



**BRUSSELS | 13 MARCH 2023**

## **EU Relaxes State Aid Rules in Transatlantic Subsidy Race**

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The European Commission decided to [amend](#) the General Block Exemption Regulation (GBER), allowing more scope for the grant of State aid and subsidies by Member states in response to the US Inflation Reduction Act (IRA). Alongside the [Temporary Crisis and Transition Framework](#), this package now makes it much easier for governments to provide State support for key sectors in line with the Europe's [Green Deal Industrial Plan](#).

In an apparent subsidy race with the US, the EU is further looking to relax its rules in order to match the ambitious subsidies industry support package in the US. This week the Commission will also present the long-awaited response to the industrial support measures in the US and China regarding supply of key raw materials and green technology. President Joe Biden's subsidy package worth \$369 billion has caused a transatlantic rift, with Europe's largest carmaker Volkswagen [threatening to abandon Europe](#) plans in favour of a US investment after a promise of €10bn in US subsidies.

Ursula von der Leyen, President of the European Commission, met US President Joe Biden in the US, where much of the discussions were focused on these topics. President von der Leyen asked for equal treatment of EU raw materials with the US-subsidy eligible equivalents: *"We agreed that we will work on critical raw materials that have been sourced or processed in the European Union and to give them the access to the American market, as if they were sourced in the*

*American market. We will work on an agreement what that is concerned."* The [joint statement](#) with Joe Biden recognises the US commitment to this end, noting that both sides intend to immediately begin negotiations on a targeted critical minerals agreement for the purpose of enabling relevant critical minerals extracted or processed in the EU to count toward requirements for clean vehicles in the IRA Section 30D clean vehicle tax credit. This kind of agreement would further shared goals of boosting mineral production and processing and expanding access to sources of critical minerals that are sustainable, trusted, and free of labor abuse, the statement notes.

## **EU Ministers Discuss US-EU Trade Relations & Ukraine**

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Under the auspices of the Swedish Presidency of the EU, Swedish Trade Minister Johan Forssell hosted an informal meeting of EU trade ministers in Stockholm, which focused on trade's contribution to EU competitiveness and EU-US trade relations. In addition, further support for Ukraine in the face of Russia's aggression was discussed as well as inclusion of Ukraine into the EU free roaming area.

Speaking about the informal gathering, the Swedish minister [said](#): *"It's vital that the EU pursues an ambitious, open and sustainable trade agenda, implements ongoing free trade agreements and adopts fully negotiated agreements. This is key to enhancing EU competitiveness, which is one of the main priorities of the Swedish Presidency."*

The next EU–US Trade and Technology Council (TTC) will take place in Sweden during the Swedish Presidency of the Council of the EU. According to the Biden-Von der Leyen agreement, the Clean Energy Incentives Dialogue will become a part of the EU-U.S. Trade and Technology Council where it will also facilitate information-sharing on non-market policies and practices of third parties (such as those employed by the China) to serve as the basis for joint or parallel action and coordinated advocacy on these issues in multilateral or other fora.

## OECD Public Consultation on Compliance & Tax Certainty of Global Minimum Tax

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The OECD [published](#) comments received on the compliance and co-ordination aspects of the Pillar Two global minimum tax from the agreement of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

On 16 March 2023 at 12:30-15:30 CET, a public consultation meeting will now be held to discuss the published comments. Input received relating to the [GloBE Information Return consultation](#) and to the [Tax Certainty for the GloBE Rules](#) will be discussed during the public consultation meeting. Discussions will also cover how to preserve consistent and co-ordinated outcomes for MNEs while minimising compliance burdens and avoiding the risk of double taxation.

The meeting will take place online via Zoom/OECD TV and will be open to the public. Live interpretation will be available in English and French. Interested parties can register [here](#).

**Register Now: CFE Forum - 20 April 2023 - *"Towards a More Cohesive European Fiscal Union? Minimum Tax & VAT in the Digital Age"***

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Registration is open for CFE Tax Advisers Europe's 2023 Forum, which will be held on 20 April 2023 in Brussels on the topic of ["Towards a More Cohesive European Fiscal Union? Minimum Tax & VAT in the Digital Age"](#). These two key European Commission projects mark another milestone in the deepening of EU fiscal integration. The Directive on Minimum Tax which implements Pillar 2 has been adopted and is now EU law. The directive relies on a degree of inter-national fiscal equity, with minimum common standards for paying a 'fair share' of tax.

Member states, tax administrations, companies and advisers all have questions about the implementation and the mechanism of operation. CFE will seek to clarify the main issues surrounding the practical application of the new directive as well as the issues posed by the lack of US implementation for taxpayers and wider.

On the other hand, similar developments have already been occurring in the indirect tax area. VAT, which as an area of competence for the EU, has evolved alongside the European project and is now entering the digital age. To discuss the VAT in the Digital Age EU package, CFE has invited a number of speakers to consider the policy side as well as the technical implications.

More details about the programme and line-up of speakers will be made available in due course. Register now [here](#).

## **CFE Statement of VAT Treatment of Compensation Payments**

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The CFE has issued an [Opinion Statement](#) on the VAT Treatment of Compensation Payments.

It is clear from the case law of the Court of Justice that not all compensation payments are subject to VAT. The difficulty is determining the demarcation line between cases that give rise to a liability and those that do not. The demarcation is not just potentially significant in determining whether a payment paid to a supplier is subject to VAT but also on the related question of whether a compensation payment made by a supplier should be considered to result in a reduction in the consideration for a supply.

The decisions in Case C-222/81 *BAZ Bausystem AG v Finanzamt München für Körperschaften* and Case C-277/05 *Société Thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie* make it clear that not all payments paid for compensatory reasons can be considered consideration for

supplies. They also make it clear that there are two issues that need to be considered. The first is whether the taxable person can be considered to have rendered a supply. The second is whether there can be considered a sufficiently direct link between the payment and the alleged supply. Because of the harmonised basis of the tax, these issues cannot be purely determined by reference to concepts of national law, although they clearly form part of the context against which the issues need to be assessed.

Penalty and prepayment charges can in some cases be taxable if they are consideration for a supply. However, it is important to observe that in the facts of the cases considered by the CJEU concerning this issue there was clearly a supply, being the seat in the aircraft, access to the telephone networks or parking facilities. The Court also considered that the payments could be viewed as being consideration for those supplies, rather than purely compensatory. Therefore, different considerations may apply when these conditions are not satisfied. The fact sensitivity of these issues is also important to emphasise, because some tax authorities have sought to suggest that prepayments or cancellation payments, for example for a supply of goods, can be taxed even though no goods have been supplied.

In the generality of cases, the decision of C-107/13 *FIRIN OOD* also suggests that it cannot be correct to view a prepayment for the supply of goods as also resulting in a supply of services, since *FIRIN OOD* would then have had a right of recovery for that reason if its payment could be considered a payment for a supply of services. This conclusion is also consistent with the Court's reasoning in Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*, where the Court considered that on the facts of that case it would be wrong to view the deposit as consideration for a reservation service.

The *Apcoa* case makes it clear that some penalty payments may be consideration for a supply. However, we also do not consider that it would be correct to view all penalty payments as consideration. Each case will depend on its facts. However, it will clearly be significant if the payment does not impact on the quality of what is supplied to the customer and does not result in the customer

obtaining any additional rights. With both compensatory and penalty payments, both these points will support the conclusion that there is an insufficiently direct and immediate link between the payment and any supply. For these reasons, the payment of a penalty when there is nothing corresponding to a supply should not give rise to a liability.

We also do not consider that all prepayments should be considered as consideration. In particular no charge should arise when it is not realistic to analyse the customer as receiving anything.

We invite you to read the [statement](#) and remain available for any queries you may have.

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The selection of the remitted material has been prepared by:  
Aleksandar Ivanovski & Brodie McIntosh