



BRUSSELS | 11 MARCH 2024

EESC Opinion on Taxation of Cross-Border Workers

The European Economic and Social Committee (EESC) has adopted an [Opinion](#) on taxation of cross-border teleworkers globally and the impact on the EU.

In the opinion, the EESC:

- *stresses that over the last decade, globalisation and digitalisation have opened up new opportunities to work remotely. The COVID-19 pandemic brought about an unprecedented change in the lives of both workers and businesses, leading to an exponential rise in teleworking;*
- *reminds that with the new technology, the exact same work can be carried out without the need to be physically present. This also means that many more people are able to work remotely across borders and the number of cross-border teleworkers has increased drastically;*
- *believes that taxation of employee income as wage income in the employer's country of residence is the preferred option. Such a regime would make things simpler for employees and could also be attractive for employers. In order to compensate for loss of revenue in the employee's country of residence, a revenue sharing mechanism would likely be required;*

- *proposes that the revenue authorities may divide the income between the countries by applying data on actual individual presence in the states concerned (reported by the employer to the tax authority in its country of residence, thereby acting as a one-stop shop) or using some macro-economic aggregate key.*

The EESC in 2022 adopted an opinion on the taxation of cross-border teleworkers, calling on the European Commission to develop a set of rules that ensures that employees and employers in Europe do not suffer double or multiple taxation, or unintended non-taxation, due to working from abroad.

The full opinion can be accessed [here](#).

CFE ECJ TaskForce Opinion Statement on Joined Cases C-451/21P & C-454/21P *Engie* State Aid in Deduction/Non-Inclusion Structure in Luxembourg

The CFE ECJ Task Force has issued an [Opinion Statement](#) 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.

This Opinion Statement focuses on questions of law and the relevance for the development of the European Union State Aid law doctrine applicable to tax measures. The factual and corporate law aspects are analysed to the extent relevant for the State aid analysis.

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](#)

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](#).

[Register Now: CFE Forum - 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, Belgium; Dr. Marie Lamensch, Professor of Taxation, Louvain School of Management, UCLouvain; and, a speaker from the European Commission's VAT Unit at DG TAXUD. 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 Tax & Development Days - 12 & 13 March

This week, the OECD is holding the 2024 edition of its [Tax & Development Days](#) on 12 and 13 March 2024, virtually via Zoom, to provide an update on the OECD's tax capacity and policy initiatives in developing countries. Members of the OECD Inclusive Framework and key stakeholders are invited to participant, with sessions open to public.

Topics to be discussed across the two days include: developing countries perspectives on the Two-Pillar Solution; COVID-19 impact on revenues; taxation and inequality, transfer pricing and international taxation capacity; realities of carbon pricing; tax morale; tax transparency and co-operation; tax crime; Tax Inspectors Without Borders; VAT on e-commerce in developing countries, and more.

Further information and registration can be located [here](#).

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