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Edition 204

Highlights in this edition

- CJ judgment regarding default interest for VAT refunds (*Gemeente Dinkelland*, Case C-674/22). *Read more >*

- AG Kokott's Opinion on VAT fixed establishment concept (*SC Adient Ltd & Co. KG*, Case C-533/22). *Read more >*

- AG Emiliou's Opinion on the validity of DAC6 (*Belgian Association of Tax Lawyers and Others v. Premier ministre/ Eerste Minister*, Case C-623/22). *Read more >*

EU Tax Alert

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 Court of Justice of the European Union (CJ), Opinions of its Advocate Generals (AG), as well as relevant case law of the national courts of the Member States.

Furthermore, we set out important tax plans and developments of the European Commission (EC), the Council of the European Union (Council) and the European Parliament (EP).

For a full overview of the content in this edition, click here.

Content

1. Highlights in this edition

CJ judgment regarding default interest for VAT refunds (*Gemeente Dinkelland*, C-674/22)

On 22 February 2024, the CJ delivered its judgment in the case *Gemeente Dinkelland* (C-674/22). The case concerns the interpretation of EU law on the obligation of Member States to pay interest on the refunded VAT amount levied in breach of EU law.

Gemeente Dinkelland is a municipality that carries out both non-economic activities, as a public authority, and economic activities subject to VAT. It can (partially) deduct VAT on costs related to its economic activities. The municipality uses an input tax allocation key based on its accounting records to allocate general costs between its economic and non-economic activities.

The municipality applied a new allocation key that increased the right to deduct VAT. This new allocation key in combination with certain errors in the municipality's administration led to a VAT refund right for the years 2012 up to and including 2016. The tax inspector granted the VAT refund to the municipality including tax interest. The municipality argued that, because it did not fully exercise its VAT refund right, it was also entitled to 'collection interest' (the so-called 'Irimie interest') by paying VAT in breach of EU law.

The CJ ruled that the municipality was not entitled to the 'collection interest', because not fully exercising the VAT refund was partly due to errors in its own accounting records and partly due to retroactive changes in the allocation key established under its own responsibility. The CJ ruled that the VAT not fully deducted by the municipality was therefore not levied in breach of EU law.

AG Kokott's Opinion on VAT fixed establishment concept (*SC Adient Ltd & Co. KG*, C533/22)

On 1 February 2024, AG Kokott of the CJ issued her Opinion in the case *SC Adient Ltd & Co. KG* (C533/22) on the concept of VAT fixed establishment.

The Adient group is active in the automotive industry. The principal company is located in Germany (**Adient DE**). Adient DE engaged a group company in Romania (**Adient RO**) to provide manufacturing and assembly services for car seat covers. Adient DE possessed of a Romanian VAT number due to its products being located in and sold from Romania. Adient DE was not registered as a VAT fixed establishment in Romania.

Adient DE provided its German VAT number to Adient RO for the procured services. Adient RO did not charge any Romanian VAT to Adient DE due to application of the VAT reverse charge mechanism.

The Romanian tax authorities argued that Adient RO should have charged Romanian VAT to Adient DE. It reasoned that Adient DE was disposed of a VAT fixed establishment in Romania as a result of 'possessing' over the human and technical resources of Adient RO. The employees of Adient RO did not have any decision-making power for the supplies of goods by Adient DE in terms of quantities, prices or parties involved.

AG Kokott opined that, even if Adient DE would have been disposed of a VAT fixed establishment in Romania through Adient RO, that the services of Adient RO should not attract Romanian VAT. In that case, according to the AG, the service provider and the service recipient would be one and the same person, in which case, no VAT taxable transactions are recognized.

The AG further reasoned, based on the aspect of legal certainty in combination with the most recent CJ case law, that an independent company, in principle, cannot at the same time be regarded as a fixed establishment of a different independent company, even if it belongs to the same group. Similarly, the AG opined that the conclusion of a services agreement in principle does not mean, in itself, that the supplier of the service effects a taxable transaction in favour of a fixed establishment of the recipient of the services.

These outcomes may be different in case the contractual arrangement does not relate solely to the provision of services but is aimed at the provision of human and/or technical resources that are necessary to ensure that the service recipient can supply goods or services on site similar to those provided at a head office. Further, abusive practices may also lead to the recognition of a VAT fixed establishment. However, the AG opined that no such practice exists in the case at hand because Adient DE would have been able to deduct the Romanian VAT charged by Adient RO (if/when due).

AG Emiliou's Opinion on the validity of DAC6 (*Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister*, Case C-623/22)

On 29 February 2024, AG Nicholas Emiliou issued his Opinion in the case *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister* (Case C-623/22). The case deals with the issue of whether certain aspects of the mandatory reporting regime of reportable cross-border arrangements introduced under DAC6 is compatible with the principles of equality and non-discrimination, the principle of legality in criminal matters, the general principle of legal certainty and the right to respect for private life. In his Opinion, AG Emiliou considered that the examination of the questions referred to the Court has not disclosed any issues affecting the validity of the Directive.

In 2020, the Belgian Association of Tax Lawyers ('BATL'), *Ordre des barreaux francophones et germanophone* ('OBFG'), *Orde van Vlaamse Balies and Others* ('OVBO'), *Institut des conseillers fiscaux et des experts-comptables* ('ICFC') (collectively, 'the applicants') brought proceedings before Belgium's Constitutional Court, requesting that it suspend the national law transposing DAC6 and to set it aside on the ground that that the latter directive infringes a number of provisions of the Charter and general principles of EU law. Harbouring doubts as to the proper interpretation of certain provisions of the Charter and general principles of EU law, the Belgian Court decided to refer five questions to the CJ for a preliminary ruling.

The first question referred to the Court consists of whether DAC6 infringes the principles of equality and non-discrimination, guaranteed by Articles 20 and 21 of the Charter, in that it introduces a reporting obligation for cross-border arrangements that is not limited to corporate tax. Referring to both the 'manifest inappropriate test' applicable in the field of discretionary EU policy choices and DAC6's overarching objectives mentioned in its recitals, the AG considered that, by including taxes other than corporate tax, the EU legislature has not breached the principle of equality. In this regard, the AG noted that potentially aggressive cross-border tax arrangements may concern a variety of taxes and that the risks of tax avoidance, evasion or fraud exists regardless of the specific tax (or taxes) they are concerned with. On such basis, he considered that the broad scope *ratione tributi* of reporting obligation appears consistent with the subject matter and purpose of DAC6 and, more generally, with the DAC.

The second and third question referred to the Court concern the issue of whether certain concepts of DAC6 (i.e. 'arrangement', 'cross-border', 'marketable' and 'bespoke' arrangement, 'intermediary', 'participant' and 'associated enterprise', the different hallmarks, the 'main benefit test' and the 30-day rule) are sufficiently clear and precise to comply with both the principle of legality of penalties and of respect for private life. Understanding that the assessment of DAC6's compatibility with those two principles raises different issues (and, consequently, requires different types of analysis), the AG addresses them separately.

Concerning whether certain concepts of DAC6 are sufficiently clear and precise to satisfy the requirements of legal certainty, the AG makes an individual assessment of each of these concepts and concludes that the criticism put forward by the applicants in this regard is unfounded. Admitting the broad and general nature of DAC6's concepts, the AG considers that none of the provisions examined appears to make it impossible or unreasonably difficult, for the individuals concerned, to ascertain when and within what timeframe they may be subject to DAC6 reporting obligation. In his view, at least in the vast majority of cases, the circumstances in which the reporting obligation is triggered are reasonably clear. To arrive to such conclusion, the AG gave special consideration to inter alia, DAC6's inclusion of some detailed and fact-based definitions of some of the key concepts, the possibility to use traditional legal methods to interpret DAC6 broad concepts, the assistance of qualified legal counsel in this task, and the guidance provided by the tax authorities of a number of Member States. Based on all the above, the AG opines that DAC6 does not infringe the principle of legality of penalties enshrined in Article 49(1) of the Charter.

Relying on the same considerations made in relation to Article 49(1) of the Charter, the AG arrives to a similar conclusion with respect to the compatibility of DAC6 reporting obligation with the principle of respect for private life enshrined in Article 7 of the Charter. In this regard, he notes that such article does not impose any stricter obligation in terms of clarity or precision than Article 49 of the Charter.

Before examining the fourth question, the AG addresses the fifth question referred to the Court, which concerns the issue of whether the reporting obligation infringes the right to respect for the private life of the intermediaries and of the taxpayers concerned because the interference with that right would not be justified or proportionate, in the light of the objectives pursued by DAC6. In this regard, the AG opines that, whilst DAC6 reporting obligation does indeed interfere with the private life of taxpayers and intermediaries, that interference may be justified as necessary and proportionate to attain certain objectives in the public interest recognized by the European Union.

The AG reaches such conclusion on the basis of the following arguments. First, the AG notes that the interference with the right for private life has an adequate legal basis, in so far as the limitation on the exercise of the rights concerned is framed by rules whose application is, as explained in the assessment of the second and third questions referred, sufficiently clear and predictable. Pursuant to the AG, the predictability and clarity of the provisions is by no means called into question by the fact that they may have a rather broad scope.

Second, the AG opines that DAC6's reporting obligation does not impinge on the essence or 'core' part of the right to privacy as it requires certain taxpayers and certain professionals, who are in a rather specific situation to communicate to the relevant tax authorities, some relatively limited and mainly business-related information.

Third, the AG considers that DAC6 complies with the principle of proportionality because the measure: (i) Is suitable to attain the objectives of general interest pursued by the EU legislature (suitability test), (ii) Is necessary to attain those objectives; (iii) Does not go beyond what is necessary in order to attain those objectives (necessity test); and (iv) Strikes a fair balance between the various interests at stake (proportionality *strictu sensu* test).

Regarding the suitability test, the AG notes in the first place that the provisions of DAC6 pursue objectives of general interest recognized by the European Union. In the second place, it considers that the reporting obligation is particularly suited to ensuring that public authorities obtain relevant information about potentially aggressive cross-border tax arrangements, enabling those authorities to react promptly to harmful practices, for example, by amending the regulatory framework. The AG thus considers that the reporting obligation makes an effective contribution to the ultimate objective of DAC6. Furthermore, he points out that there is no detailed and concrete indication of alternative measures that would have made it possible to achieve the same level of protection of the objectives pursued by DAC6, whilst being less restrictive vis-à-vis the persons concerned.

With respect to the necessity test, the AG relies on several considerations to take the view that the EU legislature has limited the interference with the private life of intermediaries and taxpayers to what is strictly necessary. These considerations include the AG's understating that (a) the scope ratione personae of DAC6 is limited to the natural and legal persons that have a direct link to situations in respect of which the EU legislature seeks to enhance transparency; (b) the reporting obligation only arises in specific situations; (c) it is crucial (and inevitable) for attaining the objectives pursued, that that the material scope of DAC6 reporting obligation be to some extent over-inclusive (i.e., extending to arrangements that may be neither aggressive nor motivated by the prospect of obtaining a tax advantage); (d) the quantity and quality of the information to be provided to the authorities also appears to be necessary; (e) there are clear limits as to which authorities can access the information disclosed; (f) there is also an indication, even if a somewhat general one, of how the information can be used by the competent authorities, and (g) a number of safeguards are in place against unlawful access and, more importantly, unlawful use of the personal data.

Concerning the proportionality *strictu sensu* test (balance of interest), the AG considered that the provisions introduced by DAC6 strike a fair balance between the interests at stake. Acknowledging the greatest importance of the public interest pursued by DAC6, the AG first considers that the interference produced by the reporting obligation in the intermediaries' and taxpayers' private life appears rather limited, for the reasons explained above. Moreover, he highlights that the overall number of situations in which that interference takes place is also reduced. To further substantiate this conclusion, the AG emphasizes that that the EU legislature has sought to minimize, as far as possible, the inconvenience for those required to file the information in question; and to avoid unnecessary multiplication of work for taxpayers and intermediaries. In relation to this latter aim, the AG rejects the claims made by the applicants according to which the reporting obligation would require intermediaries to engage in a time-consuming and costly activity to seek and communicate the relevant information or that it is disproportionate because 'some' of the data to be reported could be extracted, by the tax authorities, from the data provided by the taxpayers and/or exchanged between the authorities in conformity with the provisions of other legal instruments (DAC3/DAC5).

Finally, the AG addresses the fourth question referred to the Court, which deals with two related issues namely: (i) whether the right of a waiver on account of professional secrecy, set out in Article 8ab(5) of DAC6, is restricted to lawyers or can be granted to other categories of professionals, if those categories enjoy such protection under national law; and (ii) if the latter, as to whether such is invalid, for a breach of Article 7 of the Charter, in so far as it requires those professionals to notify other intermediaries of their reporting obligation, thereby disclosing their identity and their having been consulted.

Regarding the first aspect, the AG considered that the term 'legal professional privilege', within the meaning of Article 8ab(5) of DAC6, should receive a restrictive interpretation, being concerned only with lawyers. Furthermore, he acknowledged that, in some national systems, there are different professionals which fit the definition of 'lawyer' and whose communications with clients are, under national law, protected by confidentiality (e.g. solicitors, barristers, in-house counsel). Similarly, he noted that some national systems provide for specific situations in which, exceptionally, non-lawyers (e.g., university professors or tax accountants) are treated in the same way as lawyers and are, thus, permitted to provide legal advice to clients and represent them in court. On such basis, he concludes that Member States may give intermediaries the right to a waiver in relation to filing information on reportable cross-border arrangements only where the reporting obligation would be in breach of the legal professional privilege which, under the national law of that Member State, is recognized in relation to lawyers and other professionals which are, in exceptional circumstances, treated in the same way as lawyers.

When it comes to the second aspect (which the AG notes that would be irrelevant if the Court agrees with his Opinion on the first aspect discussed above), the AG notes the following. If Member States would be able to grant waivers to professionals other than lawyers, the AG considers that the notification obligation by intermediaries (other than lawyers) which benefit from a waiver would not create an unjustifiable interference with the intermediaries' right, under Article 7 of the Charter, to keep confidential their identity and the fact that they have been consulted by the client. He reaches such conclusion on the understanding that the 'strengthened' protection which the Court recognized in relation to the legal professional privilege in *Orde van Vlaamse Balies* C-694/20 (which stems from the specific function that lawyers exercise in advising and representing clients) is not necessary for accountants, auditors and tax advisors as they do not exercise that same function. Furthermore, he considers that taxpayers' consultations with accountants, auditors or tax advisors is generally regarded as being part and parcel of running a business and, therefore, the fact that one intermediary has, in some very specific circumstances, to disclose, to some other intermediary, his or her involvement in the tax-planning activities of a given taxpayer does not appear to give rise to unacceptable interference with the intermediaries' right flowing from Article 7 of the Charter, including the right to keep professional communications confidential. On such basis, the AG finds that no manifest error exists in relation to this aspect of DAC6.

Based on all the above, the AG concludes that the examination of the questions referred to the Court has not disclosed any issues affecting the validity of DAC6.

2. Direct Taxation

Four countries removed from the EU list of non-cooperative jurisdictions for tax purposes

On 20 February 2024, the Economic and Financial Affairs Council (ECOFIN) updated the EU list of non-cooperative jurisdictions for tax purposes (referred to as Annex I) by removing four jurisdictions, namely Bahamas, Belize, Seychelles, and Turks and Caicos Islands. In the wake of this recent update, the listed jurisdictions now encompass American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, Russian Federation, Samoa, Trinidad and Tobago, US Virgin Islands, and Vanuatu.

Simultaneously, the compilation of jurisdictions with outstanding commitments (termed Annex II) has undergone a revision, now incorporating Armenia, British Virgin Islands, Belize (newly appended - transferred from Annex I), Seychelles (newly appended - transferred from Annex I), Costa Rica, Curaçao, Eswatini, Malaysia, Turkey, and Vietnam.

AG De La Tour's Opinion on whether the exclusion of tax debts from debt discharge procedures is compatible with EU law (*SF v Instituto da Segurança Social and Others*, Case C-20/23)

On 11 January 2024, AG De La Tour delivered his Opinion in the case *SF v Instituto da Segurança Social and Others* (Case C20/23). The case addresses the question whether the exclusion of tax debts from discharge procedures is compatible with the provisions laid down in Directive (EU) 2019/1023 (Directive on restructuring and insolvency). In his Opinion, the AG considers that the list of debt categories opened for discharge in the Directive is not exhaustive and that a decision by a Member State to deviate from the list can be duly justified in national law, it being possible for such justification to appear elsewhere than in the provision transposing that directive.

The applicant had been declared insolvent and applied for a debt discharge under Portuguese law. The insolvency administrator granted the requested discharge of debt, except for tax and social security debts, as according to Portuguese national law. The debtor appealed, arguing the exclusion of these type of debts foreseen by Portuguese law lacked due justification and was contrary to EU Directive 2019/1023. The Court of Appeal stayed proceedings and referred the case to the CJ.

In his analysis the AG focuses on the second question from the referring court regarding the option for Member States to exclude tax and social security debts from the full discharge of debt. In essence, the referring court asks if the possibility for Member States to exclude specific categories of debt from the 'discharge of debt' provision should be interpreted as allowing Member States to exclude tax debts (which are not listed in the Directive), thereby placing themselves in a privileged position.

The AG firstly notes that it follows from the Directive's wording that the list of categories of debts that can be excluded from discharge is non-exhaustive. In addition, he opines that it is hard to argue that harmonizing debt discharge justifies excluding specific debt categories. Secondly, the AG states that the discussions prior to the adoption of the Directive did not oppose excluding tax and social security debts from discharge. Indeed, he highlights that the discussions on the Directive proposal emphasized Member States' discretion in setting limitations for general interest protection. Lastly, the AG opines that it is clear that the Directive seeks a minimum level of harmonization in the procedure type of discharge of debt and not to create a fully harmonized discharge of debt procedure.

Acknowledging the Directive's requirement that any exclusion should be duly justified by the national legislation of the Member State, the AG finds that it is not strictly necessary for the same transposing act to include this justification, as long as the latter is already provided in other national legislation or was discussed during directive negotiations. The AG leaves the question whether this justification is sufficient to the referring Court.

In conclusion, the AG is of the opinion that Article 23(4) of Directive 2019/1023 must be interpreted as meaning that the list of dischargeable debts contained therein is not exhaustive and that specific categories of claims other than those included in that list (e.g. tax debts) may be the subject of discharge of debt, restricted discharge of debt or a longer discharge period, provided that such a decision is duly justified in national law, it being possible for such justification to appear elsewhere than in the provision transposing that directive.

EU Parliament and EESC support FASTER proposal with amendments

Both the EU Parliament and the European Economic and Social Committee (EESC) have adopted a supportive opinion of the FASTER proposal with some recommended amendments. On 28 February 2024, Members of the European Parliament (MEPs) in plenary adopted a positive opinion on the FASTER proposal, with the following recommended amendments:

- Member States shall take the appropriate measures to require an individual or entity deemed resident in their jurisdiction for tax purposes to inform tax authorities issuing the electronic tax residence certificate (eTRC) about any change that could affect the validity or the content of the eTRC.
- Member States shall update their national registers to reflect the status of financial intermediaries no longer holding certification. In cases where the removal as a certified financial intermediary results from a decision by a Member State, the specific reasons for such action shall be clearly indicated in the register.
- Member States should take the necessary measures to ensure that certified financial intermediaries requesting relief on behalf of a registered owner verify the risks of residence and citizenship by investment schemes that present a potentially high risk.
- Member States shall process a refund request within 25 calendar days unless the Member State has reasonable doubts on the legitimacy of the refund request. A refund request may be rejected if any verification procedure or tax audit is initiated.
- The European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) shall regularly monitor the risk for cum-cum and cum-ex schemes in the Union. Member States shall introduce coordinated cooperation and mutual assistance between national competent authorities, tax authorities and other law enforcement bodies to detect and prosecute illegal withholding tax reclaim schemes.

More details of the proposed changes can be found in this summary. Parliament's changes will now be submitted to the Council, which must consider them before it finally adopts the legislation.

Furthermore, in December 2023, the EESC also adopted a supportive opinion of the FASTER proposal and made some recommendations. In its opinion, the EESC:

- Supports the Commission's objective of avoiding double taxation and complicated procedures for reduced rates to the detriment of investors holding securities in a transnational context.
- Appreciates the added value that the Commission proposal could bring in order to support cross-border investments across the EU, especially for retail investors, by achieving substantial procedural simplification;
- Welcomes the introduction of the eTRC, a uniform, EU-wide electronic tax residence certificate that will improve the timing of refunds and so benefit transnational investors. The EESC suggests that the eTRC might be used to simplify issues in addition to those already covered in the Proposal;

- Underlines that the Commission expects the proposal to deliver significant cost savings compared to the status quo and encourages the Commission to periodically verify whether such savings are actually achieved;
- Agrees with the Commission's choice to establish a de minimis threshold, whereby investors with dividend payments below a threshold of EUR 1,000 are not asked to provide information about financial arrangements or minimum holding periods;
- Encourages Member States to swiftly provide the Commission, during the implementation period, with annual reports on statistics regarding how many excess WHT reclaims are refunded/relieved both within and after the timeframe in order to ensure that WHT reclaims are gradually refunded/relieved within the ambitious timeframe of no more than 25 days set by the Commission proposal.

CJ rules that additional solidarity tax on domestic branches of non-resident credit institutions is incompatible with the freedom of establishment (*Cofidis*, Case C-340/22)

On 21 December 2023, the CJ delivered its judgment in the case *Cofidis* (C-340/22). This case deals with the issue whether the freedom of establishment is compatible with national legislation which allows only resident credit institutions and subsidiaries of non-resident credit institutions, having legal personality (to the exclusion of branches of non-resident credit institutions, which do not have legal personality) to deduct their own funds and comparable debt instruments from the tax base in respect of a tax on the liabilities of those entities.

This case involved a Portuguese branch of a credit institution, Cofidis, which is headquartered in France. Cofidis faced a Portuguese levy known as the ASSB. The ASSB was introduced to provide financial support for social security and to equitably distribute the tax burden within the banking sector. According to Cofidis, the levy operates in such a way that non-resident credit institutions, due to their lack of legal personality, are unable to deduct equity and similar debt instruments from their tax base. In contrast, resident credit institutions and subsidiaries of non-resident credit institutions with legal personality can avail of this deduction.

The CJ first examined whether EU Directive 2014/59 prohibits the imposition of the Portuguese solidarity tax. The CJ concluded that the directive does not seek to standardize the taxation of credit institutions across the EU, thus allowing for national taxation policies. Subsequently, the Court noted that, unlike resident credit institutions and subsidiaries of non-resident credit institutions, branches of non-resident credit institutions are unable (because they do not have legal personality) to deduct own funds from their ASSB tax base since, legally, those entities have no own funds. In addition, the CJ considered that such branches are unable to issue debt instruments that are comparable to own funds such as, inter alia, convertible bonds, profit-sharing bonds, redeemable preference shares and contingent convertible bonds, with the result that they are also unable to deduct such instruments from the tax base.

On the basis that the Portuguese legislation does not allow branches of non-resident credit institutions to pursue their activities under the same conditions as those which apply to subsidiaries of non-resident credit institutions, the Court found that such legislation is liable to make pursuing an activity in Portugal by means of a branch less attractive. Therefore, in line with the AG's Opinion, the CJ found that the Portuguese solidarity tax infringes the freedom of establishment. because it violates the requirement for equal treatment within the host state.

Finally, the CJ evaluated whether the restriction can be justified. The CJ concluded that neither the need to preserve the coherence of the Portuguese tax system nor the need to ensure a balanced allocation between Member States of the power to tax can justify the restriction of the freedom of establishment. In the former case, because nothing in the file submitted to the Court indicated that the possibility to deduct own funds from the ASSB tax base is offset by a particular tax levy borne by resident credit institutions and subsidiaries of non-resident credit institutions. In the latter case, because Portugal chose not to tax resident credit institutions and subsidiaries of non-resident credit institutions in so far as concerns debt instruments comparable to own funds and, therefore, it cannot rely on the argument that there is a need to safeguard the balanced apportionment of the power to tax between the Member States in order to justify the taxation of entities established in another Member State.

ECON Committee of the EU Parliament discusses and adopts recommendations on the HOT Proposal

On 22 January 20024, the Committee on Economic and Monetary Affairs (ECON Committee) of the European Parliament discussed the draft report on the legislative proposal for a Council Directive establishing a 'Head Office Tax system' for micro, small and medium-sized enterprises and amending Directive 2011/16/EU (DAC) (HOT Proposal), as well as possible amendments to the report. For more information on the HOT Proposal, please see the EUTA Highlight 2023 (page 6).

The rapporteur of the opinion on the HOT proposal, reaffirmed the support for the initiative, which is considered to be a positive step forward. The draft report aims to enhance the initiative by broadening its scope to encompass companies with subsidiaries, relaxing eligibility requirements to extend benefits to more SMEs, establishing a definitive framework to streamline administrative processes, fostering closer collaboration with tax authorities to facilitate implementation, and expediting the adoption of the directive to ensure SMEs can access the HOT system by 2025.

Following this discussion, on 22 February 2024, the ECON Committee formally adopted the draft report. The adoption will be followed by a plenary vote in the European Parliament, which is scheduled for 10 April 2024. The HOT initiative operates under the consultation procedure, where the Council must consult the European Parliament although its opinion is not legally binding.

ECON Committee of the EU Parliament discusses draft reports on BEFIT and TP Proposals

During the first two months of 2024, the ECON Committee of the EU Parliament discussed the draft reports of the proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT) and the proposal for a Council Directive on Transfer Pricing (TP proposal).

The draft report on the former proposal (i.e., BEFIT) was discussed by the ECON Committee of the EU Parliament on 22 January 20024. The report, while generally supportive of the proposal, suggests several amendments, including aligning BEFIT with the Minimum Taxation Directive, lowering the annual revenue threshold, revising interest limitation rules, ensuring minimum taxation of royalties, strengthening Controlled Foreign Company (CFC) rules, implementing proportionate penalties, and transitioning from an indefinite limit to a 5-year limit for carrying forward a negative BEFIT tax base. The draft report on the BEFIT Proposal has not yet been put to the vote by the ECON Committee (it was scheduled on 4 March but then removed from the agenda) and the vote at the plenary level of the EU Parliament is scheduled to take place on 10 April 2024, although this plenary voting may be postponed.

It should be noted that, on 23 January 2024, Loyens & Loeff provided feedback to the European Commission regarding the BEFIT proposal. The feedback covers four different aspects of BEFIT (i.e., general issues, technical provisions, transfer pricing clauses, and the impact on Pillar Two rules) and offered recommendations to help the Commission achieve its objectives and improve the BEFIT Proposal. Furthermore, in February 2024, several EU Member States including Ireland, Germany, Poland, Malta, Czech Republic and Sweden submitted reasoned opinions to the EU or adopted statements raising concerns with respect to the BEFIT proposal. Previously, the Netherlands and Finland had adopted similar opinions.

Regarding the TP proposal (which is part of the BEFIT package), the ECON Committee of the EU Parliament discussed its draft report on 14 February 2024. Some of the concerns raised by members of the Committee in relation to this proposal relate to, inter alia, the proposal's adherence to the OECD framework and ongoing international discussions and potential interferences with Member States' national competencies. The draft report on the TP proposal was adopted by the ECON Committee on 22 February 2024. The vote at the plenary level of the EU Parliament is scheduled to take place on 10 April 2024.

EU Parliament adopts opinion proposing amendments to DEBRA

On 16 January 2024, the European Parliament plenary approved its opinion on the Proposal for a Directive concerning a debt-equity bias reduction allowance and the restriction of interest deductibility for corporate income tax purposes, known as the DEBRA proposal.

The opinion backs the DEBRA proposal but suggests certain modifications, including, amongst others, the following:

- Excluding medium-sized groups and undertakings that are not SMEs from the scope of the provision limiting the deductibility of exceeding borrowing costs and setting the date of application of this rule as of 2027.
- Add definitions for the terms 'large undertaking', 'medium-sized group' and 'large group'.
- Allow the equity allowance for ten consecutive tax periods for SMEs or medium-sized groups and to limit same for any large undertaking or group to seven consecutive tax periods, subject to a cap of 30% of the taxpayer's EBITDA in both cases.
- Introducing a carry forward mechanism for equity allowances exceeding the cap of 30% of the EBITDA for a maximum of three tax periods.
- Limit the carry forward mechanism for deductible allowances on equity exceeding the taxpayer's taxable income to three tax periods for large undertakings or large groups, while foreseeing no such limit for SMEs or medium-sized groups.

While the European Parliament's opinion is obligatory, it is not binding on the Council. However, the Council must consider it during the directive's deliberation.

The negotiations on the DEBRA proposal which was originally tabled by the EU Commission on 11 Mary 2022, is currently on hold at the EU Council.

EU Commission takes action to ensure complete and timely transposition of Pillar Two Directive and DAC7

The European Commission has taken action against Member States for failing to communicate measures to transpose two EU directives into national law. These include Pillar Two's Minimum Taxation Directive (2022/2523) and the new rules on joint audits included in DAC7.

On 25 January 2024, the Commission announced that it had sent letters of formal notice to nine Member States that failed to notify national measures transposing Pillar Two Directive, o (i.e. Estonia, Greece, Spain, Cyprus, Latvia, Lithuania, Malta, Poland and Portugal).

On the same date, the Commission also announced that it has decided to open an infringement procedure against Germany and Poland over the failure to communicate the transposition of new rules on joint audits under DAC7 and that it has sent letters of formal notice to both Member States. In both cases, Member States had to communicate the transposition of Directives before the end of 2023. If the Member States do not respond to the letters of formal notice and comply with the transposition obligations within 2 months, the Commission may decide to issue a reasoned opinion.

EU Commission adopts recommendation for a Council decision providing for a negotiating mandate with third countries with respect to DAC8 amendments

On 17 January 2024, the EU Commission adopted a recommendation for a Council Decision to authorize the negotiations for the amendment of the five agreements on the automatic exchange of financial account information to improve international tax compliance between the European Union and, respectively, the Swiss Confederation, the Principality of Liechtenstein, the Principality of Andorra, the Principality of Monaco and the Republic of San Marino.
The recommendation aims to ensure that, after the adoption of DAC8 and its updates to the CRS standard, the automatic exchange of financial account information between EU Member States and the five non-EU countries under the five respective EU agreements is aligned with and continue to take place in accordance with such standard as of 1 January 2026.

Frequently Asked Questions on Pillar 2 Directive

On 22 December 2023, the European Commission released a non-binding 'Frequently Asked Questions' document (FAQs) concerning the interpretation of the EU Minimum Tax Directive (Pillar 2). These FAQs emerged from informal discussions between EU Member States and Commission Services. They underscore the reliance on OECD work, as stated in Recital 24 of the Directive's Preamble, and confirm the potential use of the OECD Model Rules Commentary for consistent application across Member States, provided it aligns with EU law. References to the OECD Model Rules, Commentary, and Administrative Guidance appear throughout the FAQs, although they do not include the most recent Administrative Guidance released on 18 December 2023. The FAQs also clarify provisions unique to EU implementation and unrelated to the OECD Model Rules, such as the Safe Harbour placeholder. Moreover, they address specific EU considerations like Acceptable Accounting Standards and treatment of tax schemes approved under EC State aid assessments.

3. VAT

CJ judgment regarding denial of 0% VAT rate for intra-EU supply of goods (*B2 Energy*, C 676/22)

On 29 February 2024, the CJ delivered its judgment in the case *B2 Energy* (C676/22).

B2 Energy is located in the Czech Republic and supplies rapeseed oil to businesses that are located in Poland. B2 Energy applied the 0% VAT rate for these transactions. The Czech tax authorities denied B2 Energy the right to apply this 0% VAT rate by arguing that it did not demonstrate that the goods have been supplied to a business in another EU country.

The CJ ruled that the Czech tax authorities are allowed to refuse the 0% VAT rate if the business supplying the goods cannot demonstrate that it supplied the goods to another business in another EU country.

CJ rules on reduced VAT rate for hotel accommodation and the like (*Valentina Heights*, C-733/22)

On 8 February 2024, the CJ delivered its judgment in the case *Valentina Heights* (C-733/22).

Valentina Heights rents out a tourist apartment complex in Bulgaria. Valentina Heights has declared 9% VAT on its turnover in connection with this activity. The Bulgarian VAT law makes the application of the reduced VAT rate for hotel accommodation and the like conditional on a 'classification certificate'.

The Bulgarian tax authorities imposed a VAT assessment on Valentina Heights because it did not possess of such a certificate for the building in question.

The CJ ruled that Bulgaria is in violation of EU law by making the application of the reduced VAT rate subject to this specific condition in so far it does not limit the application of the reduced VAT rate to concrete and specific aspects of hotel accommodation and the like or, in the event that it limits the application of that rate to those concrete and specific aspects, it does not comply with the principle of fiscal neutrality.

CJ judgment about VAT Liability when employee issues fraudulent VAT invoices on behalf of employer (*P Sp. z o.o.*, C-442/22)

On 30 January 2024, the CJ delivered its judgment in the case P Sp. z o.o. (Case C-442/22).

P is a business with 14 employees. During 2010 and 2014, an employee of P issued fake invoices for around 1500 fictitious transactions. These sales invoices were issued in the name of P. The Polish tax authorities argued that P, in its capacity as employer, had failed to exercise due diligence in preventing the issuance of the fake invoices and consequently, held P liable for the VAT wrongfully charged on the fake invoices.

The CJ ruled that the employee must be regarded as the issuer of the invoice if that employee commits VAT fraud. This means that the employee is liable for the VAT mentioned on the invoices issued by it. However, the CJ also ruled that the employer can be liable for the VAT due on the invoices issued in its name when it fails to exercise reasonable diligence to control the actions of its employees. It is up to the national court to verify whether the employer failed to exercise such diligence procedures.

4. Customs Duties, Excises and other Indirect Taxes

CJ judgment regarding the re-imposition of definitive anti-dumping duties of certain iron or steel fasteners originating in China to imports consigned from Malaysia (*Eurobolt 2*, C-517/22 P)

On 11 January 2024, the CJ delivered its judgment in the case of *Eurobolt 2* on the re-imposition of definitive anti-dumping duties following the annulment of Implementing Regulation No 723/2011 inasmuch it has been adopted in breach of essential procedural requirements.

Between January 2012 and October 2013, Eurobolt and the other appellants imported fasteners from Malaysia. During this period, these fasteners were subject to anti-dumping duties pursuant to Implementing Regulation No 723/2011. As a result, the Dutch Customs Authorities issued collection notices for the anti-dumping duties owed by the appellants in respect of those imports.

In its judgment of 3 July 2019 (*Eurobolt*, C-644/17), the CJ ruled Implementing Regulation No 723/2011 invalid inasmuch that it had been adopted in breach of the essential procedural requirements under the Advisory Committee procedure laid down in Article 15(2) of Regulation (EU) 1225/2009.

Following the judgment of the CJ in *Eurobolt*, the Commission reopened the anti-circumvention investigation aiming to restore the breached essential procedural requirements. The reopening of the investigation, however, did not give rise to a change of the conclusion of the Commission, meaning that the original anti-dumping measures were to be reimposed. As a result, on 30 April 2020, Implementing Regulation (EU) 2020/611 was adopted, re-imposing the anti-dumping duties during the period of application of Implementing Regulation No 723/2011 and stipulating that the anti-dumping duties paid on the basis of Implementing Regulation No 723/2011 are not to be reimbursed and that any reimbursements that took place following the CJ judgment of 3 July 2019 (*Eurobolt*, C-644/17) are to be recovered by the national authorities.

The appellants brought an action for annulment of Implementing Regulation (EU) 2020/611 and put forward seven grounds in support of their appeal. In the proceedings before the CJ, the appellants argued, amongst others, that the re-imposition of anti-dumping duties is in breach of the principle of non-retroactivity. In addition, the appellants argued that the Regulation at issue cannot restore the infringement of essential procedural requirements under the Advisory Committee procedure. Furthermore, the appellants argued that the Commission could not prohibit the reimbursement of anti-circumvention duties paid on the basis of Implementing Regulation No 723/2011.

The CJ considered that the infringement of the essential procedural requirements did not affect the stages of the anti-circumvention investigation prior to that infringement. In this respect, the annulment of Implementing Regulation No 723/2011 by the CJ in *Eurobolt* does not necessarily affect its preparatory acts. As a result, the Commission was allowed to resume the anti-circumvention investigation at the point where that infringement occurred and, after having remedied it, adopt a new act.

In addition, the CJ considered that Implementing Regulation No 723/2011 was annulled in *Eurobolt* only on the basis of the infringement of the procedural requirements and not on the basis of any substantive content. In that judgment, the CJ neither examined the substantive content of the Implementing Regulation nor reversed the rules contained therein. Moreover, since the annulment of the Implementing Regulation was based solely on the infringement of the procedural requirements, the appellants could not expect the Commission to change its position on the substance of the matter.

Lastly, the CJ considered that the re-imposed anti-dumping duties set out by Implementing Regulation (EU) 2020/611 were identical to those set out in Implementing Regulation No 723/2011. As there was no obligation imposed on the appellants that went beyond the obligations laid down in this Implementing Regulation, it was within the competence of the Commission to prohibit the reimbursement of previously paid anti-dumping duties as well as ordering the national authorities to recover these reimbursements.

In conclusion, the CJ dismissed the arguments of the appellants and dismissed the appeal.

CJ rules Malta violates the prohibition of discrimination with its tax on motor vehicles (*Commission v Malte, Taxation des véhicules d'occasion*), Case C-694/22)

On 22 February 2024, the CJ delivered its judgment in the case *Commission v Malte, Taxation des véhicules d'occasion* (C-694/22). In its judgment, the Court ruled that Malta's establishment of a higher motor vehicle tax rate for cars imported from other Member States constitutes an infringement of EU law.

As of 1 January 2009, Malta has imposed a higher motor vehicle tax rate on vehicles originally registered in other Member States prior to 1 January 2009, and subsequently transferred to Malta compared to similar vehicles registered in Malta before that date. The European Commission initiated a pre-litigation procedure against Malta due to its failure to meet obligations under Article 110 TFEU. Article 110 TFEU prohibits any Member State from imposing higher domestic taxes on products of other Member States that those imposed on similar domestic products.

The CJ ruled that Malta's establishment of a higher motor vehicle tax rate for imported cars from other Member States is contrary to EU law. Firstly, and contrary to the argument of Malta to the effect that there is no Maltese vehicle market, the Court held that vehicles registered in Malta and placed on the market for second-hand vehicles of that Member State must be regarded as being 'similar domestic products', within the meaning of Article 110 TFEU, to imported second-hand vehicles of the same type, characteristics and wear. Secondly, the CJ pointed out that the fact that imported cars are taxed more heavily than similar national second-hand vehicles favours the sale of national second-hand vehicles and discourages the importation of similar second-hand vehicles. Thirdly, the Court rejected the arguments put forward by Malta regarding: (i) an existent link between a national registration tax for motor vehicles and the tax in question in the proceedings (annual circulation licence fee); and (ii) potential justifications for the difference in treatment (i.e., the aim of the new system to protect the environment and the legitimate expectations of the owners of motor vehicles registered in Malta prior to 1 January 2009). On the basis of the above, the CJ ruled in favour of the Commission, concluding that Malta has indeed failed to fulfil its obligations under Article 110 TFEU.

Get in contact

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