



**BRUSSELS | 20 MARCH 2023**

## **CJEU to Hear Apple State Aid Case in May**

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The Court of Justice of the European Union will hear the appeal of the European Commission against the decision of the General Court in the €14 billion Apple State Aid case on 23 May 2023. The EU Commission appealed the 2020 [decision](#) of the General Court, in which it annulled the Commission's decision that Ireland's tax authorities granted Apple a "selective advantage" by failing to employ appropriate profit allocation methods to apportion income of the Irish Apple branches, in contravention of EU State aid law.

The Commission issued its preliminary decision in August 2016 after a three-year long investigation into Apple's tax arrangements in Ireland. The Commission found Ireland granted a selective advantage to Apple as it did not employ appropriate profit allocation methods to calculate the Irish source income of the Irish Apple branches. Apple in its appeal argued that there was no legal requirement that profit allocation be compliant with the arm's length principle and that it was furthermore not an applicable standard of assessment under European law. Apple argued that the Commission fundamentally erred in failing to recognise that profit creating activities, including development of IP, are attributable to the United States, rather than Ireland. Apple's lawyers argued that the fact that Apple's products and services were developed in the United States exposed flaws in the primary line of the Commission's arguments which defied logic, saying the two branches simply could not be responsible for generating all of Apple's profits outside the US. Lawyers for the Commission argued that Ireland

had not carried out any assessment of the subsidiaries' activities, risks or assets, arguing that accepting the arbitrary method of calculating profits suggested by Apple without carrying out any assessment in itself gave rise to a presumption of advantageous treatment.

The final determination of the case will now be made by the Court of Justice of the European Union.

## **EU Parliament Subcommittee on Tax Matters to Discuss Pillar 1 & 2 with OECD**

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The European Parliament's Permanent Subcommittee on Tax Matters ("FISC") has now [published](#) an agenda for their upcoming meeting next week.

On 28 March, FISC will hold an exchange of views with Mr Achim Pross from the OECD on Pillar 1 and 2 of the OECD/G20 Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

The FISC will also hold a case study at the meeting concerning Germany and implemented national tax reforms and the combat against aggressive tax schemes. Finally, the meeting will conclude with a discussion with the European Public Prosecutor's Office on the "Enhancement of the available tools in the fight against VAT Fraud".

The meeting can be viewed via livestream [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](#).

## **OECD Public Consultation on Global Minimum Tax**

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On 16 March 2023 at 12:30-15:30 CET, a public consultation meeting was held to discuss the [published](#) comments received concerning 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.

Input received relating to the [GloBE Information Return consultation](#) and to the [Tax Certainty for the GloBE Rules](#) was discussed during the consultation meeting. Discussions also covered how to preserve consistent and co-ordinated outcomes for MNEs while minimising compliance burdens and avoiding the risk

of double taxation. The consultation meeting was recorded and can be replayed [here](#).

## CFE Opinion Statement on VAT 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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