Slaughter and May Podcast
Tax News Highlights: December 2023

Zoe Andrews	Welcome to the December 2023 edition of our tax news highlights podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge.
Tanja Velling	And I am Tanja Velling, Tax PSL Counsel. As trailed in the November edition of this podcast, we will discuss the Supreme Court's decision in *Skatteforvaltningen* (apologies for my pronunciation to any Danish listeners) and the Advocate General's opinion in the *Apple* State aid case. We will also talk about the CJEU's decision in the *Engie* State aid case – and I'm very excited that we are again joined by Nele Dhondt, PSL Counsel in our Competition Team to discuss these EU State aid developments. The podcast will further cover the Supreme Court's decision in *Fisher*, the UN resolution on a framework convention and the OECD's tax certainty day and MAP statistics.
Zoe Andrews	We had originally planned to also cover key points from the Autumn Statement - but there was too much to say about the other items. So, hopefully, our listeners will forgive us for leaving this out. We previously covered selected tax measures from the Autumn Statement on the European Tax Blog and our colleagues published a 2023 HR Autumn Statement Briefing and other materials.
Tanja Velling	And I suspect some of us might not even mind a break from discussion of the Autumn Statement… and if there's appetite, we could always pick up key points in January. Anyway, I should note that this podcast was recorded on the 12th of December 2023 and reflects the law and guidance on that date. Nele, tell us about the European Court of Justice judgment in the *Engie* case?
Nele Dhondt	Well, Tanja, last week's judgment makes for very interesting reading because it amounts to another defeat for the European Commission in the fiscal State aid area. The Court of Justice ruled against the European Commission's 2018 decision relating to two sets of tax rulings of the Luxembourg tax authorities in connection with relatively complex corporate and financial arrangements within the Engie group. According to the Commission, that tax treatment had enabled the group to avoid taxation on almost all the profit made by the subsidiaries established in Luxembourg and the Commission concluded that this constituted State aid that was incompatible with the internal market and had to be recovered from the aid beneficiaries. The amount to be recouped was around 120 million euros. So, the French energy group and Luxembourg first brought actions before the General Court of the EU against the decision, which the Court

	dismissed, but they then brought an appeal before the Court of Justice and they have now been vindicated. I am not proposing to cover the Court of Justice ruling in great detail here, but I do want to highlight the Court's conclusions on the application of the selectivity condition. So, as you are aware, to determine whether a national measure constitutes State aid, the Commission has to demonstrate that the measure confers a selective advantage on the beneficiary. To classify a tax measure as 'selective', the Commission must begin by identifying the reference system, so, which is the 'normal' tax system applicable in the State concerned. Next, the Commission has to demonstrate that the measure at issue derogates from that reference system because it differentiates between undertakings in a comparable factual and legal situation. Now, in the *Engie* case, the Court of Justice considered that the Commission made errors in its various analyses of the reference framework defining the normal tax system. The Court in particular concluded that the fiscal competence and autonomy of the Member States in areas that have not been harmonised at EU level would be disregarded if the Commission could define a reference framework exclusively on the basis of the general objective pursued by national law of taxing all resident companies, and therefore without including in that framework the provisions providing for exemptions. The Court also said that only the national law applicable in the Member State concerned must be considered to identify the reference system, and the Commission — and also the lower court — are required to accept the national authority's interpretation of its law, provided that that interpretation is compatible with the wording of those provisions. The Commission may depart from the authority's interpretation only if it is able to establish, based on reliable and consistent evidence, that another interpretation prevails in the Member State's case-law or administrative practice. So according to the Court, the Commission's errors affected the validity of the whole of the selectivity analysis and the Court therefore annulled the Commission's decision.
Zoe Andrews	A very interesting judgment indeed! Do you think it will have a wider impact on the Commission's approach to national tax measures going forward?
Nele Dhondt	It's a good question, Zoe. This judgment follows a string of other appeals reversing negative Commission decisions on national tax rulings or arrangements (most notably in *Amazon*, *Fiat* and *Starbucks*) and so, it should really restrict the Commission's scope for challenging such rulings or arrangements on State aid grounds going forward. But a win in the *Apple*

	case could help the Commission regain some momentum and confidence in this area.
Tanja Velling	Well, yes, but even with the favourable opinion by Advocate General Pitruzzella, a conclusive win would seem some time off. While the AG's opinion does propose that the Court of Justice annuls the General Court's decision in favour of Apple, it also proposes to refer the case back to the General Court rather than that the Court of Justice remakes the decision as it did in *Engie* (and that's before we get to the question whether the Court of Justice would follow the AG's opinion). Zoe, do you want to cover the underlying facts?
Zoe Andrews	Absolutely, although this will necessarily be a simplified version! You may recall that Ireland issued tax rulings in 1991 and 2007 in relation to two companies of the Apple Group which were incorporated under Irish law, but not tax resident there. Neither were they tax resident in any other country; one might describe this as the two companies having stateless head offices. Both companies did, however, have operations in Ireland; each carried on a trade through an Irish branch. They also held valuable IP licences. The rulings concerned the method of calculating the profits attributable to the Irish branches which would be subject to tax in Ireland. The Irish Revenue accepted that the IP licences should be attributed to the stateless head offices and approved a profit allocation method that allocated only a small amount of the companies' profits to the Irish branches, leaving the rest effectively attributed to the stateless head offices and, therefore, untaxed. What did the Commission make of this?
Nele Dhondt	In 2016, the European Commission concluded that the tax rulings granted those companies State aid that was unlawful and had to be recovered to the amount of around 13 billion euros. So perhaps unsurprisingly, Apple and Ireland appealed to the General Court, and the General Court annulled the Commission's decision, but as you said, Tanja, the AG is now proposing that the Court of Justice set aside the General Court's decision and refer the case back to the General Court for a new decision.
Tanja Velling	And what's the AG's reason for proposing that?
Nele Dhondt	According to the AG, the General Court committed a series of errors in law in assessing the Commission's decision. We don't have time to go into all the technical detail here (and there's a lot of technical detail), but one overarching theme is that the AG and the General Court basically disagree on how the Commission's original decision should be interpreted. In the AG's view, the General Court misread that decision. So, for example, as I have already mentioned, whether the companies were granted a selective advantage must be determined by reference to the

	applicable provisions of national law. In the AG's view, the General Court had wrongly interpreted the Commission as having adopted (as part of its primary reasoning) an "exclusion" approach to profit allocation that was incompatible with national law. Under this approach profits should, by default be allocated to the Irish branches, if they can't be allocated to other parts of the companies. In contrast, the AG considered that the Commission's reasoning had looked at the functions performed by the Irish branches as compared to, and I quote, "the complete absence of functions and risks assumed by the head offices". So this is a rather subtle distinction, one might argue.
Zoe Andrews	Thanks Nele. Remind us, what's the next stage; does the Court of Justice have to follow the AG's opinion?
Nele Dhondt	The AG's opinion is not binding on the Court, but the Court does often follow AG opinions. So it will be interesting to see whether the Court does so in this case.
Tanja Velling	And that's it for State aid. We shall return to the UK – although the Supreme Court's decision in *Skatteforvaltningen* also has an international angle. It concerns proceedings brought by the Danish tax authority against – I quote the Supreme Court – "Mr Sanjay Shah and companies related to Mr Shah". The latest news in respect of Mr Shah is, of course, that he has been extradited from the United Arab Emirates to Denmark where he will reportedly remain in custody awaiting criminal trial.
Zoe Andrews	That trial and our Supreme Court case both concern what some refer to as "cum-ex trading scams". Broadly, the Danish tax authority alleges that the defendants fraudulently obtained refunds of dividend withholding tax even though they neither owned the relevant shares nor actually suffered any such tax. As one can imagine, the fact pattern will be intricate – the main trial for the civil proceedings in the UK is expected to take nearly four legal terms (meaning that it would occupy a court for almost a full year) – and the High Court had ordered two preliminary issues to be tried first. Our Supreme Court decision deals with one of them, the question whether Dicey Rule 3 renders the Danish tax authority's civil claims for fraud inadmissible.
Tanja Velling	Dicey Rule 3 provides that the "English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State". Danish penal laws were not in issue here; essentially, the question boiled down to whether the Danish tax authority was seeking to enforce Danish tax laws through bringing claims for fraud.
Zoe Andrews	The Supreme Court acknowledged that a claim for fraud on the basis that someone had evaded a liability to tax would be barred under Dicey Rule 3. However, on the Danish tax authority's pleaded case here, there had never

	been an underlying tax liability that the defendants had evaded; the defendants had used the Danish tax system as the context in which they had fraudulently induced their victim (i.e. the Danish tax authority) to make payments to which they had not been entitled. The Supreme Court quoted the Court of Appeal's conclusion with approval that, "whilst [the Danish tax authority] thought it was making repayments or refunds…, they were not in fact repayments or refunds at all, but abstraction of monies by the fraudsters…., in the same way as if they had broken into [the tax authority's] safe and stolen the monies". In such circumstances, Dicey Rule 3 could not bite.
Tanja Velling	Let's now discuss the Supreme Court's decision in *Fisher*. This case concerned the interpretation of the transfer of assets abroad rules, specifically section 739 of the Income and Corporation Taxes Act 1988 as it applied at the time. Section 739 is an anti-avoidance provision preventing UK resident individuals from reducing their income tax liability by transferring assets to low or no tax jurisdictions whilst still having the "power to enjoy" or benefit from the transferred assets, whether or not such benefit is received. Lady Rose flags at the start of her judgment (with which all the other Justices agree) that the transfer of assets abroad rules have been the subject of litigation since they were first introduced in the Finance Act 1936. They have been amended over time and re-enacted in Chapter 2 of Part 13 of the Income Tax Act 2007, but as Lady Rose says, "they have continued to perplex and concern generations of judges faced with the task of construing them".
Zoe Andrews	The Fisher family had built up a tele-betting business which, between 1988 and 2000, had been run through a UK company owned by the family. In 2000, UKCo sold the business to a company incorporated in Gibraltar owned by the same UK tax resident family members. At the same time Gibraltar charged a significantly lower rate of betting duty. HMRC sought to tax GibraltarCo's profits in the family members' hands under section 739 arguing that the Fishers as shareholders of UKCo were the "quasi-transferors" of assets transferred by UKCo for the purposes of section 739. The FTT decided the Fishers were the transferors for the purposes of section 739 but the Upper Tribunal concluded that the transfer was made by UKCo and so the transfer of assets abroad code was not engaged at all. The majority of the Court of Appeal allowed HMRC's appeal, but Lord Justice Phillips dissented. So what did the Supreme Court decide?
Tanja Velling	The Supreme Court held unanimously that section 739 construed as part of the overall transfer of assets abroad code is limited to charging individuals who are ordinarily resident in the UK <u>and</u> who transfer the assets which generate the income which is then deemed to be their income under section 739(2) or which generates the capital triggering the charge under section

	739(3). The liability of non-transferors, on the other hand, is dealt with in section 740, and that requires an actual benefit to be received. The Supreme Court rejected the "quasi-transferor" argument and concluded that section 739 does not apply to an individual in relation to a transfer made by a company in which they are a shareholder, even if they are also a director. Accordingly, in this case the transferor was UKCo, not the individuals, and the charging provision in section 739 was not engaged.
Zoe Andrews	I must admit I was bemused by Counsel for HMRC suggesting, in the context of arguing the "quasi-transferor" point that a degree of uncertainty about when, and to whom, the charge applied was a positive virtue of the drafting! The argument was that a bright line anti-avoidance rule would be too easy for people to devise a way round and that the penal provision works better to achieve its aim if taxpayers are unable to know whether they would be caught or not. Fortunately, Lady Rose agreed with Counsel for the taxpayers that "the law cannot be left in some unclear state 'just to scare people'".
Tanja Velling	I agree. This is a sensible result bringing welcome clarity to this area. It remains to be seen, however, if the government will take up the challenge laid down by Lady Rose in paragraph 87 and make changes to the legislation if, as HMRC argued (although the Supreme Court did not agree), this result leaves a gap in the legislation to be filled. Lady Rose does suggest, however, that the government should think carefully about "how to fill that gap in a fair, appropriate and workable manner".
Zoe Andrews	But enough with the cases – on the 22nd of November, the UN General Assembly voted in favour (by a majority of nearly two thirds) of a resolution establishing an intergovernmental drafting committee to draft, by August 2024, terms of reference for a UN framework convention on international tax cooperation. As a second stage, there will be consensus-building on the scope and key elements of the Framework Convention. But what is the framework convention and how does this fit with the OECD's two-pillar approach to international tax reform, and isn't this covering the same ground?
Tanja Velling	Yes. There is overlap between what the UN is doing and what the OECD has been doing with the two pillars. Both tackle the concern that there are profits which are not taxed at all, or which should be taxed at a higher rate, or which are not being taxed in the right jurisdiction. The UN resolution was borne out of the concern, voiced by developing countries led by Nigeria, that the OECD proposals are not inclusive enough and that the needs, priorities and capacities of developing countries have not been taken into account sufficiently. The resolution requests that the working group take into consideration the work of other relevant forums involved in tax cooperation, which would include the OECD. But there are certainly concerns that the

	resolution will undermine, rather than strengthen, the existing international tax system.
Zoe Andrews	I saw that the UK had proposed an amendment which was voted down, to replace “framework convention” with simply “framework”. The significance of this distinction is that a framework convention implies a form of legally binding instrument whereas a framework does not.
Tanja Velling	That is interesting. But do you think the UN will be able to come up with an effective and workable alternative to the OECD’s two-pillar solution?
Zoe Andrews	There is still the fundamental problem of getting international consensus on what international tax cooperation should look like and consistency of implementation. Will the UN be any more successful in achieving this than the OECD has been so far? The voting on the resolution was polarised with mostly developing countries voting for it and mostly developed countries voting against (including the UK, US and EU Member States). So I’m not convinced this will have the support to carry it through to implementation. The OECD has stated that it remains committed to implementing the global corporate tax deal. Certainly, at the time of recording, the UK is still going full steam ahead with implementing Pillar 2.
Tanja Velling	And now for the MAP awards; they don’t get quite so much press coverage as the BAFTAs, but are nevertheless important for multinational taxpayers! The 2023 awards are based on the 2022 MAP statistics. The OECD MAP statistics measure the effectiveness and timeliness of tax-related dispute resolution mechanisms. They provide a global view and also drill down to highlight specific countries. How did the UK do according to the 2022 statistics?
Zoe Andrews	Although the UK did not win any awards this time, the 2022 statistics reveal that the UK continues to perform well at MAP both in relation to historic (pre-2016) cases and more recent cases. In 2022, the UK managed to reduce its transfer pricing case inventory by closing 69% of its pre-2016 TP MAP cases. Just 4 of the pre-2016 TP MAP cases now remain for the UK to resolve. Globally, average case times are getting closer to the 24-month target. The UK has an average of just under 27 months for post-2016 transfer pricing cases and just over 11 months for other post-2016 cases.
Tanja Velling	So who got the awards this year?
Zoe Andrews	The star of this year’s awards is the Netherlands which did really well, taking two of the five awards. It won for the most improved jurisdiction and having the shortest average time for closing transfer pricing cases (19.6 months). The MAP statistics show that the number of transfer pricing cases going into MAP continues to increase, and so the OECD highlighted at the start of 2023 the importance of advance pricing arrangements (APAs) and

	published a reporting framework. From 2024, the OECD will also publish APA statistics to be read together with the MAP statistics to give the full picture of a jurisdiction's efforts to prevent and resolve transfer pricing disputes.
Tanja Velling	As to what we have coming up (other than the festive season): • comments on the OECD's proposed changes to the Commentary on Article 5 of the Model Tax Convention in respect of extractible natural resources must be submitted before the 4th of January 2024; and • the reduction of the main primary percentage of Class 1 National Insurance Contributions from 12% to 10% will come into force on the 6th of January. The relevant legislation is contained in the National Insurance Contributions (Reduction in Rates) Bill. Also, joking about the Autumn Statement aside, we have something new and exciting planned for the podcast in the new year – so watch this space!
Zoe Andrews	Perhaps you should have added that "exciting" is a relative term – especially when used in the context of a tax podcast… And with that, I wish you a merry Christmas, all the best for the new year and thank you for listening. If you have any questions, please contact Tanja or me, or your usual Slaughter and May contact. Further insights from the Slaughter and May Tax department can be found on the European Tax Blog – www.europeantax.blog. And you can also follow us on Twitter – @SlaughterMayTax.