BRUSSELS | MARCH 2024

European Parliament Adopts The World's First AI Law

In a 'historic' vote, the European Union became the first jurisdiction to adopt a landmark act on regulation of Artificial Intelligence (AI). The European Parliament legislative resolution of 13 March 2024 on the proposal for a Regulation of the European Parliament and of the Council of the EU on laying down harmonised rules on Artificial Intelligence ("Artificial Intelligence Act") was adopted at the Parliament session in Strasbourg last week. The European Parliament Internal Market Committee co-rapporteur Brando Benifei (S&D, Italy) said during the plenary: “We finally have the world’s first binding law on artificial intelligence, to reduce risks, create opportunities, combat discrimination, and bring transparency. Thanks to the European Parliament, unacceptable AI practices will be banned in Europe and the rights of workers and citizens will be protected. The AI Office will now be set up to support companies to start complying with the rules before they enter into force. We ensured that human beings and European values are at the very centre of AI’s development”.

GPAI (General-purpose) AI systems and their foundational models are mandated to fulfil specific transparency criteria, encompassing adherence to EU copyright law and the provision of comprehensive summaries of the training content. Enhanced GPAI models, with potential systemic risks, are subject to further prerequisites, including conducting model evaluations, assessing and mitigating systemic hazards, and incident reporting. Moreover, artificially created or manipulated multimedia content, known as "deepfakes", must be explicitly labeled as such. This is to ensure clarity and maintain the integrity of information in the digital space. In addition, other high-risk AI systems will be placed under

stricter scrutiny due to their potential detriment to human health, safety, fundamental rights, environment, democracy, and the rule of law. Examples of these high-risk AI applications comprise of critical infrastructure, education and vocational training, employment, essential private and public services like healthcare and banking, specific systems in law enforcement, migration and border management, justice and democratic processes, including influencing elections. The EU contends that it is imperative that these systems perform thorough risk assessments and mitigation, maintain logs, uphold transparency and accuracy, and guarantee human supervision at all times. Furthermore, citizens can submit complaints regarding AI systems and are to be provided with detailed explanations about decisions made by high-risk AI systems that impinge on their rights.

In the spirit of safeguarding collective human rights, the EU AI act establishes guidelines that prohibit certain AI applications, such as invasive technologies with biometric categorisation, i.e. indiscriminate collection of facial images from the internet or CCTV for facial recognition databases. The rules also extend to emotion recognition in workplaces and schools, social scores, and predictive policing that relies on profiling an individual or assessing their characteristics. Moreover, any AI designed to manipulate human behaviour or exploit human vulnerabilities is prohibited.

The regulation is subject to a final lawyer-linguist check and is expected to be finally adopted before the end of the legislature, then formally endorsed by the Council. It will enter into force 20 days after its publication in the Official Journal, and be fully applicable 24 months after its entry into force, except for: bans on prohibited practises, which will apply six months after the entry into force date; codes of practise (nine months after entry into force); general-purpose AI rules including governance (12 months after entry into force); and obligations for high-risk systems (36 months).

US House Hearing on Pillar 1 and Digital Taxes & EU FISC Chair: Enact Digital Services Tax in Absence of US Pillar 1 Implementation

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The United States House Committee on Ways and Means (Tax Subcommittee of the US Congress House of Representatives) held a hearing related to the future of the OECD Pillar 1 and Digital Services Taxes, entitled "Tax Subcommittee Hearing on OECD Pillar 1: Ensuring the Biden Administration Puts Americans First". Republican Congressman Mike Kelly, Chairman of the Ways & Means Subcommittee on Tax, called on the Biden Administration to revisit the OECD negotiations on the Pillar 1 deal, saying that if Pillar 1 is enacted, the tax burden will fall disproportionally on American companies.

"The Biden Treasury Department has worked with OECD and foreign governments to craft this Pillar 1 proposal – instead of with the legislative body which represents the Americans that will have to pay for this deal. And in my eyes – the worst part of this negotiation is Treasury's complete lack of cooperation with Congress on OECD Pillar 1. The Biden Administration leapfrogged Congress and put the interests of foreign governments ahead of the concerns of the men and women elected to represent American taxpayers. We will do our due diligence to protect American companies and consumers and ensure they get a good deal.", Chairman Kelly said in his remarks.

Daniel Bunn, President and CEO of the Tax Foundation said at the hearing: *"With Pillar One, Amount A, very little is truly certain. It is uncertain whether a robust system for allocating profits is achievable. And even if it is, it may not result in the removal of all DSTs. The limited list and the option to retain such policies run contrary to the goals set out on a bipartisan basis by members of Congress. One thing that is more certain, however, is that if a multilateral solution to remove the DSTs is not agreed to, then DSTs will continue to spread and mutate with negative impacts on some of the most innovative companies in the world. Multilateralism is better than multiple rounds of a tax and trade war. As other countries lean toward unilateral approaches, though, it is worth recalling the unilateral U.S. approach to redefine where companies pay taxes, namely the border-adjusted tax proposal from 2016. As mentioned, the UN is building its own*

role in multilateral tax negotiations. In that forum, the United States and likeminded nations will likely have less leverage due to the procedural differences from the OECD.", Daniel Bunn said in his Witness Statement.

The political polarisation in the United States ahead of the November elections threatens to derail the two-pillar solution that was designed to address the taxation challenges related to the digital economy and emerging business models, the FT reported following discussions on the matter at G20. As as a result, the EU should give the US a deadline, after which digital services tax should be implemented, contends Paul Tang, Chairman of the FISC, European Parliament Subcommittee on Tax Matters: *"The EU should give the US a deadline, saying in 2025 the US needs to deliver with whatever administration. And if it doesn't, the EU should pursue a digital services tax."*, Mr Tang said.

Without US Congress ratification, the requisite threshold for effectiveness of the Pillar 1 rules, as currently designed, would not be met. In defence of OECD's track-record on international tax reform, OECD's Secretary-General submitted a report to the G20 in Brazil, arguing that "the BEPS Project has successfully addressed various tax planning strategies used by multinational enterprises (MNEs) that exploit gaps and mismatches in tax rules to avoid paying tax. The OECD/G20 IF on BEPS continues to implement the 15 BEPS Actions to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalisation of the economy.", Mr Kormann argued.

United Nations (UN) 28th Session of the Committee of Experts on International Cooperation in Tax Matters

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The 28th Session of the United Nations (UN) Committee of Experts on International Cooperation in Tax Matters took place last week from 19 to 22 March 2024, alongside the ECOSOC Special Meeting on International Cooperation in Tax Matters, held on 18 March. The Committee focused on further progress of the implementation of 2021-2025 period work plan, given

there are now only three remaining Sessions in the work period.

Significant issues on the agenda included: taxing the digitalised and globalised economy, tax treaties, environmental taxes, health taxes, wealth taxes, extractive industries taxation, and transfer pricing, among others. CFE Tax Advisers Europe is represented at the United Nations Committee in Tax Matters by Chair of the Direct Taxes Subcommittee, Mr Jos Goubert.

Further information and reports discussed at the Sessions can be found here.

TAXUD Consultation on Tax Dispute Resolution Mechanisms in the EU

The European Commission's TAXUD has launched a consultation questionnaire on tax dispute resolution mechanisms in the European Union, in line with its obligations under Article 21 of the Directive requiring that a review and report on the functioning of the DRM be undertaken by 30 June 2024.

The Consultation invites input from stakeholders on the operation of the Mechanism since its implementation on 1 July 2019. It focuses on implementation issues, and seeks input in particular from taxpayers experiences with Article 3 of the DRM Compliant stage and Article 4 of the Mutual Agreement Procedure stage of the DRM.

Input can be submitted via the questionnaire until 10 May 2024.

CFE Forum | Sharing the Tax Pie | 18 April 2024 | Brussels

CFE Tax Advisers Europe will hold its 2024 Forum on 18 April 2024 in Brussels on the topic of “Sharing the Tax Pie: Revisiting the Role of the UN, EU & OECD in Tax Policy; and Taxable Presence Threshold (Fixed Establishment) in Indirect Taxation”. The Forum will bring together two excellent panels of speakers to discuss the allocation of tax base from a direct and indirect tax perspective.

Speakers on the direct tax panel will include: Mr. Benjamin Angel Director, European Commission DG TAXUD; Professor Philip Baker, KC, OBE, Barrister and Professor of Law at Oxford University; Ms. Olivia Long, Head of Tax Policy at Matheson LLP (Ireland); Mr. Pascal Saint-Amans, Partner at Brunswick and previous Director of the OECD Centre for Tax Policy and Administration OECD Tax (CTPA); and Professor Irma Mosquera Valderrama, Professor of Tax Governance at University of Leiden Law School. The panel discussion will be moderated by Mr. Bruno Gouthière, Partner at CMS Francis Lefebvre Avocats and Chair of CFE Tax Advisers Europe Fiscal Committee.

The indirect tax panel will feature: Ms. Trudy Perié, Counsel, Loyens & Loeff, Netherlands; Mr. Erik Stessens, Senior Vice President Tax, Mastercard; Dr. Marie Lamensch, Professor of Taxation, Louvain School of Management, UCLouvain; and, Ms. Charlène Herbain from the European Commission. The panel will be moderated by Mr. Jeremy Woolf, Barrister, Pump Court Tax Chambers, United Kingdom, and Chair of the CFE Indirect Taxes Subcommittee.

Further details and registration is available here.

OECD Publishes 6th Peer Review Report on Prevention of Treaty Shopping

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The OECD published the 6th peer review report on OECD BEPS Action 6, on the Prevention of Tax Treaty Shopping, monitoring anti-abuse measures of countries to prevent tax tax shopping. The reviews are carried out as part of the implementation of Action 6 of the OECD/G20 Base Erosion and Profit Shifting Project:

As one of the four minimum standards, BEPS Action 6 identified treaty abuse, and in particular treaty shopping, as one of the principal sources of BEPS concerns. Treaty shopping typically involves the attempt by a person to access

indirectly the benefits of a tax agreement between two jurisdictions without being a resident of one of those jurisdictions. To address this issue, all members of the Inclusive Framework have committed to implementing the Action 6 minimum standard and participate in a periodic peer review process to monitor its accurate implementation.

The report sets out that most agreements concluded between the members of the Inclusive Framework are either already compliant with the Action 6 minimum standard or will shortly come into compliance and confirms that the majority of the jurisdictions use the BEPS MLI as the tool for implementation of the standard. The BEPS MLI covers 102 jurisdictions and over 1900 bilateral treaties.

The report can be accessed here.

DAC6 Not In Breach of EU Law, Advocate General Contends

In the Opinion in Case C-623/22 "Belgian Association of Tax Lawyers" delivered to the Court of Justice of the EU on 29 February 2024, Advocate General Emiliou takes the view that the EU Directive 2018/822 (DAC6) on reportable cross-border arrangements is not in breach of primary EU law, notably the principles of EU law and the Charter of Fundamental Rights of the EU.

The assertions of ambiguity in Directive 2018/822, as brought forth by applicants, are unfounded the AG concluded. Despite the broad scope of certain elements of the Directive, they are intentionally designed to cover a range of situations. The comprehension of when and how professionals are under the reporting obligation imposed by the Directive is not excessively complex, the AG argued. Further, additional key terms may be deciphered through traditional legal analytical methods, taking into account the contexts and objectives of the directives. Many of these terms are standard in the realm of taxation, nationally and globally. The AG noted that it is critical to note that aggressive tax planning arrangements tend to be complex, costly instruments, designed and overseen

by professionals who are expected to comprehend and interpret the regulations, and keep abreast of developments in clarifications from EU and national case-law. As a result, the Directive 2018/822 does not infringe the principle of legality of penalties enshrined in Article 49(1) of the Charter. In addition, the AG notes that the reporting obligation does not go beyond what is necessary to attain the objectives pursued by the EU legislature, and is therefore not breaching the principle of proportionality.

In terms of the application of legal professional privilege stricto sensu, as argued by the applicants, the AG notes the Opinion of Advocate General Poiares Maduro who wrote, 'it is possible to find traces of it "in all democracies" and in all eras … From that point of view, if *lawyers*' secrecy merits recognition in the Community legal order, that is quite simply because it has its roots in the very foundations of European society'. Such a restrictive reading of the term 'legal professional privilege' is also supported by the judgment of the Court in *Orde van Vlaamse Balies*. The AG takes the view that under Article 8ab(5) of Directive 2018/822, Member States may give intermediaries the right to a "waiver in relation to filing information on reportable cross-border arrangements only where the reporting obligation would be in breach of the legal professional privilege which, under the national law of that Member State, is recognised in relation to lawyers and other professionals which are, in exceptional circumstances, treated in the same way as lawyers."

However, the AG observed, given the complexity of tax legislation and the significant filing burdens placed by such legislation, the fact that a taxpayer has consulted an accountant, auditor or tax advisor is considered understandable in the course of doing business. Therefore, the fact that one intermediary has an obligation to disclose to another their involvement in tax planning activities does not give rise to unacceptable interference with the intermediaries' right from Article 7 of the Charter, including the right to confidentiality. Accordingly, the European Union legislative bodies have not made a manifest error when drafting legislation which aims to strike a balance between the right of tax intermediaries (other than lawyers) to confidentiality and the public interest, in this case,

the interest of combating aggressive tax planning and preventing the risk of tax avoidance and evasion, the AG noted.

The Opinion is available here in multiple European languages.

G20: Discussion on Global Minimum Wealth Tax

Brazil, currently chairing the G20 summit of nations, proposed a global minimum tax on billionaires at the meeting of the finance ministers in Sao Paolo. Speaking with reporters, Brazil's Finance Minister Fernando Haddad said "tax evasion can be resolved through international cooperation so that these few individuals make their contribution to our societies and to the planet’s sustainable development." Mr Haddad said Brazil is seeking a new joint statement on international taxation by G20 members in July.

In apparent agreement with Brazil's position, Bruno Le Maire, France's Finance Minister said: "Europe should take it forward. Currently the richest people can avoid paying the same level of tax as other people who are less rich. We want to avoid such tax optimisation. We want Europe to take this idea of minimum taxation of individuals forward as quickly as possible, and France will be at the forefront.", Le Maire said before the meeting.

On invitation of the G20 Presidency, Gabriel Zucman, Director of the EU Tax Observatory, spoke before the G20 debate on the taxation of large fortunes, and advocated for a globally coordinated minimum wealth tax on substantial fortunes, set at a minimum of 2% annually.

CFE Opinion Statement on *Engie* Case*:* State Aid in Deduction/Non-Inclusion Structure in Luxembourg

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The CFE has issued an Opinion Statement of the ECJ Task Force on the decision of the CJEU of 5 December 2023 in Joined Cases C-451/21P and C-

454/21P, *Engie*, on alleged State aid in relation to a deduction/non-inclusion structure in Luxembourg.

The *Engie case* concerns the question whether tax rulings issued by Luxembourg to companies part of the French energy group Engie are compatible with primary EU law, notably rules on State aid; and, whether, and to what extent, the Commission can invoke the concept of "abuse of law" for a State aid challenge of *ex ante* tax assessment issued by a tax authority of a Member state in the form of a tax ruling. The Court set aside the General Court judgment of 12 May 2021, which initially upheld the European Commission findings of State aid. The CJEU's Grand Chamber found that the European Commission did not establish to the appropriate legal standard that the tax rulings related to the zero-interest convertible loan (ZORA) provided selective advantage for the Engie entities. It did not establish the correct reference framework for assessment of State aid by way of excluding the legal basis for the tax ruling practice from the reference framework itself (Articles 164 and 166 LIR). By establishing an erroneous reference framework, the Commission relied on a wrongfully based selectivity analysis, a key step in establishing State aid for purposes of Article 107(1) TFEU. Finally, the Court established that the Commission cannot invoke national anti-abuse rules to establish selectivity in a situation where the non-application of the "abuse of law" concept by tax authorities unless the non-application of the anti-abuse provisions is based on derogation from national law or administrative practice on anti-abuse provisions comparable to the case at issue (*in concreto*). Thus, the Grand Chamber judgment follows the Opinion of AG Kokott delivered on 4 May 2023.

The Court, however, opened the door for establishing selectivity of tax rulings such as those in the Engie case, where the basis for taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law, under specific conditions.

CFE Tax Advisers Europe welcomes the clarification and further guidance on the applicability of Article 107(1) TFEU to national (individual) tax measures provided by the Grand Chamber of the CJEU in this judgment. It is equally relevant from a perspective of competence (overlap of national corporate tax law and primary

EU law, i.e. rules on State aid), and from the perspective of compliance of Member States' fiscal autonomy with the applicable rules on State aid.

Following *Fiat*, the CJEU confirmed that the Commission is in principle obliged to follow the Member state's interpretation of national law, unless the Commission is able to prove, after an exchange of arguments with the Member State concerned, that another interpretation of national law prevails in the case-law or administrative practice of that Member State. The Court's decision contributes to the dynamic balance of powers in the European Union's legal order. Following the *Fiat* and *Engie* judgments, the review of national tax measures remains possible but under strict conditions. The CJEU did not endorse a mere "plausibility check". However, the Court pointed the Commission to another direction for challenging individual tax ruling such as those in the Engie case, where the basis of taxation consists of pre-agreed margin (mark-up), approved by the tax administration, and not under the rules of ordinary tax law. Therefore, the Luxembourg tax rulings practice may be under further investigation after this decision, albeit on a different basis.

We invite you to read the Opinion Statement and remain available for any queries you may have.

EU Commission Updates Carbon Border Adjustment Mechanism Q&A Document

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The European Commission's DG TAXUD has updated its Carbon Border Adjustment Mechanism Q&A document, which aims to provide information primarily on the transitional phase of implementing the CBAM.

In the updated document, the primary changes concern questions 10, 12, 27, 28, 30, 44, 50, 56, 68, 91, 92, and 99, relating to, inter alia, returned goods of non-EU origin, goods used for military activities, Extensions and Reporting deadlines, importation and CBAM reporting obligations, CBAM reporting corrections

and Access and completion instruction for CBAM reporting.

The Q&A document can be accessed here.

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