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EU Tax Law

Highlights of 2024

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In the course of 2024, there have been several important developments in the field of EU tax law. This annual edition of the EU Tax Alert provides an overview of those developments.

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EU Tax Alert

In this publication, we look back at the most important tax law developments within the European Union during 2024. We discuss, amongst other things, relevant legislation adopted at the EU level, case law of the Court of Justice of the European Union (CJ) and Opinions of its Advocate Generals (AG). 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).

If you are interested in other tax law developments within the European Union during 2024, please see the editions 204-208 of the EU Tax Alert available in our website.

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1. Direct Taxation

Case Law

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 on whether Dutch interest deduction limitation rule is in line with EU law (*X BV v Staatssecretaris van Financiën*, Case C-585/22)

On 4 October 2024, the CJ delivered its judgment in the case *X BV v Staatssecretaris van Financiën* (Case C-585/22) where it found that the Dutch interest deduction limitation rule of Article 10a Corporate Income Tax Act 1969 (CITA) is not in breach of EU law, as it pursues the legitimate objective of combatting tax fraud and tax evasion.

In its judgment, the Court found that: (i) Article 10a CITA creates a restriction to the freedom of establishment which can be justified because the legislation pursues the goal of combatting tax avoidance and its application is limited to wholly artificial arrangements; (ii) EU law does not preclude Article 10a CITA refusing the deduction of the whole interest of a loan that is devoid of economic justification and would have never been contracted, absent the intragroup relationship between the parties to the loan and the tax advantage sought; and (iii) Article 10a CITA is not similar to the Swedish interest deduction limitation rule in the *Lexel* case (C-484/19), as the purpose of the legislation is not the same and the practical application of the former rule was not limited to artificial arrangements.

For more information on the CJ judgment please see our recent web post on this topic.

CJ judgment regarding legal professional privilege in the context of an EoIR under the DAC (*Ordre des avocats du Barreau de Luxembourg*, Case C-432/23)

On 26 September 2024, the CJ delivered its judgment in the case *Ordre des avocats du Barreau de Luxembourg* (C432/23). The case concerns the issue of whether and, if so, under what conditions, a tax administration may seek disclosure of information from a lawyer in relation to its client in the context of an exchange of information on request (EoIR) under Council Directive 2011/16/EU (DAC). In particular, the case deals with the question of whether such request for information is compatible with the legal professional privilege (LPP) protected by Article 7 of the Charter of Fundamental Rights of the European Union (Charter). The judgment follows the Opinion of AG Kokott issued on 30 May 2024 and included in our EU Tax Law Alert 206.

This case involves an injunction order to provide information issued by the tax administration of Luxembourg to a law firm named F in relation to one of its clients, a Spanish legal entity called K. This order was issued because of a previous request for information submitted by the Spanish tax administration to its Luxembourg equivalent under the DAC. The data and documents requested under the injunction order concerned the services provided by F to K in connection with the acquisition of two shareholdings. F refused to comply with the order and provide the requested information/documents on the basis that it had acted as lawyer/legal counsel for the group to which K belongs and that, therefore, such information was covered by its LPP. Furthermore, F asserted that the services were not related to taxation but exclusively concerned corporate law. Under Luxembourg law, LPP does not apply to tax advisory or representation matters unless the disclosure of information would expose lawyers' clients to the risk of criminal prosecution. Disagreeing with F's views, the Luxembourg tax administration imposed a fine for failing to comply with the information order. After two appeals, the case reached the Luxembourg High Administrative Court, which decided to stay the proceedings and refer several questions to the CJ.

The questions addressed by the CJ essentially concerned whether: (i) communications concerning corporate law advice between a lawyer and his client are covered by article 7 of the Charter, and whether or not the injunction order of the Luxemburg tax authority constitutes an interference with the LPP guaranteed by such article; (ii) the DAC would be invalid in so far as it does not include provisions relating to the protection of the confidentiality of communications between lawyers and their clients in the context of information to be collected by Member States as a consequence of an EoIR; and (iii) EU law precludes an injunction order based on national legislation under which advice and representation by a lawyer in tax matters do not benefit (except where there is a risk of criminal prosecution for the client) from the enhanced LPP protection guaranteed by Article 7 of the Charter.

Regarding the first question above, the CJ found that, legal advice from a lawyer enjoys, whatever the field of law to which it relates (e.g. corporate law), the enhanced protection guaranteed by Article 7 of the Charter. On such basis, the Court considered that an injunction decision ordering a lawyer to nonetheless provide information based on the DAC is an interference of the LLP guaranteed by such article.

In relation to the second question, the Court found that the fact that the system for EoIR provided by the DAC does not include provisions relating to the protection of the confidentiality of communications between a lawyer and his or her client, in the context of the collection of information for which the requested Member State is responsible, does not imply that that Directive infringes Article 7 and Article 52(1) of the Charter. The Court noted that it is for each Member State to ensure, in the context of the national procedures implemented for the purposes of that collection, the enhanced protection of these communications guaranteed by the Charter. Thus, the CJ found no factor that could affect the validity of the DAC.

When it comes to the third question, the Court held that the Luxembourgish legislation (as well as its application in the present case by means of the injunction order) is not limited to exceptional situations but, on the contrary, removes almost entirely from the enhanced protection afforded to LPP the content of lawyers' consultations provided in tax matters. On such basis, the Court found that this entails an infringement of the essence of the right to respect for communications between lawyer and client, and therefore, is an interference which cannot be justified.

CJ judgment on the compatibility of DAC6 reporting regime for cross-border arrangements with the EU law (*Belgian Association of Tax Lawyers and Others v Premier ministre/Eerste Minister*, Case C-623/22)

On 29 July 2024, the CJ delivered its judgment in the case *Belgian Association of Tax Lawyers and Others v Premier ministre/Eerste Minister* (Case C-623/22). The case concerns the compatibility of the mandatory reporting regime for cross-border arrangements introduced under DAC6, with various EU law principles, including equality, non-discrimination, legality in criminal matters, legal certainty, and the right to respect for private life. In its judgment, the CJ upheld the validity of DAC6 in line with AG Emiliou's Opinion. The conclusion of the AG in this case was included in the EU Tax Law Alert 204.

The applicants, comprising several legal and tax professional bodies, challenged Belgium's national law implementing DAC6. They argued that the law infringed multiple provisions of the Charter and general principles of EU law. The Belgian Constitutional Court referred five questions to the CJ for a preliminary ruling.

The first question referred to the CJ concerned whether DAC6 violates the principles of equality and non-discrimination under Articles 20 and 21 of the Charter, in so far as it does not limit the reporting obligation to corporation tax, but makes it applicable to all taxes falling within its scope. Acknowledging that it is not apparent how the application without distinction of the reporting obligation at issue with regard to the various tax types concerned could reveal the existence of a difference in treatment, the CJ found no evidence that DAC6 violates the aforementioned principles. It emphasized that the Directive applies broadly to all taxes within its scope, noting that aggressive tax planning cannot only occur in the field of corporate tax but also in other direct taxation areas such as, for example, income tax applicable to natural persons. The CJ, therefore, concluded that DAC6 is not manifestly inappropriate and that its broad application beyond the field of corporate taxation is justified to meet its objectives of combating tax avoidance.

The second and third questions addressed by the Court refer to whether certain DAC6 concepts (i.e., 'arrangement', 'cross-border', 'marketable' and 'bespoke' arrangement, 'intermediary', 'participant' and 'associated enterprise', the different hallmarks, the 'main benefit test' and the 30-day rule) are sufficiently clear and precise to comply with the principle of legal certainty, legality in criminal matters and the right to respect for private life. The principles of legal certainty and legality (which is a specific expression of the former general principle) require laws to be clear and foreseeable, especially where penalties are involved. The applicants argued that the aforementioned DAC6's concepts were too vague, making it difficult for intermediaries and taxpayers to understand their legal obligations.

When addressing these questions, the Court first noted that: (i) the fact that legislation refers to broad concepts which must be clarified gradually does not, in principle, preclude that legislation from being regarded as laying down clear and precise rules; (ii) what matters is whether any ambiguity or vagueness in those concepts may be dispelled by using the ordinary methods of interpretation of the law' (including the possibility of relying on relevant international agreements and practices whenever they correspond to the vague EU concepts); and (iii) the degree of foreseeability required depends to a considerable extent on the content of the text in question, the field it covers and the number and status of those to whom it is addressed (e.g., persons carrying out a professional activity or not). In the light of the foregoing considerations, the CJ examined each of DAC6's concepts mentioned above and found that these are sufficiently clear and precise. On such basis, the Court consider that DAC6 complies with the requirements imposed by the principles of legal certainty and legality in criminal matters.

As regards compliance with Article 7 of the Charter, the Court noted that such article does not impose any obligation that is stricter than Article 49 of the Charter (Principle of legality in criminal matters) in terms of the requirement for clarity or precision of the concepts used and the time limits laid down. Thus, the Court held that the interference with the private life of the intermediary and relevant taxpayer entailed by the DAC6 reporting obligation is itself defined in a sufficiently precise manner in view of the information that that reporting must contain. Consequently, the CJ found no infringement of the Charter with such article.

The fourth question addressed by the CJ concerned whether the exemption from DAC6's reporting obligation, based on legal professional privilege (LPP) applies only to lawyers or whether it also extends to other professionals who are also subjected to LPP under the applicable national law (e.g., tax advisers, notaries, auditors, accountants, bankers or university professors). The applicants argued that limiting the exemption to lawyers unfairly discriminated against other tax professionals who also have confidentiality obligations. The CJ, however, ruled that the exemption applies only to lawyers. It reasoned that lawyers occupy a unique position in the administration of justice, with a special role in defending clients and ensuring the proper functioning of the legal system. This role justifies their exclusion from DAC6's reporting obligation. The CJ added that applying the exemption to other professionals, could undermine the effectiveness of DAC6's reporting regime by allowing too many actors to evade their obligations under the guise of professional confidentiality.

The fifth and final question the CJ addressed was whether DAC6 infringes the right to respect for private life protected by Article 7 of the Charter in so far as the reporting regime covers cross-border arrangements that are lawful, genuine, non-abusive and the main advantage of which is not fiscal in nature. In this regard, the CJ first found that DAC6's reporting obligation does create an interference with the right to privacy of taxpayers and intermediaries, as the reporting of lawful arrangements is liable to deter both those taxpayers and their advisers from designing and implementing them. However, the Court found this interference to be justified and proportionate. The CJ based its reasoning on three key points. First, the Court considered that the identified interference is provided by law and, thus, it meets the requirement that limitations on fundamental rights must be established by clear and foreseeable rules. Second, the Court considered that the interference created by the DAC6 reporting obligation does not impinge on the essence of the right to privacy, as it relates solely to the communication of data revealing the design and implementation of a potentially aggressive tax arrangement without even directly affecting the possibility of such design or such implementation. Third, the CJ found that the interference created by the DAC6 reporting obligation is proportionate, as it is a suitable, strictly necessary measure to achieve the Directive's objectives (i.e., combating aggressive tax planning, preventing the risks of tax avoidance and evasion). The Court also found that, while the interference created by DAC6 application to lawful cross-border arrangements is certainly not negligible, it does not outweigh the public interest objectives pursued by the Directive which are important and legitimate objectives.

In conclusion, the CJ ruled that the examination of the five questions referred did not reveal any factors affecting the validity of DAC6.

CJ judgment on whether a withholding tax exemption applicable only to resident public pension institutions is compatible with the free movement of capital (*Keva, Landskapet Ålands pensionsfond, Kyrkans Centralfond v Skatteverket*, Case C-39/23)

On 29 July 2024, the CJ delivered its judgment in case Keva, Landskapet Ålands pensionsfond, Kyrkans Centralfond v Skatteverket (C-39/23). The case concerned the issue of whether Swedish legislation under which dividends distributed by resident companies to non-resident pension institutions governed by public law are subjected to a withholding tax (whereas dividends distributed to resident pension funds are exempted) is compatible with the free movement of capital. The Opinion of AG Collins in this case was included in our EU Tax Law Alert 205.

This case involves *Keva, Landskapet Ålands pensionsfond and Kyrkans Centralfond* (the Finnish pension funds), which received dividend payments from Swedish companies. Sweden has so-called general pension funds (GP), which manage capital to protect the income-based pension system. Such funds aim to balance any surpluses and deficits between pension contributions and pension payments in a given year, and to contribute to the long-term performance of the Swedish pension system. These GP funds are part of the Swedish government and, therefore, are exempt from taxation in Sweden. However, Sweden levies a withholding tax of 15% on dividends received by analogous foreign pension funds in Finland. Since these foreign pension funds are exempted from tax in Finland, they cannot offset the tax withheld against any tax liability in Sweden. As a consequence of this situation, the Finnish pension funds requested a refund of the tax withheld in Sweden. They claimed that, due to being analogous to Swedish GP funds, they should also be entitled to an exemption from taxation in Sweden.

In its judgment, the CJ first reiterated that, according to established case law, measures that may deter non-residents from investing in a Member State or discourage residents from investing abroad restrict the free movement of capital. It also reaffirmed that this freedom applies equally to both private and public undertakings, meaning public entities are also covered under its scope.

The CJ then observed that the difference in tax treatment between Swedish public pension institutions and their foreign counterparts results in unfavourable treatment for non-resident pension institutions, potentially discouraging them from investing in Swedish companies. Following this reasoning and in line with the AG's Opinion, the CJ concluded that the contested Swedish legislation constitutes a restriction on the free movement of capital.

However, the CJ noted that such differential treatment might be permissible if the situations are not objectively comparable or if the restriction is justified by an overriding reason of public interest.

In examining comparability, the CJ reiterated that, based on established case law, cross-border and domestic situations should be assessed in terms of: (i) the objectives and purpose of the national legislation in question; and (ii) the relevant distinguishing criteria established by that legislation. As regards, in the first place, the objectives and purpose of the Swedish scheme on the taxation of dividends, the CJ ruled that Sweden's exemption for domestic public pension funds is intended to avoid a circular flow of public resources within the Swedish State. However, the CJ found that the fact that such funds are part of the Swedish State does not necessarily place them in a different position from foreign public pension institutions. The CJ reasoned that this goal could still be achieved by extending the tax exemption to non-resident pension institutions. Moreover, the Court rejected the argument alleging that non-resident funds are not covered by the exemption because they are not intended to promote the financial stability and viability of the Swedish social security system. In this regard, the CJ found that although, by definition, the objective of each fund is to protect the stability and viability of a separate national pension system, that cannot render impossible the cross-border comparison of pension funds.

In the second place, as regards the relevant distinguishing criteria established by the Swedish legislation, the CJ held that both Swedish and Finnish pension funds share the same social objectives, tasks and type of legal organization.

While acknowledging certain differences between resident and non-resident funds (i.e., collection of pension contribution, payment of pensions and legal form of the fund concerned), the Court concluded that these distinctions do not seem directly linked to the tax treatment of dividends received from Swedish companies. Therefore, it ruled that, under the Swedish legislation, the only true distinction between Swedish and foreign public pension funds is their place of residence, which is why foreign funds are denied the exemption. Therefore, the CJ held that the different tax treatment applies to objectively comparable situations.

Lastly, the CJ assessed whether the Swedish government's justifications (i.e., protecting Swedish social policy and ensuring a balanced allocation of taxing powers) could justify the identified restriction. While the CJ recognized the need to safeguard the objective pursued by the Swedish social policy (i.e., avoiding a costly circular flow of resources and ensuring the autonomy of Sweden's pension system), it found that administrative inconvenience alone is insufficient to justify the restriction.

Regarding the need to preserve a balanced allocation of taxing rights between Member States, the Court noted that this justification may be accepted where a scheme seeks to prevent risks posed to a Member State's taxing powers in relation to activities carried out within its territory. However, it found that where a Member State has chosen not to tax resident funds on their domestic income, it cannot rely on such justification to tax non-resident funds which receive such income. On such basis, the Court also rejected the justification based on the preservation of a balanced allocation of taxing rights.

Based on the above, the CJ ruled that the Swedish legislation constitutes a restriction on the free movement of capital which cannot be justified by an overriding reason of public interest.

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.

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 discussed below, 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.

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.

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.

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.

EU Commission initiates infringement procedure against the Netherlands on taxation of foreign investment funds

On July 2024, the EU Commission initiated an infringement procedure against the Netherlands for failing to extend a dividend tax reduction scheme to foreign investment funds, which are comparable to Dutch investment funds. The Commission considers that the relevant remittance reduction scheme (*afdrachtsvermindering*) restricts the free movement of capital by a discriminatory treatment of investment funds of other EU/EEA States.

The EU Commission initiated this infringement procedure against the Netherlands by issuing a formal notice. This is the first step in the procedure. The Netherlands had a two-month window to address the concerns raised in the Commission's letter. If these issues are not resolved, the Commission may advance to the second stage, which involves issuing a reasoned opinion. Please refer to our website post for a more detailed analysis of the infringement procedure.

EU Council adopts EU Anti-Money Laundering Package

On 30 May 2024, the Council of the European Union adopted a package of new anti-money laundering and countering the financing of terrorism (AML/CFT) rules. The package consists of: (i) An EU 'single rulebook' regulation, which will officially enter into force on 10 July 2027, and includes all rules applicable to the private sector to protect the EU internal market from money laundering and the financing of terrorism; (ii) A Regulation establishing a new EU anti-money laundering authority (AMLA), which will officially apply from 1 July 2025; and (iii) a new Directive on anti-money-laundering mechanisms at national level (6th AML Directive), which must be transposed into national legislation by 10 July 2027. The package was published in the Official Journal of the European Union on 19 June 2024.

For more information about the EU-AML package or other financial regulatory topics, please see our website post on this topic or contact our Financial Regulatory Team.

EU Commission's public consultation on the ATAD

On 31 July 2024, the European Commission made a call for evidence to review the implementation of the Anti-Tax Avoidance Directive (2016/1164) (ATAD), as updated by the 2017 Amending Directive (ATAD 2). This public consultation was launched to comply with Article 10 of such Directive, which provides that the Commission must first evaluate the implementation of the ATAD and then report to the Council. As part of this consultation, stakeholders had the opportunity to submit their feedback to the Commission by 11 September 2024.

This evaluation will result in a report that examines the achievement of ATAD's objectives and considers potential future amendments. Specifically, the Commission asked for input on the implementation of ATAD across Member States, the effectiveness of ATAD's measures in addressing aggressive tax planning, and the ongoing relevance of ATAD in light of the Minimum Taxation Directive (2022/2523).

In total, 49 stakeholders provided their input on the ATAD. Loyens & Loeff submitted its own feedback which can be consulted here.

EU Commission launches an open public consultation on the evaluation of the DAC

On 7 May 2022, the European Commission's Directorate-General for Taxation and Customs Union (DG TAXUD) launched an open public consultation in relation to the forthcoming evaluation of the Directive on Administrative Cooperation in the Field of Direct Taxation (DAC). The evaluation will focus on the functioning of the DAC in the period 2018-2022, covering only DAC1 to DAC6 (DAC7 and DAC8 are therefore excluded as they were not yet implemented in such period).

The evaluation will assess the extent to which the DAC (as amended) is: (i) effective in fulfilling expectations and meeting its objectives; (ii) efficient in terms of cost-effectiveness and proportionality of actual costs to benefits; (iii) relevant to current and emerging needs; (iv) coherent both internally (coherence between different DAC amendments) and externally (coherence between DAC and EU and international legal framework); and (v) has EU added value i.e. produces results beyond what would have been achieved by Member States acting alone. In line with the ongoing Commission's efforts to rationalize and simplify reporting requirements for companies and administrations, a special focus will be given to this aspect to inform potential proposals to reduce the reporting burden for the stakeholders involved.

It should be noted that an evaluation of the DAC was included in Annex II to the Commission's Work Programme for 2024 and is required by Article 27(1) of the same Directive. A first evaluation of the DAC was based on a study conducted in 2018 and published in 2019 and the forthcoming evaluation will be the second one. The feedback period to provide input on this evaluation ran from 7 May to 30 July 2024.

EU position regarding the UN Framework Convention for International Tax Cooperation

With the aim of dislodging the OECD and developed countries from their global tax leadership role, the United Nations ("UN") is currently working on the creation of a new Framework Convention on International Tax Cooperation ("FC"), which is meant to strengthen international tax cooperation and make it more inclusive and effective.

On 16 August 2024, an ad hoc member-state-led intergovernmental committee voted in favour of the final draft of the Terms of Reference ("TOR") for this new UN FC, which would basically consist of some general guidelines to negotiate said multilateral convention. In total, 110 countries, mostly of the African, Asian, and Latin American continents, voted in favour of this final draft TOR, while 8 countries (including the US and seven of its allies) voted against it and 44 countries (including EU Member States) abstained. The resolution with the final draft TOR was subjected to vote during the 26th Plenary meeting of the UN General Assembly, at the 79th session held on 27 November 2024. The Resolution was 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).

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. The explanatory statement 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.

2. State Aid

Case Law

CJ judgment in the landmark Apple State aid case (*Commission v Ireland and Others*, Case C-465/20 P)

On 10 September 2024, the CJ delivered its final judgment in the case *Commission v Ireland and Others* (Case C-465/20 P). In its judgment, the Court set aside the 2020 ruling of the General Court and confirmed the 2016 decision of the European Commission, which had concluded that two Irish subsidiaries of the Apple group had received unlawful State aid from Ireland from 1991 to 2014.

Siding with the EU Commission, the CJ found that: (i) The Commission's decision contained an appropriate functional analysis of Apple's Irish branches and did not rely on a presumption that the activities had to be performed in the Irish branches because of the lack of substance in the offshore head offices; (ii) Under its interpretation of Irish law, the functions of Apple Inc. are irrelevant to the functional analysis for purposes of splitting the two subsidiaries' profits between the Irish branches and the offshore head offices. Also, Apple and Ireland should have provided proof during the administrative procedure of the role played by Apple Inc. employees on behalf of the two Irish subsidiaries; (iii) If board minutes do not mention certain decisions or topics, the Commission is entitled to use this fact as argument to support a finding that the functions allegedly performed by the board of directors did not exist; (iv) The Commission was entitled to rely on the Authorised OECD Approach when interpreting Irish law provisions on the taxation of Irish incorporated, non-Irish-resident companies, in particular as regards the allocation of profits between the Irish branch and the foreign head office; and (v) The two tax rulings provided a selective advantage as they reduced the tax burden of the two Irish subsidiaries of the Apple group compared to Irish standalone companies (which are taxed on their profits reflecting 'prices determined on the market and negotiated arm's length').

This judgment is final and consequently, Ireland will have recover more than EUR 13 billion. This judgment may boost the Commission's investigations in other pending cases after it had suffered several losses in the *Fiat*, *Amazon* and *ENGIE* cases, all concerning Luxembourg. Taxpayers should pay attention to the CJ's approach to the functional analysis and supporting documentation.

For more information on the CJ judgment in this landmark *Apple State aid* case, please see our web post on this topic.

CJ judgment on UK's CFC Group Financing Exemption (*United Kingdom v Commission and Others*, Joined Cases C 555/22 P, C-C 556/22 P and C 564/22 P)

On 19 September 2024, the CJ delivered its judgment in the case *United Kingdom v Commission and Others* (Joined Cases C 555/22 P, C-C 556/22 P and C 564/22 P) on whether United Kingdom's Controlled Foreign Company (CFC) Group Financing Exemption (GFE) constitutes illegal State aid. The CJ set aside the judgment of the General Court that concluded the GFE constituted of illegal State aid and annulled the Commission's decision in the same line.

By decision of 2 April 2019 (2019/1352), the European Commission found that between 2013 and 2018, the UK had granted illegal State aid to certain multinational groups by means of tax advantages. Specifically, the UK's CFC rules were intended to prevent UK companies from using subsidiaries in low or no tax jurisdictions to evade UK taxes. These rules allowed UK tax authorities to reallocate profits that were artificially shifted to offshore subsidiaries back to the UK parent company for taxation. However, from 2013 to 2018, the CFC rules included an exemption for certain financing income, such as interest payments from loans, for multinational groups operating in the UK. The Commission viewed this exemption as an illegal tax advantage and ordered the UK to recover the aid from the beneficiaries. The UK and the company ITV challenged the Commission decision before the General Court of the European Union. By judgment of 8 June 2022 (T-363/19 and T-456/19), the General Court dismissed their actions. The United Kingdom, ITV and two companies of the London Stock Exchange Group appealed the latter judgment taking the case to the CJ.

On 11 April 2024, AG Laila Medina issued her Opinion in this case. In her Opinion, AG Medina proposed that the CJ to set aside the judgment of the General Court and annul the Commission decision. Please refer to our EU Tax Law Alert 205 for a summary of this Opinion.

In its judgment, the CJ first dealt with the challenge of determining the reference framework. The Commission considered that the CFC rules constituted the correct reference framework considering these rules were severable from the GCTS. The appellants, however, argued that the CFC rules form part of the general UK corporate tax system and cannot be severed from it. They consider, therefore, that the General Court erred by abstracting one set of rules (the CFC rules) from their broader legislative framework (the general corporate tax system).

In that regard, the CJ ruled that the CFC rules should not be considered severable from the GCTS. With regard to the tax base, taxable persons, taxable event, tax rate and specific provisions concerning the calculation of the CFC charge and the GCTS, the CJ concluded that the General Court was wrong to consider that there was a relevant distinction between the CFC rules and the GCTS.

Based on the above, the CJ concluded that the General Court erred in law when it confirmed that, as the Commission had found in the decision at issue, the reference framework for the purposes of examining the selectivity consisted solely of the rules applicable to CFCs. Consequently, in the Court's view, the error in law is sufficient to set aside the judgment under appeal. In accordance with Article 61 of the Statute of the CJ, the Court may itself give final judgment in the matter, where the state of proceedings so permit.

On such basis, the CJ decided to set aside the General Court's judgment and annul the Commission's decision that the UK's CFC GFE constitutes illegal State aid.

CJ dismisses Bilbao Port Authority's Appeal on Bizkaia's Tax Exemption (*Case Autoridad Portuaria de Bilbao v Commission*, C-110/23 P)

On 30 May 2024, the CJ delivered its judgment in the case *Autoridad Portuaria de Bilbao v Commission* (Case C-110/23 P) where the Bilbao Port Authority sought to set aside the judgment of the General Court of 14 December 2022 (Case C-110/23 P) in which the latter Court decided to uphold the European Commission's decisions on Bizkaia's Tax Exemption (T-126/20).

On 8 January 2019, the European Commission had found that aid granted by Spain to its port authorities, in the form of exemptions from corporate tax, constituted selective advantages incompatible with the internal market, under State aid case SA.38397 (the 'Commission's Decision'). Spanish ports are managed by port authorities, which act with a degree of financial, functional and administrative autonomy, as a public legal body with its own assets, independent of the Spanish state. On such basis, the Commission proposed several appropriate measures to ensure that Spanish port authorities (including in Bizkaia and Gipuzkoa) are subject to corporate tax in the same manner as other undertakings. In its proposal, the European Commission mentioned that abolishing the current partial or full exemptions from corporate tax would adequately address the issue. By letter of 7 October 2019, Spain unconditionally and unequivocally declared that it accepted the proposed measures. Until then, ports in Spain had been exempt from corporate tax on their main sources of revenue, such as port fees, income from rental or concession contracts. In the Basque Country (of which Bizkaia is a province), ports were fully exempt from corporate tax. The tax regimes applicable to ports in Spain existed prior to the entry into force of the EU Treaty. Therefore, these exemptions are considered 'existing aid'; in relation to which, reimbursements would not be required from beneficiaries.

On 14 December 2022, the Court, confirmed the Commission's Decision, and dismissed the action filed by the Port Authority of Bilbao, which argued that: (i) Bizkaia's tax exemption does not constitute an advantage; (ii) there was a lack of a full analysis of the data available at the time when the existence of an advantage was examined; (iii) Bizkaia's tax exemption is not a selective measure; (iv) Bizkaia's tax exemption did not improve the applicant's competitive position or affect trade between Member States; and (v) Bizkaia's tax exemption was compatible with the internal market on the basis of Article 107(3)(c) TFEU.

The General Court rejected the five pleas invoked by the applicant, dismissing the action in its entirety. In particular, the Court considered that: (i) Bizkaia's tax exemption is liable to confer an advantage on the applicant; (ii) the evidence which the applicant complains the European Commission failed to analyse was not relevant for the purposes of determining the existence of an advantage in the present case; (iii) Bizkaia's tax exemption contains neither a definition of the public service obligations incumbent on the Spanish port authorities nor an objective and transparent calculation of the compensation for the provision of such services of general interest; (iv) the European Commission was correct to consider that the Spanish port authorities were active on markets where competition existed, since Spanish ports participate in intra-Community trade; and (v) Bizkaia's tax exemption, as operating aid, did not fall within the scope of Article 107(3)(c) TFEU.
On 22 February 2023, the port authority brought an appeal before the CJ against this judgment, claiming that the CJ should: (i) set aside the General Courts judgment due to it being vitiated by an error of law; (ii) rule on the substance of the case and declare that the action of annulment must be upheld; and (iii) order the European Commission to pay the costs incurred by the Bilbao Port Authority in its proceedings. Furthermore, the Authority claimed that the tax exemption should have been assessed in conjunction with the principle of self-sufficiency.

On 30 May 2024, the CJ issued its judgment upholding the General Court's decision and dismissing the appeal filed by the port authority in its entirety. In its judgment, the Court considers that the General Court relied on several undisputed grounds to reach the conclusion that the tax exemption for Biscay is capable of conferring an advantage to the appellant. Furthermore, the Court did not agree to the appellant's allegation that the General Court had infringed its obligation to state reasons and to abide by the principles of sound administration and sincere cooperation, also confirming that the European Commission does not have to further examine specific circumstances of individual awards when such awards are made in the context of aid schemes.

Thus, by dismissing the Authority's appeal, the CJ ultimately upheld the European Commission's decision on Bizkaia's Tax Exemption being incompatible with the internal market.

General Court's judgments on Spanish Tax Lease System (Cases T-508/14, T-509/14, T-700/13 and T-401/14)

On May 2024, the General Court issued several judgments in relation to the Spanish Tax Lease System (STL system) which allowed for shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, to the detriment of shipyards in other Member States.

These judgments were issued in the following cases: (i) *Caixabank v Commission* (Joined Cases T700/13) and *Vego Supermercados v Commission* (Joined Cases T-465/14) of 8 May 2024; (ii) *Duro Felguera v Commission* (Joined Cases T401/14) and *Naturgy Energy Group v Commission* (Case T-508/14) of 15 May 2024; and (iii) *Decal España v Commission* (Case T-509/14) of 29 May 2024.

In these judgments, the Court found that that it was no longer necessary to rule on the actions seeking the annulment of Article 1 and Article 4(1) of the Commission Decision of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain, as both articles mentioned above were annulled by the CJ's judgment in *Spain v Commission, Lico Leasing and Pequeños y Medianos Astilleros Sociedad de Reconversión v Commission, Caixabank and Others v Commission* (Joined Cases C-649/20 P, C-658/20 P, C-662/20 P). Since, in the latter judgment, the CJ only partially annulled the Commission's State Aid decision (which is still partially valid and requires Spain to recover the unlawful aid) the General Court had to address the remining claims made by the applicants, which were ultimately rejected on the basis of several grounds. Thus, the General Court decided to dismiss the remainder of the actions.

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.

3. VAT

Case Law

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.

CJ judgment regarding VAT exemption for management 'special investment funds' in relation to defined benefit pension funds (Joint cases *X*, C-639/22 and others)

On 5 September 2024, the CJ issued its judgment in the joint cases *X* (C-639/22), *Fiscale Eenheid Achmea BV* (C-640/22), *Y* (C-641/22), *Stichting Pensioenfonds voor Fysiotherapeuten* (C-642/22), *Stichting BPL Pensioen* (C-643/22) and *Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf* (C-644/22). The cases concern the VAT exemption for the management of 'special investment funds' in relation to pension fund management services.

Five applicants are Dutch pension funds and one applicant is a provider of asset management services for the benefit of a pension fund. All cases concern pension funds that operate pension plans based on a 'collective defined benefit pension scheme'. These pension schemes aim to provide pension benefits to employees. The amount of the pension benefits depends on the number of years of service and the salary. There is no guarantee that the target pension benefits will be achieved. The rights and benefits provided to members are not directly linked to the fund's investment performances. The question put before the CJ was whether the management of such pension funds qualifies for the fund management exemption. An important condition for this is that the pension participants bear the investment risks.

The CJ considered that regulated UCITS funds ('undertaking for collective investment in transferable securities') in any case qualify as 'special investment funds'. A pension fund may, therefore, qualify as a 'special investment funds' if the investment risk of a pension fund participant is comparable to that of a UCITS participant. This is not the case when the amount of pension entitlements or retirement benefits pension fund's investments should significantly affect the pension entitlements and retirement benefits due under the pension agreement.

A pension fund could qualify as a 'special investment funds' if the situation of a participant in the pension fund is comparable to that of participants in other collective investment funds recognized by the Member State. In the Dutch context, these include the pension funds that operate a defined contribution pension scheme. This comparison should be made from the viewpoint of the legal and financial situation of the participant in the pension fund. It is now up to the Dutch courts to assess whether the pension entitlements and benefits are primarily dependent on the results of the investments.

CJ judgment on VAT fixed establishment concept (Case *SC Adient Ltd & Co. KG*, C533/22)

On 13 June 2024, the Court of Justice of the European Union (CJ) issued its judgment in the case *SC Adient Ltd & Co. KG* (C533/22). The case concerns toll manufacturing arrangements in a corporate group and the VAT fixed establishment concept.

The Adient group is active in the automotive industry. The principal company is located in Germany (Adient DE). Adient DE engaged a group company in Romania (Adient RO) as a toll manufacturer to provide manufacturing and assembly services for car seat covers. Adient DE was in possession of a Romanian VAT number due to its products being located in and sold from Romania. Adient DE was not registered as a VAT fixed establishment in Romania. Adient DE provided its German VAT number to Adient RO for the procured services. Adient RO did not charge any Romanian VAT to Adient DE due to the VAT reverse charge mechanism.

The Romanian tax authorities argued that Adient RO should have charged Romanian VAT to Adient DE. It reasoned that Adient DE possessed a VAT fixed establishment in Romania as a result of its 'possessing' the human and technical resources of Adient RO. The employees of Adient RO did not have any decision-making power for the supplies of goods by Adient DE in terms of quantities, prices or parties involved.

The CJ reasoned that Adient RO should, in principle, be deemed to act in its own name and in its own economic interests as an independent contract partner as opposed to being under the effective control of Adient DE. In that regard, the CJ established that the employees and technical means of Adient RO cannot be attributed to Adient DE, even if those resources are, in fact, used entirely for Adient DE under an exclusive service agreement. The CJ ruled that Adient DE, therefore, should in principle not be considered to possess a VAT fixed establishment in Romania.

According to the CJ, a VAT fixed establishment could only be present if the service provider does not remain responsible for its resources and thus, the recipient of the services would dispose of these resources as its own. The involvement of Adient RO with the supplies of finished products by Adient DE is not relevant for the VAT fixed establishment analysis if only preparatory or auxiliary services are rendered via the available resources of Adient RO.

CJ judgment on VAT taxability of transactions within VAT group (Case *Finanzamt T*, C184/23)

On 11 July 2024, the CJ issued its judgment in the case *Finanzamt T* (C184/23) which deals with the question of whether supplies of services made for consideration between legally independent persons closely linked by financial, economic, and organizational relations should be subject to VAT and whether the entitlement to deduct input VAT plays a role in this determination.

S operates a university school of medicine and in that capacity, provides VAT exempt patient care services for consideration. S also provides teaching services that are governed by public law for which it is not considered a taxable person for VAT purposes. S is the controlling company of U-GmbH, which provided cleaning services in respect of the premises used for the business activities of S.

EU Member States may treat persons in their country who are closely bound to one another by financial, economic, and organizational links as one VAT taxable person. This ‘consolidated’ VAT taxable person is known as a ‘VAT group’ or ‘VAT fiscal unity’. S and U-GmbH considered that the cleaning services were not subject to VAT due to the existence of a VAT group between S and U-GmbH. The German Tax Authority disagreed by arguing that the services provided by U-GmbH constituted a deemed supply of services given the use of the services for the non-taxable educational activities performed by S. This implied that non-recoverable VAT would have been due on this deemed supply.

The CJ ruled that supplies for consideration between members of the same VAT group are not subject to VAT. This is also the case if the members of the VAT group perform activities that do not entitle an input VAT deduction.

CJ judgment regarding default interest for VAT refunds (*Gemeente Dinkelland*, C-674/22)

On 22 February 2024, the CJ delivered its judgment in the case *Gemeente Dinkelland* (C-674/22). The case concerns the interpretation of EU law on the obligation of Member States to pay interest on the refunded VAT amount levied in breach of EU law.

Gemeente Dinkelland is a municipality that carries out both non-economic activities, as a public authority, and economic activities subject to VAT. It can (partially) deduct VAT on costs related to its economic activities. The municipality uses an input tax allocation key based on its accounting records to allocate general costs between its economic and non-economic activities.

The municipality applied a new allocation key that increased the right to deduct VAT. This new allocation key in combination with certain errors in the municipality’s administration led to a VAT refund right for the years 2012 up to and including 2016. The tax inspector granted the VAT refund to the municipality including tax interest. The municipality argued that, because it did not fully exercise its VAT refund right, it was also entitled to ‘collection interest’ (the so-called ‘Irimie interest’) by paying VAT in breach of EU law.

The CJ ruled that the municipality was not entitled to the 'collection interest', because not fully exercising the VAT refund was partly due to errors in its own accounting records and partly due to retroactive changes in the allocation key established under its own responsibility. The CJ ruled that the VAT not fully deducted by the municipality was therefore not levied in breach of EU law.

Developments

VAT in the Digital Age: political agreement reached

Late 2022 the European Commission published a legislative proposal regarding VAT in the digital age (the ViDA proposal). On 5 November 2024, the Council of the EU finally reached political agreement on an amended version of the ViDA proposal.

The ViDA proposal focuses on improving VAT efficiency, minimising VAT fraud and reducing foreign VAT registration obligations. Thereto, the new rules will introduce digital reporting requirements for cross-border transactions, require platforms to pay VAT on short-term accommodation rental and passenger transport services and will expand existing VAT simplification schemes to minimise foreign VAT registration obligations for businesses.

The measures introduced in the ViDA proposal will impact all businesses and particularly those carrying out cross-border transactions and platform companies. Businesses will have to amend their invoicing and VAT reporting processes. Businesses will further have to assess whether their foreign VAT registrations are still required after the implementation of ViDA proposal. The ViDA proposal also introduces new obligations and liabilities for platforms that facilitate supplies of goods. Businesses offering passenger transport by road and short-term accommodation rental through platforms and platforms that facilitate these services will also have to apply new VAT rules.

The European Parliament will now be consulted on the amended ViDA proposal. The ViDA proposal should subsequently be formally adopted by the Council of the EU. This procedure – which should be seen as a formality – is expected to be finalised early 2025.

For more information about ViDA and its main elements, please see our dedicated web post on this topic.

4. 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 cm^3. 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.

CJ judgment on the concept of 'import' and 'importer' and the applicability of the REACH Regulation for substances which are subject to customs supervision (Case *Triferto Belgium*, C-654/22)

On 11 April 2024, the CJ delivered its judgment in the case of *Triferto Belgium* on the scope of the concepts of 'import' and 'importer' and the applicability of Regulation No 1907/2006 (REACH Regulation) to substances subject to customs supervision under the customs warehousing procedure.

In 2019, Triferto, an undertaking established in Belgium, ordered more than one tonne of urea from an undertaking established in Singapore. The urea was delivered in Ghent by an undertaking established in Germany (Belor), which physically introduced the shipment of urea into the EU and stored it in a customs warehouse. Belor submitted a registration for the urea to ECHA in accordance with Article 6(1) of the REACH Regulation and made the customs declaration for these goods. However, the Belgian competent authority, the Federal Public Service Health (FPS for Health), considered that in fact Triferto, rather than Belor, should be regarded as the importer in accordance with the REACH Regulation and therefore, was responsible for submitting a registration to ECHA. As a result, the FPS for Health imposed a fine on Triferto for failing to submit a registration to ECHA.

Triferto disputed this and argued that the undertaking responsible for the physical introduction of the substance in question should be considered the importer of that substance, irrespective of the fact that Triferto had purchased it. It also argued that it is open to the undertakings concerned to agree that the undertaking which makes the customs declaration is the importer within the meaning of the REACH Regulation. Subsequently, two preliminary questions were referred to the CJ.

First, the CJ examined whether the requirement to submit a registration under Article 6(1) of the REACH Regulation applies to substances stored in a customs warehouse where there has been no previous customs procedure involved. According to Article 2(1)(b) of the REACH Regulation, the Regulation does not apply insofar substances are subject to customs supervision and do not undergo any treatment or processing, where they are placed under a specific customs procedure set out in that article. Since the customs warehousing procedure is not a specific customs procedure expressly referred to in Article 2(1)(b), the CJ considered that there is no exclusion from the scope of the REACH Regulation for substances placed under the customs warehousing procedure.

Second, the CJ examined whether a buyer of a substance imported into the EU is not itself required to submit the registration for that substance if another undertaking established in the EU has assumed responsibility for importing that substance into the EU. Under the REACH Regulation, an 'import' is the physical introduction into the customs territory of the EU – an 'importer' is any natural or legal person established in the EU who is responsible for the import. In light of this, the CJ considered that both Belor and Triferto could be covered by the concept of 'importer' in accordance with Article 3(11) of the REACH Regulation. Consequently, since Belor has assumed responsibility for importing the urea into the EU and has submitted the registration in accordance with Article 6(1) of the REACH Regulation whereby it was established that the obligations relating to the registration had not been circumvented, the CJ held that, in these circumstances, the buyer itself is not required to submit a registration for a substance imported into the EU.

CJ judgment regarding the re-imposition of definitive anti-dumping duties of certain iron or steel fasteners originating in China to imports consigned from Malaysia (*Eurobolt 2*, C-517/22 P)

On 11 January 2024, the CJ delivered its judgment in the case of *Eurobolt 2* on the re-imposition of definitive anti-dumping duties following the annulment of Implementing Regulation No 723/2011 inasmuch it has been adopted in breach of essential procedural requirements.

Between January 2012 and October 2013, Eurobolt and the other appellants imported fasteners from Malaysia. During this period, these fasteners were subject to anti-dumping duties pursuant to Implementing Regulation No 723/2011. As a result, the Dutch Customs Authorities issued collection notices for the anti-dumping duties owed by the appellants in respect of those imports.

In its judgment of 3 July 2019 (*Eurobolt*, C-644/17), the CJ ruled Implementing Regulation No 723/2011 invalid inasmuch that it had been adopted in breach of the essential procedural requirements under the Advisory Committee procedure laid down in Article 15(2) of Regulation (EU) 1225/2009.

Following the judgment of the CJ in *Eurobolt*, the Commission reopened the anti-circumvention investigation aiming to restore the breached essential procedural requirements. The reopening of the investigation, however, did not give rise to a change of the conclusion of the Commission, meaning that the original anti-dumping measures were to be reimposed. As a result, on 30 April 2020, Implementing Regulation (EU) 2020/611 was adopted, re-imposing the anti-dumping duties during the period of application of Implementing Regulation No 723/2011 and stipulating that the anti-dumping duties paid on the basis of Implementing Regulation No 723/2011 are not to be reimbursed and that any reimbursements that took place following the CJ judgment of 3 July 2019 (*Eurobolt*, C-644/17) are to be recovered by the national authorities.

The appellants brought an action for annulment of Implementing Regulation (EU) 2020/611 and put forward seven grounds in support of their appeal. In the proceedings before the CJ, the appellants argued, amongst others, that the re-imposition of anti-dumping duties is in breach of the principle of non-retroactivity. In addition, the appellants argued that the Regulation at issue cannot restore the infringement of essential procedural requirements under the Advisory Committee procedure. Furthermore, the appellants argued that the Commission could not prohibit the reimbursement of anti-circumvention duties paid on the basis of Implementing Regulation No 723/2011.

The CJ considered that the infringement of the essential procedural requirements did not affect the stages of the anti-circumvention investigation prior to that infringement. In this respect, the annulment of Implementing Regulation No 723/2011 by the CJ in *Eurobolt* does not necessarily affect its preparatory acts. As a result, the Commission was allowed to resume the anti-circumvention investigation at the point where that infringement occurred and, after having remedied it, adopt a new act.

In addition, the CJ considered that Implementing Regulation No 723/2011 was annulled in *Eurobolt* only on the basis of the infringement of the procedural requirements and not on the basis of any substantive content. In that judgment, the CJ neither examined the substantive content of the Implementing Regulation nor reversed the rules contained therein. Moreover, since the annulment of the Implementing Regulation was based solely on the infringement of the procedural requirements, the appellants could not expect the Commission to change its position on the substance of the matter.

Lastly, the CJ considered that the re-imposed anti-dumping duties set out by Implementing Regulation (EU) 2020/611 were identical to those set out in Implementing Regulation No 723/2011. As there was no obligation imposed on the appellants that went beyond the obligations laid down in this Implementing Regulation, it was within the competence of the Commission to prohibit the reimbursement of previously paid anti-dumping duties as well as ordering the national authorities to recover these reimbursements.

In conclusion, the CJ dismissed the arguments of the appellants and dismissed 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%.

Get in contact

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