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ECJ: Certain Elements of DAC6 Incompatible with Primary EU Law

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

In a preliminary question addressed to the Court of Justice, the Belgian Constitutional Court queried whether fundamental rights guaranteed with

Articles 7 and 47 of the Charter are infringed if the tax intermediary is a lawyer, and the reporting requirement with respect to third party intermediaries would violate legal professional privilege (LPP).

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

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

EU Proposes DAC8 Directive: Crypto-Assets Reporting

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

jurisdictions that have agreed the OECD CARF, the United States included, will follow a similar calendar.

Paolo Gentiloni, EU Commissioner for Economy said of the publication: *"The fight against tax evasion and avoidance is what prompted the latest amendment to the Directive on Administrative Cooperation, also known as DAC8. Today, we are proposing new tax transparency rules for all service providers facilitating transactions in crypto-currencies for customers who reside in the EU. The cover of anonymity, the fact that there are more than 9,000 different crypto-assets currently available, and the inherent digital nature of the trade means that many crypto-asset users that are making huge profits fall under the radar of national tax authorities. So our proposal will mean that Member States get the information they need to ensure that taxes are paid for gains made in trading or investing crypto-assets, as they would be for any other financial assets.*

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

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

VAT in the Digital Age Proposals Published

The European Commission published on 8 December measures to modernise the EU's Value-Added Tax (VAT) system by embracing digitalisation, in

particular by addressing challenges in the area of VAT raised by the development of the platform economy.

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

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

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

"*Our proposal will introduce an EU-wide standard for the real-time reporting of cross-border supplies, through transaction-based electronic invoicing. This means that each intra-EU business-to-business transaction in goods will need to be accompanied by an e-invoice, submitted to national authorities through an EU wide database. At a stroke, it will allow MSs to tackle fraud by giving them the real-time information they need to act on suspicious transactions. And by sharing this information, national authorities will be able to cooperate more efficiently.*

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

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

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

OECD Invites Input on Amount B (Pillar 1)

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

According to the OECD, the scope of Amount B defines the controlled transactions that would be subject to these rules and sets out criteria to help that determination. If the scoping criteria are met and the taxpayer is therefore within the scope of Amount B, the Amount B pricing methodology would be applied to establish the arm's length price for the in-scope transaction, subject to potential exemptions currently under consideration. On-going work with regards to the Amount B pricing methodology focuses on the benchmarking criteria, the net profit indicators and the comparability adjustments that would need to be considered in pricing transactions in scope of Amount B.

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

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

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

At issue in W AG was the ability of a German company to deduct the final losses which it had incurred in its UK permanent establishment (PE) because Germany as the State of residence had waived its power to tax the profits (and losses) of that PE under the Germany/UK tax treaty. The CJEU ruled that when the State of residence refrained from exercising its power to tax the profits (and losses) of the foreign PE under a double tax treaty, the situation of a company with a foreign PE was not objectively comparable to the situation of a company with a domestic PE. As such, there was no different treatment of comparable situations and as a corollary, no breach of the freedom of establishment.

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

The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, exemption has the same economic effects regardless of whether is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court would have made

this explicit. Finally, it remains to be seen if *Marks and Spencer* is still “good law” or if *W AG* was one of the final nails in the coffin of the “final loss” doctrine.

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

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