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EU Tax Alert

- EU Member States formally adopt directive implementing Pillar Two
- Council adopts Regulation on foreign subsidies distorting the internal market
- CJ rules on whether DAC6 infringes the right to respect communications between a lawyer and his/her client (*Order of Flemish Bars and Belgian Association of Tax Lawyers v Flemish Government*, C-694/20)
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In this publication, we look back at recent tax law developments within the European Union. We discuss, amongst other things, relevant case law of the national courts of the Member States, Opinions of the Advocate Generals of the Court of Justice of the European Union as well as its case law. 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:

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EU Member States formally adopt directive implementing Pillar Two

On 12 December 2022, the Council of the EU announced that Member States had reached the required unanimity for the adoption of the Directive implementing Pillar Two at EU level.

Following this announcement, on 15 December the Council formally adopted the Directive's compromise text of 25 November 2022 together with a statement stressing the EU's commitment to also adopt Pillar 1. As part of a larger political deal, all Member States voted in favour with one Member State abstaining. In addition, it was agreed that the Commission will have to report to the Council on the progress on Pillar 1 by June 2023. If appropriate, the Commission will have to submit a legislative proposal by the end of 2023 to address the tax challenges arising from the digitalization of the economy, if there is no agreement on Pillar 1. This entails that the proposal for an EU digital levy could be revived in the absence of an agreement on Pillar 1.

The Pillar Two Directive should be transposed into Member States' national law before 31 December 2023 and some Member States have already presented concrete implementation plans. For groups with a consolidated turnover of at least EUR 750 million, the transitional rules would, however, already have been in effect as from December 2021.

For more information about this development, please see our website post on the announcement and on the adoption.

Council adopts Regulation on foreign subsidies distorting the internal market

On 28 November 2022, EU Member States formally adopted the Council Regulation on foreign subsidies distorting the internal market (Regulation). This Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the EU (the exact date is not yet known).

Currently, no existing EU instruments address distortions caused by foreign subsidies. This legislation introduces a new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field. In particular, the new tool complements EU State aid rules which deal with distortions in the internal market caused by EU Member State subsidies.

To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission will be the sole authority competent to apply this Regulation. The Commission will have the power to examine any foreign subsidy to the extent it is within the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources.

CJ rules on whether DAC6 infringes the right to respect communications between a lawyer and his/her client (*Order of Flemish Bars and Belgian Association of Tax Lawyers v Flemish Government*, C-694/20)

On 8 December 2022, the CJ delivered its judgment in the case of *Order of Flemish Bars and Belgian Association of Tax Lawyers v Flemish Government* (C-694/20). The case addresses the question referred by the Belgian Constitutional Court regarding Directive 2018/822 (**DAC6**) and the right to respect communications between a lawyer and his or her client. Under DAC6 intermediaries are obliged to report a Reportable Cross-border Arrangement (**RCBA**) to the competent Tax Authorities. Intermediaries are waived from reporting an RCBA if the reporting obligation would breach the legal privilege under national law of a Member State. In such a case, the lawyer bound by legal privilege is required to inform the other intermediaries concerned in writing, stating reasons, that he or she cannot fulfil his or her reporting obligation. The question referred by the Belgian Constitutional Court is whether this obligation to notify other intermediaries under DAC6 is contrary to Articles 7 and 47 of the Charter.

As a preliminary point, the CJ first noted that the referring court is in fact only seeking to ascertain the validity of the reporting obligation under DAC6 in so far as the notification must be made by the lawyerintermediary to another intermediary who is not his or her client. The Court notes that a notification is not contrary to the rights and freedoms guaranteed by Articles 7 and 47 of the Charter if made by the lawyerintermediary to his or her client, regardless of whether that client is another intermediary or the relevant taxpayer.

The CJ then recalled that Article 7 of the Charter protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. That specific protection afforded to lawyers' legal privilege is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. That role requires that any individual is able to seek advice freely from his or her lawyer, a principle recognized in all Member States. Legal privilege also covers legal consultation, both with regard to its content and its existence. Other than in exceptional situations, clients must have a legitimate expectation that their lawyer will not disclose to anyone that they are consulting him or her.

However, pursuant to the CJ, the obligation for a lawyer-intermediary subject to legal privilege to notify other intermediaries of their reporting obligations implies that those other intermediaries become aware of the identity of the lawyerintermediary. They also become aware of his or her analysis that the tax arrangement at issue is (or may be) reportable and of his or her having been consulted in connection with the arrangement. Thus, in the Court's view, that obligation to notify entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. The fact that other intermediaries are required to inform the Competent Tax Authorities of the identity of the lawyer (exempt intermediary) also leads indirectly to a second interference with the right to legal privilege. The Court then examines whether those interferences may be justified, in particular whether they meet objectives of general interest recognized by the EU and whether they are necessary for the pursuit of those objectives.

The Court recalled that DAC6 forms part of international tax cooperation intended to contribute to the prevention of the risk of tax avoidance and evasion, which constitute objectives of general interest recognized by the EU. Nevertheless, the CJ found that the obligation to notify other intermediaries is not necessary to achieve the objective of DAC6. The Court arrived at this conclusion on the following grounds. All intermediaries are required to report an RCBA to the Competent Tax Authorities. No intermediary can claim that he or she was unaware of the reporting obligations - which are clearly set out in the Directive - to which he or she is directly and individually subject. By expressly providing that legal privilege may lead to a waiver from the reporting obligation, DAC6 makes a lawyer-intermediary a person from whom other intermediaries cannot, *a priori*, expect any initiative capable of relieving them of their own reporting obligations. Any intermediary who is exempt from the reporting obligation because of the legal privilege is nevertheless still required to notify his or her client of his or her reporting obligations. Pursuant to the CJ, being able to disclose the identity of the lawyer subject to legal privilege upon reporting by another intermediary is not necessary to obtain the Directive's objective. The reporting obligation on other intermediaries who are not subject to legal privilege and, if there are no such intermediaries, on the relevant taxpayer, ensure, in principle, that the tax authorities are informed. Although mentioning the identity can enable the tax authorities to ascertain whether that lawyer-intermediary is justified in relying on legal privilege, the purpose of the reporting and notification obligations laid down in DAC6 is not to check that lawyer-intermediaries operate within their limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion, by ensuring that the information concerning an RCBA is filed with the competent Tax Authorities.

The Court thus concluded that the obligation laid down in DAC6 to notify other intermediaries that are not the client is invalid in view of the right to respect for communications between a lawyer and his or her client.

CJ strikes down Luxembourg's publicly accessible UBO-register (*Luxembourg Business Registers*, Joined Cases C-37/20, C-601/20)

On 22 November 2022, the CJ delivered its judgment on the compatibility of the public access to UBO-information contained in a register with the fundamental right to protection of private life and the right to protection of personal data. This judgment was issued in response to preliminary questions raised by the Luxembourg court.

The CJ declared the prescribed public accessibility to the UBO-register invalid. The CJ found the public access to UBO-information to constitute a serious interference with the fundamental rights to respect private and family life and the right to protection of personal data which is not limited to what is strictly necessary and is disproportionate to the objective pursued. For more information, please see our website post on this CJ judgment.

EU Commission publishes long-awaited 'VAT in the Digital Age' proposal

On 8 December 2022, the European Commission published a legislative proposal regarding VAT in the digital age ('ViDA initiative') as part of its action plan for fair and simple taxation. This package aims to improve VAT efficiency and to minimize VAT fraud. This is done by modernizing VAT reporting obligations and facilitating e-invoicing, extending the scope of the VAT rules for the platform economy and moving towards businesses having one single VAT registration in the EU. It concerns significant changes for businesses.

What are the changes?

The ViDA initiative is aimed at three subjects: (1) digital reporting obligations; (2) the VAT treatment of the platform economy; and (3) the single VAT registration.

Digital reporting obligations

E-invoicing

Starting 1 January 2024, Member States may require businesses to issue e-invoices. The e-invoice must in that case comply with European e-invoicing formats. It may not be subject to any prior validation (from tax authorities) and/or acceptance by the customer. Member States that have already implemented a certain e-invoicing regime may continue this regime until 1 January 2028.

Taking effect 1 January 2028, e-invoicing will become the default for intra EU B2B transactions. E-invoices must be issued within two working days after the transaction takes place. Member States may still authorize paper invoices in domestic situations.

Transaction based reporting

As per 1 January 2028, intra-EU B2B transactions must be reported to the tax authorities electronically within two working days from the invoice date. It will no longer be required to submit periodical EC Sales Listings. Member States shall provide for the electronic means for submitting such transactions and may also require domestic and other transactions to be reported in a transaction-based way. Member States should make sure that before 1 January 2028, existing reporting systems are in line with the new rules.

Platform Economy

Taking effect 1 January 2025, VAT reporting liabilities will be further centred around digital intermediary platforms.

The existing VAT liability for platforms facilitating supplies of goods within the EU will be extended to capture all B2C and B2B supplies of goods regardless of where the supplier is located. It will also become mandatory for platforms facilitating B2C distance sales of imported goods with a low consignment value to account for VAT through the Import One Stop Shop arrangement (I-OSS). The European Commission further intends to implement flanking measures to prevent I-OSS number VAT fraud.

A new VAT liability will be introduced for platforms facilitating services relating to short-term accommodation rental and passenger transport. This liability will apply if the actual supplier is not liable for VAT itself, for example due to the small businesses scheme. These service platforms will also be required to collect and store information regarding services relating to short-term accommodation rental and passenger transport for which it is not held liable for VAT.

Another new VAT liability will be introduced for fulfilment platforms facilitating the intra-EU shipments of own goods by businesses. These rules are aimed at platforms that operate a fulfilment warehouse, from which businesses supply their products.

The VAT place-of-service rules will be amended to achieve that VAT on B2C facilitation services provided by all platforms will become due in the Member State where the underlying transaction takes place.

Single VAT Registration

The ViDA initiative aims at decreasing businesses' VAT compliance obligations by taking away the need to maintain foreign VAT registrations. As a result, businesses will only have to maintain one single VAT registration in one Member State.

On 1 January 2025, a mandatory VAT reverse charge mechanism will be introduced for all B2B supplies of goods and services where the supplier is not established in the Member State in which VAT is due and its customer maintains a VAT registration in that Member State. Further, the scope of the existing One Stop Shop (OSS) scheme will be extended to cover domestic supplies of goods by suppliers that are not established in the Member State in which VAT is due. This includes, for example, domestic supplies and installation supplies of goods.

Also taking effect 1 January 2025, a new scheme will be implemented to report all cross-border transfers of own goods within the EU. Call-off stock can also be reported in this scheme. During 2025, the current scheme can still be applied to call-off stock arrangements which are in place at the latest on 31 December 2024.

For whom is this relevant?

Please note that the ViDA initiative is a legislative proposal that still has to be adopted by the EU Council. The ViDA initiative fits in the broader VAT trend of more digital and real-time reporting obligations, enabling businesses to cut compliance costs by minimizing VAT registration requirements and concentrating VAT liabilities around digital intermediary platforms. Given the broad scope of the proposed changes, the ViDA initiative will impact all businesses, especially those involved in international trade and the broader platform economy.

CJ judgment on benefits-in-kind between members of VAT Group (*Finanzamt T*, C-269/20)

On 1 December 2022, the CJ delivered its judgment in the case *Finanzamt T* (C-269/20).

S operates a university school of medicine and, in that capacity, it provides VAT exempt patient care services for consideration. S also provides teaching services that are governed by public law for which it is not considered a taxable person for VAT purposes. S is the controlling company of U-GmbH, which provided cleaning services in respect of the premises used for the business activities of S. S and U-GmbH considered that these cleaning services were not subject to VAT due to the existence of a VAT Group between S and U-GmbH. The German Tax Authority disagreed by arguing that the services provided by U-GmbH constituted a benefit in kind, which constituted a deemed supply over which non-recoverable VAT would have been due (given the use of the services for the non-taxable educational activities performed by S).

In its judgment, the CJ ruled that Germany was allowed to designate S as the sole taxable person for VAT purposes under the condition that S is able to impose its will on the other VAT Group members and this designation does not lead to a loss of VAT revenues.

The CJ further seems to have ruled that VAT Group members can still carry out independent economic activities to other VAT Group members despite being part of the same VAT Group, thereby suggesting that intra VAT group transactions are not out of the scope of VAT.

This deviates from the practice currently applied in many EU countries. The CJ ruled that no VAT corrections should place based on the VAT correction rules for expenses used for non-business activities because the cleaning services of U-GmbH were used for the non-economic business activities of S. For more information on this case, please see our web post.

CJ judgment on German VAT Grouping Scheme (*Norddeutsche Gesellschaft für Diakonie mbH*, C-141/20)

On 1 December 2022, the CJ delivered its judgment in the case Norddeutsche Gesellschaft für Diakonie mbH (C-141/20).

Norddeutsche Gesellschaft für Diakonie (NGD) considered that it was part of a VAT Group with its majority shareholder. According to the tax authorities, NGD was not financially integrated with its majority shareholder because the latter did not hold a majority of the voting rights in NGD.

In its judgment, the CJ ruled that Member States are allowed to designate the majority shareholder as the sole taxable person for VAT purposes under the condition that it is able to impose its will on the other VAT Group members and this designation does not lead to a loss of VAT revenues. In that regard, the CJ ruled that Member States cannot require the condition that an entity holds the majority of voting rights in addition to a majority of the shares to determine that an entity can 'impose its will' on the other entities. To form a VAT group, it is not necessarily required that an entity be subordinate to the other entity.

Furthermore, the CJ also ruled that Member States are not allowed to designate certain entities as non-independent merely because these entities are part of a VAT Group. This seems to imply that VAT Group members can still carry out VAT taxed economic activities to other VAT Group members despite being part of the same VAT Group. This deviates from the practice currently applied in many EU countries. For more information on this case, please see our web post.

Direct Taxation

CJ judgment on whether the requirement to collect information, withhold tax and appoint a tax representative under the Italian tax regime for short-term property rentals contravenes EU law (*Airbnb Ireland and Airbnb Payments UK*, Case C-83/21)

On 22 December 2022, the CJ delivered its judgment in the case *Airbnb Ireland and Airbnb Payments UK* (Case C-83/21). The case deals with the issue of whether the requirements to collect information, withhold tax and appoint a tax representative under the Italian tax regime for short-term property rentals contravenes the freedom to provide services within the Union laid down in Article 56 TFEU.

Since 2017, Italy has had a special tax regime for short-term property rentals. The regime applies to contracts for the rental of residential property by natural persons outside a commercial activity for a maximum period of 30 days, whether such contracts were concluded directly with the lessees or through the involvement of property intermediaries. The latter intermediaries include taxpayers who, like Airbnb, operate online platforms. As part of this regime, relevant intermediaries like Aribnb are obliged to: (i) report certain data relating to the rental agreements to the tax authority; (ii) withhold 21% of the amount of the rent and pay it to the Treasury, whenever they receive rent, or take part in their collection; and (iii) appoint, in their capacity as persons liable to pay the tax, a tax representative whenever the relevant intermediary is a non-resident person who does not have a permanent establishment in Italy.

In the present case, Airbnb brought an action seeking the annulment of the decision of the Director of the Italian Tax Authority implementing the aforementioned tax regime. After an appeal brought by Airbnb against the ruling dismissing that action, the *Consiglio di Stato* (Council of State, Italy) asked the Court to interpret several provisions of EU law in the light of the three obligations imposed on intermediaries by the Italian regime.

In its judgment, the Court held that the three obligations in question fall within the field of taxation and therefore, are excluded from the scope of Directives 2000/31, 2006/123 and 2015/1535 relied on by Airbnb.

The Court then examined the lawfulness of the three measures solely in the light of the prohibition on restrictions to the freedom to provide services within the Union laid down in Article 56 TFEU. In this regard, the Court held that Article 56 TFEU must be interpreted as meaning that, first, it does not preclude legislation of a Member State requiring providers of real estate intermediation services, (regardless of their place of establishment and the manner in which they mediate) to: (i) collect and then communicate to the national tax administration the data relating to the rental contracts concluded following their intermediation, and, (ii) if these service providers have collected the rent of the corresponding counterparties or have intervened in their collection, to deduct at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Public Treasury of the said Member State.

Second, in line with the judgments of the CJ in the cases *Commission v Belgium* (C-522/04) and *Commission v Spain* (C- 678/11), the Court found that the obligation to appoint a tax representative, in circumstances such as those of the Italian tax regime, is contrary to Article 56 TFEU. This is because, in the Court's view, obligations incumbent on the service providers concerned in their capacity as persons liable to pay the tax could not be ensured by means less prejudicial to Article 56 TFEU than the appointment of a tax representative residing in Italy

Finally, the Court found that Article 267 TFEU must be interpreted as meaning that, in the presence of a question of interpretation of EU law raised by one of the parties to the main proceedings, the determination and formulation of the questions to be submitted to the Court belong only to the national court and these parties cannot impose or change their content.

CJ judgment regarding the recovery of write-downs after the transfer of the company's registered office to a different Member State (*VP Capital NV v Belgian State*, C-414/21)

On 10 November 2022, the CJ delivered its judgment in the case of *VP Capital NV v Belgian State* (C-414/21). The case addresses the question of whether the freedom of establishment (Article 49 TFEU) precludes national tax legislation under which increases in value of shares recorded by a company in a Member State, after the transfer of its registered office in that Member State, are treated as being unrealized capital gains, without taking into account whether those shares gave rise to the recording of write-downs by that company on a date on which it was a taxable resident of another Member State.

VP Capital, incorporated and having its registered office in Luxembourg, recorded deductible writedowns related to various shareholdings which resulted in losses which could be carried forward. VP Capital was unable to offset those losses because of its loss-making situation. Following those transactions VP Capital transferred its registered office from Luxembourg to Belgium and became a company incorporated under Belgian law. Following that transfer, VP Capital recovered part of the write-downs and relied on the Belgian exemption scheme to exempt this recovery. However, in the event of a transfer to Belgium of the registered office of a foreign company, as regards the assets located abroad and held by that company, the capital gains and losses corresponding to those assets which were realized after that transfer are determined on the basis of their book value at the time of that transfer. The capital gains expressed but not realized (the 'unrealized capital gains') are exempt provided that they are recorded in a separate liability account. Since the recovery of write-downs recorded by VP Capital after the transfer of its registered office to Belgium had not been recorded in a separate liability account, the Belgian tax authorities took the view that that recovery of write-downs was taxable.

In its judgment, the CJ first noted that a benefit of the freedom of establishment is that a company can transfer its registered office to another Member State, and, after such a transfer the foreign company will receive the same treatment as national companies. However, the freedom of establishment will not guarantee that such a transfer will be neutral as regards taxation. Legislation such as that at issue in the main proceedings establishes, to the detriment of companies formed under the law of a Member State and exercising their freedom of establishment, a difference in treatment liable to deter them from transferring their registered office to another Member State in order to carry on their economic activity there. That difference in treatment can be permissible only if it relates to cases which are not objectively comparable or if it is justified by an overriding reason in the public interest and is proportionate thereto.

The CJ then found that VP Capital is not comparable to a company which already fell within the tax jurisdiction of Belgium during the period in which those writedowns were recorded. Pursuant to the Court, the fact that VP Capital cannot use carried forward losses is a result of its subsequent choice to exercise its freedom of establishment by carrying out that transfer. Therefore, the CJ concluded that the freedom of establishment does not preclude national tax legislation under which increases in value of shares in companies recorded by a company in a Member State, after the transfer of its registered office in that Member State, are treated as being unrealized capital gains, without taking into account whether those shares gave rise to the recording of writedowns by that company on a date on which it was a taxable resident of another Member State.

Council of European Union Amends Code of Conduct for Business Taxation

On 8 November 2022, the Ecofin Council approved a revised Code of Conduct for Business Taxation (COC), broadening its scope to include not just preferential tax measures, but also 'tax features of general application', which create opportunities for double non-taxation or can lead to the double or multiple use of tax benefits.

When assessing whether a tax feature of general application of a Member State is harmful, account should be taken of the cumulative criteria that the tax feature is not accompanied by appropriate anti-abuse provisions or other safeguards, and the tax feature affects the location of business activity in the Union in a significant way.

In addition, the revised COC now includes a provision that tax measures of a Member State that have not been notified, may be brought to the attention of the COC Group at the request of another Member State or the Commission.

The revised Code, which also sets out the procedure for assessing these features, will apply from 1 January 2024 and it will cover tax features of general application introduced after 1 January 2023.

Commission Update on Current and Upcoming Tax Initiatives During FISC Subcommittee MEPs Meeting with Czech MPs

On 15 November 2022, Members of the European Parliament (MEPs) of the Subcommittee on Tax Matters (FISC Subcommittee) held discussions with members of the parliament (MPs) of the Czech Republic concerning tax legislative initiatives, taxation of energy products and electricity, and whether tax harmonization was equally fair towards large and small jurisdictions.

Representatives of the European Commission also participated in the meeting and gave an update on current and upcoming legislative initiatives. The Director of the European Commission for direct taxation, first referred to ongoing discussions on the Minimum Taxation. On the Unshell proposal, he referred to the discussion about the tax consequences of an entity being considered as a shell, as views have been divergent on this particular issue and the Commission is 'pushing for having serious tax consequences'. The DEBRA proposal discussions are also ongoing, but no details concerning possible adoption dates or the central points of discussion were revealed.

On what concerns the upcoming initiatives, the Commission plans to present the following in the forthcoming months (in chronological order):

- DAC 8;
- EU withholding tax framework proposal to facilitate the process of refunds of withholding taxes (by the end of spring 2023);
- BEFIT proposal (around July 2023);
- Pillar one proposal (mid 2023).

Adopted resolution on abuse by Hungary of unanimity rule European Parliament

On 21 November 2022, the European Parliament adopted a motion for a resolution regarding the trigger of the Conditionality Regulation in the case of Hungary and its abuse of the unanimity rule in the case of the Relief and Resilience Fund (RRF).

The European Parliament called on the Council to adopt the measures under the Conditionality Regulation and to lift the adopted measures only after seeing evidence that the conditions for the adoption of the measures are no longer fulfilled.

In addition, the European Parliament regrets the continued abuse by the Hungarian authorities of the EU's unanimity rule to block crucial decisions with the objective of pressuring the Commission and Council to release EU funds, thereby delaying the EUR 18 billion Ukrainian aid package and the global minimum corporate tax rate. The Parliament recalled that the purpose of the RRF is to boost recovery and resilience in the EU and its Members States, including Hungary.

European Commission has published proposal on new transparency rules that require service providers to report crypto-asset transactions (DAC8)

On 8 December 2022, the EU Commission proposed new tax transparency rules for service providers facilitating transactions in crypto-assets for customers resident in the European Union (DAC8). These rules complement the Markets in Crypto-assets Regulation (MiCA) and anti-money laundering rules. The proposal takes the form of an amendment to the EU Directive for Administrative Cooperation (DAC) and is consistent with the OECD initiative on the Crypto-Asset Reporting Framework (CARF) and the amendments to the OECD Common Reporting Standard (CRS). The proposal will be submitted to the European Parliament for consultation and to the Council for adoption. In addition to the release of the proposals, the Commission opened a public consultation until 7 February 2022. It is foreseen that the new reporting requirements would enter into force on 1 January 2026. For more information on the DAC8 proposal, please see our Tax Flash.

European Parliament passed amendments on alternatives for Pillar One in the event of clear lack of progress

On 16 November 2022, the European Parliament passed amendments on the System of own resources of the EU. One of these amendments is on the lack of progress of Pillar One. Pillar One is meant to address tax challenges that arise from the digitalization of the economy. Amount A provides a new taxing right over a portion of the profits that large and highly profitable enterprises realize in market jurisdictions where they supply goods or services, or where consumers or users are located.

The amendment passed by the Parliament states that 'The OECD aims for the Multilateral Convention implementing the OECD/G20 IF Pillar 1 Agreement to enter into force in 2024. However, as the successful implementation of the OECD/G20 IF Pillar 1 Agreement at international level by certain key third countries is not yet guaranteed, it is necessary for the Commission and the Member States to regularly reassess the situation. In the event of clear lack of progress by end of 2023, the Commission should submit a legislative proposal for a digital levy or a similar measure. Such digital levy or proceeds resulting from a similar measure should then be considered an own resource of the Union in order to generate revenues by 2026'.

Czech Presidency has published its Presidency report on the new own resources Decision

On 25 November 2022, the Czech Presidency of the Council of the European Union published the Presidency report (Report) on the proposals for a revision of the Own Resources Decision (ORD). This Report sets out the progress made during the Czech Presidency in the field of the ORD.

The Commission presented in December 2021 a proposal to amend the ORD, which would include three new own resources based on: (i) the EU emissions trading system; (ii) a carbon border adjustment mechanism; and (iii) a reform of the international corporate taxation framework. The legislative proposal underlying the third own resource, is based on the share of residual profits from multinationals following the OECD/G20 IF Pillar One Agreement of October 2021. In its proposal to amend the ORD, the Commission proposed a new own resource paid by Member States by applying a uniform call rate of 15% to the share of residual profits of the multinational enterprises, which will be reallocated to Member States according to the Pillar One agreement once implemented.

One of the aims of the work in the OECD is to develop a Multilateral Convention, which then should be opened for signature of the contracting parties (not expected before mid-2023). Only once this work has been completed, does the Commission intend to submit a proposal for a Directive giving effect to the agreement in compliance with EU law and in accordance with the requirements of the single market.

Tax trends and developments for MNEs

On 30 November 2022, Loyens & Loeff published its annual tax update. This update focuses on the tax trends and developments foreseen for 2023 and includes some tips and takeaways.

Topics addressed in this update include the next steps in the implementation of the global agreement on Pillar One and Pillar Two, the European Commission's proposals on the abusive use of shell entities and on debt financing as well as developments in tax transparency and transfer pricing. For Multinational Enterprises ('MNEs') that may be affected by Pillar Two, 2023 will be the year to assess the impact and potential actions needed to mitigate undesired effects. In transfer pricing, we see more and more multi-jurisdictional audits and multilateral agreement procedures. MNEs may want to prepare what they must do in the case they are confronted with these procedures.

In addition, the update includes some current tax developments in Belgium, the Netherlands, Luxembourg and Switzerland that might have an impact on MNEs. For more information, please see our website post.

VAT

CJ judgment on VAT consequences of the provision of vouchers free of charge for the private purposes of employees (*GE Aircraft Engine Services Ltd*, C607/20)

On 17 November 2022, the CJ delivered its judgment in the case *GE Aircraft Engine Services Ltd* (C607/20).

GE Aircraft Engine Services Limited ('GE') is a company that services and maintains jet engines in the United Kingdom. GE operated a staff recognition scheme called 'Above & Beyond'. In this programme, GE provided retail vouchers to the selected employees free of charge. The employees could then redeem their vouchers with participating retailers. In dispute is the question if GE should have declared VAT in respect of the provision of the retail vouchers to its employees.

The provision of services free of charge could lead to VAT corrections at the level of GE if these services should be provided for the private purposes of the employees. There would be no room for a VAT correction if GE had provided the vouchers to its employees for its own business purposes.

The staff recognition scheme was designed to show appreciation for and reward the best and most productive employees. Under these circumstances, the CJ ruled that the vouchers were not provided for non-business purposes because the recognition scheme was aimed at improving the performance of employees and thereby, ensuring the business profitability.

CJ judgment on VAT consequences of examining medical information (*CIG Pannónia Életbiztosító Nyrt.*, C458/21)

On 24 November 2022, the CJ delivered its judgment in the case *CIG Pannónia Életbiztosító Nyrt* (C458/21).

CIG offers patients a health insurance product, whereby it undertakes to provide health care abroad to in relation to life-threatening diseases. CIG engaged Best Doctors España SAU with the aim of examining patients' medical information to verify whether patients are eligible for a medical treatment. In dispute is whether CIG was liable for self-charged VAT on the procurement of the services from Best Doctors. The relevance of this question lies in the fact that CIG is not entitled to reclaim VAT on its expenses due to its VAT exempt medical activities. CIG argued that the services provided by Best Doctors were subject to the VAT exemption for medical services.

The CJ ruled that CIG should have declared VAT in relation to the Best Doctors services. According to the CJ, the services provided by Best Doctors are essentially administrative in nature because they concern the logistical organization of medical care and are not related to actual treatment of the patient's medical diseases. The VAT exemption for medical services does not apply under these circumstances.

CJ judgment on VAT carrousel fraud (*Aquila Part Prod Com*, C512/21)

On 1 December 2022, the CJ delivered its judgment in the case *Aquila Part Prod Com* (C512/21).

Aquila was involved in the cross-border trade of goods. The Hungarian tax authorities argued that Aquila was involved in VAT carousel fraud because it could have known about VAT fraud taking place in earlier stages of the transaction chain. On this basis, the Hungarian tax authorities denied Aquila the right to reclaim VAT on certain on-transactions (for which no VAT was declared by the seller).

The CJ ruled that, in order to establish the existence of VAT carousel fraud, it is not sufficient to provide proof that a transaction is part of a transaction chain in which VAT carousel fraud has taken place. Instead, tax authorities are required:

1. to accurately describe the characteristics of the VAT fraud and to provide evidence of the various fraudulent activities.
2. to provide proof that the taxable person that is held liable for VAT actively participated in that fraud or knew or should have known about the VAT fraud.

CJ judgment on invoice requirement when applying the simplified triangulation scheme (*Luxury Trust Automobil GmbH*, C247/21)

On 8 December 2022, the CJ delivered its judgment in the case *Luxury Trust Automobil GmbH* (C247/21). The Austrian company, Luxury Trust, is involved in the cross-border supply of vehicles. Luxury Trust purchased vehicles from UK suppliers and transferred these vehicles to a Czech customer. Luxury Trust applied the intracommunity triangulation scheme in relation to these supplies, as a result of which, Luxury Trust did not register for VAT in the Czech Republic. The invoices issued by Luxury Trust to the Czech customer mentioned 'VAT-exempt intra-community triangular transaction'. The Czech customer failed to declare VAT on the intracommunity acquisition in relation to the triangular transactions.

Luxury Trust provided its Austrian VAT number to the UK supplier. The Austrian tax authorities argued that the formal requirement to apply the triangulation scheme were not fulfilled as a result of which, a VAT assessment was imposed relating to the (deemed) intracommunity acquisition of the vehicles by Luxury Trust in Austria.

The CJ ruled that the Czech customer should only be liable for VAT on the triangular transactions if the invoice issued by Luxury Trust states that the VAT has been reverse charged to the Czech customer. The mere statement 'intra-Community triangular transaction exempt from VAT' is not sufficient for that purpose. The CJ furthermore ruled that it is not possible to correct these invoices with retroactive effect in order to establish that the relevant invoicing requirements would be fulfilled. The CJ therefore concluded that the VAT assessment was correctly imposed on Luxury Trust.

CJ judgment on the possibility to obtain a refund of amounts of VAT that were wrongfully charged (*P GmbH*, C-378/21)

On 8 December 2022, the CJ delivered its judgment in the case *P GmbH* (C-378/21). P GmbH is the operator of an indoor playground and charged 20% VAT to its customers, but the correct VAT rate turned out to be 13%. P GmbH requested the Austrian tax authorities for a refund of the VAT amount that was overpaid.

The CJ ruled that P GmbH should be entitled to reclaim the VAT overcharged as its customers were consumers that could not reclaim the VAT charged by P GmbH. There is also no unjust enrichment of P GmbH because its prices included any VAT due. Hence, no risk of loss of VAT revenues would occur if the VAT refund should be granted to P GmbH. This outcome would be different if the customers of P GmbH were businesses. In that case, P GmbH would only be entitled to a VAT refund if it acted in good faith or if it made sure that no risk of loss of VAT revenues would occur.

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, Quinten Mulder, Daan Both, Riemer Reitsma, Souhail Lahlimi, Gino Sparidis and Bram Middelburg.

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

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