LOYENS & LOEFF

EDITION 200

EU Tax Alert

- European Parliament approves EU Emission Trading System reform and new EU Carbon Border Adjustment Mechanism
- CJ judgment on the compatibility of German tax rules for non-resident closed-end real estate funds with the free movement of capital (L Fund, C-537/20)
- AG Kokott's opines that the Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of a tax advantage
- European Commission Adopts DAC7 Implementing Regulation for Exchange of Information with Third Countries
- CJ judgment on VAT liability relating to newly constructed real estate (Promo 54 SA, C 239/22)

LOYENS LOEFF

In this publication, we look back on recent tax law developments within the European Union (EU). We discuss, amongst other things, relevant case law of the national courts of the Member States, Opinions of the Advocate Generals (AG) of the Court of Justice of the European Union (CJ) as well as its case law. Relevant cases of the European Court of Human Rights (ECHR) are also included. Furthermore, we set out important tax plans and developments of the European Commission, the Council of the European Union and the European Parliament.

Highlights in this edition are:

- European Parliament approves EU Emission Trading System reform and new EU Carbon Border Adjustment Mechanism

- CJ judgment on the compatibility of German tax rules for non-resident closed-end real estate funds with the free movement of capital (L Fund, C-537/20)

- AG Kokott's opines that the Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of a tax advantage

- European Commission Adopts DAC7 Implementing Regulation for Exchange of Information with Third Countries

- CJ judgment on VAT liability relating to newly constructed real estate (Promo 54 SA, C 239/22)

Contents

Highlights in this edition 4

- European Parliament approves EU Emission Trading System reform and new EU Carbon Border Adjustment Mechanism 4
- CJ judgment on the compatibility of German tax rules for non-resident closed-end real estate funds with the free movement of capital (*L Fund*, C-537/20) 4
- AG Kokott's opines that the Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of a tax advantage 5
- European Commission Adopts DAC7 Implementing Regulation for Exchange of Information with Third Countries 6
- CJ judgment on VAT liability relating to newly constructed real estate (*Promo 54 SA*, C239/22) 6

Direct Taxation 6

- CJ judgment on the application of the Merger Directive to domestic reorganizations (*Banca A*, Case C-827/21) 6
- Clarity on the interpretation of the European Investigation Order Directive (*Staatsanwaltschaft Graz*, Case C-16/22) 7
- CJ finds that electricity tax exemption does not apply to mined German coal (*RWE Power*, C-571/21) 8
- ECHR judgment on whether Hungary's tax defaulter list violates privacy laws (*L.B. v Hungary*, 36345/16) 9
- Update on DAC 8 proposal 9
- Action brought against EU Pillar Two's carveout for shipping income (*VF v Council*, Case T-143/23) 10
- Update with respect to a timeline for Pillar One and the potential for an EU proposal in absence of an international agreement 11
- New opinion European Parliament issued on DEBRA 11
- European Commission presents Fiscal Policy Guidance for 2024 11
- European Commission amends general block exemption rules to include environmental taxes aid schemes and facilitate green and digital transition 11
- European Parliament Committee adopts recommendations to fight tax avoidance, calls for minimum taxation of capital gains and assessment of tax regimes for attraction of private wealth 11
- European Union considers that the UN should support OECD two-pillar solution and avoid duplication of efforts 12
- European Commission opens infringement procedures against 20 Member States regarding transposition of Directive on Cross-border Conversions, Mergers and Divisions 12
- French preliminary ruling request regarding DAC6 removed from CJ register 12
- European Commission refers Belgium to the CJ for failing to correctly transpose ATAD Directive 12

VAT 12

- CJ judgment on VAT liability of Polish Municipality for asbestos removal (*Gmina L*, C-616/21) 12
- CJ judgment on VAT liability of Polish Municipality for renewable energy sources (*Gmina O*, C-612/21) 13
- CJ judgment on whether precluding the submission of evidence after a tax assessment notice is against EU law (*NEC Plus Ultra Cosmetics AG*, C-664/21) 13

Customs Duties, Excises and other Indirect Taxes 14

- CJ judgment on the requirement of the guarantor to pay a customs debt if the amount of duty has not been duly communicated to the debtor (C-358/22). 14

Get in contact 16

Highlights in this edition

European Parliament approves EU Emission Trading System reform and new EU Carbon Border Adjustment Mechanism

On 18 April 2023, the European Parliament approved important components for the 'Fit for 55' legislative package, which includes a reform of the EU Emissions Trading System (ETS) and the creation of the EU Carbon Border Adjustment Mechanism (CBAM).

The ETS will see a significant change in the phase-out of free allowances, which will take place between 2026 and 2034. The revisions will also increase the overall goal for emissions reductions to 62% by 2030 compared to 2005 levels, and increase the annual reduction rate of the cap to 4.3% from 2024 to 2027, and 4.4% from 2028 to 2030. The EU ETS will be extended to maritime transport and include non-CO2 emissions such as methane and nitrous oxide. A new EU Social Climate Fund will be established in 2026 to support vulnerable households and micro-enterprises.

The CBAM is a climate policy designed to prevent carbon leakage by establishing an equivalent carbon price for imports and EU domestic production that are subject to carbon costs under the EU ETS. The scope of goods covered has significantly increased and will apply to downstream products as well. The product list will also likely be extended to cover all product categories subject to the EU ETS by 2030.

The new CBAM rules require importers to report the total verified greenhouse gas emissions in goods imported in a given calendar year. CBAM payments will be facilitated through the purchase of CBAM certificates.

CJ judgment on the compatibility of German tax rules for non-resident closed-end real estate funds with the free movement of capital (*L Fund*, C-537/20)

On 27 April 2023, the CJ delivered its judgment in the case *L Fund* (C-537/20). The case deals with the issue of whether the German corporate income tax, which applies to non-resident closed-end real estate funds, is in line with the free movement of capital.

The case involved a Luxembourg closed-end fund (L Fund), which generated revenue by renting and selling real estate properties in Germany. The fund had two institutional investors, both of which were located outside Germany and had no central administration or registered office in that country. According to German tax law, closed-end real estate funds based in Germany with exclusively non-resident investors are exempt from paying corporate income tax at the level of the fund. In these cases, the immovable property income is attributed directly to the non-resident investors and the relevant tax is withheld by the German fund. Differently, non-resident closed-end real estate funds are not exempt from German corporate tax in relation to their immovable property income, which is taxable at the fund level. L Fund considered that this treatment was not in line with the free movement of capital.

In its judgment, the CJ first evaluated whether the distinction in treatment made by the aforementioned German law was linked to situations that are objectively comparable. The CJ found that the sole criterion of distinction in the German law was the tax residency of the fund, as the corporate income tax exemption and the obligation to withhold tax on behalf of non-resident investors only applied to domestic funds. Thus, the Court concluded that resident and non-resident closed-end real estate funds were in a comparable situation.

Next, the CJ analysed the justifications put forward by the German government to defend the rules in question. Such alleged justifications referred to: (i) the need to ensure the coherence of the German tax system, and (ii) the need to ensure a balanced allocation of taxing rights. First, the Court stated that justifying a tax benefit on the grounds of tax system coherence required a direct correlation between such benefit and its offsetting with a relevant tax charge. The CJ left to the referring Court the task of determining whether such correlation exists or not. In any case, and regardless of whether such a direct link exists, the CJ found that the measure in question was disproportionate because a less restrictive measure was available. Pursuant to the Court, such a measure would be to exempt foreign closed-end real estate funds, as long as the investors pay a tax equal to that paid by investors in a German closed-end real estate fund. Furthermore, the CJ held that the rules in question might not meet the objective of the legislation, as German investors in foreign closed-end real estate funds may be subject to double taxation, with property income taxed initially at the fund level, followed by taxation at the investor level.

Second, the CJ dismissed the justification of ensuring a balanced allocation of tax jurisdiction, based on the understanding that this justification could not be invoked in cases where a Member State chose not to tax domestic funds on the income received from immovable property.

Considering these lack of justifications, the CJ therefore ruled that the aforementioned treatment of non-resident closed-end real estate funds with exclusively foreign investors under German law is against EU law.

AG Kokott's opines that the Commission erred in finding that Luxembourg had granted unlawful State aid to the Engie group in the form of a tax advantage

On 4 May 2023, AG Juliane Kokott delivered her Opinion in the case *Engie Global LNG Holding and Others v Commission* (Case C-454/21 P). In her Opinion, Kokott proposed that the CJ set aside the judgment of the General Court and annul the Commission decision which found that Luxembourg had granted unlawful State aid to the Engie group in the form of tax advantages.

The Commission found, by decision of 20 June 2018, that Luxembourg had granted the Engie group unlawful State aid in connection with restructuring operations in Luxembourg. In the Commission's view, the group had been granted (by means of tax rulings) tax treatment whereby almost all profits made by two subsidiaries in Luxembourg would ultimately remain untaxed. Even though there was only low taxation at the level of the operational subsidiaries through an agreed basis of assessment, the parent companies benefited from the tax exemption for participation income (group relief). As a result, a selective advantage was granted to the Engie group in derogation from Luxembourg tax law. The Commission considered that a relevant principle of correspondence (tax exemption at the level of the parent company only after taxation at the level of the subsidiary) can be inferred from national law. Moreover, according to the Commission, the tax authorities unlawfully failed to apply an anti-abuse rule.

In a judgment issued on 12 May 2021, the General Court of the European Union, hearing the actions brought by the Engie group and Luxembourg, fully endorsed the Commission's view and dismissed the actions (see *Luxembourg e.a./Commission*, T-516/18 and T-525/18). The Engie group and Luxembourg thereupon lodged appeals before the CJ.

In her Opinion, AG Kokott proposed that the CJ uphold the appeals and, consequently, set aside the judgment of the General Court and annul the Commission's decision. The AG first emphasised that tax rulings do not, in themselves, constitute illegal State aid and that they are an important instrument for creating legal certainty. Pursuant to Kokott, tax rulings are unproblematic in terms of State aid law as long as they are open to all taxpayers and are in line with the relevant national tax law, which forms the sole reference framework.

In that respect, the AG found that the Commission and the General Court proceeded on the basis of an incorrect reference framework. According to Kokott, both had assumed that the Luxembourg tax law in force at the time contained a principle of correspondence, according to which a tax exemption for participation income at the level of the parent company is contingent on taxation of the underlying profits at the level of the subsidiary. However, the AG considered that such a link is not apparent and cannot simply be interpreted into Luxembourg law because it might be preferable. In Kokott's view, the EU institutions cannot use State aid law to shape an ideal tax law.

In addition, the AG argued in favour of only a restricted standard of review in respect of tax law decisions taken by the tax authorities that is limited to a plausibility check. Not any incorrect tax ruling, but only tax rulings which are manifestly erroneous in favour of the taxpayer may constitute a selective advantage and be considered an infringement of State aid law. Otherwise, the Commission would become a de facto supreme inspector of taxes and the Courts of the European Union, by dint of reviewing the Commission's decisions, would become de facto supreme tax courts, which would impinge on the Member States' fiscal autonomy in the field of non-harmonised taxes. On such basis, Kokott found that, in the present case, the tax rulings were not manifestly erroneous. She further noted that the standard of review should also be reduced to a plausibility check in respect of national tax authorities' review of the application of anti-abuse rules under State aid law. Pursuant to the AG, a manifest misapplication can be assumed only where it is not possible to explain plausibly why the case in question should not be considered a matter of abuse. On such grounds, Kokott found that in the case at hand, the existence of abuse of legal structural possibilities under Luxembourg law was not obvious and has not been established by the Commission.

European Commission Adopts DAC7 Implementing Regulation for Exchange of Information with Third Countries

On 13 April 2023, the European Commission adopted an implementing regulation regarding the assessment and determination of information equivalence in an agreement between a non-EU jurisdiction and a Member State under the seventh version of the EU Directive on Administrative Cooperation (DAC7). The regulation establishes criteria for assessing whether the national law of a non-EU jurisdiction and an agreement between competent authorities ensure that information automatically received by a Member State is equivalent to that required under DAC7 reporting rules for digital platforms. The criteria are: to assess relevant definitions, due diligence procedures, reporting requirements, and administrative procedures, and that the assessment is performed by the European Commission. If the criteria are met, the information exchanged will be deemed DAC7 equivalent and non-EU platform operators will be released from the obligation to register in an EU Member State to comply with their DAC7 reporting obligations.

CJ judgment on VAT liability relating to newly constructed real estate (*Promo 54 SA*, C239/22)

On 9 March 2023, the CJ delivered its judgement in the case *Promo 54 SA* (C239/22).

Promo 54 and Immo 2020 concluded a cooperation agreement regarding the transformation of an old school building into newly constructed residential apartments and offices. Buyers of these units concluded a purchase agreement with Immo 2020 for the land. Buyers separately concluded a contracting agreement for the renovation works with Promo 54. The transfer of the land and the realization of the new residential apartments and offices therefore, were split up from each other.

Promo 54 applied the 6% Belgian VAT rate to its contracting supplies. The Belgian tax administration disagreed by arguing that this split-contracting structure was artificial: the parties had, in fact, intended to transfer newly created residential apartments and offices. These supplies would instead have been subject to 21% Belgian VAT. This VAT treatment would then also apply to the contracting supplies of Promo 54. In order to assess whether the 21% VAT rate could apply to the services of Promo 54, it should first be established if the supply takes place before first occupation of the building. As a main rule, the transfer or real estate is exempt from VAT. An exception to this VAT exemption applies to transfers of buildings before their first occupation, which are then deemed VAT taxed. Based on Article 135(1)(j) in conjunction with Article 12(1)(a) VAT Directive, Member States are allowed to indicate in their national VAT legislation when the first occupation of a building takes place.

Promo 54 argued that Belgium did not make use of the possibility to define the conditions under which the ‘first occupation’ of a building is deemed present in the case of transformation of old buildings. Therefore, according to Promo 54, the Belgian tax administration could not extend the concept of ‘first occupation’ to a renovated building for which a first occupation had already taken place before its conversion. The referring court asked to CJ to clarify whether the exception to the VAT exemption also applies to the supply of a building which was first occupied before its transformation if the Member State has not laid down the detailed rules for applying the criterion of first occupation to conversions of buildings.

The CJ considered that although Member States are entitled to lay down the detailed rules regarding the application criterion of ‘first occupation’ to conversions of buildings, Member States are not authorised to alter the concept of ‘first occupation’ in their national laws. The CJ also stated that the concept of ‘conversion of a building’ implies that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of occupation of the building. Further, the CJ ruled that the supply of a renovated building can also be subject to VAT if the Member State did not lay down the detailed rules for applying the criterion of first occupation to conversions of buildings.

Direct Taxation

CJ judgment on the application of the Merger Directive to domestic reorganizations (*Banca A*, Case C-827/21)

On 27 April 2023, the CJ ruled in the case *Banca A v ANAF* (C-827/21), which concerns the issue of whether EU law requires a national court to interpret a provision of national law applicable to a purely internal transaction in accordance with Directive 2009/133 (Merger Directive).

The case also deals with the interpretation of Article 7 of the latter Directive.

In this matter, Banca A (acquiring company) merged with Bank B (acquired company). The parties had negotiated a price for the shares below their market value and the profit resulting from the acquisition of these shares on favourable terms had been recognised by Banca A in its financial statements at the effective date of the merger. Banca A sent a request to the Romanian Tax Authorities (ANAF) for a tax ruling on the tax treatment of that profit, arguing that it should not be included in the calculation of corporation tax for the tax year in which the merger became effective. Banca A understood that the merger was a tax-neutral transaction, as the transfer of assets and liabilities were not, in its view, taxable. Following a first rejection of Banca A's request by the ANAF and a subsequent favourable appeal, the case reached the Court of Cassation, which found that the merger did not qualify for the tax exemption from national law. Among other things, that Romanian court found that the law that transposes the Merger Directive was not applicable given that it concerned cross-border reorganisations, whereas the merger at issue in the present case concerned two companies having their registered office in Romania. As a consequence of an action for review tabled by Banca A, the national court questioned whether the merger would fall within the scope of Directive 2009/133/EC and referred three questions to the CJ for a preliminary ruling.

By its first question, the national court asked, in essence, whether Union law requires a national court to interpret in accordance with the Merger Directive a provision of national law applicable to a purely internal transaction. In response to this first question, the CJ considered that Union law does not require a national court to interpret, in accordance with the Merger Directive, a provision of national law applicable to a purely internal merger of two undertakings each having their registered office in the same Member State, since that transaction does not fall within the scope of that directive.

The second and third questions, which were considered together, concerned the interpretation of Article 7 of the Merger Directive. In this regard, the CJ noted that first, the facts of the main proceedings do not fall within the scope of Directive 2009/13 and, second, that the Romanian law did not make that directive 'directly and unconditionally applicable' to those facts (i.e., the purely domestic situation of the dispute in the main proceedings).

Therefore, the Court concluded that it had no jurisdiction to answer the questions referred for a preliminary ruling on the interpretation of such directive.

Clarity on the interpretation of the European Investigation Order Directive (*Staatsanwaltschaft Graz*, Case C-16/22)

On 2 March 2023, the judgment of the CJ in the case Staatsanwaltschaft Graz (C-16/22) was published. This case concerns the question of whether the tax authority of a Member State (which is empowered under domestic law, as regards certain specified criminal offences, to assume the rights and the obligations of the public prosecutor's office), could be classified as a 'judicial authority' and an 'issuing authority' under the first subparagraph of Article 1(1) and Article 2(c)(i) of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/41).

The case involved the Düsseldorf Tax Office for Criminal Tax Matters which was investigating MS for tax evasion. As manager of a private limited company, MS was suspected of having failed to declare taxes. For the purposes of the investigation, that office issued a European Investigation Order ('EIO') which it transmitted to the Staatsanwaltschaft Graz (Public Prosecutor's Office, Graz, Austria). By that order, it requested the Public Prosecutor's Office, Graz, to collect, from a bank located in Austria, documents relating to two bank accounts opened in MS's name. In the EIO, it was indicated that the order was issued by a 'judicial authority'. Under Austrian law, a bank can be required to comply with this type of request only pursuant to an investigative measure, which must be ordered by the public prosecutor's office on the basis of a judicial authorisation. Following a request of the Austrian Public Prosecutor, an Austrian Judge authorised execution of the EIO. Such authorization was appealed against by MS before the referring court. MS pleaded that the Düsseldorf Tax Office is neither a 'judicial authority', within the meaning of Article 1(1) of Directive 2014/41, nor an 'issuing authority', within the meaning of Article 2(c) thereof. Therefore, pursuant to MS, that office lacked competence to issue an EIO. The referring court then asked the CJ whether the tax authority, which is empowered under German law, as regards certain specified criminal offences, to assume the rights and the obligations of the public prosecutor's office, may be equated to a 'judicial authority', within the meaning of Article 1(1) of that directive, and to a 'prosecutor',

within the meaning of Article 2(c)(i) thereof. In its judgment, the CJ considered that Article 2(c) of Directive 2014/41 draws a distinction between two categories of issuing authority, referred to in Article 2(c)(i) and Article 2(c)(ii) respectively. Article 2(c)(i) expressly designates judges, courts, investigating judges or public prosecutors as 'issuing authorities' subject to the condition that they have competence in the case concerned. These four authorities may all participate in the administration of justice, and they are classified as 'judicial authorities' within the meaning of that directive. As the coordinating conjunction 'or' is used in the provision, the CJ considered that the provision lists those four authorities in an exhaustive manner.

According to the CJ, the aforementioned interpretation is supported by Article 2(c)(ii), which provides that a second category of authorities falls within the concept of 'issuing authority'. That category covers any authority 'other' than those referred to in Article 2(c)(i), provided that such an authority is competent to act as an investigating authority in criminal proceedings. Therefore, the CJ considered that an EIO issued by such an authority must, before being transmitted to the executing authority, be validated by a 'judicial authority' falling within Article 2(c)(i) of the directive.

Based on the above, the CJ found that a tax authority of a Member State which, while being part of the executive of that Member State, conducts criminal tax investigations autonomously cannot be classified as a 'judicial authority' and an 'issuing authority'. Such an authority is, on the other hand, capable of falling within the concept of an 'issuing authority' within the meaning of Article 2(c)(ii) of the Directive, provided that the conditions set out in that provision are met.

CJ finds that electricity tax exemption does not apply to mined German coal (*RWE Power*, C-571/21)

On 9 March 2023, the CJ delivered its judgment in the case *RWE Power* (C571/21) which deals with the interpretation of Article 14(1)(a) and Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

The request for preliminary ruling was made in proceedings between RWE Power Aktiengesellschaft (RWE) and the Hauptzollamt Duisburg (Principal Customs Office, Duisburg, Germany) concerning the latter's refusal to exempt from taxation the electricity used by RWE Power in the course of its opencast mining operations and in the production of electricity in its power stations. RWE operated opencast lignite mines mostly for electricity production. Approximately 10% was intended for the production of lignite briquettes and pulverised lignite in its factories. In the context of a tax inspection ordered by the Principal Customs Office, Duisburg, it was found that the preparation of the lignite fell to be classified as 'fuel production' and was, therefore, subject to electricity tax. RWE reiterated its view that, under Directive 2003/96, all the electricity necessary for the process of electricity production must be covered by the tax exemption. After several appeals, the matter was brought to the CJ.

The first question answered by the CJ was whether the first sentence of Article 14(1)(a) of Directive 2003/96, read in conjunction with the second sentence of Article 21(3) of that Directive, is to be interpreted as meaning that the tax exemption for 'electricity used to produce electricity' laid down in that provision covers the electricity used in connection with the extraction of an energy product, such as lignite, from an opencast mine and the subsequent conversion and processing of that energy product in power stations in order to produce electricity. In its judgment, the CJ stated that in the first place it is apparent from the terms 'energy products and electricity used to produce electricity' that the use of the electricity is characterised by the fact that the 'use' must take place in the context of production and that the tax exemption implies that the electricity is used to produce electricity, not the manufacturing of a product. In the second place, as regards the scheme of Directive 2003/96, the Court noted that such Directive does not seek to establish general exemptions. In the third place, as regards the objectives pursued by Directive 2003/96, the CJ observed first, that such directive seeks to promote the proper functioning of the internal market in the energy sector by avoiding, in particular, distortions of competition. To that end, with regard to the production of electricity, the Court noted that the EU legislature had made the choice to require Member States to tax the electricity produced; and that the energy products used to produce that electricity must, as a corollary, be exempted from taxation in order to avoid the double taxation of electricity.

Regarding the first question, the CJ concluded that the provisions referred to above must be interpreted as meaning that the tax exemption for 'electricity used to produce electricity' does not cover the electricity used in connection with the extraction of an energy product,

such as lignite, from an opencast mine, where that electricity is used not in the technological process of electricity production, but for the manufacture of an energy product.

The second question answered by the CJ was whether the first sentence of Article 14(1)(a) of Directive 2003/96, read in conjunction with the third sentence of Article 21(3) of that Directive, is to be interpreted as meaning that the tax exemption for 'electricity used to maintain the ability to produce electricity' laid down in that provision covers electricity intended for the operation of storage facilities for an energy product, such as lignite, and of means of transport allowing that product to be transported from opencast mines to power stations. In this case, the CJ concluded that the provision must be interpreted as meaning that the tax exemption does cover electricity intended for the operation of storage facilities for an energy product, such as lignite, and of means of transport allowing that product to be transported, where those operations take place inside power stations, provided that they are essential and contribute directly to maintaining capacity for the technological process of electricity production, in as much as such operations are required to guarantee maintenance of capacity for uninterrupted electricity production.

ECHR judgment on whether Hungary's tax defaulter list violates privacy laws (*L.B. v Hungary*, 36345/16)

On 9 March 2023, the European Court of Human Rights (ECHR) gave its decision in a case L.B. v. Hungary (Application Num. 36345/16) concerning the publication of personal data of defaulter taxpayers by the National Tax and Customs Authority and its alignment with EU privacy laws.

According to Hungary's 2003 Tax Administration Act, the Tax Authority was required by law to publish the personal details of those individuals whose tax arrears exceeded 10 million Hungarian forints (HUF) on a list of tax defaulters on its website. The legislation was amended in 2006 to include tax debtors in the publication scheme. The amendment provided that the Tax Authority had to publish a list of 'major tax debtors', including the personal data of those whose tax debts exceeded HUF 10 million over a period of more than 180 days. The purpose of the amendment was to 'whiten the economy' by broadening the categories of taxpayers subject to publication of their personal data. The applicant, a Hungarian national residing in Budapest, challenged the lawfulness of the publication of his personal data.

The ECHR found that the Hungarian interference with the individual's privacy was not necessary in a democratic society, and that the Hungarian Tax Authority had not properly balanced the individual and public interests at stake. The Court noted that the legislative choices behind the policy had not been properly reviewed, and data protection considerations had featured little in the preparation of the legislative amendment. As such, the ECHR ruled that Hungary violated the right to respect for private life by publishing personal data, including names and home addresses, of major tax debtors on the internet.

Update on DAC 8 proposal

Inspired by the OECD's Crypto Assets Reporting Framework (CARF), in December 2022, the European Commission published a Directive proposal for tax reporting by crypto-asset service providers and the exchange of that information between EU tax authorities. Since then, the proposal, known as DAC8, has been discussed by EU countries, which must agree unanimously for it to be adopted. The European Commission wants DAC8 to enter into force in January 2026. The last updates on this initiative include, *inter alia*, the following developments:

- **EESC Support to DAC8**: On 22 March 2023, the European Economic and Social Committee (EESC) expressed support for proposed improvements to DAC8, stating that it will help deter non-compliance with fiscal rules by crypto-asset holders and reinforce the fight against tax fraud, evasion, and avoidance. The Committee also encouraged global efforts to regulate crypto-assets and their use, and recommended the implementation of a tax identification number reporting system to improve legal certainty and predictability. Additionally, the EESC suggested that reporting obligations should not only be limited to exchanges and transfers but also be extended to overall holdings of crypto-assets for transparency purposes. The committee stressed the importance of effective and proportional penalties and hopes that they will strike a balance between effectiveness and proportionality. Finally, the EESC recommended enhancing cooperation between tax authorities and those in charge of combatting

money laundering and financing of illegal activities and terrorism, and highlights the need for adequate resources in terms of qualified personnel and digital technology.

- **Commission published feedback received on DAC8 proposal**: Following the end of the period for submitting feedback on 30 March 2023, the EU Commission published the input received in its website. The comments will be summarized and presented to the European Parliament and Council to feed the legislative debate.

- **ECON Committee draft report**: On 29 March 2023, the Committee on Economic and Monetary Affairs (ECON Committee) published a draft report on the DAC8 proposal. The Committee's vote on the report has been scheduled for 30 May 2023.

- **MICA adoption**: On 20 April 2023, the European Parliament adopted the Markets in Crypto Assets Regulation ('MiCA') and the Regulation on Information accompanying transfers of funds and certain crypto-assets ('TFR') by passing its final vote. It is expected that MiCA and the TFR will be published in the Official Journal by the end of June 2023 and enter into force in July 2023. The provisions regarding the regulation of stablecoins under MiCA will apply from July 2024. The remainder of the provisions under MiCA together with the TFR will apply from January 2025. Although MiCA does not directly impact taxation of crypto assets within the EU, the proposed DAC8 borrows heavily from the former regulation.

- **Two remaining issues to be agreed on DAC8 crypto reporting**: The Swedish presidency of the EU Council has made changes to two provisions of the proposed DAC8. One of the changes refers to the implementation date of the exchange of taxpayer identification numbers (TINs) for the purposes of DAC4 (from 2028 to 2024). A second issue is the so-called switch-off mechanism that would exempt non-EU crypto service providers from reporting to the EU (because MiCA-regulated providers must register in the EU, a switch-off mechanism for those entities is considered unnecessary and, therefore, under the latest proposal, unregulated crypto service providers reportedly would have to ask for the switch-off mechanism).

The DAC8 proposal requires unanimity in the Council for its adoption, following consultation of the European Parliament and the European Economic and Social Committee (special legislative procedure). The Council will aim to agree its position on DAC8 during the ECOFIN meeting of 16 May 2023.

Action brought against EU Pillar Two's carveout for shipping income (*VF v Council*, Case T-143/23)

On 15 March 2023, an action was filled with the General Court of the EU contesting the validity of the international shipping income exemption of the EU global minimum tax directive. The applicant (VF), claims that the Court should annul 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 (EU Pillar Two Directive), in so far : (i) Article 17 excludes from its scope income from a shipping activity covered by Member States' tonnage tax regime authorized under State aid rules, other than 'international shipping income' and 'qualified ancillary international shipping income'; (ii) Article 17 applies only if 'the constituent entity demonstrates that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where the constituent entity is located'; and (iii) the Directive does not lay down transitional measures for taxpayers that made substantial investments relying on a national tonnage tax regime. Furthermore, the applicant claims that the Court should order the Council of the European Union to pay the costs of this procedure.

In its application, VF relies on the following arguments against the EU Pillar Two Directive: (i) it infringes the general principle of equal treatment of comparable enterprises; (ii) it infringes the general principle of proportionality because its effects exceed what is necessary to achieve its purpose; (iii) the application of the Directive rules to purely domestic situations infringes the principle of proportionality; (iv) it infringes the principle of protection of legitimate expectations and legal certainty, as well as Articles 115 and 107 TFEU.

Update with respect to a timeline for Pillar One and the potential for an EU proposal in absence of an international agreement

A member of the European Parliament has requested additional details from the European Commission regarding two matters: (i) a new timeline for Pillar One adoption in the EU, and (ii) the possibility of unilateral proposals being implemented if the United States refuses to agree to Pillar One, such as digital taxes.

According to the European Commission's response issued on 3 March 2023, the current timeline conform the OECD's Inclusive Framework outlines that a Multilateral Convention should be signed in June 2023. Furthermore, the Commission noted that if necessary, it will 'consider submitting a legislative proposal to address the tax challenges arising from the digitalization of the economy in the absence of the implementation of the Pillar One solution.'

New opinion European Parliament issued on DEBRA

On 1 March 2023, the sub-committee on economic and monetary affairs (ECON) of the European Parliament (EP) held a discussion on the proposed amendments to the debt-equity bias reduction allowance (DEBRA) file. The basis for discussion was a draft report prepared by rapporteur Luděk Niedermayer. While some Members of the EP support DEBRA, others favour the suspension of its examination. The rapporteur on the topic stated that MEPs will continue discussions on DEBRA aiming to reach a majority position in the Parliament. It should be remembered that the Council of the European Union put the DERBA file on hold on 6 December 2022, in light of the many interlinkages with other corporate tax legislative initiatives.

European Commission presents Fiscal Policy Guidance for 2024

On 8 March 2023, the European Commission released a communication to the Council on fiscal policy guidance for 2024, which aims to provide guidance to EU Member States on coordinating their fiscal policies for 2024. The guidance advises Member States to ensure medium-term debt sustainability and promote sustainable and inclusive growth across all Member States. The Commission invited Member States to ensure that their fiscal plans include continuous debt reduction, to discuss how their reform and investment plans contribute to fiscal sustainability, and to ensure the effective use of the Recovery and Resilience Facility and other EU funds. The guidance will be updated as needed, and fiscal country-specific recommendations will be provided as part of the European Semester Spring Package in May 2023.

European Commission amends general block exemption rules to include environmental taxes aid schemes and facilitate green and digital transition

On 9 March 2023, the European Commission approved a draft regulation aimed at facilitating, simplifying and speeding up support for the EU's green and digital transitions. The regulation amends the General Block Exemption Regulation (GBER) and the related Commission Regulation 2022/2473 to give Member States more flexibility to design and implement support measures in key sectors for the transition to climate neutrality and a net-zero industry in line with the Green Deal Industrial Plan. The changes include allowing aid schemes in the form of reductions in environmental taxes or parafiscal levies to be exempted from notification requirements if conditions are fulfilled, as well as an extension of aid possibilities in the area of environmental protection and energy. The GBER will also be prolonged until the end of 2026.

European Parliament Committee adopts recommendations to fight tax avoidance, calls for minimum taxation of capital gains and assessment of tax regimes for attraction of private wealth

On 21 March 2023, the European Parliament's Committee on Economic and Monetary Affairs adopted a report with a set of recommendations that call for a continued push for legislation to prevent tax avoidance and money laundering, correct implementation and enforcement of previously agreed measures, and the need for new essential reforms. The report highlights the agreement on the taxation of capital gains and limitations of harmful tax practices aimed at attracting foreign-earned income and assets. The report calls for the possibility of a minimum tax on capital gains to be assessed by the European Commission, and assessment of potentially harmful tax regimes that attract digital nomads and foreign-earned income or wealth. Other recommendations in the report cover protecting journalists and whistle blowers, better regulation of intermediaries, improving reporting and exchange of

information, tackling harmful tax collection practices, investigating unexplained wealth, and reforming the Code of Conduct on Business Taxation. The recommendations are based on the lessons learnt from the Pandora papers and similar data leaks, and follow-up to studies requested and hearings organized by the Subcommittee on Tax Matters of the European Parliament.

European Union considers that the UN should support OECD two-pillar solution and avoid duplication of efforts

The European Union submitted a response to a consultation on the UN Resolution on 'Promotion of inclusive and effective international tax cooperation at the United Nation' on behalf of its Member States. The EU supports multilateralism, fair distribution of wealth, increased tax transparency, and upgrading global taxation standards. It also recognizes the UN's crucial role in promoting global cooperation in taxation. However, it suggests that the UN should collaborate with other international bodies to prevent duplication of efforts and inconsistent outcomes. The EU explicitly supports the work of existing international fora like the OECD/G20 Inclusive Framework on BEPS and the Global Forum on Transparency and Exchange of Information, as well as the Global Agreement of October 2021 on the Two-Pillar solution. The EU and its Member States support the effective participation of developing countries in decision-making at a multilateral level and suggest that existing international fora already offer jurisdictions the possibility to contribute to the design and establishment of international standards.

European Commission opens infringement procedures against 20 Member States regarding transposition of Directive on Cross-border Conversions, Mergers and Divisions

On 27 March 2023, the European Commission sent letters of formal notice to 20 Member States requesting information on the transposition of the Mobility Directive (2019/2121). This is the first step of an infringement procedure. All Member States had to transpose the Directive into their national legislation and inform the Commission by 31 January 2023. If the Member States do not respond to the letters of formal notice and comply with the transposition obligations within two months, the Commission may decide to issue a reasoned opinion.

French preliminary ruling request regarding DAC6 removed from CJ register

The CJ has removed the preliminary ruling request in Case C-398/21 from its register. The case concerned the compatibility of the reporting obligations under the Amending Directive to the 2011 Directive on Administrative Cooperation (DAC6) with the provisions of the Charter of Fundamental Rights of the European Union. The French Supreme Administrative Court (Conseil d'État), which had submitted the request for a preliminary ruling, informed the CJ that it did not intend to maintain the request in light of the CJ's decision in the identical case of *Orde van Vlaamse Balies and Others* (Case C-694/20).

European Commission refers Belgium to the CJ for failing to correctly transpose ATAD Directive

On 19 April 2023, the EC referred Belgium to the CJ for failing to properly implement the Anti-Tax Avoidance Directive (Directive (EU) 2016/1164). The ATAD allows a Member State where a parent company of a multinational is located to tax profits made by a 'controlled foreign company' in another Member State. This is allowed when the tax paid by the controlled foreign company is less than half of what would be paid in the Member State of the parent company (the CFC rule). The company should be granted a tax credit for all taxes that it has paid abroad.

However, contrary to the Directive, Belgian law does not allow a taxpayer to deduct from its tax liability the tax already paid by a controlled foreign company in the State of tax residence. Therefore, on 2 July 2020, the European Commission sent a letter of formal notice to the Belgian authorities, followed by a reasoned opinion on 1 December 2021, requesting them to amend their legislation within two months. As Belgium›s reply to the Commission›s reasoned opinion was not satisfactory, the Commission has decided to refer Belgium to the CJ.

VAT

CJ judgment on VAT liability of Polish Municipality for asbestos removal (*Gmina L*, C-616/21)

On 30 March 2023, the CJ delivered its judgment in the case *Gmina L* (C-616/21).

A Polish Municipality removes from its territory asbestos-containing products from residential and commercial buildings and collects asbestos-containing waste. This activity is based on a specific government program. The Municipality bears all the costs of removing asbestos from buildings eligible for the program. The Municipality engages a third party contractor to carry out the asbestos-removal activities. The contractor issues invoices including VAT to the Municipality. The Municipality claims a subsidy from the Polish government that reimburses part of the costs incurred by the Municipality.

The Municipality wished to rule the VAT consequences of the asbestos program. The Polish tax administration argued that the Municipality was a VAT taxable person and that they were entitled to reclaim the VAT charged by the contractor. The Municipality argued that it did not act in the capacity of a VAT taxable person when providing the asbestos program.

The CJ ruled that the Municipality does not provide a VAT taxable service when removing and collecting asbestos-containing products and waste from homes. To reach this outcome, the CJ deemed relevant that the asbestos activities were not aimed at obtaining sustainable income, that the building owners did not have to pay any remuneration to the Municipality and that the operations were financed from public funds.

CJ judgment on VAT liability of Polish Municipality for renewable energy sources (*Gmina O*, C-612/21)

On 30 March 2023, the CJ delivered its judgement in the case *Gmina O* (C-612/21).

Another Polish Municipality is involved with three other municipalities in a project to install systems for renewable energy sources. The real estate owners on which the installations are placed will pay a contribution of 25% of the costs to the Municipality. The remaining 75% is reimbursed by public funds designated for the transition to a low-carbon economy.

The Municipality wished to rule the VAT consequences of the renewable energy program. The Polish tax administration argued that the Municipality was a VAT taxable person. The Municipality argued that it did not act in the capacity of a VAT taxable person when providing the renewable energy program.

The CJ ruled that the Polish Municipality does not provide a VAT taxable service when supplying and installing renewable energy sources. To reach this outcome, the CJ deemed relevant that the Municipality indicated in its ruling request that this activity is not aimed at obtaining sustainable income, that the customers pay only a quarter of the costs incurred and the remaining balance is financed from public funds. The CJ also argued that the fact that this proposition was not 'economically viable' indicated that the Municipality did not provide a VAT taxable service.

CJ judgment on whether precluding the submission of evidence after a tax assessment notice is against EU law (*NEC Plus Ultra Cosmetics AG*, C-664/21)

On 2 March 2023, the CJ ruled in the case *NEC Plus Ultra Cosmetics AG* (C-664/21). The case deals with the issue of whether Slovenia's law on tax procedure, which places conditions on the submission of evidence in tax appeals, is in line with EU principles of effectiveness and proportionality.

NEC Plus Ultra Cosmetics AG (NEC) is a company established in Switzerland, which supplies cosmetic products to customers in Croatia and Romania. During 2017, a purchaser in Croatia took control of purchased goods from a Slovenian warehouse and transported them to another Member State. The goods later received an exemption from VAT payment for the supply of goods within the territory of the European Union for intra-Community transactions.

In February 2019, the Slovenian tax authority asked NEC to submit all documents related to the supplies in question. At the time, NEC claimed it did not possess all the documents because its office in Germany, which was responsible for Croatian deliveries, had closed in August 2018. NEC said it was making an effort to retrieve any relevant documents. It later provided the tax authorities with the requested documents.

An additional tax liability was levied against NEC for underpaid VAT in 2017 following a tax assessment notice from the tax authority, which found that NEC did not properly demonstrate through its documentation that the goods were actually transported to another Member State. In doing so, the tax authority 'did not take into account the evidence submitted after the report was issued, on account of the evidence having been submitted late,' the Court explained.

After several appeals the Supreme Court of Slovenia requested a preliminary ruling from the CJ on whether the principles of tax neutrality, effectiveness, and proportionality should preclude the Slovenian legislation, which sets conditions and dates for a supplier of goods to submit evidence in administrative or judicial proceedings that are not included in the VAT Directive (2006/112).

The CJ explained that VAT exemptions can be denied under some circumstances, including when the taxpayer is late in submitting evidence 'after several unsuccessful reminders from the tax authorities and when the procedure was already at a contentious stage.' But it also noted that when 'the tax authority refuses to grant a taxable person the benefit of an exemption from VAT at an early stage of the tax procedure, it must ensure strict compliance with the principle of tax neutrality.' A refusal to take evidence into account, before imposing a tax assessment, must in this respect be based on particular circumstances such as the absence of any justification for the delay or a loss of tax revenue caused by the delay.

The court stated that national legislation which does not allow the taxable person to provide evidence which is still outstanding, in order to substantiate the right which, he or she claims and which does not take account of any explanations as to why that evidence was not provided earlier thus appears difficult to reconcile with the principle of proportionality and also with the fundamental principle of VAT neutrality. Further, such a refusal to take into account evidence is capable of making it excessively difficult to exercise the rights conferred by EU law. The Court then ruled that the referring court must determine whether or not the refusal to take those factors into account complies with the principle of effectiveness.

Based on the above, the CJ found that Articles 131 and Article 138(1) of the VAT Directive (2006/112), read in conjunction with the principles of tax neutrality, effectiveness and proportionality, must be interpreted as not precluding national legislation which prohibits the production and gathering of new evidence which establishes that the substantive conditions laid down in Article 138(1) of that Directive are satisfied, during the administrative procedure which resulted in the adoption of the tax assessment notice, in particular after the tax inspection stage but before the adoption of that decision, provided that the principles of equivalence and effectiveness have been complied with.

Customs Duties, Excises and other Indirect Taxes

CJ judgment on the requirement of the guarantor to pay a customs debt if the amount of duty has not been duly communicated to the debtor (C-358/22).

On 9 March 2023, the CJ delivered its judgment in the case of *Bolloré logistics SA* ('Bolloré logistics) (C-358/22). This case concerns the requirement of Bolloré logistics, in its capacity as guarantor, to pay an amount corresponding to a customs debt, if this customs debt has not been duly communicated to the customs debtor.

The customs debtor, BPC, had been granted an authorisation for the customs warehousing procedure. Later on, the French customs authorities cancelled the authorisation and notified BPC of the customs debt resulting from the ineffectiveness of that procedure. On 9 March 2016, the authorities notified BPC of a final decision establishing a customs debt and an invitation to pay. However, it was not until 21 March 2016, that it booked ('entry in the accounts') the amount of that debt.

On 21 March and 21 June 2016, it also notified Bolloré logistics, in its capacity as guarantor, of two recovery notices relating to the amounts of customs duties guaranteed.

Article 221 CCC prescribes that, as soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures. In the present case, that requirement was not met and therefore, the recovery notice to BPC was annulled and all the claims of the customs authorities against BPC were dismissed by the French court of appeal.

However, the referring French court was uncertain whether the failure to lawfully communicate the duty to the debtor, constitutes a personal exception for that debtor on which the guarantor (i.e., Bolloré logistics) cannot rely, or whether the customs debt is payable by the guarantor only if it is payable by the debtor?

The CJ considered that a contract of a guarantee represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the debtor if that debtor fails to fulfil them himself. The obligation created is accessory in,

amongst others, the sense that the obligation assumed by the guarantor cannot be more extensive than that of the debtor. Furthermore, it should be borne in mind that Article 195 CCC states that the guarantor is to undertake in writing to pay jointly and severally with the debtor the secured amount of a customs debt 'which falls to be paid'.

In the current case, the customs debt does not fall to be paid by the debtor in the absence of a prior entry in the accounts of the amount of customs duty without which the communication of that amount to the debtor is not lawful. It is the decision of the CJ that the guarantor cannot be required to guarantee payment of that debt when it has not become payable to the debtor.

Get in contact

For more information, please reach out to Dennis Weber or Harmen Zeven via the contact details below. The contributors to this edition of the EU Tax Alert were Juan Manuel Vázquez, Daan Both, Liselot Bakker, Gino Sparidis, Bram Middelburg, Emma van Doornik and Bruce van Schaik.

Dennis Weber
Of counsel
T +31 20 578 57 50
E dennis.weber@loyensloeff.com

Harmen Zeven
Partner / Tax adviser
T +31 10 224 66 55
E harmen.zeven@loyensloeff.com

The EU Tax Alert is an e-mail newsletter to inform you of recent developments in the EU that are of interest for tax professionals. It includes recent case law of the European Court of Justice, (proposed) direct tax and VAT legislation, customs, state aid, developments in the Netherlands, Belgium and Luxembourg and more.

To subscribe (free of charge) see: **eutaxalert.com**

Although this publication has been compiled with great care, Loyens & Loeff N.V. and all other entities, partnerships, persons and practices trading under the name 'Loyens & Loeff', cannot accept any liability for the consequences of making use of the information contained herein. The information provided is intended as general information and cannot be regarded as advice. Please contact us if you wish to receive advice on this specific topic that is tailored to your situation.

LOYENS LOEFF

LOYENSLOEFF.COM

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, London, Luxembourg, New York, Paris, Rotterdam, Tokyo, Zurich