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EU Opens Infringement Procedure Against Spain, Cyprus, Poland and Portugal for Non-Compliance With Pillar Two Directive

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The European Commission has referred Spain, Cyprus, Poland, and Portugal to the Court of Justice of the European Union for failing to implement the Council Directive (EU) 2022/2523, the Pillar 2 Directive. This directive establishes a minimum global tax rate of 15% for multinational enterprises and large domestic groups with an annual turnover of at least €750 million, aiming to prevent tax base erosion and profit shifting.

While EU member states were required to transpose the Pillar 2 Directive into national law by 31 December 2023, these four countries have yet to notify the European Commission of their national measures. Despite ongoing efforts, Spain, Cyprus, Poland, and Portugal missed the deadline, prompting the Commission to escalate the matter by taking formal legal action.

The Commission emphasises that the swift implementation of Pillar 2 is crucial for ensuring a level playing field across the EU and globally, by curbing harmful tax competition and ensuring that large corporations are subject to a fair minimum tax rates. Companies operating in these countries should closely monitor developments, as delays in implementing the Pillar 2 rules could affect corporate tax planning and compliance strategies.

CFE Opinion Statement in Apple State Aid Case - *Commission v Ireland*, C-465/20

CFE Tax Advisers Europe's ECJ TaskForce has issued an Opinion Statement on the decision in the *Commission v Ireland ("Apple")* case, C-465/20, in which the Court of Justice of the EU (Grand Chamber) delivered its decision on 10 September 2024.

The *Apple* case concerns the question of whether tax rulings issued by the Irish tax administration to Irish incorporated but non-resident companies that form part of the Apple Group are compatible with EU rules on State aid and, in particular, if the General Court's holding that the Commission had failed to prove to the required standard that such aid had indeed been granted, was legally correct.

The Court set aside the General Court judgment of 15 July 2020, which had annulled the European Commission findings of State aid. The CJEU's Grand Chamber found that the General Court made errors in its understanding of the Commission's decision that led it to wrongly conclude that the Commission had failed to demonstrate that the tax rulings led to favourable tax treatment of the non-resident entities in comparison to non-integrated standalone companies and other companies dealing at arm's length. In reaching this result, the Grand Chamber judgment follows the Opinion of AG Pitruzzella delivered on 9 November 2023. Rather than referring the case back to the General Court for reconsideration, as the AG had recommended, the Court decided to render a final judgment on the validity of the Commission decision, reinstating it in full.

The CFE Opinion Statement seeks to explain and analyse the CJEU's reasoning both with respect to the annulment of the General Court's judgment and its final ruling on the granting of illegal state aid to the Apple Group. CFE Tax Advisers Europe welcomes the CJEU's decision to give a final judgment in the case to prevent a prolonged uncertainty over the outcome. It wonders, however, how the judgment fits with recent case law of the Court, which had shown more deference to Member States' interpretation of their law in assessing derogations from 'normal taxation' in specific cases.

The CFE wonders whether the judgment's outcome, insofar as it sits in tension to holdings in its earlier judgments in *Fiat* and *Engie*, and the later judgment in *UK CFC* might be considered as specific to the circumstances of the procedure. In particular, this relates to the fact that the CJEU did not review the findings of the General Court it had rejected in that judgment but, in the absence of a cross-appeal by Ireland or Apple, had considered *res judicata* in this decision. In light of these considerations, the CFE expects the Court will clarify the status of its judgment in this case and its previous case law in future decisions.

The CFE ECJ Task Force is formed by CFE Tax Advisers Europe and its members are Georg Kofler (Chair of this Task Force and Professor at the Institute for Austrian and International Tax Law of WU Wien), Alfredo Garcia Prats (Professor at the University of Valencia), Werner Haslehner (Professor at the University of Luxembourg), Aleksandar Ivanovski (Director of Tax Policy at CFE Tax Advisers Europe, *ad hoc* member in 2024), Eric Kemmeren (Professor of International Taxation and

International Tax Law at the Fiscal Institute Tilburg of Tilburg University), Michael Lang (Professor at the Institute for Austrian and International Tax Law of WU Wien), João Nogueira (Professor at Universidade Católica Portuguesa and Deputy Academic Chairman at IBFD), Christiana HJI Panayi (Professor at Queen Mary University of London), Stella Raventós-Calvo (Vice-President of CFE Tax Advisers Europe), Isabelle Richelle (Co-Chair of the Tax Institute - HEC - University of Liège, Brussels Bar Elegis), and Alexander Rust (Professor at the Institute for Austrian and International Tax Law of WU Wien).

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

ECOFIN: EU Council to Update List of Non-Cooperative Jurisdictions for Tax Purposes

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The Economic and Financial Affairs Council, comprised of Economic and Finance Ministers from the EU Member States will this week meet to discuss economic policy and taxation matters. It is expected that the Council will approve conclusions on the revision of the EU list of non-cooperative jurisdictions for tax purposes at the meeting, as part of the EU's ongoing fight against tax evasion and avoidance, aiming to promote tax transparency and fair competition globally. Jurisdictions that failed to meet tax governance criteria will be listed in the update.

The EU evaluates jurisdictions based on several tax good governance criteria, which have evolved over time to align with international standards developed by the OECD and other global organisations. These criteria include:

- Tax Transparency: Jurisdictions must participate in the global exchange of tax information.
- Fair Taxation: Tax regimes should not facilitate offshore structures that attract profits without genuine economic activity.
- Anti-BEPS Measures: Jurisdictions must implement reforms to address Base Erosion and Profit Shifting (BEPS), which involve shifting profits to low-tax or no-tax locations.

The EU and its Member States implement defensive measures against listed countries, including:

- Tax measures: Limiting the deductibility of costs in listed countries, applying stricter controlled foreign company (CFC) rules, and enforcing withholding tax measures.
- Non-tax measures: Restricting access to EU funding programs, and considering the list in foreign policy, development aid, and economic relations.

Since the list was established in 2017, it has undergone regular updates in the monitoring of jurisdictions. Countries that make commitments to improve their tax practices are moved to a monitoring list and remain under scrutiny until they fully comply.

Court of Justice of the EU Upholds Dutch Rules on Intra-Group Loan Interest Deduction - Case C-585/22

The European Court of Justice (ECJ) has upheld Dutch legislation that limits the deduction of interest on intra-group loans as a measure to combat tax fraud and evasion, ruling in Case C-585/22 *Staatssecretaris van Financiën* (Interest in respect of an intra-group loan) that Dutch legislation limiting the deduction of interest on intra-group loans is compatible with EU law as it aims to combat tax fraud and tax evasion.

The case involved a Dutch company, part of a multinational group, which financed a share acquisition through a loan from a related Belgian entity. The Dutch tax authorities denied the deduction of interest paid on the loan, suspecting the arrangement was designed to reduce taxable profits.

The ECJ confirmed that the Dutch law, which presumes intra-group loans may be part of artificial tax arrangements, could deter cross-border business activities. However, it also found that the legislation serves the legitimate goal of preventing companies from using internal group funds to create tax advantages through artificial arrangements.

The Court noted that taxpayers have the right to rebut this presumption by proving the economic reality of the transactions. If a loan's interest rate is excessively high but economically justified, the deduction may be limited to the normal market rate. However, if the loan lacks real economic justification and is solely aimed at securing a tax advantage, the entire deduction can be denied.

The judgment reinforces the principle that national laws targeting tax fraud can restrict certain tax advantages in cross-border situations, provided they are proportional and justified.

OECD Publications on Tax Arbitrage, Crypto-Asset & CRS Reporting

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The OECD has published three publications in the last week surrounding international tax reporting and tax arbitrage trends, namely: revised guidelines for the Common Reporting Standard (CRS) and the Crypto-Asset Reporting Framework (CARF), as well as a working paper exploring tax arbitrage incentives across OECD countries.

Updated User Guide for CRS XML Schema

The updated user guide XML schema for the Common Reporting Standard (CRS), is pivotal for facilitating the automatic exchange of CRS-related financial information between tax administrations worldwide. However, beyond cross-border exchanges, this XML schema can also be used by Reporting Financial Institutions for domestic reporting purposes, subject to local law provisions.

The updated guide has enhanced guidance on data structuring and transmission to improve compliance with CRS requirements and includes more flexibility for jurisdictions to adopt the schema for domestic reporting, allowing for greater standardisation in financial reporting.

Crypto-Asset Reporting Framework (CARF) User Guide

The OECD as also released a user guide for the Crypto-Asset Reporting Framework (CARF) XML schema, approved in 2023. This framework is aimed at facilitating the automatic exchange of information on crypto-assets between tax administrations globally. Similar to CRS, the XML schema for CARF can also be employed by Reporting Crypto-Asset Service Providers for domestic reporting, where local regulations allow.

The user guide includes guidelines for crypto-asset data exchange, helping authorities track crypto-asset transactions and tax obligations more effectively and information for the use of XML schema by crypto-asset service providers for reporting to domestic tax authorities.

OECD Report on Tax Arbitrage Incentives

A recent OECD paper has delved into the issue of tax arbitrage behaviours, particularly in the context of unincorporated businesses and closely held incorporated businesses. The study highlights how tax system features in many

OECD countries incentivise tax minimisation strategies, leading to increased incorporation of businesses as a tax planning tool.

The working paper concludes that tax incentives to incorporate and earn capital income through corporations have grown over the past two decades, contributing to a rise in incorporated businesses across OECD countries. A combination of factors— including corporate, dividend, capital gains, and inheritance tax features— encourages business owners to retain earnings within corporations rather than distributing them. The study suggests that tax planning strategies have become more sophisticated, with tax systems themselves sometimes driving these behaviours.

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