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EU Calls on UN to Support OECD Efforts on International Taxation

The European Union and its Member states have submitted a joint response to the *Note Verbale* related to the United Nations (UN) resolution on promoting inclusive and effective international cooperation on tax matters at UN level. Whilst welcoming the UN efforts to contribute to more effective international cooperation on tax matters, the EU and its Members states cautioned against stalling the existing work of the OECD Secretariat on Pillar 1 and 2 by duplication of efforts at UN level.

"The work of the United Nations should support the ongoing OECD/G20 negotiating process, which has reached its final stages, whilst avoiding undue duplication of international efforts and a risk of likely inconsistent outcomes at global level.", the Swedish Presidency letter to the UN sets out.

In an effort to highlight the inclusiveness of the OECD-led process, the EU letter states that joint efforts of both developed and developing countries are required at all international fora and expressed readiness to explore ways in which the Platform for Collaboration on Tax could be reinforced.

For its part, the OECD is continuing the technical work on Pillar 2. A public consultation on the responses received regarding the compliance and co-ordination aspects of the Pillar Two global minimum tax from the agreement of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy was held on 16 March 2023. Input relating to the *GloBE Information Return* consultation and to the *Tax Certainty for the GloBE Rules* was discussed during the consultation meeting. Discussions also covered how to preserve consistent and co-ordinated outcomes for MNEs while minimising compliance burdens and avoiding the risk of double taxation. The consultation meeting was recorded and can be replayed here.

EU and UK Adopt the Brexit Windsor Framework

On Friday 24 March, after months of negotiations, the British Foreign Secretary James Cleverly and Vice-President of the European Commission Maroš Šefčovič signed the Windsor Framework in London, which revises the Northern Ireland Protocol and completes the UK Withdrawal from the European Union.

The Windsor Framework reaffirms full commitment by both parties to the Good Friday (Belfast) Peace Agreement on Northern Ireland, whilst reserving the integrity of the EU and UK internal markets.

Crucially, the agreement provides clarity on the trade arrangements between the UK and the Single Market, as well as Northern Ireland, containing important elements related to VAT, customs and State aid, as well as definitive solutions for the movement of goods.

The joint statement of the European Commission and the British Government sets out that *"this new way forward is a tangible manifestation of the shared desire for a positive bilateral relationship between the United Kingdom and the European Union, based on their continued commitment to the two Agreements that govern their relationship - the Withdrawal Agreement and the Trade and Cooperation Agreement, which is the cornerstone of their bilateral relations. Recalling their mutual respect for each other's autonomy and the ambition to engage in friendly cooperation on common issues, particularly at a time of shared geopolitical challenges, both the European Commission and the Government of the United Kingdom express their intention to fully exploit in the future the potential of the Trade and Cooperation Agreement, and will seek to maximise the potential of the relationship between the EU and the UK in ways that benefit both parties and support their shared commitment to support stability and prosperity in Northern Ireland."*

CFE Opinion Statement on VAT Groups

The CFE has issued an Opinion Statement on VAT Groups.

The Court of Justice's decision in C-812/19 *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket* considered the question of how the provisions relating to VAT Groups in Article 11 of the Principal Directive interrelate with the decision of the Court of Justice in C-210/04 *Ministero dell'Economia e delle Finanze v FCE Bank plc.*

In the *FCE Bank* case, the Court considered that no VAT was chargeable on supplies of services between the head-office of the Bank in the UK and its fixed establishment in Italy. The Court considered that the Italian branch was not performing an independent economic activity because it was the Bank as a whole, rather than the branch, that was incurring the risk and any charges agreed between the branch and head office could not be considered to be negotiated between independent parties. FCE Bank was a member of the UK VAT group of Ford, the car manufacturer. However, that fact was not highlighted to the Court.

As in the earlier decision of C-17/13 *Skandia America Corp (USA), filial Sverige v Skatteverket,* the reference in Danske Bank related to a Member State, Denmark, that considered that only fixed establishments within its jurisdiction could form part of a VAT group. The Court considered that taxable supplies were made when the head office in Denmark, which was part of a VAT group, made taxable supplies in providing services to its Swedish fixed establishment. In reaching this conclusion, the Court was following the reasoning of the Court in the earlier *Skandia America case.* However, one significant difference between the *Skandia America case* and the *Danske Bank* case is that the *Danske Bank* case also raised the issue of whether the Swedish authorities were obliged or entitled to recognise the existence of a VAT Group in another Member State.

On this additional issue the Court, at paragraph 33, observed that: *"The fact remains that the existence of a VAT group in that Member State must, where appropriate, be taken into account for the purposes of taxation in other Member States, in particular when the latter assess the tax obligations of a branch established in their territory".* Here, the Court was clearly recognising that there

may be a need for tax authorities to recognise the existence of VAT groups in other Member States.

However, the use of the words “where appropriate” leaves open the possibility that there may be limitations on this obligation.

Many Member States have adopted a similar approach to Sweden and Denmark and consider that only fixed establishments that are within that state can form part of a VAT group. However, there have also been Member States that have favoured the whole entity approach, so that on joining a VAT group in those states the entire entity, including any foreign establishments, form part of the grouping for the purposes of imposing VAT in that Member State.

This approach accords with the literal reading of Article 11 which talks about “persons” and not “fixed establishments” in a Member State forming part of the grouping. It also accords with the legal and economic realities, because as the Court recognised in the *FCE case,* fixed establishments cannot generally be considered distinct taxable persons.

One issue that arises from the *Danske Bank* case is whether it remains open to a Member State to adopt the whole entity approach. There are comments in the *Danske Bank* case which could be read as rejecting a whole entity approach. However, those comments were made in the context of a Member State that adopted the national establishments only approach. There is in fact nothing in the explicit wording of Article 11 which prevents the adoption of a whole entity approach. Indeed, if anything the contrary is the position, since Article 11 refers to “persons” rather than “establishments” joining the grouping. While the Court in *Skandia America* clearly accepted that a national establishment only approach could be adopted, it certainly did not question the

legitimacy of the whole entity approach.

It could also be suggested that the fact that the Court in *Danske Bank*, at paragraph 33, considered that Member States were required to recognise VAT groups in other Member States also supports the conclusion that the Court was rejecting the whole entity approach to VAT grouping.

The *Danske Bank* decision illustrates how the process of recognition can have VAT consequences in other Member States that are required to recognise the grouping, in that case a VAT charge in Sweden on services rendered by the Danish head-office which only arose because Sweden recognised the Danish VAT group. It could also impact on the ability to recover input tax. If the whole entity approach is acceptable, these consequences potentially become more complex.

We consider that there would be considerable merit in developing the idea of EU wide VAT groupings. The effect of a national establishment only approach is effectively to discourage the provision of cross-border services within a commercial grouping within the EU, which we consider to be unfortunate and inconsistent with the idea of an EU wide single market.

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

OECD Public Consultation on Global Minimum Tax

On 16 March 2023 at 12:30-15:30 CET, a public consultation meeting was held to discuss the published comments received concerning compliance and co-ordination aspects of the Pillar Two global minimum tax from the agreement of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

Input received relating to the *GloBE Information Return* consultation and to the *Tax Certainty for the GloBE Rules* was discussed during the consultation meeting. Discussions also covered how to preserve consistent and co-ordinated outcomes for MNEs while minimising compliance burdens and avoiding the risk of double taxation. The consultation meeting was recorded and can be replayed here.

Register Now: CFE Forum - 20 April 2023 - *"Towards a More Cohesive European Fiscal Union? Minimum Tax & VAT in the Digital Age"*

Registration is open for CFE Tax Advisers Europe's 2023 Forum, which will be held on 20 April 2023 in Brussels on the topic of *"Towards a More Cohesive European Fiscal Union? Minimum Tax & VAT in the Digital Age".* These two key European Commission projects mark another milestone in the deepening of

EU fiscal integration. The Directive on Minimum Tax which implements Pillar 2 has been adopted and is now EU law.

The directive relies on a degree of inter-nation fiscal equity, with minimum common standards for paying a 'fair share' of tax. Member states, tax administrations, companies and advisers all have questions about the implementation and the mechanism of operation. CFE will seek to clarify the main issues surrounding the practical application of the new directive as well as the issues posed by the lack of US implementation for taxpayers and wider.

On the other hand, similar developments have already been occurring in the indirect tax area. VAT, which as an area of competence for the EU, has evolved alongside the European project and is now entering the digital age. To discuss the VAT in the Digital Age EU package, CFE has invited a number of speakers to consider the policy side as well as the technical implications.

Register now here.

EU Tax Observatory: ATAD GAAR Applied Infrequently Out of Litigation Fears

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In a public hearing at the French Parliament (Assemblée nationale) held on 22 March, Gabriel Zucman, director of the EU Commission-funded think-thank EU Tax Observatory, warned that EU Member states are not using the existing and available instruments of EU law to tackle tax avoidance, such as the General Anti-Avoidance Rules of the EU Directive on Tax Avoidance (ATAD). Speaking in front of the deputies of the Committee on Public Finances, Zucman said that the GAAR, which was enacted to allow Member states with options to target

abusive, yet legal, tax avoidance practices against companies is used infrequently out of fear of costly litigations.

"If there is political willingness to use and impose GAAR, the approach towards profit shifting to more tax-friendly jurisdictions would be very different," said Gabriel Zucman, EU Tax Observatory director and professor at University of California, Berkley.

EU Parliament Subcommittee on Tax Matters Discusses Pillar 1 & 2 With OECD

On 28 March Members of the European Parliament's Permanent Subcommittee on Tax Matters ("FISC") held an exchange of views with Mr Achim Pross from the OECD on Pillar 1 and 2 of the OECD/G20 Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

The FISC also discussed a case study at the meeting concerning Germany and their implemented national tax reforms in combatting aggressive tax schemes.

CJEU to Hear Apple State Aid Case in May

The Court of Justice of the European Union will hear the appeal of the European Commission against the decision of the General Court in the €14 billion Apple State Aid case on 23 May 2023. The EU Commission appealed the 2020 decision of the General Court, in which it annulled the Commission's decision that Ireland's tax authorities granted Apple a "selective advantage" by failing to employ appropriate profit allocation methods to apportion income of

the Irish Apple branches, in contravention of EU State aid law.

The Commission issued its preliminary decision in August 2016 after a three-year long investigation into Apple's tax arrangements in Ireland. The Commission found Ireland granted a selective advantage to Apple as it did not employ appropriate profit allocation methods to calculate the Irish source income of the Irish Apple branches. Apple in its appeal argued that there was no legal requirement that profit allocation be compliant with the arm's length principle and that it was furthermore not an applicable standard of assessment under European law. Apple argued that the Commission fundamentally erred in failing to recognise that profit creating activities, including development of IP, are attributable to the United States, rather than Ireland. Apple's lawyers argued that the fact that Apple's products and services were developed in the United States exposed flaws in the primary line of the Commission's arguments which defied logic, saying the two branches simply could not be responsible for generating all of Apple's profits outside the US. Lawyers for the Commission argued that Ireland had not carried out any assessment of the subsidiaries' activities, risks or assets, arguing that accepting the arbitrary method of calculating profits suggested by Apple without carrying out any assessment in itself gave rise to a presumption of advantageous treatment.

The final determination of the case will now be made by the Court of Justice of the European Union.

EU Relaxes State Aid Rules in Transatlantic Subsidy Race

The European Commission decided to amend the General Block Exemption Regulation (GBER), allowing more scope for the grant of State aid and subsidies by Member states in response to the US Inflation Reduction Act (IRA).

Alongside the Temporary Crisis and Transition Framework, this package now makes it much easier for governments to provide State support for key sectors in line with the Europe's Green Deal Industrial Plan.

In an apparent subsidy race with the US, the EU is further looking to relax its rules in order to match the ambitious subsidies industry support package in the US. This week the Commission will also present the long-awaited response to the industrial support measures in the US and China regarding supply of key raw materials and green technology. President Joe Biden's subsidy package worth $369 billion has caused a transatlantic rift, with Europe's largest carmaker Volkswagen threatening to abandon Europe plans in favour of a US investment after a promise of €10bn in US subsidies.

Ursula von der Leyen, President of the European Commission, met US President Joe Biden in the US, where much of the discussions were focused on these topics. President von der Leyen asked for equal treatment of EU raw materials with the US-subsidy eligible equivalents: *"We agreed that we will work on critical raw materials that have been sourced or processed in the European Union and to give them the access to the American market, as if they were sourced in the American market. We will work on an agreement what that is concerned."* The joint statement with Joe Biden recognises the US commitment to this end, noting that both sides intend to immediately begin negotiations on a targeted critical minerals agreement for the purpose of enabling relevant critical minerals extracted or processed in the EU to count toward requirements for clean vehicles in the IRA Section 30D clean vehicle tax credit. This kind of agreement would further shared goals of boosting mineral production and

processing and expanding access to sources of critical minerals that are sustainable, trusted, and free of labor abuse, the statement notes.

CFE Opinion Statement on VAT Compensation Payments

The CFE has issued an Opinion Statement on the VAT Treatment of Compensation Payments.

It is clear from the case law of the Court of Justice that not all compensation payments are subject to VAT. The difficulty is determining the demarcation line between cases that give rise to a liability and those that do not. The demarcation is not just potentially significant in determining whether a payment paid to a supplier is subject to VAT but also on the related question of whether a compensation payment made by a supplier should be considered to result in a reduction in the consideration for a supply.

The decisions in Case C-222/81 *BAZ Bausystem AG v Finanzamt München für Körperschaften* and Case C-277/05 *Société Thermale d'Eugénie-les-Bains v Ministère de l'Économie*, *des Finances et de l'Industrie* make it clear that not all payments paid for compensatory reasons can be considered consideration for supplies. They also make it clear that there are two issues that need to be considered. The first is whether the taxable person can be considered to have rendered a supply. The second is whether there can be considered a sufficiently direct link between the payment and the alleged supply. Because of the harmonised basis of the tax, these issues cannot be purely determined by reference to concepts of national law, although they clearly form part of the context against which the issues need to be assessed.

Penalty and prepayment charges can in some cases be taxable if they are consideration for a supply.

However, it is important to observe that in the facts of the cases considered by the CJEU concerning this issue there was clearly a supply, being the seat in the aircraft, access to the telephone networks or parking facilities. The Court also considered that the payments could be viewed as being consideration for those supplies, rather than purely compensatory. Therefore, different considerations may apply when these conditions are not satisfied. The fact sensitivity of these issues is also important to emphasise, because some tax authorities have sought to suggest that prepayments or cancellation payments, for example for a supply of goods, can be taxed even though no goods have been supplied.

In the generality of cases, the decision of C-107/13 *FIRIN OOD* also suggests that it cannot be correct to view a prepayment for the supply of goods as also resulting in a supply of services, since *FIRIN OOD* would then have had a right of recovery for that reason if its payment could be considered a payment for a supply of services. This conclusion is also consistent with the Court's reasoning in Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*, where the Court considered that on the facts of that case it would be wrong to view the deposit as consideration for a reservation service.

The *Apcoa* case makes it clear that some penalty payments may be consideration for a supply. However, we also do not consider that it would be correct to view all penalty payments as consideration. Each case will depend on its facts. However, it will clearly be significant if the payment does not impact on the quality of what is supplied to the customer and does not result in the

customer obtaining any additional rights. With both compensatory and penalty payments, both these points will support the conclusion that there is an insufficiently direct and immediate link between the payment and any supply. For these reasons, the payment of a penalty when there is nothing corresponding to a supply should not give rise to a liability.

We also do not consider that all prepayments should be considered as consideration. In particular no charge should arise when it is not realistic to analyse the customer as receiving anything.

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

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