred in determining the reference system, which is a starting point in establishing when taxation measures are considered unlawful State aid under EU law. In so far as national tax measures do not discriminate between companies, these do not confer a selective advantage within the meaning of EU law. The Court of Justice established that the Commission cannot establish a derogation from a reference framework without taking account of provisions of national law specifying the objective of the tax measure.

The Luxembourg tax ruling under scrutiny confirmed deductibility of unpaid charges related to a convertible loan, without any corresponding taxable income at the level of the holder of the convertible loan. Upon conversion of the loan into shares, Luxembourg tax authorities approved no taxation at the level of the holder of the conversion shares. The European Commission considered that the resulting "deduction without inclusion" outcome is a tax advantage for Engie, contrary to EU State aid law.

The Court considered, however, that Member States' tax sovereignty would be undermined if the Commission could examine tax avoidance structures, relying on a reference framework on the basis of the general objective pursued by national law of taxing all resident companies. The Court decided the matter itself, without returning the case to the General Court, and found directly that the error in establishing a reference framework vitiates the whole analysis, annulling on that basis both the Commission's decision and the General Court judgment.

The ECJ findings are in line with the opinion of Advocate General Kokott, who argues in favour of restricting the EU State aid law standard of review in respect of tax avoidance practices approved with tax rulings of tax authorities. Only tax rulings which are manifestly erroneous in favour of the taxpayer may constitute State aid, AG Kokott argued in the *Engie* opinion, advising the ECJ to limit its review to manifest errors and plausibility check. AG Kokott's opinion in the Engie case (related to financing structures) is in stark contrast with the opinion of AG Pitruzzela in the *Apple* case (transfer-pricing and profit allocation), who considers that the Commission's challenge of such tax structures is valid under EU law.

State Aid & Transfer Pricing: General Court Declares Belgian Excess Profit Scheme Unlawful

The General Court of the EU has confirmed the European Commission's assessment of its Decision in 2016 on the excess profit exemption State Aid scheme implemented by Belgium, where the Commission declared Belgium's excess profit exemption scheme illegal and ordered recovery of around 700 million EUR from 35 multinational companies. Subsequently, the Court received 30 applications seeking annulment of the Commission's findings (from Belgium and the aid beneficiaries). With a judgment of 14 February 2019 in cases T-131/16 and T-263/16, the General Court initially annulled the contested Commission decision.

However, the Court of Justice of the EU (CJEU) set aside the General Court original judgment and referred the case back to the General Court with its judgment of 16 September 2021, *Commission v. Belgium and Magnetrol* (C-337/19 P). On 20 September 2023, following the CJEU judgment, the General Court dismissed the actions seeking annulment of the Commission decision on the excess profit rulings scheme and issued 10 judgments in 30 cases, confirming that the European Commission rightly concluded that excess profit rulings were illegal under EU law, and therefore declared State aid.

The General Court, in the judgment pronounced by Judge Vesna Tomljenović (rapporteur), concluded that the European Commission did not err in stating that the excess profit exemption scheme derogated from ordinary Belgium corporate income tax system. Such a scheme was not available to all entities in a similar and factual situation in the light of the objective of the Belgian corporate income tax system, which was to tax the profits of all companies subject to tax in Belgium, the Court said. Furthermore, the Court did not find it necessary to examine the merits of Belgium's arguments against the subsidiary line of reasoning regarding selectivity, namely that the tax rulings on excess profit rulings constitute a misapplication of the Arm's Length Principle (ALP) and thus a deviation from the said principle, which forms a part of the Belgium reference system.

Belgium, the aid beneficiaries, and Ireland as an intervening Member state in support of Belgium, have the right to appeal the judgment to the Court of Justice.

General Court Dismissed EU Minimum Tax Challenge

The General Court of the European Union (GC) dismissed as manifestly inadmissible an action for annulment of the EU Directive on Pillar 2/Minimum Tax i.e. Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. In the Case T-144/23, Koninklijke Boskalis NV, established in the Netherlands, and Boskalis Offshore Transport Services NV, established in Belgium v Council of the European Union, the Court stated that the time-limit for bringing proceedings is a matter of public policy, having been established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice.

The Court established that the contested measure was published in the Official Journal on 22 December 2022, indicating that the time limit for applying for the annulment of that measure or of one of its provisions, in accordance with Article 263 TFEU, expired on 15 March 2023. As result, the application was dismissed as manifestly inadmissible.

On 12 December 2022, the Council adopted the Commission proposal a for Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups, becoming one of the first jurisdictions to implement the OECD agreement on Pillar 2.

ECHR Publishes Judgment in LuxLeaks Whistleblower Case

The European Court of Human Rights has published its judgment in the LuxLeaks Whistleblower Case. The Grand Chamber in the case of Halet v. Luxembourg (application no. 21884/18) held that there had been a violation by Luxembourg of Article 10 (freedom of expression) of the European Convention on Human Rights.

As set out in the Press Release of the Court:

The case concerned the disclosure by Mr Halet, while he was employed by PwC, of confidential documents protected by professional secrecy, comprising 14 tax returns of multinational companies and two covering letters, obtained from his workplace. Following a dismissal by his employer, and at the close of criminal proceedings against him, Mr Halet was ordered by the Court of Appeal on appeal to pay a criminal fine of 1,000 euros, and to pay a symbolic sum of 1 euro in compensation for the non-pecuniary damage sustained by his employer.

In view of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant had made an essential contribution, the Court considered that the public interest in the disclosure of that information outweighed all of the detrimental effects arising from it.

The Court held that Luxembourg was to pay the applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 40,000 in respect of costs and expenses.

CFE Opinion Statement in Case C-83/21 *Airbnb Ireland and Airbnb Payments UK*

The CFE ECJ Task Force issued an Opinion Statement on the ECJ decision of 22 December 2022 in case C-83/21, *Airbnb Ireland* and *Airbnb Payments UK* decided following the Opinion of AG Szpunar delivered on 7 July 2022. Inter alia, at issue was the compatibility with the freedom to provide services of the tax obligations imposed by the Italian government on service providers offering their intermediation services regarding real estate located in Italy. The Court found admissible to impose the obligation to collect and report data and to withhold tax on the intermediated payments. However, it held disproportionate to request them the appointment of a tax representative resident in Italy.

This case covered other issues such as: i) whether the tax obligations imposed by the Italian government on service providers would fall within the scope of three directives regulating the provisions of services within the EU, which would require communicating it to the Commission prior to its enactment, and; ii) whether the domestic referring court is bound to phrase the preliminary ruling questions following the wording proposed by the parties in the domestic procedures. Those questions will not be covered in this Opinion Statement, which focuses solely on compatibility with fundamental freedoms and, specifically, with the freedom to provide services.

The Court decision in *Airbnb* clarifies the limits of Member States' action concerning the imposition of tax-related obligations to non-taxpayers and reaffirms the inadmissibility of imposing the appointment of tax representatives. Although provided with a new opportunity, the Court did not further clarify the conditions by which a neutral criterion at face value would amount to factual discrimination (i.e. when it is not "inherently neutral" or can be more easily met by residents). This issue has already been addressed in our previous Opinion Statement on the *Vodafone* case.

Airbnb appears to prevent any discussions on the validity of DAC7 in what concerns the reporting obligations. Furthermore, *Airbnb* might facilitate the introduction of withholding tax regimes also with non-resident withholding agents.

Finally, *Airbnb* does not prevent Member States (and the respective regions and municipalities) from imposing reporting and withholding tax obligations on the platforms operating within their territories. In case they effectively decide to do so autonomously, online platforms may be faced with thousands of different tax (procedural) regimes, increasing their compliance costs exponentially and hindering their capacity to offer their services within the internal market effectively. For that reason, the EU Commission could consider a proposal to harmonise the respective regimes through a directive.

CFE Opinion Statement in Case C-322/22 *E v Dyrektor Izby Administracji Skarbowej we Wroclawiu*

The CFE ECJ Task Force issued an Opinion Statement prepared by the ECJ Task Force on the CJEU's decision of 8 June 2023 in case C-322/22*, E. v Dyrektor Izby Administracji Skarbowej we Wrocławiu*, concerning the right to be paid interest on overpayment of taxes in breach of EU Law. CFE welcomes the decision of the Court as it reinforces the taxpayers' right to interest on refunds in cases where a tax is imposed in breach of EU law. CFE also acknowledges that the Court has limited competence to ensure the enforcement of EU law at this level. Therefore, additional action seems to be necessary to establish a common normative framework for the reimbursement of unduly paid taxes and its corresponding right to interest.

Currently, there is a margin of discretion in the regulation by the Member States (in what concerns both the exercise of the rights and their content), which may lead to unwanted asymmetries in the levels of protection of the same EU rights in the different Member States. Such diversity is not welcomed in view of strengthening the internal market. Cases such as the one at hand urge reflection on whether the EU institutions could start taking a different approach. This is particularly true in the case of the European Commission, which, as "guardian of the Treaties", is responsible for ensuring that EU law is timely interpreted and applied. This includes extracting adequate conclusions from CJEU's rulings. Several actions could be considered.

First, the EU Commission could engage in constructive dialogue with the Member States, actively asking whether they consider legislative action necessary to ensure full compliance with EU law in the aftermath of a Court case considering certain tax provisions as inadmissible.

Second, the EU Commission could lead the efforts in assessing whether further action (by that Member State or by any other Member State) is required to ensure compliance with EU law. This could be ensured with the following initiatives:

- Public consultations, inviting all stakeholders to provide input on the amendments needed;
- By public tenders, commissioning studies to expert organisations on the amendments needed;
- By asking the EU tax observatory, financed by the European Commission, to include such assessments in their activities.

Third, the Commission could consider, as a priority, the assessment of domestic tax systems whenever the same provision or the same point of law is referred for the second time to the CJEU.

CFE would welcome actions by EU institutions (and particularly by the European Commission) towards ensuring effective protection of the right to interest on refunds in cases where a tax is imposed in breach of EU law. Such actions would not only be adequate but also needed and could include soft law (such as a Communication regarding the implementation of such rights in accordance with the case law) and/or hard law (namely, a directive laying down the adequate normative framework for the implementation of such rights).

CFE Opinion Statement in Case C-707/20, Gallaher Limited, on the taxation of capital gains in intra-group transfers

The CFE ECJ Task Force issued an Opinion Statement on the ECJ decision of 16 February 2023 in Case C-707/20, *Gallaher Lim*ited, the last UK direct tax case before the CJEU. *Gallaher* concerns the compatibility of the United Kingdom's group transfer rules with EU law. Under those rules, sales of assets between resident group members are treated as tax neutral, whereas sales to non-resident group members are taxed immediately.

Following AG Rantos' Opinion of 8 September 2022, the CJEU found the UK's group transfer rules to be in line with EU law. In essence, the Court held that only the freedom of establishment under Article 49 TFEU (and not also the freedom of capital movement under Article 63 TFEU) is relevant in respect of national legislation which applies only to groups of companies; that no relevant restriction of the parent company's freedom of establishment exists where a transfer is taxed irrespective of the residence of the parent; and that the immediate taxation of a realised gain in cross-border sale within the EU is justified and proportionate, even if a comparable domestic sale is treated as tax neutral.

The CFE ECJ Task Force notes that *Gallaher*, the last UK direct tax case before the CJEU, has provided further clarity on the scope of the fundamental freedoms, the correct comparator in establishing discrimination, and the proportionality of discriminatory taxation of capital gains. In line with established case law, the Court in *Gallaher* confirmed that exclusively the freedom of establishment – and not also the freedom of capital movement – applies to group taxation regimes, hence excluding third-country situations.

However, in substance, the Court in *Gallaher* also found the UK's group transfer rules to be proportionate, although they treated the sales of assets between resident group members as tax neutral, while sales to non-resident group members were taxed immediately. Unlike in the Court's case law on exit taxation of unrealised gains, a deferral of payment was not deemed necessary for the UK rules to be proportionate, as the cross-border transaction involved a (cash) compensation. Surprisingly, the Court did not explain the relationship to *X Holding* and *Commission v. Germany*. Moreover, the Court's focus on the "realisation" of income, the relationship of *Gallaher* with established exit tax case law, and the relevance of the concrete ability to pay tax on the level of proportionality opens the door for Member States to treat domestic and cross-border transactions differently.

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