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EU Tax Alert

- CJ judgment on VAT fixed establishment concept in case of exclusive toll manufacturer *(Cabot Plastics, C-232/22)*

- Commission presents Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER)

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- European Parliament and Council adopt the Carbon Border Adjustment Mechanism (CBAM) Regulation

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, the Council of the European Union and the European Parliament.

Highlights in this edition are:

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CJ judgment on VAT fixed establishment concept in case of exclusive toll manufacturer (*Cabot Plastics*, C-232/22)

On 29 June 2023, the CJ delivered its judgment in the case *Cabot Plastics Belgium BVBA* (C-232/22) regarding the concept of fixed establishment in the manufacturing industry.

Cabot Switzerland engaged an affiliated group company, Cabot Belgium, to provide toll manufacturing services on an exclusive basis. Cabot Belgium used its own resources and staff to transform raw materials belonging to Cabot Switzerland into finished plastic products. Cabot Belgium did not charge Belgian VAT on its invoices to Cabot Switzerland. Cabot Belgium argued that its services to Cabot Switzerland were subject to VAT in Switzerland and therefore, subject to the VAT reverse charge mechanism.

The Belgian tax administration argued that Cabot Switzerland possessed a VAT fixed establishment in Belgium by procuring the toll manufacturing services from Cabot Belgium. Their reasoning was that the Principal can exclusively be disposed of the staff and resources of Cabot Belgium under the toll manufacturing agreement. Based on this reasoning, the Belgian tax administration argued that Cabot Belgium should have charged VAT on its services to Cabot Switzerland. The Belgian tax administration imposed VAT assessments on Cabot Belgium increased by fines and interest.

The CJ ruled that Cabot Switzerland did not possess a VAT fixed establishment in Belgium. The CJ based its decision on the circumstance that Cabot Belgium remained responsible for its own resources and carried out the toll manufacturing services at its own risk. Cabot Switzerland was not able to be in possession of the human and technical resources of Cabot Belgium as if they belonged to it. The CJ further deemed relevant that the tolling services were effectively used by Cabot Switzerland in Switzerland for its business of selling goods resulting from the acquired tolling services.

Commission presents Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER)

On 19 June 2023, the European Commission proposed a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER). This Directive introduces new rules to enhance withholding tax procedures in the European Union (EU), aiming to improve efficiency, security, and fairness for investors, financial intermediaries, and tax administrations. The proposal is part of the Commission's efforts to modernize business taxation and promote cross-border investment within the EU.

Withholding tax refers to situations where investors in one EU Member State are liable to pay tax on earnings from another Member State. To avoid double taxation, many countries have signed double taxation treaties, allowing investors to claim refunds for excess taxes paid. However, the current refund procedures are time-consuming and burdensome, which discourages cross-border investment. Additionally, refund procedures have been subject to abuse, resulting in significant tax losses.

The measures proposed as part of this Directive include the introduction of: (i) A common EU digital tax residence certificate to streamline refund procedures, enabling investors to reclaim multiple refunds with one certificate; (ii) Two fast-track procedures, namely 'relief at source' and 'quick refund,' which will expedite the refund process and harmonize it across the EU; (iii) A standardized reporting obligation, which will aid tax administrations in verifying eligibility for reduced rates and detecting potential abuse; and (iv) A national register of certified financial intermediaries, which will facilitate faster processing of refund requests and prevent double taxation.

If adopted by Member States, the rules are expected to take effect on 1 January 2027. For more information on the FASTER proposal, please consult our Tax Flash on this subject.

AG Kokott opines that the Commission erred in finding that Luxembourg granted unlawful State Aid to Amazon (*Amazon.com and Others v Commission*, *Case* C-457/21 P)

On 8 June 2023, AG Juliane Kokott delivered her Opinion in the case *Amazon.com and Others v Commission* (Case C-457/21 P). In her Opinion, Kokott proposed that the CJ uphold the judgment of the General Court and annul the Commission decision which found that Luxembourg had granted unlawful State aid to Amazon.com in the form of tax advantages.

In this case, the Commission found, by decision of 4 October 2017, that Luxembourg had granted Amazon.com unlawful State aid via a tax ruling made in 2003, which involved transfer pricing (TP) calculations related to royalties payments. In order to determine the appropriate royalty, Luxembourg and Amazon.com relied on a particular mutually agreed method. The Commission regarded that transfer pricing agreement as State aid given that, in the Commission's view, it was not consistent with the arm's length principles of the OECD. The Commission made its own calculation to determine the appropriate amount of the royalty in accordance with a different method and arrived at a lower royalty. Because that would have resulted in a higher corporate income tax burden, the tax ruling was considered to have granted a selective advantage to the subsidiary paying the royalty. Luxembourg and Amazon brought proceedings before the General Court seeking the annulment of that decision.

In a judgment issued on 12 May 2021, the EU General Court annulled the Commission decision at issue. On the basis of the OECD TP Guidelines, the General Court did not find that the determination of transfer pricing was erroneous. The issue of whether the arm's length principles of the OECD could actually be the correct reference system for a review of State Aid was not the subject of dispute before the General Court. In disagreement with this decision, the Commission lodged an appeal before the CJ.

In her Opinion, AG Kokott proposed that the CJ uphold the General Court's judgment and reject the Commission's appeal.

The AG first analysed the reference system in the context of the appeal, understanding that the question of whether this system had been determined correctly is inextricably linked with that of the existence of a selective advantage. In such context, and even though Luxembourg and Amazon did not raise this issue before the General Court and this Court had not examined it, the AG found that the Commission had incorrectly failed to take the Luxembourg national law as the relevant reference system for its review of a selective advantage. Kokott justified this opinion on fact that: (i) the CJ recently held in its judgment in *Fiat Chrysler* (C-885/19 P and C-898/19 P) that when examining whether there is a selective advantage and when establishing the tax burden that should normally be borne by an undertaking, parameters and rules external to the national tax system at issue cannot be taken into account, unless that national tax system makes explicit reference to them; and (ii) the Commission had based its review of the appropriate amount of the royalty exclusively on the OECD TP Guidelines, although at the time when the tax ruling was issued, Luxembourg law did not refer to those guidelines. On the basis of that error regarding the reference system, Kokott understood that all the subsequent considerations in the Commission's decision are vitiated by an error of law and that the General Court, therefore, was correct in annulling the Commission decision at issue, albeit on different grounds.

In addition, the AG concluded that even if the reference system were correctly identified, the Commission's argument still cannot succeed because the CUP method selected in the ruling would not have been manifestly the incorrect method, nor was it manifestly misapplied under the OECD TP Guidelines. In this regard, the AG pointed out that, in view of the fiscal autonomy of Member States, only tax rulings which are manifestly erroneous in favour of the taxpayer could constitute a selective advantage and the Commission did not demonstrate that the tax ruling manifestly departed from the reference system and thereby conferred a selective advantage on Amazon.

European Parliament and Council adopt the Carbon Border Adjustment Mechanism (CBAM) Regulation

On 10 May 2023, the Carbon Border Adjustment Mechanism (CBAM) Regulation was signed by the European Parliament and Council. The CBAM Regulation was published in the EU Official Journal on 16 May 2023 and officially entered into force on 17 May 2023.

The CBAM Regulation will be implemented gradually, starting with a transitional phase on 1 October 2023. During this phase, importers will only need to report greenhouse gas emissions from their imports without any financial obligations. The information gathered during this phase will be used to refine the CBAM methodology. By mid-2025, the European Commission will evaluate the regulation's application and determine the final methodology. The permanent CBAM system is expected to be enforced on 1 January 2026, requiring importers to declare the quantity of goods imported along with corresponding greenhouse gas emissions. They will have to surrender CBAM certificates calculated based on the auction price of EU ETS allowances. The phasing-out of free allocation of GHG allowances under the EU ETS will align with the implementation of CBAM.

Following the adoption of the Regulation, on 13 June 2023 the EU Commission published a draft implementing regulation laying down reporting obligations for the purposes of CBAM during the transitional period. The draft was opened for feedback until 11 July 2023.

For more information on the CBAM Regulation including its key takeaways and how your business can prepare for the transitional period starting on 1 October 2023, please see our Tax Flash on this topic.

Direct Taxation

CJ judgment on the compatibility of French tax integration scheme with the freedom of establishment (*Manitou BF SA and Bricolage Investissement France SA*, C-407/22 and C-408/22)

On 11 May 2023 the CJ delivered its judgment in the joint cases *Manitou BF SA* (C-407/22) and *Bricolage Investissement France SA* (C-408/22). The case deals with the issue of whether the French tax integration scheme, under which a tax advantage is granted only to resident parent companies with subsidiaries located in France and not to similar companies but with subsidiaries in other Member States, is in line with the freedom of establishment (Article 49 TFEU).

The case involved two French resident parent entities (i.e., Manitou and Bricolage) which derived dividend income from non-resident subsidiaries and sought to obtain a reimbursement for certain corporate income tax amounts paid in that respect (i.e. proportion of costs and expenses fixed at 5% of the amounts of dividend received). Manitou BF and Bricolage were not part of a tax-integrated group in France. The entities argued that the national provisions under which the French tax authority denied the reimbursement (i.e., French tax integration scheme) undermined the freedom of establishment.

Under the French tax integration scheme, dividends received by a resident parent company that is part of a tax-integrated group, and which have been distributed by its subsidiaries belonging to the same tax group, are fully deducted from that parent company's net profit and, therefore, fully exempt from corporation tax. However, in accordance with those rules, only companies resident in France could opt for the tax integration scheme and be part of a tax-integrated group in that Member State. Thus, Manitou BF and Bricolage did not have the possibility of creating such a group with their subsidiaries established in Member States other than France. On such bases, the entities claimed that the French tax integration scheme was not compatible with the freedom of establishment.

After several appeals, the case was referred to the CJ. The referring court asked, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State, relating to a tax integration scheme under which: (i) a resident parent company that has opted for tax integration with resident companies is entitled to neutralisation as regards the add-back of a proportion of costs and expenses of the dividends received from its subsidiaries located in other Member States which, had they been resident, would have been eligible in practice, if they so elected, and; (ii) whereas a resident parent company that has not opted for such tax integration despite the existence of capital links with other resident companies permitting, it is refused such neutralisation. In its judgment, the CJ found the aforementioned legislation to be precluded by the freedom of establishment. To reach such conclusion, the Court first found that - contrary to the situation at issue in the judgment in *Groupe Steria* (C-386/14) - Manitou and Bricolage were not part of a tax-integrated group. However, because of capital links between them and other companies resident in France, that possibility was open to them, if they had so elected (in the case of Manitou, because of capital links with its resident subsidiaries, and in the case of Bricolage because of capital links with its resident parent company).

The CJ then found a difference in treatment to exist between resident parent companies with subsidiaries located in France (which may always be entitled to the tax advantage involving neutralisation) and resident parent company with subsidiaries located in other Member States (who are not entitled to that advantage, unless they were previously part of a tax-integrated group in France with resident companies).. In other words, it understood that the French rules in question only allowed resident companies in France to opt for the tax integration scheme and form a tax-integrated group and that companies such as Manitou and Bricolage, with subsidiaries in other EU Member States, cannot create such a group. As a result, the Court concluded that there is a difference in treatment, which may discourage parent companies from establishing subsidiaries in other Member States and should only be justified if there are objective differences or overriding public interest reasons (*X-Holding* C-337/08).

The Court then found the aforementioned difference in treatment to relate to situations that are objectively comparable with regard to the objective of a tax integration scheme. Such conclusion is grounded on the Court's case law (*Groupe Steria* C-386/14, *X Holding* C-337/08 and *SCA Group Holding and Others* C-39/13 to C-41/13) and its understanding that: (i) A French resident parent company has no possibility of forming a tax-integrated group with subsidiaries established in another Member State; (ii) The fact that such company has not formed such a group with at least one of its possible subsidiaries or other eligible resident entities does not make it possible to establish that it is not seeking to create such a group or to benefit from a tax integration scheme with one or more of its non-resident subsidiaries; and (iii) In the present case, the situation of companies belonging to a tax-integrated group must be regarded as comparable to that of companies not belonging to such a group with regard to rules providing not for tax integration but for full tax exemption of dividends received, by virtue of the tax advantage at issue in the dispute. Finally, regarding whether the aforementioned difference in treatment could be justified by an overriding reason in the public interest, the CJ stated that no overriding reason in the public interest had been presented by either the referring Court or the French Government to justify this difference.

Considering these lack of justifications, the CJ therefore ruled that the aforementioned tax integration scheme is against EU law.

CJ judgment on Polish provisions providing for limitations and exclusions of interest on tax withheld in breach of EU law (*Dyrektor Izby Administracji Skarbowej we Wrocławiu*, C-322/22)

On 8 June 2023, the CJ delivered its judgment in the case *E. v Dyrektor Izby Administracji Skarbowej we Wrocławiu* (C-322/22). The case deals with the issue of whether the principles of effectiveness, sincere cooperation and equivalence expressed in Article 4(3) TEU preclude a provision of national law which provides for limitations and exclusions of interest on taxes withheld in breach of EU law (i.e., CJ judgment in the case *Emerging Markets*, C-190/12 concerning third-country funds investing in Poland).

The case involves a Polish taxpayer who requested of the Polish tax authorities a refund for overpaid taxes incurred, as well as the corresponding interests on those overpayments for the periods running from the day on which those overpayments were collected, until the day on which they were actually refunded. While the Polish tax authorities accepted the tax refund, they only partially consented to grant the interests on the overpayment. This decision was grounded on a Polish national provision that limits the recognition of these interest to a certain time limit (i.e. 30 days after the publication of the CJ's ruling that gave place to the overpayments) or even excluded them entirely in certain circumstances (i.e. when the request is submitted after that time limit, with the overpayment also arising after that date). In disagreement with such decision, the taxpayer submitted an appeal before the referring court, who asked the CJ whether national legislation, which limits or excludes interest on overpaid tax when a refund request is submitted more than 30 days after the publication of a CJ's ruling declaring the tax contrary to EU law, violates the principles of equivalence, effectiveness, and sincere cooperation.

In its ruling, the CJ first analysed whether the national legislation complies with the principle of effectiveness. In this regard, the court examined the limitation of interest in relation to the principle of diligence. It acknowledged that filing a refund request within 30 days of the Court's ruling may be expected from a party involved in the dispute, but it cannot be reasonably expected from other taxpayers who are unaware of the ruling and are not a party to the dispute. Moreover, even as regards the taxable person who was a party to the dispute, the Court noted that such person may still not be reasonably expected to file a request for a refund within the 30 days following the publication of that ruling. The CJ further noted that even if a tax is found to be contrary to EU law, it does not guarantee that taxpayers can avoid paying the tax in practice as such tax might still be collected, even in violation of EU law, after the Court's ruling has been published.

In addition, the CJ noted that the taxable person faces challenges in preventing tax payment, especially when a third-party paying agent is responsible for collecting and transferring the tax. The paying agent's delay in informing the taxable person about the collection further complicates the situation. The fact that the paying agent could have objected to the payment does not change this circumstance.

Considering the foregoing, the CJ ruled that the principle of effectiveness, in conjunction with the principle of sincere cooperation, must be interpreted as precluding a piece of national legislation such as the one described above.

CJ judgment on whether German treatment of dividends received from resident and non-resident capital companies is in line with the free movement of capital (*H Lebensversicherung*, C-258/22)

On 22 June 2023, the CJ delivered its judgment in the case *H Lebensversicherung* (C-258/22). The case deals with the issue of whether a German method concerning the inclusion of dividends in the taxable corporate tax base of resident and non-resident capital companies is in line with the free movement of capital.

The case involved H Lebensversicherung, a German life insurance company that received dividends from non-resident capital companies in which it held 10% or less of the capital. Under German rules, dividends from such non-resident companies were added back to the tax base if they had previously been deducted. However, no such rule applied to dividends received from resident companies in which 10% or less of the capital was held. As a consequence of a tax assessment of the German tax authorities applying the aforementioned rules, H Lebensversicherung brought an action before a national court arguing that this difference in treatment based on the location of the distributing company resulted in discrimination and violated the free movement of capital. The dispute reached the Federal Finance Court of Germany, which referred to the CJ the question of whether Article 63 TFEU must be interpreted as precluding legislation of a Member State under which, when calculating the basis of assessment for a company's business tax, dividends from holdings of less than 10% in non-resident capital companies are to be added back to that basis of assessment, if and to the extent that those dividends were deducted from such basis a previous stage of that calculation, whereas dividends from comparable holdings in resident capital companies are included from the outset in the abovementioned basis of assessment, without being deducted from or, consequently, added back to that basis of assessment.

In its judgment, the CJ rejected H Lebensversicherung's argument and ruled that the disparity in treatment did not put non-resident companies at a disadvantage since dividends from both resident and non-resident companies were included in the tax base. In fact, the CJ emphasized that the add-back provision for business tax was intended to ensure that dividends from non-resident companies faced the same tax burden as those from resident companies by including them fully in the tax base.

The CJ also highlighted that the case at hand was distinguishable from the STEKO Industriemontage judgment (C377/07), where a tax advantage was granted only to resident capital companies. In the present case, both resident and non-resident companies were subject to the same tax burden, negating the applicability of the *STEKO Industriemontage* judgment.

In conclusion, the CJ determined that the difference in treatment arising from the German legislation, concerning the calculation of the business tax base for dividends distributed by resident and non-resident companies, did not result in unfavourable treatment of non-resident companies. As both types of dividends were included in the tax base and subjected to the same tax burden, such a difference in treatment did not discourage residents of the Member State from investing their capital in another State. Therefore, the Court found that such legislation did not constitute a restriction on the free movement of capital.

Spanish Supreme Court judgment applying CJ's case law on Danish beneficial ownership cases (*STS*, 2652/2023)

On 8 June 2023, the Spanish Supreme Court issued its judgment in the case *STS*, 2652/2023 concerning the issue of where does the burden of proof of tax abuse rest when the tax administration rejects the EU Parent-Subsidiary exemption of dividends distributed to EU parent companies. In particular, the case addresses the questions of: (i) with whom the burden of proving the establishment of the parent entity on valid economic grounds lies; and (ii) on whom the consequences of failure to establish that fact must fall; in order to assess the anti-abuse clause of the Spanish domestic law which transposed the Parent-Subsidiary Directive (PSD).

In its decision, the Spanish Supreme Court concluded that it is for the tax administration, and not the taxpayer, to prove the assumptions for the application of the anti-abuse clause, by using the various means of information provided for in the relevant tax treaty or the instruments that envisage the exchange of information between tax administrations. With this decision, the Supreme Court applied the CJ judgments on the *Danish cases* (C-116/16 and C-117/16). In this way, it abandoned the case law doctrine set out in prior judgments and recognized its duty to adjust and interpret the anti-abuse clause contained in the national law transposing the PSD, in the sense that it should be established as case law that the burden of proof of abuse rests with the tax administration. The decision, published on 23 June 2023, is available here (only in Spanish).

Commission puts forward an adjusted package for the next generation of own resources

On 20 June 2023, the European Commission released an adjusted package for the next generation of own resources. The new package includes: (i) a new temporary statistical own resource based on company profits; (ii) an adjustment of the own resources proposal based on the Emissions Trading System (ETS); and (iii) an adjustment of the own resources proposal based Carbon Border Adjustment Mechanism (CBAM).

The new proposal completes and updates the package for the next generation of own resources to the budget put forward back in December 2021. Three sources of revenue were proposed back then: one based on revenues from ETS, one drawing on the resources generated by the proposed EU CBAM, and one based on the share of residual profits from multinationals that will be re-allocated to EU Member States under Pillar One.

Concerning the new temporary statistical based own resource on company profits, the Commission proposes this measure to be temporary and later on replaced by a possible contribution from BEFIT (once proposed and unanimously agreed by all Member States). In the meantime, the Commission proposes this new own resource be calculated as 0.5% of the notional EU company profit base, an indicator calculated by Eurostat on the basis of the national accounts statistics. The Commission expressly notes that this is not a tax on companies, nor does it increase companies' compliance costs. It further notes that this new resource will be a national contribution paid by Member States based on the gross operating surplus for the sectors of financial and non-financial corporations, which would help to balance the basket of own resources and further diversify the revenue sources of the EU budget. Pursuant to the Commission estimations, the statistical own resource on company profits would provide revenues as of 2024 of about EUR 16 billion (2018 prices) per year.

Regarding the adjustment of the own resources proposal based on ETS, as compared to its original proposal of December 2021, the Commission proposes to increase the call rate for the ETS-based own resource to 30% from all revenues generated by EU emissions trading, up from 25% originally proposed. Finally, in relation to the own resources proposal based CBAM, the Commission proposes a technical adjustment to the control framework of the CBAM, to align its original proposal for an own resource with the adopted text.

It should be noted that the Commission's idea to allocate to the EU budget a new statistics-based levy on large companies' profits has received little support by EU finance ministers.

Commission publishes report assessing the state of play of the negotiations on Pillar One

On 30 June 2023, the European Commission published a progress report providing a brief assessment of the state of play of the negotiations at the OECD on Pillar One. This document was submitted as a consequence of Article 57 of the Pillar Two EU Directive, which required the Commission, by 30 June 2023, to report to the Council on the implementation of Pillar One.

In the report, the Commission: (i) welcomes the great efforts and the progress made so far and urges all participants to make a final effort to reach an agreement on the Multilateral Convention (MLC) to implement Pillar One; (ii) strongly supports the OECD Secretariat's intention to finalise the MLC and the Explanatory Statement and present the package in July 2023 to ensure that the MLC could be signed as soon as possible; (iii) provides a window of opportunity to reach a historical agreement in the area of international taxation and complete the work on the Two-Pillar Solution of the October 2021 statement; and (iv) expressly states that it will do its utmost to ensure a timely and consistent implementation of Pillar One at EU level.

On the basis of this report and the latest progress made by the OECD in relation to Pillar One, on 14 July 2023, the Spanish Presidency of the Council shared the latest Pillar One updates with a view to signing the MLC on that matter by the end of 2023. This information was provided during the first meeting of the Economic and Financial Affairs Council (ECOFIN) under the Spanish EU Presidency.

Commission publishes Annual Report on Taxation 2023

On 30 June 2023, the European Commission published its Annual Report on Taxation 2023, presenting the state of play of taxation and tax systems in the European Union. Broadly, the report assesses recent tax reforms and explores how tax policy, implementation or compliance within the European Union could be improved.

The report looks at the challenges faced by different types of taxes, and how the design of taxes can affect different economic agents and their behavior. It aims to describe the most recent reforms in tax systems and the main indicators used by the Commission to assess taxation policies in EU Member States and at EU level. The 2023 report's general theme is centred around a discussion and analysis of the tax mix and of how to re-design our tax systems in the light of dramatic structural changes that have been reshaping our societies and economies.

Each chapter of the report focuses on a different type of tax, assessing both: (i) the challenges posed to different tax types by a variety of dramatic structural changes in the future – also known as 'megatrends'; and (ii) possible developments in terms of tax design. Throughout the analysis, the report takes into consideration three important properties of tax systems: (i) fairness (looking at the contribution of tax systems to social fairness and prosperity); (ii) efficiency and simplicity (making sure that tax administrations are effective and efficient in achieving tax compliance and reducing unnecessary tax complexity for economic agents); and (iii) stability (including the need to ensure fiscal sustainability, especially given the impact that different megatrends will have on taxation systems).

Spanish presidency identifies tax priorities of the Council for second semester of 2023

The Spanish Presidency of the Council of the European Union published its Programme setting out the priorities and main directions of the Council while Spain holds the Presidency, from 1 July to 31 December 2023.

According to the Programme, in the field of taxation, the Spanish Presidency will: (i) expedite files regarding corporate, indirect and customs taxation with the aim of streamlining the burden for individuals and companies, establishing minimum and common standards on corporate taxation in all Member States, and combating tax evasion and avoidance; (ii) advance the debate on passerelle clauses to extend the use of qualified majority voting, including in taxation; (iii) propose a policy debate on the need to improve the working, social security and tax conditions of artists and cultural workers; and (iv) continue to promote the legislative proposals on energy contained in the Fit for 55 initiative.

Commission publishes summary of outcome of public consultation report on BEFIT Initiative

On 8 May 2023, the European Commission published a summary of the online contributions made by stakeholders on the 'Business in Europe: Framework for Income Taxation' (BEFIT) initiative. The contributions were made in response to the Call for evidence and the online survey about this initiative, which were published from 13 October 2022 to 26 January 2023. The report first summarizes what different stakeholders think about the problem definition of BEFIT. It notes that the existence of 27 different national corporate tax systems is seen as problematic in the internal market and that stakeholders prioritize objectives such as business growth, investor attractiveness, and legal certainty for a new corporate tax framework. Furthermore, the report notes that some respondents express concerns about complexity and costs, while others highlight the need to align with EU policy priorities.

Second, the main features of BEFIT are discussed. Regarding these features, the reports mentions that a majority of survey respondents consider it effective to have a threshold for mandatory application, with the possibility for companies below the threshold to opt in. It further states that respondents believe that making limited adjustments to a company's financial accounts for calculating the tax base is more effective than implementing a comprehensive set of rules. The report also acknowledges respondents' mixed views about cross-border loss relief and formulary apportionment.

The Commission will analyse the responses submitted to integrate stakeholders' views in the BEFIT's draft legislative proposal and impact assessment. The EC is planning to adopt the BEFIT proposal in the third quarter of 2023.

ECOFIN report to the Commission on tax issues

On 16 June 2023, the Economic and Financial Affairs Council (ECOFIN) released its report to the European Council on tax issues of 7 June 2023. The report provides an overview of the progress achieved in the Council during the term of the Swedish Presidency, and the current status of the most important dossiers under negotiations in the area of taxation. These dossiers include – *inter alia* - those related to the Unshell proposal (ATAD 3): the DAC8 proposal and the discussions on exchanging tax information with non-EU jurisdictions, considering personal data protection and international cooperation.

Council agrees on DAC 8's compromise text

On 16 May 2023, the ECOFIN reached an agreement on its position (general approach) regarding an extension to the Directive on Administrative Cooperation (DAC) to include the exchange of information on crypto-assets and tax rulings for high-net-worth individuals (DAC8). Although the agreed text closely aligns with the European Commission's initial proposal, it includes some changes in relation to the minimum penalties' regime, the exchange of advance cross-border rulings, elements of the timeline and an amendment regarding notification requirements for intermediaries under DAC6.

The Directive is pending the opinion of the European Parliament. Following the Council's formal adoption of DAC8, Member States will have until 31 December 2025 to transpose the main rules into national law. The new provisions will apply as of 1 January 2026.

State Aid

General Court's judgment on *Madeira's Tax Regime* (T-131/21) – Modifications incompatible with the internal market

On 21 June 2023, the General Court confirmed the special tax regime in the free trade zone of Madeira (Portugal) amounted to unlawful State aid. Initially approved in 1987, this regime was subsequently modified in 2007 and provided corporate income tax reductions and other benefits to companies engaging in activities within the region of Madeira. This version of the regime was approved in 2007 but its access was restricted to a list of activities effectively conducted in the region and excluding all financial intermediation, insurance activities, as well as 'intragroup services'. Another modified version of the regime was approved in 2013 under these same conditions.

However, in 2018, the European Commission launched a formal State aid investigation and concluded that the regime was incompatible with the internal market. Consequently, the Commission ordered Portugal to recover the granted aid and to abolish the regime. The Commission's view was further upheld by the General Court, which agreed that the regime's selective nature favoured certain companies over others, thus violating the principle of non-discrimination.

One key aspect of the General Court's judgment was the region of Madeira's standing to challenge the Commission's decision. The General Court ruled that the autonomous region had the right to challenge the decision, as it directly affected the region's autonomy and competencies. The decision resulted in the loss of vital tax advantages and in the recovery of previously granted aid, thus distinctively impacting the region.

The General Court confirmed the Commission's classification of the regime as 'new aid' instead of 'existing aid' eligible for a continuous assessment process because its actual implementation deviated significantly from the conditions set in the Commission's approval decisions of 2007 and 2013. These decisions subjected the approval of the measure to the condition that the profits of companies registered in the region be derived from activities 'actually and materially carried out in Madeira' and must contribute to job creation in Madeira. However, the regime as implemented in Madeira benefited also activities carried out outside the region by companies registered in the region. The General Court confirmed the Commission's decision and rightly pointed out that only activities affected by a disadvantage due to their location in an outermost region such as Madeira and thus incurring additional costs specific to such location should be eligible for such operating aid. Accordingly, activities carried outside those regions, which are not therefore affected by those additional costs, must be excluded from the benefit of such aid even if they are carried on by companies established in Madeira.

On the selective nature of the regime, the General Court pointed out that the regime granted tax breaks exclusively to companies registered within the free trade zone of Madeira, which must carry on certain activities exhaustively listed. It follows that only certain companies may register in the free trade zone, and it is only these companies that may benefit from the tax reduction, excluding companies registered in other parts of the region or elsewhere on the Portuguese territory. The General Court, therefore, sided with the Commission on finding that the regime was selective, as it favoured certain companies over others which were in a comparable factual and legal situation. On the reference framework for examining the selective nature of the regime, the Tribunal ruled that even if that could be the entire region, the fact that undertakings registered in Madeira but outside the free trade zone cannot benefit from that regime is sufficient to establish its selective nature.

Moreover, the General Court upheld the Commission's approach, considering that the condition of job creation in the region violated the decisions taken in 2007 and 2013. The General Court further explained that the Commission's decision was justified because the Portuguese authorities considered any type of employment as a 'job' for the application of the regime, regardless of the actual hours, days, or months of active work per year, which did not allow for the verification of the actual existence and continuity of the jobs declared by the beneficiaries. Additionally, the General Court stated that regional tax regimes based on regional development or social cohesion policies do not automatically justify measures that violate competition rules.

Regarding the principles of legal certainty and protection of legitimate expectations, the General again sided with the Commission, ruling that the recovery of illegal and incompatible State aid is a logical consequence of its illegality. The General Court dismissed arguments claiming recovery was impossible and disproportional, as alternative recovery methods could be employed.

The judgment serves as a reminder of the need to implement approved regimes as described to the Commission and, as the case may be, subject to the conditions set by the Commission.

AG Pikamäe's Opinion on State Aid qualification of German tax treatment applicable to operators of public casino (*Fachverband Spielhallen eV, LM v/ European Commission* - C-831/21 P)

On 25 May 2023, AG Pikamäe issued his Opinion in the case *Fachverband Spielhallen eV, LM v/ European Commission* (Case C-831/21 P). AG Pikamäe suggests that the CJ set aside the judgment of the General Court dismissing the appellants notably on the ground that their argumentation did not relate to the Commission's finding of absence of advantage resulting from the tax treatment of operators of public casinos, applicable in Germany.

In Germany, the law on public casinos in North-Rhine Westphalia (the Law) subjected gambling-related income to a specific tax system, whereas non-gambling-related income was subject to the German normal tax system. The Law provided that a certain portion of profits realized by the public casinos in North Rhine-Westphalia should be paid to that region's authorities (the Amount Levied). The Amount Levied was then deductible from the corporate tax and trade tax bases as a business expense, up to the amount of non-gambling related income. The appellants challenged the deductibility of the Amount Levied, as constituting a deemed State aid to the benefit of public casinos.

The European Commission ruled, in its decision of 9 December 2019, that the Amount Levied did not confer a selective advantage and decided not to initiate the formal investigation procedure, on the grounds that the Amount Levied neither qualified as a general tax on profits (like corporate income tax) nor as dividends but constituted a specific tax. As a deductible expense compliant with the German general deductibility rules, the Amount Levied could not confer a selective advantage to the public casinos. In addition, the European Commission raised that the criterion of the selective advantage was not fulfilled to the extent that the deduction of the Amount Levied reducing the public casino's corporate tax burden was outweighed by the heavier burden associated to the payment of that levy, much higher than German corporate tax and trade tax.

In a judgment issued on 22 October 2021, the General Court rejected the appeal lodged by the appellants on the grounds that they failed to prove: (i) that the elements brought before the European Commission should have given rise to doubts on whether the deductibility of the Amount Levied constituted an advantage for public casinos, and (ii) that the existence of an advantage must be assessed independently of the condition relating to selectivity. The General Court found the appellants had failed to demonstrate an advantage for the beneficiaries of the Amount Levied. Also, the General Court underlined that the criteria of advantage and selectivity in tax matters can be examined together, given that the effective taxation results from a derogation from the normal tax regime.

In his Opinion, AG Pikamäe questions that latter approach and suggests the CJ set aside the first instance judgment and refer the case back to the General Court for it to rule on the potential advantage resulting from the deductibility of the Amount Levied.

Based on the case law of the CJ, AG Pikamäe recalls that in order for a measure to be selective, the reference framework (i.e., the 'normal' tax regime) needs to be determined. This step also serves to assess the existence of an advantage, (i.e., whether the measure reduces the tax burden of the taxpayer) through an objective examination of the concrete effects of the applicable tax measure. In this respect, AG Pikamäe considers that the deductibility of the Amount Levied derogates from the German general tax regime, in that it does not constitute a special tax but a transfer or distribution of profits, and even if it were a special tax, it could not qualify as a business expense.

According to the AG Pikamäe, the General Court committed a legal error by rejecting the action brought by the appellants, by not questioning the reference framework retained by the European Commission. Such an error vitiates both the selectivity and the advantage analyses, as the normal tax regime constitutes the reference against which to assess the existence of an economic advantage. Moreover, the General Court should have considered that the determination of the reference framework necessarily requires examining the existence of an advantage in addition to the selective nature of the Amount Levied. It should, therefore, have ruled on the arguments put forward by the applicants even if it had not questioned the finding that the disputed measure was not such as to confer an advantage on its beneficiaries.

Lastly, the European Commission's finding that the economic benefit resulting from the deductibility of the Amount Levied is outweighed by the charge related to this 'specific tax' is not relevant, as solely the income and charges (including the deductibility of the Amount Levied) should have been taken into account when examining an advantage, and not the combination between the Amount Levied and the normal corporate tax system. If the European Commission's reasoning were to be endorsed, any special tax measure would be precluded from being State aid merely by demonstrating that the tax burden payable is greater than the economic benefit obtained by the taxpayer pursuant to that measure.

VAT

CJ judgment on application of VAT margin scheme to end-of-life vehicles sold for parts (*IT*, C 365/22)

On 17 May 2023, the CJ delivered its judgment in the *case IT* (C 365/22).

IT purchases end-of-life vehicles and vehicle wrecks from insurance companies and resells them to third parties for spare parts without these parts having been removed. In dispute is whether these supplies of spare parts can be considered as 'used goods' for the application of the VAT margin scheme. The Belgian tax administration argued that this is not the case because the end-of-life vehicles and vehicle wrecks, from which the spare parts were not removed at the time of the supply, were not suited for further use.

The CJ ruled that, end-of-life vehicles and vehicle wrecks that are sold as such for parts, should be considered as 'used goods' eligible for the VAT margin scheme if the parts have retained the functionalities they had when new and the sold vehicles have remained in the same economic cycle due to this reuse of parts. The VAT margin scheme would not be applicable if the vehicles had been sold to be scrapped or to be transformed into another new object.

CJ judgment on tax fines for failure to declare and pay output VAT (*SA CEZAM*, C 418/22)

On 17 May 2023, the CJ delivered its judgment in the case *SA CEZAM* (C 418/22).

The Belgian tax administration issued tax fines to SA CEZAM for failing to submit periodical VAT returns and, consequently, failing to declare and pay the VAT due on its supplies. These tax fines amounted to 20% of the VAT due on the sales concluded by SA CEZAM, without taking into account the right of SA CEZAM to deduct input VAT on its expenses. In dispute is whether this tax penalty is in breach of the EU law principles of proportionality and fiscal neutrality.

The CJ ruled that this specific tax fine regulation is compatible with EU law. The CJ stated that is does not appear that the tax fine, that seeks to penalize the deliberate failure to declare and pay the VAT due, goes beyond what is necessary to ensure the correct levying and collection of VAT and to prevent VAT fraud. This has to be verified by the referring Belgian court. The CJ further mentioned that the tax fine is not in breach of the neutrality principle because SA CEZAM was not denied the right to deduct the input VAT on its expenses.

CJ judgment on VAT revision obligation for written-off goods (*BTK*, C 127/22)

On 4 May 2023, the CJ delivered its judgment in the case *BTK* (C 127/22).

BTK offers telecommunications services. It voluntarily discarded written-off goods, such as installations, equipment or devices that were no longer fit to be used for its telecommunications services. These goods were either sold as waste or destroyed all together. BTK corrected the input VAT initially claimed in respect of these written-off goods and then asked the Bulgarian tax administration for a refund of these VAT revision payments. In dispute is whether the exemption to the VAT revision obligation for 'destruction' of (capital) goods applies to BTK.

The CJ ruled that BTK was not required to revise the initial input VAT deduction claimed both in case of waste sales and voluntary destructions of written-off goods.

Get in contact

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