BRUSSELS | DECEMBER 2022

EU Adopts Minimum Tax Directive

The European Union formally adopted the directive on minimum taxation of multinational groups, after Poland granted its consent in the formal written procedure on 15 December and Hungary agreed to support the Commission proposal on 12 December, under auspices of the Czech Presidency of the EU.

As such, the adoption makes the European Union a leader in the international adoption of the OECD/ G20 agreed Pillar Two, which aims to introduce 15% minimum taxation for international groups via complex mechanisms of international tax law. On adoption, EU ministers reaffirmed the commitment to the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy and invited all members of the OECD/G20 Inclusive Framework on BEPS to live up to their commitment on both pillars.

The Czech Finance Minister, Zbyněk Stanjura, currently chairing the Council said: "*I am very pleased to announce that we agreed to adopt the directive on the Pillar 2 proposal today. Our message is clear: The largest groups of corporations, multinational or domestic, will need to pay a corporate tax that cannot be lower than 15%, globally*."

The European Commission also welcomed the Council adoption, calling it a win for fairness and a win for diplomacy.

EU Seeks to Define Aggressive Tax Planning

Benjamin Angel, Director in the European Commission in DG TAXUD, said on Friday 2 December that the European Commission will try to establish a legal definition of aggressive tax planning, thus providing clarity to tax professionals on the so-called 'grey zone' in tax planning. Whereas DAC6 already mandates reporting of aggressive tax planning arrangements, the SAFE proposal would potentially seek to provide a clear definition of what is aggressive tax planning and, as such, would be made illegal. This will depend on establishing clear, workable, predictable rules which tax advisers would be able to understand and abide by *ex ante*. These remarks were made in a key-note speech delivered at CFE's 15th European Conference on Tax Advisers' Professional Affairs in Zagreb, Croatia, which took place last Friday on 2 December 2022 organised in cooperation with the Croatian Chamber of Tax Advisers (HKPS), on the topic of "Targeting the "Bad Apples" : Enablers of Tax Avoidance – Is it Still a Substantial Problem in Europe?". Other speakers in the first panel discussed the need for securing the activity framework of enablers of avoidance, including Mr Paul Tang, MEP and Chairman of the European Parliament's Subcommittee on Tax Matters (FISC) and Philippe Vanclooster, Chairman of CFE Professional Affairs Committee, moderated by Dr. Sc. Nevia Čičin - Šain, Assistant Professor of Law, WU Vienna University of Business and Economics.

In the opening remarks the President of CFE, Piergiorgio Valente, said: "*CFE supports the objectives of the EU SAFE initiative but these must be balanced, targeted and proportionate. Definitions must be clear if we introduce strict legislative regimes to avoid any doubts as to what is within scope and what is outside. Tax professionals must have clear legislation to work with. We cannot afford to target the whole profession because of the few bad apples. In addition, the EU must also ensure alignment of the policy objectives of this initiative with the broader European Union policy priorities for the Single Market as stated by President von der Leyen in her State of the Union speech: to ensure a favourable European economic environment, and prevent regulatory initiatives from stifling*

business activity, against more 'aggressive' competitors".

The conference was opened by Piergiorgio Valente, CFE President, Damir Brajković, President of the Croatian Chamber of Tax Advisers and Božidar Kutleša, Director General of Croatia's Tax Administration. The second panel of speakers which included Judge Barbara Porizkova, Supreme Court of the Czech Republic; Dr. Ivan Čevizović, Croatian Chamber of Tax Advisers; Natalie Aymé, Partner Deloitte France; and Tomas Urbasek, Partner PwC Czech Republic, moderated by Aleksandar Ivanovski, Director of Tax Policy, compared and contrasted the different approaches to ethics and taxation vis-à-vis the recent attempts to define aggressive tax planning. The panel also analysed CFE's ongoing project 'Professional Judgment in Tax Planning- Ethics Quality Bar for All Advisers'.

ECJ Rules Certain Elements of DAC6 Incompatible with Primary EU Law

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The Court of Justice of the European Union found certain elements of the Directive on Administrative Cooperation to be incompatible with primary EU law, i.e. the Charter of Fundamental Rights. EU courts are empowered to invalidate secondary EU law (such as directives) or any EU legislation deemed contrary to the Charter. In the Case C-694/20, Orde van Vlaamse Balies, the Court found Article 8ab(5) of the Directive on Administrative Cooperation in the EU (Directive 2011/16/EU) invalid as it infringes the rights enshrined in Article 7 of the Charter of Fundamental Rights of the European Union.

In a preliminary question addressed to the Court of Justice, the Belgian Constitutional Court queried whether fundamental rights guaranteed with Articles 7 and 47 of the Charter are infringed if the tax intermediary is a lawyer, and the reporting requirement with respect to third party intermediaries would violate legal professional privilege (LPP).

With this judgment the Court of Justice recognised that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute

objectives of general interest recognised by the European Union for the purposes of Article 52(1) of the Charter, which can indeed place a limitation on the exercise of the fundamental rights guaranteed by Article 7 of the Charter (primary Union law). However the mechanism in which the DAC6 Directive imposes obligations for tax intermediaries, notably Article 8ab(5), infringes the right to a communication between a lawyer and their client, guaranteed in Article 7 of the Charter, in so far as it provides, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary (who is not their client) of the other intermediary's reporting obligations.

The Grand Chamber judgment of the Court of Justice of the European Union will now be follow-up by a legislative initiative of the European Commission to amend the Directive, bringing it in line with the requirements of primary EU law, as set out by the Court.

EU Progresses Landmark Agreement on Carbon Leakage Prevention

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The European Parliament and the Council agreed last week on progressing the Carbon Border Adjustment Mechanism (CBAM) agreement, which is a climate policy measure aimed at preventing the risk of carbon leakage thus protecting the Single Market from the effects of distortive and carbon-intensive imports. In order to become EU law, the CBAM proposal must be formally adopted by the co-legislators, the European Parliament and the Council.

The proposal aims to reinforce efforts to reduce greenhouse gas emissions of the EU and prevent relocation of production to non-EU countries with lax climate policy, thus preventing imports of carbon-intensive products. Commenting, the Czech Industry and Trade Minister, Jozef Sikela, currently presiding with the Council said: *"I am very pleased that we reached this agreement today. The Carbon Border Adjustment Mechanism is a key part of our climate action. This*

mechanism promotes the import of goods by non-EU businesses into the EU which fulfil the high climate standards applicable in the 27 EU member states. This will ensure a balanced treatment of such imports and is designed to encourage our partners in the world to join the EU's climate efforts."

For its part, the European Commission also welcomed the provisional agreement: "*The Commission welcomes the political agreement reached this morning between the European Parliament and the Council on the Carbon Border Adjustment Mechanism (CBAM). The CBAM is the EU's landmark tool to put a fair price on the carbon emitted during the production of carbon intensive goods that are entering the EU, and to encourage cleaner industrial production in non-EU countries. Today's agreement will be complemented by the revision of the Emissions Trading System (ETS), with negotiations taking place later this week, and that will align the phase-out of the allocation of free allowances with the introduction of CBAM to support the decarbonisation of EU industry."*

EU Proposes DAC8 Directive: Crypto-Assets Reporting

The European Commission has now published its proposals for amendments to the Directive on Administrative Cooperation (DAC) which will now include exchange of information on crypto-assets (DAC8). EU's crypto-assets reporting is largely based on the OECD's CARF Framework, thus insuring international compatibility. According to the European Commission, DAC8 and the rules of the reporting framework will enter into force on 1 January 2026, and all jurisdictions that have agreed the OECD CARF, the United States included, will follow a similar calendar.

Paolo Gentiloni, EU Commissioner for Economy said of the publication: *"The fight against tax evasion and avoidance is what prompted the latest amendment to the Directive on Administrative Cooperation, also known as DAC8. Today, we are proposing new tax transparency rules for all service providers facilitating transactions in crypto-currencies for customers who reside in the EU. The cover*

of anonymity, the fact that there are more than 9,000 different crypto-assets currently available, and the inherent digital nature of the trade means that many crypto-asset users that are making huge profits fall under the radar of national tax authorities. So our proposal will mean that Member States get the information they need to ensure that taxes are paid for gains made in trading or investing crypto-assets, as they would be for any other financial assets.

In practice, this means that crypto-asset service providers, irrespective of their size or location, will need to report transactions of clients residing in the EU, whether these transactions are domestic or cross-border. The DAC8 proposal aims, in addition, to further close loopholes and improve administrative cooperation among EU Member States in support of fair taxation, by requiring financial institutions to also report on e-money and on central bank digital currencies.

And to ensure that rules are followed, we are setting a common minimum level of penalties for the most serious non-compliant behaviours.", the Commissioner said.

OECD Invites Input on Amount B (Pillar 1)

The OECD is seeking public comments on the main design elements of Amount B under Pillar One, within the G20 mandated process of addressing the tax challenges of the digitalising economy. The Amount B sets out a new approach to the application of the arm's length principle to in-country baseline marketing and distribution activities. The OECD has noted that this is a Secretariat proposal which is not agreed by the Inclusive Framework and does not reflect the final views of the IF.

According to the OECD, the scope of Amount B defines the controlled transactions that would be subject to these rules and sets out criteria to help that determination. If the scoping criteria are met and the taxpayer is therefore within

the scope of Amount B, the Amount B pricing methodology would be applied to establish the arm's length price for the in-scope transaction, subject to potential exemptions currently under consideration. On-going work with regards to the Amount B pricing methodology focuses on the benchmarking criteria, the net profit indicators and the comparability adjustments that would need to be considered in pricing transactions in scope of Amount B.

Input should be provided to the OECD by 25 January 2023 by e-mail to TransferPricing@oecd.org in Word format.

VAT in the Digital Age Proposals Published

The European Commission published on 8 December measures to modernise the EU's Value-Added Tax (VAT) system by embracing digitalisation, in particular by addressing challenges in the area of VAT raised by the development of the platform economy.

According to the estimations of the European Commission, the newly proposed measures could potentially close a tax gap of €18 billion additional VAT revenue. Specifically, the new measures include:

- Real-time digital reporting based on e-invoicing for businesses that operate cross-border in the EU;
- Updated VAT rules for passenger transport and short-term accommodation platforms;
- Introduction of a single VAT registration across the EU.

According to Commissioner Gentiloni, this initiative of the EU brings the VAT system into the Digital Age:

"*Our proposal will introduce an EU-wide standard for the real-time reporting of cross-border supplies, through transaction-based electronic invoicing. This means that each intra-EU business-to-business transaction in goods will need to be accompanied by an e-invoice, submitted to national authorities through an EU*

wide database. At a stroke, it will allow MSs to tackle fraud by giving them the real-time information they need to act on suspicious transactions. And by sharing this information, national authorities will be able to cooperate more efficiently.

The second pillar is about VAT rules for the platform economy. Current VAT rules lead to many transactions for short-term accommodation and passenger transport services supplied via a platform going untaxed, which means an unfair playing field for traditional hotels and taxis. It will also simplify compliance for SMEs and individual users of these intermediaries, in that they will not have to worry about their VAT obligations going forward, because it will be the platform to do so.

And the third pillar is the single VAT registration. Many businesses still find it difficult to sell to consumers in multiple MSs because of the administration and compliance hurdles involved in registering for VAT separately in each country. So we want to extend the already successful new online system for VAT on e-commerce, which came into force in 2021, to other businesses that want to sell to consumers across the Single Market."

More detail regarding the legislative texts and proposals is available on the EU Commission webpage.

CFE Opinion Statement on Case C-538/20 (W AG): Foreign Final Losses

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CFE has issued an Opinion Statement on the ECJ decision of 22 September 2022 in Case C-538/20, W AG, on the deductibility of foreign final losses.

At issue in *W AG* was the ability of a German company to deduct the final losses which it had incurred in its UK permanent establishment (PE) because Germany

as the State of residence had waived its power to tax the profits (and losses) of that PE under the Germany/UK tax treaty. The CJEU ruled that when the State of residence refrained from exercising its power to tax the profits (and losses) of the foreign PE under a double tax treaty, the situation of a company with a foreign PE was not objectively comparable to the situation of a company with a domestic PE. As such, there was no different treatment of comparable situations and as a corollary, no breach of the freedom of establishment.

CFE acknowledges the different views on the CJEU's "final loss" doctrine previously established in *Lidl Belgium* for treaty-exempt permanent establishments, but also notes that the reasoning of that case has been implicitly renounced by the Court in *Timac Agro* and in *W AG*.

The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, exemption has the same economic effects regardless of whether is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court would have made this explicit. Finally, it remains to be seen if *Marks and Spencer* is still "good law" or if *W AG* was one of the final nails in the coffin of the "final loss" doctrine.

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

EU Considers State Aid Rules Change in Response to 'Buy American" US Subsidies

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The EU Commission President Ursula von der Leyen said the European Commission will react to the US discriminatory rules on green transition subsidies which affect the level-playing field in transatlantic economic relations. The response of the EU will likely entail reform of the State aid rules to reflect the

growing anti-competitive subsidy regimes adopted by other large economies in the world.

In a speech at the College of Europe in Brugge, von der Leyen added that the discriminatory part of the Inflation Reduction Act ('Buy American') would require change of the state aid rules to better support the European green transition: "*We have to adjust our own rules to make it easier for public investments to power the transition. State aid is a tried and tested tool here in Europe to incentivise business activities for the public interest. Last summer, for instance, we approved EUR 5.4 billion in state aid for the hydrogen value chain, under one of our IPCEIs. These public investments will benefit 35 companies from 15 Member States, from Portugal to Denmark, from Finland to Italy. They will help bring new technologies from the laboratory to the factory, for hydrogen production, for storage and for hydrogen-powered trucks, trains and ships. It is one of many examples of our state aid policy at the service of clean tech.*"

Von der Leyen added that 'Buy American' logic that underpins part of the IRA is based on tax breaks that could lead to discrimination. The production subsidies race is also a concern. *"If you are a consumer in the United States, you get a tax break when you buy electric vehicles, EVs, if they were manufactured in North America. And if you are a battery producer for those same electric vehicles, you get a tax break if you produce in the US. This means that a car manufacturer gets a double benefit for producing in North America and buying parts in the US. We already see how this could also affect Europe's own clean tech base by redirecting investment flows. We have all heard the stories of producers that are considering to relocate future investment from Europe to the US."*, EU Commission President said.

OECD Publishes 2021 Peer Review Reports on the Exchange of Information on Tax Rulings

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The OECD has now published the 2021 Peer Review Reports on the Exchange of Information on Tax Rulings, which sets out information in relation to 131

jurisdictions on the compulsory spontaneous exchange of information on tax rulings. It is the 6th annual per review report which sets out progress on the implementation of BEPS Action 5, the Minimum Standard on Tax Rulings.

According to the OECD, the *"new peer review results also show that 73 jurisdictions are fully in line with the BEPS Action 5 minimum standard, with the remaining 58 jurisdictions receiving a total of 61 recommendations to improve their legal or operational framework to identify the relevant tax rulings and exchange information."*

Further information is available here.

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