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EU Tax Alert

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- The Council updates the EU-list of non-cooperative jurisdictions
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In this publication, we look back on recent tax law developments within the European Union (EU). We discuss, amongst other things, relevant case law of the national courts of the Member States, Opinions of the Advocate Generals (AG) of the Court of Justice of the European Union (CJ) as well as its case law. 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:

- CJ judgment on the compatibility of UK group transfer rules with the freedom of establishment (*Gallaher*, Case C-707/20)
- CJ judgment on VAT implementing regulation for electronic services platforms (*Fenix International Limited*, Case C-695/20)
- The Council updates the EU-list of non-cooperative jurisdictions
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Highlights in this edition

CJ judgment on the compatibility of UK group transfer rules with the freedom of establishment (*Gallaher*, Case C-707/20)

On 16 February 2023, the CJ delivered its judgment in the case *Gallaher* (C-707/20). The case addresses the question of whether the United Kingdom (UK) group transfer rules which impose an immediate tax charge on the disposal of assets to a group company established in a third country, are restrictive of the freedom of establishment in circumstances where such a disposal would be made on a tax-neutral basis if the group company receiving the assets were resident or had a PE in an EU Member State. The case also addresses the issue of whether these rules are proportional in light of the impossibility of the company to defer the payment of this tax when it has obtained, by way of consideration for the disposal of the assets, an amount equal to their full market value.

The case concerns Gallaher (GL), a UK resident company indirectly own by a company resident for tax purposes in the Netherlands ('the Netherlands company') which is the head of the group for Europe. In addition to its UK's subsidiaries, the Netherlands company also has a Swiss subsidiary named JTISA. As a consequence of two disposals of assets made from GL to JTISA and to the Netherlands parent company, the tax authorities of the UK (HMRC) adopted two partial closure notices determining the amount of the chargeable gains and profits that accrued to GL in the context of those disposals. As the assignees were not resident for tax purposes in the UK, the gains on the assets were the subject of an immediate tax charge, as no provision of UK law provides for the deferral of that charge or for payment of the tax in instalments. GL appealed these closure notices arguing that there was a difference in treatment between the disposals of assets at issue and the disposals made between group members established in the UK, given that under the UK transfer group, the latter would be made on a tax-neutral basis, GL claimed, that the fact that it could not defer payment of the tax charge constituted a restriction on the Netherlands company's freedom of establishment or, alternatively, its free movement of capital. It further argued that the requirement to pay the tax immediately, without an option to defer payment, was disproportionate.

Following an appealed decision of a first-tier tribunal, the case was referred to the upper tribunal (Tax and Chancery Chamber) which asked the CJ whether: (i) Article 63 TFEU (free movement of capital) must be interpreted as meaning that national legislation which applies only to groups of companies falls within its scope; (ii) Article 49 TFEU (the freedom of establishment) is restricted by national rules such as those in the present case, in circumstances where the disposal of assets would be made on a tax-neutral basis if the sister company receiving the assets were resident or had a PE in an EU Member State; and (iii) whether the aforementioned rules are proportional in light of the impossibility of GL to defer the payment of this tax when it has obtained, by way of consideration for the disposal of the assets, an amount equal to their full market value.

In its ruling, the CJ first considered that a national rule applying only to groups of companies does not fall within the scope of the free movement of capital. The CJ came to this judgment by referring to existing case law showing, *inter alia*, that if national rules deal only with relations between group companies, those rules primarily affect freedom of establishment.

The CJ then considered whether the UK group transfer rules infringed the freedom of establishment. The CJ first noted that the case concerned a situation where a parent company (i.e., the Netherlands company) exercises its freedom of establishment by setting up a subsidiary in the UK (GL). The CJ then ruled that the tax liability imposed by the national rule at issue in the situation where assets are transferred by a UK resident subsidiary of a parent company established outside the UK to a third country is the same tax liability in the comparable situation of a disposal of assets by a UK tax-resident subsidiary of a parent company resident in the UK to a third country. On this basis, the CJ ultimately concluded that a national rule imposing immediate taxation on the transfer of assets from a company resident in a Member State to a sister company resident in a third country, (whereas such a transfer would take place in a tax-neutral manner if the sister company were also resident in the UK), does not constitute a restriction on the freedom of establishment within the meaning of Article 49 TFEU.

Finally, the CJ addressed the issue of proportionality in the context of GL's disposal of assets in favour of the Netherlands company. In this regard, the Court first noted that the UK group transfer rules constitute a restriction on GL's freedom of establishment because they provide for a different tax treatment between national and cross-border transfers of assets within a group of companies. Second, the Court found that difference in treatment to be justified under the need to maintain the balanced allocation of taxing powers between Member States. Finally, the Court considered the immediately recoverable tax charge without the possibility of deferring payment to be proportionate on the grounds that, first, GL did not face liquidity problems (capital gains were realised at the time of the taxable event), second, the tax authorities must ensure the tax on the capital gains realised during the period the assets are within their tax jurisdiction is paid and, last, the risk that the tax will not be paid may increase with the passage of time.

CJ judgment on VAT implementing regulation for electronic services platforms (*Fenix International Limited*, Case C-695/20)

On 28 February 2023, the CJ delivered its judgment in the case *Fenix International Limited* (C-695/20). This case concerns the application of the undisclosed agent regulations for persons involved in the provision of electronic services.

Fenix International is the operator of the online content platform Only Fans. Fenix collects and distributes the payments made by users to content creators that are active on the platform. Fenix withholds 20% of the remuneration paid by the user for its own services. In dispute was whether VAT was due by Fenix based on the withheld remuneration or over the full remuneration paid by the user.

The undisclosed agent provisions of Article 28 of the VAT Directive stipulate that, where a commissionaire is acting in its own name but for the account of its principal, that principal is deemed to sell its product to the commissionaire and that the commissionaire is deemed to on-sell this product to the customer. Article 9a of the VAT Implementing Regulation stipulates that a taxable person taking part in the provision of electronic services is presumed to be acting in its own name, but on behalf of the electronic service provider (unless that service provider is explicitly assigned as the person liable for VAT and this is also reflected in the various contractual arrangements).

This case concerns the validity of Article 9a of the VAT Implementing Regulation. The CJ argued that the aim of implementing measures is to provide further details on the application of a legislative act (in this case, Article 28 of the VAT Directive). This Article requires that the implementing measure complies with the essential general aims of the legislative act and that this measure does not supplement or amend the legislative act (even with regard to non-essential elements).

The CJ ruled that Article 9a of the VAT Implementing Regulation is lawful because it provides further details on when a person is considered to act in its own name, but on behalf of the provider of the electronic service. The provision in the VAT Implementing Regulation thereby respects the essential general aims pursued by Article 28 of the VAT Directive. The CJ further ruled that an online interface that has the power to charge for and define the essential elements of electronic services must be regarded for VAT purposes as the supplier of those services based on Article 28 of the VAT Directive. For this purpose, it does not matter that the customer is aware of the identity of the content creator (i.e., no undisclosed principal).

The Council updates the EU-list of non-cooperative jurisdictions

On 14 February 2023, the Economic and Financial Council configuration of the Council of the European Union (ECOFIN) approved the updated Council's conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

In this document, the Council added four jurisdictions - British Virgin Islands, Costa Rica, Marshall Islands and Russia - to the list of non-cooperative jurisdictions for tax purposes (Annex I). The number of jurisdictions in the EU tax blacklist currently amounts to 16 and includes the aforementioned four jurisdictions plus American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

The Annex II of the Council conclusion (also known as the EU grey list) was also updated and now includes Aruba, Albania, Armenia, Belize, Botswana, Curaçao, Dominica, Eswatini, Hong Kong, Israel, Malaysia, Montserrat, Jordan, Qatar, Seychelles, Thailand, Turkey and Vietnam. North Macedonia, Barbados, Jamaica and Uruguay were removed from this list for fulfilling their commitments.

The EU list of non-cooperative jurisdictions includes countries that have not engaged in constructive dialogue with the EU on tax governance or have not implemented promised reforms. Such reforms are needed to meet a set of objective criteria for good fiscal governance, including tax transparency, fair taxation and the application of international standards to prevent base erosion and profit shifting.

CJ judgment on VAT implications of association without legal personality (*ASA*, Case C-519/21)

On 16 February 2023, the CJ delivered its judgment in the case *ASA* (C-519/21). ASA and PP owned a plot of land in Romania. ASA and PP entered into an association agreement with BP and BM with the aim of developing residential properties on the plot of land. ASA, PP, BP and BM are natural persons. The association agreement stipulated that 33.33% and 66.67% respectively of the sales proceeds would be attributed to ASA / PP and BP / BM. All construction costs would be paid by BP and BM.

The residential properties were sold to third parties after completion of the construction process. The notarial deeds of transfer stipulated that the profits from the sale were intended to form part of the assets of ASA and PP as owners of the immovable property, without any mention being made to BP and MB or the association contract. The parties under the association agreement failed to declare VAT to the Romanian tax administration relating to the sales proceeds of the sold properties. The Romanian tax administration subsequently imposed a VAT assessment on ASA and PP (and not on the other parties to the association agreement). ASA and PP subsequently filed a civil lawsuit against BP and MB to have them ordered to pay two-thirds of the VAT debt due by ASA and PP.

The CJ ruled that BP and MB did not carry out an independent economic activity and were not considered taxable persons with respect to the supply of the properties. For this purpose, the CJ deemed relevant that, based on the contracts in place, the profits from the sale of the real estate were intended to form part of the assets of ASA and PP as owners of the immovable property. Further, the legal effects of the contracts of sale of the real estate concerned only ASA and PP.

The CJ further ruled that ASA should not be allowed a VAT credit for VAT paid by another association member in relation to the construction expenses of the partnership. According to the CJ, a taxable person who is not in possession of an invoice issued in its own name, is not entitled to input VAT deduction if he cannot prove that the goods and services concerned were actually provided as inputs by taxable persons to him for its own transactions subject to VAT.

Direct Taxation

General Court clarifies conditions of access to documents prepared in the Council's working groups (*De Capitani v Council*, Case T-163/21)

On 25 January 2023, the General Court of the European Union issued its decision in the case *De Capitani v Council* (T-163/21).The case concerns the public access to documents prepared by the Council of the EU within its working groups regarding the EU Public Country-by-Country Reporting (CbC) Directive file.

In this matter, the applicant had requested access to certain documents exchanged within a working group of the Council regarding EU CbCr file's legislative process, which was ongoing at the time of the request (i.e., Legislative procedure 2016/0107 (COD) concerning Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021, amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches). The request was made under Regulation (EC) No. 1049/2001 regarding public access to EU documents (the Regulation) and it was partly refused by the Council, with the argument that disclosing specific documents would undermine the Council's decision-making process. After the submission of a second request, which was again refused by the Council, the applicant sought an annulment of such decision before the General Court. In support of his action against the Council, the applicant alleged (i) an infringement of the first subparagraph of Article 4(3) of the Regulation; and (ii) a failure to state reasons concerning whether disclosure of the documents at issue would seriously undermine the Council's decision-making process.

Following said action, and only after the Council had adopted its negotiating position and an agreement had been reached on the EU Public CbCr Directive in the context of inter-institutional trilogues, disclosure of the documents at issue took place

In its decision, the Court first addressed the issue of the applicant's continuing interest in bringing proceedings, considering the fact that the Council had released all the documents at issue and, therefore, the applicant's interest in bringing proceedings had ceased to exist. In this regard, the Court found that, despite the disclosure of the documents made by the Council, such action did not take place in good time in the light of the objectives of informing the public and generating debate which the applicant pursued by his application for access to those documents. Accordingly, the Court considered that the Council's argument must be rejected.

Regarding the potential infringement of the first subparagraph of Article 4(3) of the Regulation, the Court confirmed that documents drafted in working groups of the Council are subject to the principle of publicity and transparency of the legislative procedure, which can be derived from the Treaty on the Functioning of the European Union (TFEU). However, the Court rejected the applicant's plea that by the entry into force of the TFEU, the exception related to the protection of the decision-making process is no longer applicable. By recalling its case law, the Court concluded that, while it is true that access to legislative documents must be as wide as possible, the fact remains that the provisions of the Treaties and of the Charter cannot be interpreted as precluding, as a matter of principle, access to such documents from being refused on the ground that their disclosure would seriously undermine the institution in question's decision-making process, within the meaning of the first subparagraph of Article 4(3) of the Regulation.

Finally, the Court assessed the reasons provided by the Council to justify that the disclosure of the documents at issue would seriously undermine its decision-making process and concludes that none of the grounds relied on by the Council support the conclusion that disclosure of the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process, within the meaning of the first subparagraph of Article 4(3) of Regulation No. 1049/2001. Consequently, the General Court annulled the Council's decision.

AG Medina opines on whether German rule providing a different tax treatment of salaries earned by workers of projects funded with EU and national budgetary resources violates the free movement of capital and the principle of sincere cooperation (*RF v Finanzamt G*, Case C-15/22)

On 9 February 2023, AG Medina published her Opinion in the case *RF v Finanzamt G* (Case C-15/22). The case addresses the issue of whether Member States can treat the salary of persons working on development cooperation projects that are carried out in third countries and financed by the European Development Fund ('the EDF') as opposed to a salary earned through work on similar projects that are, by contrast, funded by national budgetary resources.

This case concerns a German national administrative practice under which an income tax exemption is granted for salaries paid for working on foreign development aid projects that are funded to a level of at least 75% by a Federal Ministry responsible for development cooperation or by a State-owned private development assistance company. However, under such practice, the salary of an employee working on an aid project that is funded by the European Development Funds (EDF) does not benefit from such an exemption.

In the period from 12 April 2009 to 31 October 2012, RF worked as a project manager for a development aid company established in Germany. Because the development aid company considered that RF's salary was exempt under the Notice from the Ministry of Finance, it did not withhold tax at source on that salary for the 2011 and 2012 financial years and did not pay that tax to the competent tax authorities. The development aid company was subjected to a payroll tax audit, which led to those authorities deciding that RF's salary should be subject to income tax in respect of 2011 and 2012, against which RF appealed. The referring court stated that, on the basis of national law, the appeal was unfounded, as RF's salary was not directly financed by any national budgetary resources and her activity abroad, therefore, was not linked to German public development aid. Nevertheless, the referring court harboured doubts as to the compatibility of the legislation at issue with EU law. The referring court decided to stay the proceedings and to refer the question to the CJ.

In her Opinion, AG Medina first highlighted that the free movement of workers did not apply to the present case because, in that respect, it concerned a purely internal situation as both RF and the development aid company are established in Germany. However, she considered that may not be the case for the purposes of the other fundamental freedoms. In this regard, she found that the German rule at issue has the effect of creating a difference in treatment depending on the origin of the funds and, therefore, it should be examined whether and, if so, to what extent the rule is capable of affecting the exercise of the free movement of capital.

Concerning this specific issue, and after analysing the territorial, material and personal scope of the free movement of capital, AG Medina opined that the German tax rule at issue falls within the scope of said freedom. She then found that such a tax rule constitutes a restriction on this freedom because undertakings financed by foreign capital are subject to a higher tax burden than that applied to undertakings financed by national budgetary resources and consequently, are in a less favourable position. Furthermore, she took the view that the difference in treatment concerned situations that are objectively comparable and that the restriction was not justified.

Alternatively, and in the event that the Court does not concur with her conclusion, the AG noted that Article 4(4), Article 208(1) and Article 210(1) TFEU, read in conjunction with the principle of sincere cooperation enshrined in Article 4(3) TEU, must be interpreted as precluding the application of a tax rule of a Member State which deprives an employee of the benefit of a tax exemption on the grounds that that employee is assigned to development aid activities financed by the EDFs, given that such taxation of the funding granted by the EDF by Member States has the effect of reducing the amount of financial support that is received by the recipients of the aid projects in question in the third countries and formed financial obstacles to those projects. The AG finally observed that – differently to the free movement of capital – the aforementioned provisions do not have direct effect as they cannot possibly be interpreted as containing obligations that are sufficiently clear, precise and unconditional. However, she noted that in the present case, the act that contains direct effect is the decision of the Commission deciding to award a procurement contract or a grant allowing the funding to the company at issue. Pursuant to the AG, the existence and content of that individual decision has to be established by the national court.

AG Collins opines on inheritance tax exemption for real property rented out for residential purposes (*BA v Finanzamt X*, Case C-670/21)

On 9 February 2023, AG Collins delivered his opinion in the case *BA v Finanzamt X* (Case C-670/21). The case addresses the question of whether Member States can pursue social policy objectives within the territory of the European Union, such as the promotion of affordable rental housing, by means of measures that constitute a restriction on the free movement of capital to and from third countries. In particular, AG Collins opines on whether the free movement of capital precludes national legislation which, for the purposes of calculating inheritance tax, treats the value of real estate property leased for residential use in a Member State or in an EEA State more favourably than property located in a third country and put to the same use.

The case concerns a German resident (A) who died in 2016. A bequeathed to his son (BA), who was also resident in Germany, a share of a property located in Canada which was leased for residential purposes. Under German inheritance and gift tax rules, a higher tax base is used to calculate inheritance tax due in respect of real estate property leased for residential purposes and located in a third country (e.g., Canada), in comparison to the tax base used for real estate put to the same use but located in Germany, in another Member State or in a European Economic Area (EEA). The property in the present case met all of the conditions under German national law that would enable it to benefit from the reduced tax base for inheritance tax, save its location in a State outside the EEA (i.e., Canada). In the context of an assessment made by the German Tax Office on BA's inheritance tax with respect to that property, a dispute arose on whether the German law in question infringed the free movement of capital between Member States and third countries enshrined in Article 63 TFEU. The German Finance Court expressed doubts on the compatibility of the German rule with Article 63 TFEU and, particularly, on whether the foreseen restriction on the free movement of capital may be justified or not. It thus referred the case to the CJ for preliminary ruling.

The Opinion of AG Collins examined whether Member States can justify restrictions on the free movement of capital to and from third countries by relying upon overriding reasons in the general interest. The AG considered that, in principle, making the grant of an advantage in the assessment to inheritance tax conditional upon an asset being located on the territory of a Member State or an EEA State is a restriction on the free movement of capital provided for in Article 63(1) TFEU. He then acknowledged that the German Government had put forward two overriding reasons in the general interest to justify the restrictions that this legislation imposes: (i) the promotion of affordable rental housing as a social policy objective, and (ii) the effectiveness of fiscal supervision.

With regard to the first reason, AG Collins advised the Court that Article 63(1) TFEU does not preclude national legislation which, for the purposes of calculating inheritance tax, treats the value of real estate property leased for residential use in a Member State or in an EEA State more favourably than property located in a third country put to the same use in order to promote the availability of affordable rental housing in the European Union and in the EEA. The AG based this conclusion on the view that EU law does not require Member States to take the availability of affordable housing in third countries into account in order to justify a restriction on the free movement of capital between the European Union and third countries. He further concluded that it is for the referring court to assess whether that national legislation is appropriate to achieve the objective pursued and whether there are less restrictive yet equally effective measures to attain that goal (i.e., proportionality).

As regards the second aspect, the AG advised the Court that Article 63(1) TFEU precludes the national legislation concerned if the justification lies in ensuring the effectiveness of fiscal supervision. According to the AG, this justification is not sufficient given that there is a legal framework for the exchange of relevant information between the competent tax authorities (i.e., a Double Taxation Agreement).

AG Pitruzzella opines on compatibility of Romanian withholding tax on non-resident service providers with the freedom to provide services (*Cartrans Preda*, Case C-461/21)

On 19 January 2023, AG Pitruzzella opined on whether national legislation providing for the taxation of non-resident service providers by means of the imposition of a withholding tax on the (gross) remuneration paid by the resident recipient of the services is compatible with the provisions of EU law on the freedom to provide services.

In this case, a Romanian company named Cartans Preda (Cartans) had entered into an agreement with Denmark's FDE Holding A/S (FDE), authorizing the latter to apply on its behalf for VAT refunds in respect of fuel purchased by Cartans in various EU Member States. FDE obtained a percentage of the VAT refunded in each country as a consideration for its VAT refund service. Following an inspection carried out by the Romanian tax authorities, they issued a tax assessment requiring Cartrans to pay certain sums by way of tax on income received by non-resident persons. The Romanian Tax Administration classified the fees paid to FDE as 'commission' on which Cartrans should have applied a withholding tax. Cartrans disagreed with such view and argued that the fees were a remuneration for services within the meaning of the Romanian-Danish tax treaty, which were taxable only in Denmark. It also claimed that there was a difference in treatment that restricted its freedom to provide services within the EU, because no withholding tax at source was applicable to the remuneration paid to a Romanian company that provides similar services. On the basis of those considerations, the Regional Court of Romania had doubts, in particular, as to whether the classification of services provided by the non-resident legal person FDE Holding adopted by the Romanian tax authorities and the levying of a tax on the income received by it are compatible with EU law. The referring court referred six questions to the CJ for a preliminary ruling, of which the third, fourth, fifth and sixth question were analyzed by the AG and concern a possible infringement of the provisions of EU law on the freedom to provide services.

The third question referred to the CJ concerns the issue of whether Article 57 TFEU is to be interpreted as meaning that a service consisting in the recovery of VAT and excise duties on behalf of an undertaking from the tax authorities of more than one Member State constitutes a supply of services within the meaning of that article and thus falls within the scope of the freedom to provide services. In this regard, the AG opined that a contract for consideration under which the principal service consists in the recovery of VAT and excise duties from the tax authorities of more than one Member State, such as that concluded between Cartrans Preda and FDE Holding, involves the provision of a 'service', within the meaning of Article 57 TFEU and that the classification of such fees paid for the provision of a service as 'commission' on the basis of national law or on the basis of the double taxation convention does not, in any way, affect such conclusion.

The fourth and fifth questions concern the issue of whether an obligation imposed on the recipient of services to withhold tax on the remuneration paid to a service provider established in another Member State which provides services that are actually performed in more than one Member State, whereas there is no such obligation in the case of the same service but in a purely domestic scenario, constitutes a restriction on the freedom to provide services. In relation to this issue, the AG opined that the differential treatment in the present case constitutes a restriction on the freedom to provide services, in so far as the obligation imposed on the recipient of services in a cross-border scenario entails an additional administrative burden, as well as the related risks concerning liability. However, the AG considered that such restriction may be justified by the need to ensure the effective collection of the tax where it does not exceed what is necessary to achieve that aim.

Finally, a sixth question addressed by the AG referred to the issue of whether withholding tax also constitutes a restriction on the freedom to provide services where that withholding tax is applied to the gross income received by non-resident operators, whereas resident operators are taxed on their net income (under Romanian rules, a withholding tax of 16% - or 4% with tax treaty benefits - is applied on gross remuneration for services provided by non-resident service providers, whereas 16% of the net amount is applicable to resident service providers). In this regard, the AG considered that the Romanian rules are precluded by the freedom to provide services given that non-resident service providers do not have the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident service providers. The AG left to the national court to assess, on the basis of its national law, what business expenses may be regarded as being directly related to the activity in question.

European Parliament adopts opinion supporting Unshell with amendments

On 17 January 2023, the plenary of the European Parliament adopted its Opinion on the Unshell proposal which, in general, is supportive of the proposal but recommends amendments notably on the scope, penalties and reporting obligations. One of the relevant amendments proposed by the Parliament concerns the gateways. The 75% threshold for revenues accruing to the undertaking in the preceding two tax years is amended to 65% and the 60% thresholds of the book value of the undertaking's assets in the gateways are lowered to 55%. By lowering the thresholds, more entities may fall within the scope of ATAD 3. In addition, the carveout for undertakings with at least five own full-time equivalent employees has been removed. Furthermore, the substance indicator regarding undertakings' own premises has been amended to a more lenient indicator which takes into account the growing prevalence of remote working and the possibility of entities of the same group having shared premises.
It must be mentioned that the European Parliament's Opinion is not binding on the Council. However, the Council must consider it when debating and adopting the directive.

European Commission to adopt taxation package in June 2023

The European Commission is planning to adopt the SAFE (Securing the Activity Framework of Enablers) and FASTER (Faster and Safer Tax Excess Refund for Withholding Taxes) proposals on 7 June 2023. According to the tentative agenda for the upcoming meetings of the College of Commissioners, published on 17 January 2023, the SAFE proposal the FASTER proposal will be adopted as a 'taxation package'.

The SAFE proposal aims to tackle the role of enablers of tax evasion and aggressive tax planning and target aggressive structures involving third countries.
The FASTER proposal, which was originally recommended by the European Parliament, aims to introduce a new common EU-wide system for withholding tax on dividend and interest payments, preventing both the avoidance of double taxation and tax abuse.

European Commission presents Green Deal Industrial Plan for the Net-Zero age

On 1 February 2023, the European Commission presented their communication regarding a plan called: 'A Green Deal Industrial Plan for the Net-Zero Age' which is designed to support the European Union's expansion of net-zero manufacturing capacities. The plan consists of four pillars: simplified regulatory environment, faster access to sufficient funding, enhancing skills and open trade for resilient supply chains.

Under the first pillar, the Commission aims to develop simpler regulatory frameworks, which will subsequently accelerate the support of strategic projects necessary to meet climate targets.

This will be supported through the upcoming Net-Zero Industry Act, aimed to be proposed by March 2023.

For the faster access to sufficient funding under the second pillar, the Plan aims to extend and accelerate investment in Europe's net-zero industry, which includes taking steps that will simplify the process behind the approval of Important Projects of Common European Interest (IPCEI). The communication also confirms that the EU Innovation Fund, which has historically supported Carbon Capture Storage projects, will continue on, with another call set to be launched this Autumn.

Finally, under the third and fourth pillars of the Plan, the Commission will focus on enhancing skills needed to support net-zero industries, and enhancing how trade and trade agreements can support the green transition, under the principles of fair competition and open trade.

European Commission publishes public consultation report on initiative to tackle role of enablers of tax evasion and aggressive tax planning in the EU

On 31 January 2023, the European Commission published the report 'Public consultation on the 'Tax evasion & aggressive tax planning in the EU – tackling the role of enablers' initiative' (Securing the Activity Framework of Enablers - SAFE). The report summarizes the online contributions made by stakeholders during the public consultation.

The survey provided respondents with five different options to define aggressive tax planning (ATP). According to stakeholders, the three most 'indicative' factors in ATP are:

- the main business rationale or the purpose behind the company structure;
- the use of preferential tax regimes, tax treaties, or mismatches in national legislations across countries in a company structure;
- minimum economic substance of the entities used in the structure.

The two remaining options: 'tax advantage obtained' and 'other business rationale' were deemed less indicative by stakeholders. In addition, several stakeholders commented on the need for a clear definition of 'enablers'.

The European Commission will further analyse the replies to the public consultation in order to integrate a broad range of views expressed by stakeholders in the draft legislative proposal and its impact assessment. It should be noted that the European Commission is planning to adopt the SAFE proposal on 7 June 2023, as part of a Taxation Package.

European Commission requests feedback on DAC7 and calls on 14 Member States to fully transpose the Directive into national law

The European Commission has opened a feedback period on a draft implementing regulation of certain provisions of DAC7's reporting framework for digital platforms. The feedback period ran from 20 January 2023 to 17 February 2023. This draft implementing regulation aims to establish the criteria for determining whether the information automatically exchanged under an agreement between the tax authorities of Member States and non-EU countries is equivalent to that specified by DAC7.

In addition, on 27 January 2023, the European Commission announced that the following Member States have not notified or only partially notified the national measures transposing DAC7 and are, therefore, to receive a letter of formal notice: Belgium, Estonia, Greece, Spain, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, and Slovenia. Member States have two months to reply to letters of formal notice. In the absence of a satisfactory response, the European Commission may issue a reasoned opinion. All Member States had to transpose DAC7 into their national legislation and inform the European Commission thereof by 31 December 2022.

VAT

CJ judgment on Hungarian implementation of the VAT bad debt relief scheme (*Euler Hermes SA Magyarországi Fióktelepe*, Case C-482/21)

On 9 February 2023, the CJ delivered its judgment in the case *Euler Hermes SA Magyarországi Fióktelepe* (C-482/21).

Euler Hermes is a Hungarian insurance company. Euler Hermes is involved in the business of procuring trade receivables from its policyholders. Euler Hermes purchases trade receivables for 90% of the unpaid amount including the applicable VAT. All rights and obligations relating to the receivables are then assigned to Euler Hermes. When a debtor remained in default and the underlying receivable was deemed uncollectible for VAT purposes, Euler Hermes applied for a refund of VAT paid by the policyholders to the Hungarian tax administration. This VAT refund was denied by the Hungarian tax administration based on the argument that the right to apply for a VAT refund is vested in the taxable person whose receivable has become definitively irrecoverable and who has declared the VAT.

The CJ ruled that Hungary is not in violation of EU VAT law by not granting Euler Hermes a VAT refund for VAT paid by its policyholders. The CJ considered that the consideration for a supply can also be obtained from a third party. Since Euler Hermes paid the policyholders 90% of the amount of the debts at issue (including VAT), the CJ ruled that this part of the compensation had therefore been paid and can no longer be subject to VAT relief based on 'non-payment' within the meaning of Article 90 (1) of the VAT Directive. The CJ also considered that Euler Hermes was not the taxable person entitled to a VAT bad debt relief in respect of the sales.

Customs Duties, Excises and other Indirect Taxes

AG Richard de la Tour opines on the amendment or invalidation of a customs declaration where an excess quantity of goods is discovered after release of the goods (*SC Zes Zollner Electronic SRL*, C-640/21).

On 23 January 2022, the AG delivered his Opinion in the *SC Zes Zollner Electronic SRL* ('ZZE') case (C-640/21). This case concerned the legal means available under the Union Customs Code ('UCC') to correct a clerical error whereby an excess quantity of goods is discovered that has not been declared with the customs authorities, without incurring administrative or criminal penalties.

Upon taking delivery of a consignment at its premises, ZZE, in short, discovered that it had received 10,000 electronic integrated circuits, whereas only 5,000 electronic integrated circuits had been declared for release for free circulation ('import') with the border customs office of Romania.

ZZE requested to remedy the detected irregularity with the Romanian customs authorities and calculate the associated customs liability. The Romanian authorities, however, issued a report declaring that ZZE had intentionally removed goods from customs supervision.

In accordance with Romanian law, the authorities imposed a penalty consisting of a fine and the obligation to pay a sum corresponding to the value of the excess goods to ZZE.

ZZE appealed against the case bringing forward, among others, that it had itself brought the matter to the attention of the authorities and that the goods had not actually been removed from customs supervision, but only that a simple clerical error had occurred.

The Romanian Court subsequently asked the CJ whether it was possible to amend or invalidate the customs declaration to correct the error made by ZZE whereby no penalties would be issued as this was not clear for the Romanian Court.

The AG considered that an amendment of the customs declaration via Article 173 UCC is only allowed in the case it does not concern goods other than those which it originally covered. The AG concluded that the excess quantity does not concern 'other goods', as the goods are classified in the same tariff heading as the goods covered by the customs declaration and could have been covered by a single customs declaration if a clerical error had not been made.

Furthermore, the AG concluded that the amendment can take place after release of the goods, in so far as the request to amend the customs declaration is accompanied by information allowing a connection to be made between that excess quantity and the import documents and where any suspicion of fraud is ruled out.

It is the AG's view that, as the excess goods have already been imported into the EU in the same consignment as the other identical goods, amending the customs declaration to add that quantity of goods enables the declarant to comply with the obligations relating to the placing of all the goods under the customs procedure concerned.

With regard to the invalidation of a customs declaration, the AG concluded that Article 174 UCC does not permit a customs declaration to be invalidated in order to include an excess quantity of goods once the goods have been released. Article 174 UCC only applies in specific cases and the current situation is not provided for.

Lastly, the AG concluded that the penalty in this case goes beyond the limits of what is necessary to ensure, inter alia, that the goods are not removed from customs supervision. It undermines the objective of combating fraud and protecting the EU budget, as it would deter application of the regulations and would encourage the concealment of any excess quantity of, erroneously, undeclared goods. Furthermore, in such a situation and in the absence of any risk of fraud, it does not comply with the principal of proportionality as set out in Article 42 UCC and Article 49(3) of the Charter of Fundamental Rights.

It is now up to the CJ to consider and deliver its judgment.

Get in contact

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