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EU Tax Alert

Recent developments for tax specialists

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Edition 208

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EU Tax Alert

In this publication, we look back on recent tax law developments within the European Union (EU). We discuss, amongst other things, relevant case law of the Court of Justice of the European Union (CJ), Opinions of its Advocate Generals (AG), as well as relevant case law of the national courts of the Member States.

Furthermore, we set out important tax plans and developments of the European Commission (EC), the Council of the European Union (Council) and the European Parliament (EP).

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1. Highlights in this edition

FASTER Directive adopted by the Council of the European Union

On 10 December 2024, the Council of the EU adopted the Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER). The FASTER Directive introduces a unified framework for withholding tax (WHT) relief procedures for dividends and interest on publicly traded instruments. It aims to make WHT relief processes faster and more efficient as well as to prevent tax fraud and abuse.

The text of the FASTER Directive adopted by the Council is aligned with the compromise text politically agreed by the Member States in May 2024 (see our previous web post and EU Tax Alert 206).

Core elements of the FASTER Directive are the introduction of:

- Two fast-track procedures enhancing the current standard withholding tax relief or refund procedures. These consist of: (i) a 'relief at source procedure', whereby the applicable tax rate is applied at the payment date of dividends or interests; and (ii) a 'quick refund procedure', whereby initially the withholding tax is deducted at the payment date, but the refund of the excess withholding tax is granted within a fast term.
- A common EU digital tax residence certificate, which investors (taxpayers) are required to use to benefit from the fast-track procedures mentioned above.
- A registration and standardised reporting obligations for financial intermediaries. The registration ensures that only certified financial intermediaries can apply for a relief of withholding tax on behalf of their clients through the fast-track procedures.

  The standardised reporting obligation harmonises the main compliance requirements in this area across the EU and equips tax authorities with the essential information to check the eligibility for the relief of withholding tax, trace the relevant payments and avoid potential tax abuse or fraud.

Following adoption of the FASTER Directive, the final version will be published in the Official Journal of the EU. Member States will have to transpose the FASTER Directive into national legislation by 31 December 2028, and the national rules will apply from 1 January 2030.

DAC9 proposal published by the European Commission

On 28 October 2024, the European Commission proposed amending again the Directive on Administrative Cooperation (DAC) to facilitate the filing and exchanging of Pillar Two-related information in the EU. This proposal is referred to as "DAC9". The proposal transposes, in a coordinated manner, the OECD's GloBE Information Return into EU law by making it the Top-up Tax Information Returns (TTIR), as already contemplated by the EU directive implementing Pillar Two. It also lays down an EU framework to facilitate the exchange of TTIRs between Member States. If adopted by the Council, the DAC9 would have to be implemented into national law by 31 December 2025 (i.e., six months prior to the first filing deadline of the TTIR for most groups in scope of Pillar Two rules).

In-scope groups must file TTIRs by 30 June 2026, and tax authorities will exchange information by 31 December 2026. For exchanges with third countries, international agreements, including a Multilateral Competent Authority Agreement, are in development.

For more information on the DAC9 proposal, please see our dedicated web post on this topic.

CJ rules that Dutch 'net taxation' regime restricts the free movement of capital (*XX v Inspecteur van de Belastingdienst*, Case C-782/22)

On 7 November 2024, the CJ delivered its judgment in case *XX v Inspecteur van de Belastingdienst* (C-782/22). The case concerned the question whether Dutch legislation, under which dividends distributed by resident companies to non-resident insurance companies are subjected to a withholding tax of 15%, while dividends distributed to resident companies are effectively tax-exempt, is compatible with the free movement of capital.

This case involves XX, a UK-based life insurance undertaking, which received dividend payments from Dutch companies in the context of its 'unit-linked' insurance contracts. For resident taxpayers, Dutch dividend withholding tax acts as an advance levy on corporate income tax. The tax paid on dividends can be fully offset against their corporate income tax liability, with any excess refunded. This means resident investors subject to corporate income tax are taxed only on the net income from their investments after deducting certain costs. In contrast, non-resident taxpayers are subjected to a 15% withholding tax on the gross amount, which typically serves as a final levy.

Following a previous ruling of the CJ, *Miljoen and Others* (C-17/14), Dutch dividend tax rules allow non-residents to claim a refund if they can show they are taxed more heavily than comparable resident investors. This involves comparing the dividend tax paid with the hypothetical corporate income tax burden on the dividend income. A key factor in this comparison is the extent to which costs can be deducted from the (hypothetical) tax base. In accordance with the previous CJ ruling, non-residents can only consider costs directly related to receiving the dividend, such as bank fees associated with the dividends.

XX requested a refund of Dutch withholding tax, arguing that if it had been a resident of the Netherlands, the Dutch tax burden on the dividend income would have been nil. This is because, when determining profit, the dividends are matched by a corresponding increase in commitments to customers under unit-linked insurance contracts. Therefore, it argued, the corporate income tax due on the income would be nil, so that the dividend withholding tax paid must be refunded.

In its judgment, the CJ first reiterated its established case law that measures deterring non-residents from investing in a Member State or discouraging residents from investing abroad constitute restrictions on the free movement of capital. It also reaffirmed that this freedom applies to both private and public undertakings. The CJ then observed that the difference in tax treatment between Dutch resident companies and their foreign counterparts results in an unfavorable treatment for non-resident companies, potentially discouraging them from investing in Dutch companies. Following this reasoning, the CJ concluded that the contested Dutch legislation in principle constitutes a restriction on the free movement of capital.

The CJ ruled that while the increase in commitments to unit-linked policies does not meet the definition of 'directly linked' costs of the C-17/14 precedent, it found that the situations of resident and non-resident dividend recipients may nevertheless be comparable in the light of the Netherlands legislation at issue. The court thereby refers to its previous ruling *College Pension Plan of British Columbia* (C-641/17), in which it had considered in the case of a non-resident pension fund that uses dividends income to cover pension obligations, the increase in future liabilities should be recognised when determining a hypothetical tax burden on the dividend income.

In the C-641/17 ruling, the CJ held that if resident taxpayers are not taxed on dividend income due to the specific purpose of their investment activities, non-resident companies in similar situations with dividends from Dutch sources are in an objectively comparable situation, provided their activities are the same and the dividends received change the level of customer commitments.

The CJ further examined whether the restriction could be justified by overriding reasons in the public interest, such as safeguarding the allocation of taxing powers among Member States and maintaining the coherence of the national Dutch tax system. The Dutch government claimed that permitting non-resident companies to deduct certain expenses might undermine these objectives. However, the CJ ruled that since the Netherlands does not tax the relevant dividends when received by Dutch resident companies, it cannot justify taxing the same dividends when received by non-resident companies. The Court concluded that no overriding reason in the public interest justified the restriction.

In conclusion, the CJ ruled that the Dutch legislation constitutes a restriction on the free movement of capital that cannot be justified by an overriding reason of public interest.

CJ judgment regarding VAT on termination fees (*Rhtb*, Case C-622/23)

On 28 November 2024, the CJ issued its judgment in the case Rhtb (C-622/23), which deals with the question of whether VAT should apply to contract termination fees.

Rhtb, an Austrian company, entered into a contract to construct a drywall. After the work began, the client terminated the contract, stating that the services were no longer needed. Rhtb sued for unjustified termination, seeking compensation for the agreed amounts. The Austrian High Court referred the question of whether VAT should apply to these termination fees to the CJEU.

The main issue was whether the amount owed by the client, despite the incomplete work, should be considered remuneration for a supply of services and thus subject to VAT.

The CJ confirmed that these termination fees fall are subject to VAT. The Court reiterated that for an amount to qualify as remuneration for a supply of services, there must be a direct link between the service provided and the payment received. This direct link remains even if the client does not use the service before terminating the contract, resulting in termination fees.

Applying these principles, the Court concluded that the termination fee was indeed linked to the (non-) completed construction services and, therefore, subject to VAT.

CJ judgment regarding VAT position of charging card issuers (*Digital Charging Solutions*, Case C 60/23)

On 4 October 2024, the CJ issued its judgment in the case *Digital Charging Solutions* (C60/23). The case deals with the vat treatment of issuers of charging cards for electric vehicles.

The case concerns a German card issuer that facilitated charging sessions for electric vehicles in Sweden. The card issuer entered into contracts with charge point operators where drivers - on presentation of the EV charging card - could procure a charging session. The operator invoices the charging sessions to the card issuer and the card issuer invoices the charging sessions to the driver. The driver chooses the amount of electricity and the time and place of charging.

The ECJ considered that the card issuer acts as a commissionaire for the charging sessions by the drivers. The ECJ leaves open whether the card issuer acts as a commissionaire of the operator or of the driver. By applying the VAT commissionaire rule, the card issuer is deemed to purchase the electricity from the operator and to resell that electricity to the driver. This allows the card issuer to recover the input VAT on the purchase of the charging sessions from the tax administration.

For more information, please refer to our L&L newsletter.

2. Direct Taxation

Case Law

CJ judgment on the compatibility of non-reimbursement of Spanish withholding tax on dividends to loss-making non-residents with free movement of capital (*Credit Suisse Securities*, Case C-601/23)

On 19 December 2024, the CJ issued its judgment in the case *Credit Suisse Securities* (Case C-601/23). The case deals with the issue of whether the free movement of capital precludes Spanish rules under which withholding tax levied on dividends received by resident loss-making companies is reimbursed in full, whereas no reimbursement of such tax is provided when the recipient of the dividends is a non-resident loss-making company.

This case concerns Credit Suisse Securities (Europe), a UK-based company with no permanent establishment in Spain, which received dividends from a Spanish company. A withholding tax was applied on these dividends under Spanish provincial law, which was initially set at 19% (i.e. the same percentage as that applicable to dividends paid to resident companies) but ultimately reduced to 10% pursuant to the Hispano-British bilateral tax convention. Credit Suisse, being loss-making in the relevant year, could not offset the withheld tax against profits in the UK and sought reimbursement, arguing that the Spanish law discriminated against non-resident companies by treating the tax withheld as definitive, unlike resident companies, which could recover such tax if loss-making. Following a series of administrative and judicial rejections in Spain, the High Court of Justice of the Basque Country referred the matter to the CJ to assess the compatibility of this tax treatment with EU principles, particularly the free movement of capital.

In its judgment, the CJ found that the rules at issue constitute a restriction on the free movement of capital within the meaning of Article 63(1) TFEU. It noted that the tax regime in Spain confers an advantage on resident companies, as dividends paid to loss-making resident companies are reimbursed, whereas dividends paid to non-resident companies are subject to immediate and definitive taxation, irrespective of their financial results. This difference in treatment is liable to deter non-resident companies from making investments in Spain, thus restricting the movement of capital, which is prohibited in principle under Article 63(1) TFEU.

The court rejected the argument that the potentially lower nominal tax rate for non-residents offsets this disadvantage, stating that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other advantages. Furthermore, the CJ found that the less favourable treatment of dividends paid to non-resident companies compared to resident companies amounts to discrimination that cannot be mitigated by situations where the legislation does not discriminate. Consequently, the Court concluded that the rules at issue restrict the free movement of capital.

When assessing the existence of a justification for the restriction, the Court first analysed the comparability of the situations at issue. In this regard, it found that resident and non-resident companies are in objectively comparable situations and that the tax rules in question treat such comparable situations differently. Second, the Court found that the rules at issue cannot be justified on neither the effective collection of tax, the balanced allocation of the power of taxation between the Member States, preventing a risk of losses being used twice, and maintaining the cohesion of the tax system.

On those grounds, the Court concluded that Article 63 TFEU must be interpreted as precluding rules applicable in a Member State under which dividends distributed by a company established in a fiscally autonomous territory of that Member State are subject to a withholding tax that, where those dividends are received by a resident company, which is subject to corporation tax in that fiscally autonomous territory, serves as a payment on account of that tax and is reimbursed in full if that company is loss-making at the end of the tax year concerned, whereas no reimbursement is provided for where those dividends are received by a non-resident company in the same situation.

CJ judgment on whether national legislation that differentiates taxpayers based on the form used to purse their economic activity abroad is compatible with EU Law (Volvo Group Belgium, Case C-436/23)

On 12 December 2024, the CJ issued its judgment in the case *Volvo Group Belgium NV* (Case C-436/23). The case deals with the question of whether a Belgian legislation under which a differentiation is made between taxpayers based on form used to pursue their economic activity in other country (i.e. a subsidiary or a PE or branch) is compatible with the freedom of establishment.

The case involves Volvo Group Belgium, a Belgian company that challenged the imposition of a fairness tax on its corporate income. The company argued that the aforementioned tax violated EU law, double taxation agreements, and the Belgian Constitution. Although the Belgian Constitutional Court annulled the fairness tax provisions, it maintained their effects for certain tax years, which included those relevant to Volvo Group Belgium. The case was referred to the CJ, which was asked about whether Article 49 TFEU must be interpreted as precluding the legislation of a Member State under which a resident subsidiary of a non-resident company is subject to a 'fairness tax' on the distribution of profits (which, as a result of the use of certain tax advantages provided for by the national tax system, are not included in the final taxable profits of that subsidiary), whereas a non-resident company pursuing an economic activity in that Member State through a PE or a branch is not subject to that tax.

When addressing the question above, the Court first found that that maintenance of the effects of the fairness tax for certain tax years does not enable the subsidiaries of non-resident companies to pursue their activities under the same conditions as those which apply to PEs of such companies. Therefore, the CJ considered that the former are placed at a disadvantage in comparison with the latter. On such basis, the CJ noted that such circumstance is likely to make it less attractive for companies that have their registered office in another Member State to pursue their activities in Belgium through a subsidiary. It also found that such difference in treatment capable of limiting a business' freedom to choose the appropriate legal form in which to pursue an activity in another Member State is liable to constitute a restriction on the freedom of establishment.

Second, the CJ assessed the objective comparability of the situations of subsidiaries and PEs. In this regard it clarified that such assessment involves examining cross-border and internal situations based on the location of companies' registered offices, which determine their connection to a particular State's legal system. In the context of the fairness tax, the Court noted that the treatment of a resident subsidiary of a non-resident company must be compared to that of a resident PE of the same company, as these represent the tax treatment of a resident versus a non-resident entity, respectively.

Highlighting the fact that the comparability analysis must consider the aim of the national tax legislation at issue, the Court considered that Belgium's fairness tax was designed to prevent profits generated within its jurisdiction from being distributed without proper taxation. Thus, it found that the situation of a non-resident taxpayer operating through a PE in Belgium is comparable to that of a resident taxpayer in terms of the legislation's objective to exercise taxation rights over profits within its jurisdiction.

The Court then noted that, in the case, the fairness tax does not apply to PEs or branches of non-resident companies and, therefore, Belgium no longer exercises its taxation rights over their profits. As a result, the CJ understood that these non-resident entities are not in a situation comparable to resident subsidiaries of non-resident companies regarding the fairness tax. Under these circumstances, the Court found no restriction on the freedom of establishment under Article 49 TFEU to exist. In the CJ's view, applying the fairness tax to resident subsidiaries, while exempting non-resident PEs, does not breach EU law as their situations are not objectively comparable.

On those grounds, the Court concluded that Article 49 TFEU must be interpreted as not precluding the legislation of a Member State under which a resident subsidiary of a non-resident company is subject to a 'fairness tax' on the distribution of profits which, as a result of the use of certain tax advantages provided for by the national tax system, are not included in the final taxable profits of that subsidiary, whereas a non-resident company pursuing an economic activity in that Member State through a permanent establishment or a branch is not subject to that tax.

Developments

Priorities of the upcoming Polish Presidency of the Council of the European Union

In December 2024, the upcoming Polish Presidency of the Council of the European Union published its programme, identifying the priorities for its term. As far as taxation is concerned, the following is mentioned in the programme:

- Poland will take action to support EU competitiveness by tackling harmful tax competition. The work will include, inter alia, updating the EU list of non-cooperative jurisdictions for tax purposes, including an evaluation of the commitments made by cooperating jurisdictions to implement the principles of good governance in tax matters. The EU list will be approved through Council conclusions in February 2025.
- In the area of direct taxation, the Presidency will continue working on the DAC9 proposal, aimed at ensuring reporting and exchange of information on Pillar Two of the BEPS 2.0 Project (the GloBE system). Steps will be taken to ensure that the DAC 9 Directive is fully compliant with the OECD standard, helping to maintain the competitiveness of the European economy.
- In the area of indirect taxation, the Polish Presidency intends to continue efforts to close the VAT gap. In this context, the priority will be to further tighten up VAT in the e-commerce sector, to counter irregularities in the case of distance sales of imported goods via electronic interfaces.
- It will also seek to consider the priorities of the new Commission in its activities. Should the Commission present a legislative proposal on the structure of taxation and excise rates applicable to tobacco products and substitute products, the Presidency will take work forward on this.
- The Presidency will also continue work on the revision of the Directive on the taxation of energy products and electricity.
- In the area of customs, the Polish Presidency will continue work on the reform of the customs union, including the creation of the EU Customs Authority. The aim will be to agree a Council position and adopt a mandate for negotiations with the European Parliament. In addition, the Presidency will pay attention to issues related to customs relations with countries bordering the EU (Ukraine, Moldova, Western Balkans) also in the context of their future accession to the EU. Steps will also be taken to support the formation of the EU Customs Alliance for Borders (EUCAB), an alliance aimed at strengthening cooperation and coordination between Member States on customs border management. The issue of implementation of EU sanctions against Russia and Belarus by customs authorities will also be an important part of the work. The Presidency will also take steps to strengthen the EU's presence in the World Customs Organization.
- The Presidency's activities will aim to guide the new draft decision on the own resources' system, expected as part of the post-2027 MFF package. The Presidency will focus on possible measures to reduce the regressivity of the own resources'

system and further proposals for new sources of revenue for the EU budget linked to the Single Market. The topic of own resources will also be one of the topics to be discussed at the MFF conference in February 2025.

European Council adopts ECOFIN report on tax issues

On 10 December 2024, the European Council adopted the ECOFIN report on tax issues which provides an overview of the progress achieved in the Council of the European Union during the term of the Hungarian presidency, as well as of the state of play of the most important dossiers under negotiations in the area of taxation.

The ECOFIN report outlines the work pursed by the Hungarian Presidency on key files during the second semester of 2024. The files include the proposals comprised by the "VAT in the Digital Age" package, the revision of the Energy Taxation Directive, the "Business in Europe: Framework for Income Taxation" (BEFIT) proposal, the proposal on transfer pricing (TP Proposal), the proposal on the Head Office Tax System (HOT), the update to the EU list of non-cooperative jurisdictions for tax purposes, as well as the proposal to prevent the misuse of shell entities for tax purposes (Unshell Proposal) and the DAC9 proposal on reporting and exchange of information on Pillar Two. The report also notes the work carried out by the Hungarian Presidency regarding the negotiations on tax cooperation in the United Nations.

State of play of pending EU direct tax proposals

As of December 2024, there are several EU legislative proposals in the field of direct taxation pending of formal adoption. These include the DAC9 proposal previously mentioned above, as well as the TP proposal, the Unshell proposal, the proposal for new EU own resources, the BEFIT proposal, the HOT proposal, and the Revision of the Energy Taxation Directive. The state of play of these pending proposals is the following:

The Transfer Pricing Proposal

On 12 September 2023, the European Commission released a proposal for a Council Directive that seeks to harmonise key transfer pricing principles across the EU (the "TP Proposal"). To ensure a common application and interpretation of the arm's length principle (ALP), the TP Proposal prescribes Member States to implement the 2022 version of the OECD Transfer Pricing Guidelines in the Member States' domestic legislation. In addition, it includes specific sections on (i) the definition of associated enterprises, (ii) downward adjustments, (iii) application of the most appropriate method, (iv) use of the interquartile range, and (v) transfer pricing documentation. The TP Proposal also enables the European Commission to propose common binding rules and safe harbours for specific transactions.

In its current form the TP Proposal has attracted critical reactions from Member States. The main points of criticism refer to the potential creation of a double transfer pricing standard and the loss of flexibility in negotiating and applying the OECD Transfer Pricing Guidelines. On such a basis, it is feasible that the TP Proposal will be replaced by a non-binding Joint Transfer Pricing Forum ("JTPF"), similar to the one that existed until 2019. Allegedly, because of EU law obstacles, it has been recommended that the European Commission withdraws the TP Proposal to allow discussions on the JTPF to move forward. However, the European Commission has not yet indicated its decision on this matter, nor has it explicitly mentioned this initiative as a "focus" area.

The Unshell proposal

On 22 December 2021, the European Commission first presented a proposal for a directive introducing a legal framework for Member States to combat the use and misuse of shell entities for improper tax purposes ("Unshell proposal"). The Unshell proposal is intended to counter situations where taxpayers misuse EU entities that have no or minimal substance and that do not perform actual economic activities, i.e., a "shell" entity. For tax purposes, the Unshell proposal would introduce new reporting obligations, information exchange between Member States and possibly a denial of certain tax benefits. Whether a

company classifies as a shell entity is to be assed based on specific carve-outs, gateways, and substance indicators. For detailed information on the Unshell proposal, we refer to our brochure of May 2022.

Since the publication of the Unshell proposal in December 2021, Member States have not yet managed to reach unanimous consent on a final version of the directive. Various Member States, during their respective EU presidencies, have discussed alternative frameworks to the first draft proposal, with the aim to reach compromise on concerns raised by Member States. In this regard, we understand from various sources that there is a divide between Member States favouring the idea to limit the directive to an exchange of information on shell entities versus Member States feeling strongly about including tax consequences in the directive.

A way forward on the proposal was tabled in the summer of 2024, which would have introduced a self-assessment hallmark system instead of the economic substance test and would have limited reporting obligations for entities that present a high risk of being used in abusive tax schemes based on the hallmarks. The proposed approach also did not include common tax consequences, but instead created an obligation for Member States to use exchanged information to undertake administrative measures. This new approach, however, was dismissed by the Member States, being deemed as too complex.

The ECOFIN Report published on 24 June 2024, contains a section on the Unshell proposal, reading that most delegations have supported the objectives of the proposal, but were of the view that further important technical work was necessary before an agreement could be feasible". A political decision from the European Commission on whether to proceed with the proposal or withdraw and prepare a new initiative, which could potentially take several years, will most likely be taken in the course of 2025 under the guidance of EU Commissioner Hoekstra. In a reply to questions submitted by the European Parliament and published on 23 October 2024, Hoekstra stated that the Commission continues its wider efforts to address aggressive tax planning, for example through the Unshell proposal. In addition, on 7 November 2024, he noted that he will be engaging with the EU finance ministers to discuss what is needed to unlock the Unshell proposal and push it forward. Further updates thereon are therefore to be expected in due course.

The proposal for new EU own resources

On 22 December 2021, the EU Commission tabled a proposal for new EU own resources which aims to create new sources of revenues for the EU budget. This 2021 proposal contained three new sources of revenue based on the EU emissions trading scheme ("ETS"), the carbon border adjustment mechanism ("CBAM"), and the proceeds of the OECD's Pillar One. On 20 June 2023, the Commission put forward an adjusted package for EU own resources, amending and complementing its previous proposal. According to this new package, the three new EU own resources would consist of (i) 30% of revenues from the auctioning of ETS allowances, (ii) 75% of revenues from the sale of CBAM certificates, and (iii) a temporary contribution based on national accounts statistics prepared under the European system of accounts ("ESA"), which would be calculated based on a 0.5% of the sum of gross operating surplus recorded for the sectors of non-financial and financial corporations in such national accounts.

The Commission noted that the latter statistical contribution will not be a tax on companies, nor will it increase companies' compliance costs. This contribution will be replaced by the future establishment of an EU-owned resource based on an underlying tax, i.e., a contribution arising from either BEFIT or an EU measure implementing Pillar One's Amount A. At this point, since the implementation of the latter measure has stagnated and seems to have failed at the global level, it is not expected that this item will become a new EU-owned resource, at least not in its current form.

Following the favourable vote of the EU Parliament on the adjusted package for EU own resources in November 2023, this file has not seen much progress during 2024. However, from a hearing that took place on 7 November 2024, it can be derived that the EU commissioner Piotr Serafin intends to push forward the current package of EU own resources in 2025.

The BEFIT proposal

On 12 September 2023, the European Commission proposed a Council Directive on "Business in Europe: Framework for Income Taxation ("BEFIT")". This proposal contains a common corporate income tax framework for groups active in the EU and builds on the OECD/G20 Inclusive Framework's Pillar Two.

Apart from a supportive non-binding opinion issued by the European Economic and Social Committee ("EESC") in April 2024, the BEFIT proposal has not seen noteworthy progress during 2024. Although Member States have welcomed BEFIT objectives, many of them have voiced their concerns regarding the BEFIT's compatibility with the EU principle of subsidiarity and its interaction with national corporate tax rules, Pillar Two rules, and anti-abuse measures. Thus, further technical work and negotiations will be necessary before Member States can reach a political agreement on the BEFIT proposal. On 7 November 2024, EU Commissioner Hoekstra noted that advancing the negotiations on BEFIT is one of the Commission's top priorities to help cross-border business in the EU. Thus, it is expected that further discussions on this file will occur during 2025.

The HOT proposal

Published on 12 September 2023, the Directive proposal for a Head Office Tax System for small and medium-sized enterprises ("SMEs") ("HOT") aims at simplifying tax rules for SMEs during their early stages of expansion. The proposed HOT directive would allow certain EU-based standalone SMEs that operate in other Member States through permanent establishments ("PEs"), to determine the taxable results of such PEs according to the rules of the Member State of their head office. The taxable results of such PEs would nevertheless remain subject to the tax rate of the Member State in which they are located. The HOT proposal is designed as a complementary measure to BEFIT, which is primarily aimed at large groups operating across the EU.

During 2024, progress was achieved regarding the HOT proposal. In January 2024, the EESC adopted a non-binding supportive opinion on this initiative.

Furthermore, on 10 April 2024, the European Parliament also adopted a supportive non-binding report on the HOT proposal, although recommending clarifications about its rationale and substantial changes regarding its scope. The latter by extending it to companies that operate in other Member States through not more than two subsidiaries.

In general, Member States have raised concerns about potential challenges raised by the HOT proposal, which are linked to its administrative challenges and its impact on the tax revenues and the the tax sovereignty of Member States. According to Commissioner Hoekstra advancing the negotiations on HOT is one of the Commission's top priorities to help SMEs having a cross-border business in the EU. Thus, further work on this file is expected in 2025.

Revision of the Energy Taxation Directive (ETD)

On 14 July 2021, the European Commission submitted a proposal for a revision of the Energy Taxation Directive ("ETD proposal").

The ETD contains minimum excise duty rates for the taxation of electricity, as well as energy products such as motor fuel and heating fuel. The current ETD, however, does not reflect the EU's (renewed) climate policy and ambitions. The ETD proposal aims to align the taxation of energy products with the EU's energy and climate change objectives and introduces a new structure of tax rates based on energy content and environmental performance of the fuels and electricity. Furthermore, the proposal broadens the taxable base by including more products in its scope and by removing some of the current exemptions and reductions.

Since initially tabled in 2021, the Council of the EU has advanced the negotiations about the ETD proposal, which falls under the EU special legislative procedure. Being one of the priorities on the agenda of the Commission, it is expected that the ETD proposal will continue to be negotiated during 2025.

Recently, the new EU Commissioner Hoekstra informed the European Parliament that the Commission will continue to work with the Council to progress to a compromise on the ETD proposal, while aiming to safeguard a high level of ambition. He mentioned that he will reflect on the recommendations of the Draghi report, including solutions based on cooperation between Member States to strengthen the internal market and to ensure that taxes, charges, and levies do not have a negative impact on energy prices and on the competitiveness of EU industry, while supporting clean transition objectives.

European Commission releases final version of the Implementing Regulation for the CbCR Directive

On 2 December 2024, the European Commission has published the final version of the implementing regulation (IR) laying down a common template and electronic reporting formats from the Public CbCR Directive (2021/2101). Under the IR, companies with consolidated revenues exceeding EUR 750 million in their balance sheets for the past two consecutive financial years are required to prepare, publish, and make available a report on income tax information. The final version of the CbCR IR is based on the draft template which was issued earlier on 21 October 2024.

European Court of Auditors' report on EU's efforts to combat harmful tax regimes and corporate tax avoidance

On 28 November 2024, the European Court of Auditors (EUCOA) published a report on the EU's efforts to combat harmful tax regimes and corporate tax avoidance. In this report, the EUCOA reviewed the Anti-Tax Avoidance Directive (ATAD), DAC6, and the Tax Dispute Resolution Mechanisms Directive.

It concluded that, overall, the EU framework provides a needed first line of defence but, however, there are shortcomings in the way the framework is drawn up and implemented.

More specifically the report identifies unclear definitions and gaps that result in different interpretations of EU legislation across Member States. The main concern in this regard is the implementation of DAC6 because the tax information that is exchanged is not checked for data quality and little use is made by Member States on the information received. Furthermore, there are no measurements in place to effectively evaluate the tools used to combat harmful tax regimes and corporate tax avoidance.

Against such backdrop, the EUCOA's report recommends clarifying EU legislation, improving DAC6 quality, ensuring proper penalties, supporting the Code of Conduct Group, and better monitoring. The European Commission welcomed the report and stated that it will consider its recommendations.

European Commission sets out policy guidance for 2025 under new Economic Governance Framework

On 27 November 2024, the EU Commission published the first part of the European Semester Autumn Package, marking the commencement of the 2025 economic policy coordination cycle. This package is being issued in stages, as the new College of Commissioners has yet to take office. It is also the first package under the recently reformed EU economic governance framework, which establishes simpler, more transparent fiscal rules and introduces risk-based monitoring tailored to the fiscal context of each Member State. The key components of the package include:

- A Communication from the Commission outlining the implementation of the 2025 European Semester under the revised governance framework.
- Assessment of national medium-term fiscal-structural plans: Of the 22 plans submitted, 20 were endorsed as meeting the new framework's requirements, while adjustments were proposed for the Netherlands. The plan for Hungary remains under review.
- Opinions on 2025 draft budgetary plans for 17 euro area Member States: 8 plans were deemed in line with fiscal recommendations, 7 were partially aligned, 1 (Netherlands) was found to be non-compliant, and 1 (Lithuania) was identified as being at risk of non-compliance.

- Recommendations on multi-year net expenditure paths for 8 Member States (including Belgium, France, and Italy) to address excessive deficits under the Excessive Deficit Procedure.
- Post-programme surveillance reports for Cyprus, Greece, Spain, Ireland, and Portugal, all of which were found to have maintained their capacity to service their debts.

The second part of the European Semester Autumn Package was published on 18 December 2024. and includes:
- Commission Proposal for a Recommendation on Economic Policy of the Euro Area (2025): Focused on strengthening innovation, improving the business environment, and supporting investment in green and digital transitions and defense capabilities.
- 2025 Alert Mechanism Report: A screening tool to identify macroeconomic imbalances, with in-depth reviews for 10 Member States (e.g., Germany, Italy, and Sweden).
- Proposal for the 2025 Joint Employment Report.

The European Commission invites the Eurogroup and Council to discuss and endorse the guidance provided. More information on this matter can be found here.

Commissioner-designate Hoekstra's tax priorities for new European Commission

Ahead of his confirmation hearing, Mr. Wopke Hoekstra, Commissioner-designate for Climate, Net-Zero, and Clean Growth (also in charge of Taxation), outlined his key tax priorities for his upcoming mandate. In the field of direct taxation, Hoekstra noted that he aims to support Europe's competitiveness, social fairness and climate goals, while tackling tax fraud, evasion, and avoidance. His main initiatives in this field include:
- Simplifying and harmonizing EU corporate taxation rules to reduce complexity, which requires assessing existing legislation such as the ATAD and the DAC.
- Reducing tax gaps by promoting best practices among tax authorities.
- Engaging with Member States to advance corporate taxation proposals, respecting unanimity requirements.
- Developing a coherent tax framework for the EU's financial sector.
- Advancing the BEFIT proposal and Pillar Two implementation, by coordinating with global players like the United States .

Furthermore, during his hearing before Members of the European Parliament (MEPs) held on 7 November 2024, Mr. Hoekstra highlighted his commitment to fair taxation for digital companies and emphasized the need for a multilateral approach to international digital tax reform. However, he indicated he would support an EU-only approach if global consensus could not be reached. He also stressed the importance of aligning tax policy with the EU's environmental goals and committed to a 2026 review of EU tax policy to assess progress and make necessary adjustments.

After the hearing, most political groups reportedly gave their approval to Mr. Hoekstra.

European Commission refers Germany to the CJ for failing to eliminate discriminatory tax legislation

On 14 November 2024, the European Commission decided to refer Germany to the CJ for failing to remove the infringement created on the free movement of capital as a consequence of its tax treatment of reinvested capital gains from the sale of real estate located in Germany.

Under the German legislation, sales of real estate without business activities in Germany are treated differently for the purposes of capital gains taxation. Capital gains taxation can be deferred on reinvestments only if the real estate was attributed to the fixed assets of a domestic business for at least 6 years. In principle this applies to both domestic and foreign companies. However, resident companies are deemed to have such a permanent establishment at their place of management in Germany, while comparable entities established in other EU/EEA Member States are deemed not to have such permanent establishment. Therefore, non-resident companies are denied the deferral on reinvested capital gains, while resident companies are granted the deferral.

In November 2019, the Commission sent an reasoned opinion to Germany, stating that it considers that the legislation in question leads to a restriction of the free movement of capital. Understanding that Germany has not displayed sufficient efforts to resolve this issue, the Commission decided to refer such Member State to the CJ.

EU Parliament's FISC Subcommittee reviews future of international tax policy with EU and UN experts

On 21 November 2024, the European Parliament's (EP) Subcommittee on Tax Matters (**FISC**) met to discuss the future of European and international tax policy with representatives from the European Commission and the United Nations (UN). The session focused on the EU's role in global tax governance and its cooperation with the OECD and the UN.

Speakers included several experts of the UN Committee of Experts on International Cooperation in Tax Matters. The experts emphasized the need for broad-based support in global tax agreements rather than aiming for unanimity, which often hinders implementation.

The impact of the OECD's Pillar Two was highlighted by Benjamin Angel (European Commission), who noted that jurisdictions like Jersey, Guernsey, Isle of Man, and UAE have adopted minimum taxation measures. He stressed the need to prevent schemes allowing companies to reclaim taxes and proposed a "safe harbour" to ease reporting burdens for companies with no top-up tax liability. On Pillar One, it was noted that the main convention is ready, but negotiations on "Amount B" — covering transfer pricing for marketing and distribution — continue, especially between the United States and India. The UN tax convention was also discussed, noting that negotiations will formally begin in 2025, with overlapping discussions on a digital taxation protocol, a sensitive issue given its overlap with Pillar One.

Sanya Gbonjubola (United Nations) called for a flexible approach to international tax frameworks, arguing that tax issues differ across countries and should not be treated uniformly. He stressed the importance of creating an inclusive platform that reflects the diverse interests and capacities of countries, a lesson learned from past frameworks. He called for practical, adaptable proposals that work for all countries, both in scope and implementation.

Council of the European Union explains EU vote regarding the Terms of Reference for the UN Tax Convention

On 27 November 2024, Hungary delivered a statement on behalf of the EU and its Member States to explain the EU vote of abstention to the resolution approving the Terms of Reference (ToRs) of a UN Framework Convention on International Tax Cooperation (the 'Resolution'). It should be noted that such Resolution had already been agreed in August 2024 by the Ad hoc committee specifically formed for its negotiation. Following such preliminary agreement, the Resolution was subjected to vote during the 26th Plenary meeting of the United Nations General Assembly, at the 79th session held on 27 November 2024. The Resolution was reportedly voted by 125 jurisdictions and rejected by 9 (including Argentina, Australia, Canada, the United Kingdom, the United States) with 46 jurisdictions abstaining (including all EU Member States). Apart from adopting the ToRs, the text of the Resolution also establishes an intergovernmental negotiating committee for the purpose of drafting the UN Framework Convention and two early protocols simultaneously.

The explanatory statement published by Hungary emphasized that the EU has decided to abstain from voting to demonstrate its commitment to international tax cooperation.

Reiterating the EU commitment to inclusive and effective international tax cooperation, the statement highlights several procedural concerns and substantive disagreements in the drafting of the ToRs. Key points raised in this regard include:

- **Consensus-based decision-making**: The EU stressed this as essential for the Framewrok Convention success and broad ratification, emphasizing its link to national sovereignty.

- **Key objections**: The EU dissociated from three paragraphs (OP2, OP5, OP6) in the resolution, citing concerns about adopting ToRs without agreement, inadequate provisions for consensus on decision-making, and the lack of balanced regional representation.
- **Compromise and warning**: While the EU agreed to defer decision-making discussions to February, it insisted these must also be by consensus. It expressed regret over distrust and "retaliatory" amendments during negotiations.

Furthermore, Hungary's statement explains that the EU abstained on the Resolution as a 'gesture of constructive engagement' but warned that failure to ensure fairness, transparency, and inclusivity, or the imposition of simple majority decision-making, could force EU Member States to disengage from future negotiations.

EU Parliament's FISC Subcommittee discusses Apple Case, tax simplification and transparency

On 17 October 2024, the Subcommittee on Tax Matters of the European Parliament (FISC Subcommittee) discussed the recent judgment of the CJ in the landmark Apple State aid case (refer to EUTA 207 for more information) with Margrethe Vestager, Executive Vice-President of the European Commission. Vestager highlighted that the key lessons from the case are the necessity for tax rulings to comply with State aid regulations to be considered legal, and the importance of determining where value should be taxed.

Furthermore, the FISC Subcommittee hosted a public hearing on tax simplification and transparency with experts. The public hearing on "Simplification and Transparency in EU Tax Policy" featured three experts: Prof. Dr. Eva Eberhartinger from the Vienna University of Economics and Business, who advocated for simplifying EU tax laws, digitalizing tax administration, and supporting compliant taxpayers; Prof. Dr. Christiana HJI Panayi from Queen Mary University of London, who called for reassessing the Directive on Administrative Cooperation (DAC) and the Anti-Tax Avoidance Directive (ATAD), and suggested a unified tax approach to boost R&D investment; and Dr. Panayiotis Nicolaides from the EU Tax Observatory, who cautioned against lowering tax rates and revising ATAD without solid economic evidence, emphasizing the need for empirical assessment. The full video can be found here.

European Commission publishes implementation report on the revision of the DRM Directive

On 28 October 2024, the European Commission released a report on the implementation of the Dispute Resolution Mechanism (DRM) Directive (EU) 2017/1852, which facilitates the resolution of tax disputes between EU Member States. The report found that the Directive has improved efficiency, expanded the scope of disputes covered, and provided clearer timelines and better recourse for taxpayers.

However, feedback remains limited as the first cases under the Directive are only now emerging from audits of tax years starting in 2018. Suggestions for improvement include clarifying certain rules, expanding its scope, and applying the mechanism to other tax Directives. A full evaluation of this legislation will be conducted once more experience with real cases is available. The DRM Directive is also under review as part of a European Court of Auditors' audit on harmful tax competition.

3. State Aid

Case Law

AG Kokott's Opinion on whether Polish statutory tax exemption could be considered prohibited EU State aid (*E. sp. Z.o.o. v Poland*, Case C-453/23)

On 17 October 2024, AG Kokott issued her Opinion in the case *E. sp. Z.o.o. v Poland* (Case C453/23). The case deals with the issue of whether Polish statutory tax exemption on property taxes for land on which railway infrastructure is used constitutes illegal State aid under EU law. In her Opinion, the AG found that the Polish Statutory Tax Exemption does not constitute illegal State Aid.

The case involves a company, E. sp. z o.o. ("the appellant"), that owns plots of land containing railway sidings, which connect various businesses to the main railway network. The appellant does not directly use this infrastructure, as it represents the company's sole asset. Instead, the appellant's business consists of making the sidings available for use by transport undertakings. In the case at hand, the appellant argued that, from the moment when the siding is made available to a transport undertaking, an exemption from property tax can be claimed for the land on which the railway infrastructure is located. However, the application of the appellant was refused by the Polish authorities because they considered that it infringed EU provisions on State aid. The appellant brought an action to the court of first instance, which dismissed the action and then lodged an appeal with the referring court.

In her opinion, AG Kokott concludes that from settled case-law of the CJ, for a classification as State aid first, that there must be intervention by the State or through State resources; second, that the intervention must be liable to affect trade between Member States; third, that it must confer a selective advantage on the beneficiary; and fourth, that it must distort, or threaten to distort, competition. Although the question from the referring court relates solely on the fourth condition, AG Kokott's found that - in essence - the referring court wished to know whether granting the appellant the property tax exemption would be granting a selective advantage as understood within the concept of State aid.

The AG continues with determining whether there is selectivity using the three stages test. In these three stages test, the first step is to determine the reference system. The AG is of the opinion that the property tax exemption should be part of the reference system. In case tax exemptions are to be considered part of the reference system, it remains to be assessed whether the tax exemption is manifestly inconsistent. In the AG's view, the Court must therefore only examine whether the tax exemption is manifestly inconsistent and, only if such inconsistency exists, a derogation from the general reference system should be considered to have occurred. In the absence of that, a statutory tax exemption is part of the (national) reference system and, therefore, cannot constitute a selective advantage.

The AG opines that the tax exemption is not manifestly inconsistent, and that the exemption appears to be understandable. The AG notes, for example, that it is in the public interest of making rail transport more efficient and that the property tax exemption concerns an objective tax exemption which could be applied by any taxpayer in

possession of such an infrastructure. The AG concludes that the property tax exemption was not configured according to manifestly discriminatory parameters but rather fits understandably and consistently into Polish property tax law. The provision is therefore part of the reference system and not a derogation. It does not constitute a selective advantage.

Furthermore, even if there was to be a derogation from the reference system and a selective advantage was determined, the AG is of the opinion that such an advantage should be justified because the tax exemption serves the public interest and is consistent within the reference system. Finally, even if the property tax exemption would avail a selective advantage and this was not justified, the AG concludes that there is no existence f a distortion of competition but may even serve to enhance the competition.

Developments

European Commission closes State aid investigations into Fiat, Amazon and Starbucks tax rulings

On 28 November 2024, the European Commission closed three in-depth State aid investigations into transfer pricing tax rulings granted by Luxembourg to Fiat and Amazon, and by the Netherlands to Starbucks. Following judgments by the EU Courts, the Commission found that the tax rulings did not grant the companies selective advantages.

In 2015 and 2017, the Commission found that Luxembourg granted selective tax advantages to Fiat and Amazon, and the Netherlands to Starbucks, in breach of EU State aid rules. In each case, the Commission found that a tax ruling issued by the respective national tax authority artificially lowered the tax paid by each company and therefore granted them a selective advantage over other companies. The Commission's original decisions in all three cases were ultimately annulled by the EU Courts and therefore the respective in-depth investigations remained open.

Considering the guidance of the EU Courts, the Commission has now adopted three final decisions closing its in-depth investigations and confirming that, when granting their respective tax rulings, Luxembourg and the Netherlands did not give these Fiat, Amazon and Starbucks selective tax advantages contrary to EU State aid rules.

The non-confidential versions of the Commission's decisions will be made available under the case numbers SA.38375 (Fiat), SA.38374 (Starbucks) and SA.38944 (Amazon) in the State aid register on the Commission›s competition website.

4. VAT

CJ judgment regarding Dutch directors' liability for VAT debts (*Herdijk*, Case C-613/23)

On 4 November 2024, the CJ issued its judgment in the case Herdijk (C-613/23).

KL was the director and sole shareholder of a company. KL resigned as director from that company in March 2019 after selling the company, with the buyer assuming all future liabilities. The company went bankrupt a year later, leaving additional payroll and VAT debts unpaid for the years when KL was director. The question was whether KL could be held liable for these unpaid taxes.

Under Dutch law, directors can be held jointly and severally liable for unpaid taxes, including VAT, unless they notify the tax authorities on time of the company's inability to pay. If notification is made on time, liability arises only if non-payment is proven to result from manifestly improper management. If the notification is late, non-payment is presumed to stem from improper management. However, the director can rebut this presumption by proving the failure to notify was not his/her fault, such as in cases of force majeure or reliance on competent advice.

The Court of Appeal of The Hague found that KL, as a former director of the company, had proven the non-payment of taxes for February 2019 was not due to his mismanagement. However, for the period from November 2018 to January 2019, no valid notification was made, and KL could not rebut the presumption of mismanagement. Consequently, his liability for those months was upheld.

KL appealed the decision of the Court of Appeal and the Dutch Supreme Court referred preliminary questions to the CJ. The CJ ruled that the Dutch directors' liability regime for VAT debts does not conflict with EU law, in so far as the legislation in question does not limit the possibility of demonstrating that circumstance solely to cases of force majeure, but allows the director to raise any circumstance capable of showing that he or she is not responsible for the failure to comply with that notification obligation.

The CJ also clarified that it is not inconsistent with EU law for a director to be held liable for one period while being exonerated for a subsequent period. This ensures that liability is assessed fairly and proportionally based on the specific circumstances of each period.

CJ judgment regarding classification of building land (*Lomoco Development and Others*, Case C-594/23)

On 7 November 2024, the CJ issued its judgment in the case Lomoco Development and Others (C-594/23).

I/S Nordre Strandvej Sæby (NSS) purchased a property in 2006, which was used as a camping site. Over the years, various works were carried out on the immovable property, including the construction of foundations for residential buildings. On 1 January 2015, NSS transferred ownership of plots of land with prefabricated foundations. According to the Danish Tax Administration, NSS owed VAT in respect of this transfer because it was considered a supply of a building land.

The CJ ruled that the supply of land on which, at the time of that supply, only foundations for residential buildings have been laid constitutes a supply of a 'building land'. The CJ pointed to its case-law indicating that foundations for residential buildings cannot be classified as a 'building' or 'part of a building'. The CJ further noted that the criterion of 'first occupation' is important, as purely residential building foundations cannot qualify for 'occupation'. Consequently, the CJ ruled the transfer is considered a supply of building land.

CJ judgment regarding goods provided for free (*Voestalpine Giesserei Linz GmbH*, Case C-475/23)

On 4 October 2024, the CJ issued its judgment in the case Voestalpine Giesserei Linz GmbH (C475/23).

This case concerns the Austrian company Voestalpine Giesserei Linz GmbH (VGL) that used a toll manufacturer in Romania to produce cast parts. VGL provided a crane to the toll manufacturer for processing the cast parts. VGL sold the cast parts after production in Romania and was therefore registered for Romanian VAT purposes.

The Romanian tax authorities denied VGL the right to reclaim the VAT on its purchase of the crane. The Romanian tax authorities reasoned that VGL had not used the crane for its own VAT taxable economic activities, but instead provided the crane for free to the toll manufacturer. The VAT reclaim was also denied because the Romanian tax authorities argued that VGL failed to keep separate records for its permanent establishment in Romania.

The CJ ruled that VGL can reclaim the VAT on the crane purchase if (1) VGL could not carry out its own economic activities without the crane, (2) the cost of the crane is part of the remuneration for the products sold by VGL and (3) provided the provision of the crane to the toll manufacturer does not go beyond what is necessary for VGL to carry out its economic activities. This must be validated by the referring court.

CJ judgment on VAT aspects of intra-group charges (*Weatherford Atlas Gip SA*, Case C527/23)

On 12 December 2024, the CJ issued its judgment in the case Weatherford Atlas Gip SA (C527/23).

Weatherford Atlas Gip SA (Weatherford) is based in Romania and is active in the oil and gas industry. It purchased IT, marketing, finance and accounting services from foreign group companies. It declared reverse charge VAT on these services. The Romanian tax authorities denied Weatherford the right to reclaim the VAT on these costs by arguing that the services were not used for the own business activities of Weatherford.

The CJ ruled that the Romanian tax authorities cannot refuse a taxable person the right to reclaim the VAT on its expenses based on the reasoning that the services were simultaneously supplied to other group companies and their purchase by Weatherford was not necessary or appropriate, provided the services are used for the taxable person's own taxable transactions. Whether the services were used for Weatherford own economic activities has to be validated by the referring court.

For further information on this case, please see our web post.

5. Customs Duties, Excises and other Indirect Taxes

Case Law

CJ judgment on the determination of the non-preferential origin and the concept of processing or working operations which are not economically justified (*Harley-Davidson*, Case C-297/23 P)

On 21 November 2024, the CJ delivered its judgment in the case of *Harley-Davidson Europe* (**Harley-Davidson**), which concerns the question whether the relocation of a portion of the production of motorcycles from the US to Thailand following the introduction of additional customs duties could be regarded as economically justified.

In June 2018, the United States government introduced commercial policy measures on imports of steel and aluminium products from the EU. In response, the European Commission introduced additional customs duties on certain products originating in the United States, such as motorcycles with a reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm3. Subsequently, Harley-Davidson informed its shareholders via a Form 8-K that it planned to shift production of motorcycles for the EU market from the US to a production site in Thailand in order to avoid the additional tariff burden.

In order to ascertain that the motorcycles produced in Thailand would obtain non-preferential origin in Thailand, Harley-Davidson and its logistics service provider in Belgium (**the appellants**) applied for BOI decisions to the Belgian customs authorities. These authorities adopted BOI decisions acknowledging that Harley-Davidson's motorcycles obtained non-preferential origin in Thailand. However, following a decision by the European Commission, the Belgian customs authorities informed the appellants that they were revoking the adopted BOI decisions. According to the European Commission, the decision to relocate the production of certain motorcycles destined for the EU market was intended to avoid EU commercial policy measures and, as such, the production shift to Thailand could not be considered economically justified. This means that the determination of the non-preferential origin of the motorcycles must be based on the third paragraph of Article 33 of Delegated Regulation 2015/2446, which means that the non-preferential origin of the motorcycles is determined on the basis of where the major portion of the parts of the motorcycles originated, based on the value of the parts.

The appellants instigated an action for annulment against the decision by the European Commission before the General Court of the EU, which dismissed their action, subsequently, they brought an appeal before the CJ.

The CJ upheld the interpretation of the General Court that where the main purpose of a relocation of production is to avoid the application of EU commercial policy measures, the relocation cannot be considered economically justified. This is the case even if additional economic considerations other than the intention to avoid EU commercial policy measures may have led to the decision to relocate.

In addition, the determination that the primary purpose of the relocation is to avoid the application of a commercial policy measure should be made on the basis of objective evidence. Since the content of the Form 8-K issued by Harley-Davidson clearly stated that

the relocation of the production of Harley-Davidson motorcycles was primarily motivated by the introduction of additional customs duties on such motorcycles, and the Form 8-K was issued only three days after the entry into force of the additional customs duties, the CJ held that the General Court was entitled to establish that the relocation of the production of the motorcycles for the EU market to Thailand was primarily motivated to avoid the application of the commercial policy measures on the basis of these facts.

In conclusion, the CJ dismisses the arguments of the appellants and dismisses the appeal.

Developments

EU Deforestation Regulation delayed 12-months

The EU Deforestation Regulation ("EUDR") aims to minimise the EU's contribution to global deforestation and forest degradation, thereby reducing global biodiversity loss and greenhouse gas emissions. The EUDR requires economic operators, in their capacity as operators or traders, to ensure that the relevant products they place on the EU market, make available on the EU market or export from the EU market are deforestation-free, have been produced in accordance with the relevant legislation of the country of production and are covered by a due diligence statement. Operators and traders must exercise due diligence to ensure that these requirements are met.

A limited list of products (**relevant products**) are subject to the EUDR if they contain, have been fed with or have been made using any of the relevant commodities, namely cattle, cocoa, coffee, oil palm, rubber, soya and wood. Following an initiative by the European Commission, the due diligence requirements of the EUDR are expected to be postponed by 12 months, meaning that the due diligence requirements of the EUDR will apply from 30 December 2025 for large and medium-sized operators and traders and from 30 June 2026 for small and micro-sized operators and traders. With this extension, operators and traders will have an additional 12 months to prepare for compliance with the EUDR.

Countervailing duties on BEVs originating in China

As of 30 October 2024, definitive countervailing duties are imposed on imports of battery electric vehicles ("BEVs") from China. The countervailing duties apply to all imports of new BEVs designed for the transport of nine persons or less, including the driver, excluding vehicle categories L6 and L7 and motorcycles, propelled solely by one or more electric motors, including those with an internal combustion range extender, falling within CN code ex 8703 80 10 and originating in the People's Republic of China. The rate of the countervailing duty varies. The individual duties for BEV producers range from 7.8% (Tesla) to 35.3% (SAIC). BEV producers that cooperated with the European Commission's investigation but were not individually investigated are subject to a duty of 20.7%. Other BEV producers in China that did not cooperate with the Commission's investigation are subject to a duty of 35.3%.

Status of authorised CBAM declarant

From 1 January 2026, products covered by the Carbon Border Adjustment Mechanism ("CBAM") can only be imported into the EU customs territory by authorised CBAM declarants, including importers. The status of authorised CBAM declarant can be applied to from early 2025 onwards. As the processing of the application may take up to a maximum of 180 days, CBAM declarants are advised to act in time. To obtain the status of authorised CBAM declarant, among others, applicants have to demonstrate the financial and operational capacity to fulfil their obligations under the CBAM Regulation. This may include:

- An administrative organisation suitable for fulfilment of the estimated obligations to surrender CBAM certificates; and
- Internal controls capable of preventing, detecting and correcting errors in CBAM declarations.

EU Forced labour Regulation

On 12 December 2024, the Regulation on the prohibition of products made with forced labour on the EU market ("EUFLR") was published in the Official Journal of the EU. It will enter into effect on 14 December 2027. Under the EUFLR, products made with forced labour at any stage of the production process cannot be placed on the EU market, made available on the EU market or exported from the EU market. If products are found to have been produced using forced labour, the competent authorities can take decisions such as prohibiting the placing or making available of the products concerned on the EU market or requiring the economic operator to withdraw the products concerned from the EU market. The EUFLR is not sector specific and applies to all products and parts thereof.

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