# EU Tax News – March/April 2021

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## *CJEU Developments*

**Belgium – CJEU Referral on compatibility of the Belgian secret commissions tax with the free movement of services**

On 4 December 2020, the Belgian Court of Appeal of Liège referred a question to the CJEU for a preliminary ruling regarding an administrative tolerance in relation to the Belgian secret commissions tax imposed for failure to submit fee forms to the Belgian tax authorities (*Pharma Santé* cases C-52/21 and C-53/21).

The case concerns a Belgian company, active in the trade of pharmaceutical products, which had concluded a contract with a Luxembourg company for the transport of medicines. The Belgian company had not prepared any individual fee forms and summary statements for the expenses invoiced by the Luxembourg company between 2008 and 2012. The Belgian tax authorities therefore rejected the deduction of these expenses and applied the secret commissions tax thereon of 50%.

The Court of Appeal of Liège notes that if the Luxembourg company had been a domestic company or if it had had a Belgian establishment subject to Belgian accounting law, the Belgian company would not have been obliged to complete these administrative formalities based on an administrative tolerance, which would have enabled it to avoid the application of the secret commissions tax. The referring Court points out that Article 56 TFEU prohibits restrictions on the freedom to provide services within the EU and that, according to settled case-law, that article confers rights on both the provider and the recipient of the service. Consequently, the referring Court considers that, as a result of the aforementioned administrative tolerance which does not apply to non-resident service providers, the recipients of services from non-residents have to bear a heavier administrative burden than the recipients of services from a domestic service provider subject to Belgian accounting legislation. Such a requirement may discourage Belgian recipients of services from using the services of non-resident service providers and may constitute a restriction on the free movement of services.

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**Finland – CJEU judgment on compatibility of different tax treatment of profit distributions from non-resident corporate funds with free movement of capital**

On 29 April 2021, the CJEU handed down its judgment in *E vs. Veronsaajien oikeudenvalvontayksikkö* (Case C-480/19). In the case at hand, a Finnish resident individual, E, had initially requested an advance ruling from the Finnish Central Tax Board ("CTB") on the tax treatment of profit distributions from a Luxembourg UCITS-SICAV ("SICAV", likely established as a *société anonyme,* SA). The CTB decided that the SICAV, *a corporate fund*, was comparable to a Finnish company (Fin. *osakeyhtiö)* conducting investment activities. Accordingly, the profit distribution was to be taxed as dividend for Finnish tax purposes and, more specifically, as fully taxable earned income (progressive rates applicable up to approx. 50%) for E, in the absence of more favourable dividend tax rules being applicable due to the tax exempt nature of the SICAV. For comparison purposes, profit distribution from a Finnish investment fund, *a contractual fund,* to a Finnish individual is not taxed as a dividend for Finnish tax purposes but instead as profit distribution from an investment fund, fully taxable as capital income (two-tier tax treatment with tax rate capped at 34%).

The individual, E, appealed the decision to the Finnish Supreme Administrative Court ("SAC") arguing that such tax treatment is discriminatory and against the EU free movement of capital. The SAC decided to stay the proceeding to ask the CJEU, in essence, whether the Finnish domestic interpretation, whereby a profit distribution from a foreign corporate fund (such as the SICAV) resident in another EU Member State is not taxed similarly to a profit distribution from a resident contractual fund (such as a Finnish investment fund) because the foreign fund's legal form (corporate) does not correspond to the domestic fund's legal form (contractual), is precluded by the free movement of capital.

The CJEU decided that the free movement of capital precludes an EU Member State's tax practice whereby resident individuals are taxed differently on profit distributions from non-resident corporate funds simply because their legal form does not correspond to the legal form of resident contractual funds. Therefore, the Finnish tax practice described above was considered to be contrary to the free movement of capital. As regards discrimination and objective comparability of the non-resident and resident situations, the CJEU noted that distributions from the SICAV to E are subject to less favourable tax treatment when compared to a Finnish investment fund (earned income vs. capital income) but also noted that a corporate fund cannot be established under Finnish law. Even so, noting the aim of the SICAV as an investment vehicle and the object and purpose of tax provisions applicable to dividends received by shareholders (avoidance of economic double taxation) and investment fund profit distributions received by investors (single tier tax treatment at investor level), the SICAV is considered to be in an objectively comparable situation with a Finnish contractual investment fund. Accordingly, the corporate nature of the SICAV is not enough to justify a different tax treatment according to the CJEU and no overriding reason in the public interest was presented by the Finnish state to support this different tax treatment.

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## *National Developments*

**Belgium – Belgian audit wave on withholding tax exemptions**

In recent months a specialised and dedicated inspection team within the Belgian Special Tax Inspectorate is focusing on passive income flows (dividend, interest and royalty) and denial of withholding tax benefits claimed by multinational groups. This audit wave is clearly inspired by the judgments rendered on 26 February 2019, by the CJEU in the landmark Danish beneficial ownership cases regarding the withholding tax exemptions provided for in the EU Interest Royalty Directive 2003/49/EC (joined Cases C-115/16, C-118/16, C-119/16 and C-229/16), on the one hand, and, in the EU Parent Subsidiary Directive 2011/96/EU (joined cases C-116/16 and C-117/16), on the other hand. In these cases, the CJEU took a broad approach to the beneficial ownership concept and mentioned lack of beneficial ownership as an indicator of tax abuse (NB: see item below on the Danish High Court Eastern Division's recent decisions of 3 May 2021 in C-116/16 and C-117/16).

Whereas in a Belgian withholding tax context, a strictly legal approach to the concept of 'beneficiary' has traditionally been adopted, even by the Minister of Finance and the tax authorities, a shift towards an economic approach is taken by this new audit team. This position is however subject to criticism in the light of the principles of legal certainty and foreseeability.

As regards withholding taxes, an exceptional provision regarding the Belgian statute of limitations applies. In this respect, the date when the tax authorities establish an infringement of the Income Tax Code determines the start of a 12-month investigation and assessment period covering a period of five years preceding the year in which the infringement was established. In this respect, the legal provisions on withholding tax formalities (withholding tax return including a certificate of the beneficial owner to be filed within 15 days following the payment or attribution of the income) are also under strict scrutiny.

These audits often lead to assessments of withholding tax and late payment interest with very material amounts at stake and it is expected that many cases will be brought before the courts in the coming years. It remains to be seen if these new positions of the tax authorities will be upheld in the end.

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**Belgium – First domestic Court case ruling on abuse of the Parent Subsidiary Directive**

The case law of the CJEU in the Danish beneficial ownership cases has already found its way in the domestic case law. In a judgment of 1 December 2020, the Court of First Instance of Ghent applied the general principle of abuse of rights as laid down in the Danish beneficial ownership cases, in order to refuse the withholding tax exemption on a dividend and capital reductions paid by a Belgian company to a Luxembourg holding company.

The case concerns a complex series of transactions (restructuring, refinancing, mergers, transfers of shares, etc…) resulting in a dividend distribution and capital reimbursement to the ultimate shareholders. One of the issues raised in this case was the refusal by the tax authorities of the withholding tax exemption on these distributions on the basis of abuse of the EU Parent Subsidiary Directive (PSD).

As the dispute related to a period preceding the entry into force of the latest version of the domestic general anti abuse rule (Article 344, §1 BITC, GAAR) and of the special anti-abuse rule of the PSD (Article 266, section 4 BITC, SAAR), neither the GAAR or the SAAR were applicable at that time. Given the fact that the prior domestic GAAR was not effective to challenge this kind of transactions, the Court ruled that abuse of the PSD could be applied based on the general principle of EU law.

The Court evaluated the facts of the case in the light of the criteria set out by the CJEU in the Danish beneficial ownership cases, including the use of conduit companies, and came to the conclusion that the objective and subjective elements of abuse were present. Despite the fact that the taxpayer invoked economic reasons to justify the transactions, the Court did not consider the counterproof fulfilled. The Court did not see any reason for setting up the holding company in Luxembourg, especially given the lack of substance of that company, nor did the Court accept the simplification of the structure nor the entrance of a third party investor as a sufficient justification for all the restructuring steps. Therefore, it concluded that the series of transactions were set up with the main purpose of obtaining a tax advantage (tax free upstreaming of profit and capital gains to the ultimate shareholders).

We understand that an appeal before the Belgian Supreme Court is intended to be filed.

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**Belgium – Belgian reporting obligations for digital platform operators**

On 22 March 2021, an update of the EU Directive on Administrative Cooperation, also known as DAC7, was approved by the Council of the European Union (*see the item under EU Developments*). One of the building-blocks of DAC7 is the automatic exchange of information. Specifically, for digital platform operators (both EU and non-EU platforms), DAC7 introduces obligations to collect, verify and exchange information on (reportable) sellers with tax authorities. The DAC7 provisions regarding reporting obligations for platform operators must be implemented by 31 December 2022 (application from 1 January 2023).

Prior to DAC7, Belgium already introduced reporting obligations for digital platform operators (Law of 20 December 2020, Official Gazette of 30 December 2020). This Belgian preliminary version of the DAC7 obligations is applicable as of 1 January 2021 and will be replaced by the transposition of DAC7 into Belgian legislation.

The reporting obligations under the Belgian law apply to 'digital co-operation platforms' (non-defined term). The Belgian law clarifies, however, that the obligations apply to both Belgian and foreign platforms. We note that the material scope of the Belgian reporting obligations is more limited compared to DAC7 because they are limited to personal services (provided by individual users only, irrespective whether the services are provided in a professional context or not). The obligations under the Belgian law include that platform operators must:

(i) inform their users on their legal (tax and social) obligations and provide these users with an overview of all transactions performed through the platform, including personal information about the user concerned; and
(ii) report this information to the Belgian tax authorities.
(iii) These obligations must be fulfilled by 31 March of each year.

Hence, even though Belgium did not yet transpose DAC7 into domestic legislation, similar reporting obligations are applicable as from 1 January 2021. Platforms that fall within the scope of application will have to comply with the Belgian law by 31 March 2022 at the latest to avoid administrative penalties.

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**Denmark – Judgments in two cases on beneficial ownership**

On 3 May 2021, the Danish High Court Eastern Division ruled in two cases on the question of whether withholding tax must be paid on dividends distributed by Danish subsidiaries to EU resident parent companies. In both cases, the National Tax Tribunal, the highest Danish administrative appeals body, had ruled in favour of the Danish companies stating that the dividends were exempt from withholding tax due to the lack of an expressly stated beneficial ownership condition in the Parent Subsidiary Directive. The Danish Ministry of Taxation appealed both cases.

The High Court Eastern Division dealt with the two cases together. The CJEU has ruled on a number of principal questions in the cases, see Joined Cases C-116/16 and C-117/16.

In both cases, the Danish Ministry of Taxation argued that the EU parent companies in question were "conduit entities" and thus not the real recipients of the dividends and that the beneficial owners of the dividends were located in countries not qualifying under the Parent Subsidiary Directive or double tax treaties with Denmark.

In the first case, the Danish dividend paying company was owned by a Cyprus company, which in turn was owned by a Bermuda company with a US company as the ultimate parent. The Cyprus company did not have substance in the form of people, assets and functioned solely as a holding company for the Danish subsidiary. The High Court Eastern Division ruled that a dividend distributed in 2005 did not trigger withholding tax as the dividend ultimately was redistributed to the US parent company. Under the double tax treaty between Denmark and the US, it would have been possible to distribute the dividend directly from the Danish company to the US parent without triggering Danish withholding tax regardless of the entities in Cyprus and Bermuda. However, on the subsequent 2006 dividend Danish withholding tax was levied as it had not been documented that the dividend passed through to the US parent company.

In the second case, the Danish company was owned by a company in Luxembourg, which ultimately was owned by several private equity funds. The business activities and substance of the Luxembourg parent company was not documented and further it was not documented where the ultimate investors were resident for tax purposes. The High Court Eastern Division stated that under these circumstances it had to be assumed that the dividend was merely channelled through the Luxembourg parent company to a number of private equity funds based in countries not qualifying under the Parent Subsidiary Directive or double tax treaties with Denmark. On that basis, the Danish company could not claim tax exemption from Danish withholding taxes.

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**Germany – New decree by Federal Ministry of Finance extends motive test for escape from CFC taxation to third country situations**

On 17 March 2021, the German Federal Ministry of Finance (BMF) published a decree on the application of Section 8 (2) of the Foreign Tax Act (AStG) which stipulates the "motive test" taxpayers have to meet to escape controlled foreign company (CFC) taxation.

The BMF formulates the requirements for meeting the motive test pursuant to Section 8 (2) AStG and also orders that the standards of this test shall apply to EU/EEA as well as third country cases. However, the application of section 8 (2) AStG (substance requirements) only represents the first stage of the CFC taxation escape; at the second stage, it must additionally be proven that the participation in the foreign company does not represent a purely artificial arrangement (a requirement which is questionable under EU law).

To meet the motive test at the first stage of the escape the CFC concerned must:

- purposively utilise resources (e.g. personnel, customer proximity) in the host state. The business activity in the host state must require and reach a relevant scope. Participation in the market activity there must be active, continuous and sustainable.
- be adequately equipped not only in terms of personnel, but also in terms of material resources, so that it is in a position to carry out the intended core economic functions on a stand-alone basis;
- take the essential entrepreneurial decisions itself.

The substance requirements of Section 8 (2) AStG must be fulfilled with regard to each type of passive income individually.

Since, in EU cases, a proper exchange of information is provided for by the Directive on Administrative Cooperation, the BMF decree only deals with administrative cooperation in third country cases (including the European Economic Area). The BMF demands that there must be a sufficient legal framework for an exchange of information which in practice actually operates smoothly ("trouble free") and reasonably timely. As such a legal framework the BMF accepts, for example, Art. 26 of the OECD Model Tax Convention, Tax Information Exchange Agreements and other bilateral treaties.

It is debatable whether the motive test will still apply to third country cases after the transposition of the ATAD CFC rules into German law because, in its draft bill, the Federal Government argues that the amended German CFC legislation no longer falls into the scope of the free movement of capital.

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## *EU Developments*

### EU – Council adopts mandatory automatic exchange of information for digital platform operators (DAC7)

On 22 March 2021, the Council of the European Union adopted an EU Directive expanding the scope of automatic exchange of information to digital platform operators and amending existing provisions on administrative cooperation in the field of taxation ("DAC7"). DAC7 introduces the 6th amendment to the Directive 2011/16/EU on administrative cooperation in the field of taxation ("DAC").

*Exchange of information for Digital Platform Operators*

The new rules aim to provide EU Member States' tax authorities with information necessary to ensure the enforcement of tax rules (such as income tax and VAT) regarding commercial activities performed with the intermediation of digital platforms and to introduce standardised reporting requirements that should reduce the administrative burdens on digital platform operators.

The new reporting obligations will apply to operators of EU and non-EU digital platforms that allow certain sellers ("reportable sellers") to be connected to other users in order to perform any of the following (cross-border or domestic) reportable activities:

a) the rental of immovable property;
b) the provision of personal services;
c) the sale of goods; and
d) the rental of any mode of transport.

Reporting will apply regardless of the legal nature of the seller. More specifically, EU digital platform operators are defined as operators that are resident for tax purposes in an EU Member State or, if not, that are incorporated under the laws of an EU Member State or have their place of management or a permanent establishment in an EU Member State.

Non-EU digital platform operators are defined as operators who do not meet any of the prior territorial nexus criteria with an EU Member State but operate digital platforms that (a) facilitate the performing of reportable activities by reportable sellers located in an EU Member State, or, (b) concern rental of immovable property located in an EU Member State. Therefore, non-EU digital platform operators need to register in an EU Member State.

These operators will however be exempted from their reporting obligations if they have to fulfil similar reporting obligations to the authorities of their home country (i.e. a third country) and such authorities will exchange the information with the EU Member States' authorities pursuant to a specific agreement.

EU reporting platform operators which qualify as such in more than one EU Member State shall elect for a single EU Member State where to carry out the reporting. Non-EU reporting platform operators are generally allowed to elect the EU Member State in which they register for reporting rules purposes.

The information to be reported will include information relevant to the correct identification of the reportable seller and information relevant to the determination of the profits realised by the reportable seller through the platform. The information should be reported by the platform operator to the competent tax authorities on 31 January of the year following the calendar year in which the seller is identified as a reportable seller. The receiving EU Member State will then exchange the information received with the tax authorities of the other EU Member States.

Apart from the above, DAC7 brings the following additional amendments to the DAC:

- a clarification of the standard of “foreseeable relevance” as a precondition for the exchange of information on request (including in respect of “group requests”),
- the extension of the mandatory automatic exchange of information to royalties, and
- a new legal framework for joint audits.

EU Member States must implement the Directive by 31 December 2022 and apply the new rules as of 1 January 2023. The first information corresponding to reportable periods as from 1 January 2023 will need to be reported in 2024.

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**EU – Informal ECOFIN Council March meeting discussed digital taxation**

EU Finance Ministers exchanged views on the state of play and way forward on tax challenges arising from the digitalisation of the economy. The discussion took place ahead of the European Council meeting in March, where EU leaders also discussed this issue. During the exchange of views, Ministers underlined their continued support for the ongoing negotiations in the G20/OECD, which are aimed at achieving a global and consensus-based solution by mid-2021. They took note of the momentum, expressed hope for swift progress and highlighted their readiness to engage in reaching a global agreement. Ministers also confirmed their readiness to examine solutions for the EU to address the tax challenges arising from digitalisation, should there be no progress in the G20/OECD format. The European Commission confirmed that it was working on a legislative proposal for a ‘digital levy’, which will be designed as a source of additional own resources for the EU. It highlighted that this would be a separate instrument which should not be linked with the corporate tax rules that are being negotiated in the G20/OECD.

The Portuguese EU Presidency noted that the Council Conclusions of 27 November 2020 on digital taxation remained valid for the way forward in this area and that EU Member States were looking forward to a European Commission proposal for a digital levy (which as noted above should be a separate instrument, not linked with the corporate tax rules that are being negotiated in the G20/OECD).

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**EU – March meeting of the EU Platform for Tax Good Governance**

The main items on the agenda included:

- What is next with EU taxpayers' rights? Presentation by the Commission followed by exchange of views.
- Corporate social responsibility and taxation. Presentation by the European Commission followed by exchange of views.
- Presentation by the UN High-Level Panel on International Financial Accountability, Transparency and Integrity (FACTI) on their recommendations and way forward.

Documents published ahead of the meeting included:

- Discussion Paper on Taxpayer's rights
- Discussion Paper on Corporate Social Responsibility Taxation
- Presentation on UN FATCI Panel Report
- Executive Summary on UN FATCI Panel Report

More information on the Platform itself can be found here.
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## *EU Fiscal State Aid Developments*

**Hungary & Poland – CJEU rules that the Hungarian advertisement tax and the Polish tax on the retail sector do not infringe EU State aid rules**

On 16 March 2021, the CJEU issued its judgments in two cases relating to the Hungarian Advertisement tax (C-596/19 P) and to the Polish retail tax (C-562/19 P).

Hungary and Poland introduced very similar levies that were both assessed on the turnover of the taxpayers at progressive rates. In the case of Hungary, there was also the ability of utilizing tax losses from previous years in the year in which the tax was introduced, serving as a transitional measure.

The European Commission found these taxes constituted violations of State aid rules, due to the lower tax level on smaller taxpayers (and the utilization of tax losses in Hungary). The European Commission further found that the rules could not be justified as, in the view of the European Commission, turnover (unlike profits) is not a measure of ability to pay tax. Hungary and Poland challenged the European Commission's decisions in front of the General Court, which in turn annulled the European Commission's decisions in 2019, stating in essence that no selective advantage could be assessed. The European Commission appealed against the judgments of the General Court.

In its Judgments issued on 16 March 2021, the CJEU dismissed the European Commission's appeals and upheld the judgments of the General Court.

The CJEU ruled that considering the fiscal autonomy which EU Member States have outside the fields subject to harmonisation, they are free to establish the system of taxation and adopt progressive taxation provided that the characteristics of the measure at issue do not entail any manifestly discriminatory element.

In particular, EU law on State aid does not preclude, in principle, EU Member States from opting for progressive tax rates, intended to take account of the ability to pay of taxable persons, nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

The CJEU considered that the European Commission had not established that the characteristics of the measures adopted by the Hungarian and Polish legislatures had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law. In the view of the CJEU, the European Commission had incorrectly relied on an incomplete and notional system in considering that the progressive scale of tax measures at issue did not form part of the reference system in the light of which the selective nature of those measures had to be assessed.

As for the utilization of tax losses in Hungary, the CJEU emphasized that the General Court did not err in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage. The establishment of a transitional measure taking into account losses is not inconsistent in the light of the redistribution objective pursued by the legislature, when establishing the tax on turnover. The

CJEU highlighted in that regard that the criteria concerning the lack of profits recorded in the financial year preceding the entry into force of that tax was objective in nature, since the undertakings benefiting from the transitional measure of partial deductibility of the losses had, from that point of view, a lesser ability to pay than others.

The identification of the reference system is the first and indeed crucial step in the three-stage selectivity analysis developed by the Courts. Accordingly, these judgments are important in so far as they confirm that certain choices (including those regarding rate and base) made by EU Member States when designing their tax systems provided they are not manifestly discriminatory, have to be respected when determining a reference system for any State aid analysis.

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**Italy – CJEU confirms General Court of the EU's judgment annulling the European Commission's Decision on State aid granted by Italy to Banca Tercas**

On 2 March 2021, the CJEU (Grand Chamber) rendered its judgment in the case C-425/19 P in which it dismissed the appeal brought by the European Commission against the General Court of the European Union ("General Court") judgment of 19 March 20219 (Joined Cases T-98/16, T-196/16 and T198/16) annulling Commission Decision 2016/1208, of 23 December 2015, in which the European Commission found the intervention of the *Fondo interbancario di tutela dei depositi* ("FITD") in favour of *Banca Tercas* constituted illegal State aid and ordered its recovery.

The case arose in 2013 when an Italian bank expressed its intention to subscribe a capital increase in Banca Tercas – a private equity bank, at that time under a special administration regime by the Bank of Italy (a public authority which performs the function of central bank of the Italian Republic) - subject to the condition that the FITD covered in full the negative equity of Banca Tercas.

The FITD is a mutual consortium of banks (of which Banca Tercas was a member) governed by private law with the power, among others, to take preventive measures to support a member that is placed under a special administration regime. Following a request by the special administration of Banca Tercas, the FITD decided to intervene in its favour covering the losses and granting guarantees.

The European Commission in December 2015, following an in-depth investigation on the intervention of FITD, found that its intervention constituted illegal State aid and ordered its recovery. In particular, with specific reference to the imputability of the contested measure to the Italian Republic, the European Commission took the position that the FITD, even if organised as a mutual consortium of private banks and financed privately by the contribution of its members, carried out "a public mandate" entrusted by the Italian State which exercised constant control of compliance in the use of the FITD's resources with public objectives, and influenced the use of those resources by the FITD.

On 19 March 2019, the General Court annulled the decision of the European Commission on the grounds that the conditions for qualifying the intervention of the FITD as State aid were not satisfied, since this intervention was neither attributable to the Italian State nor financed through State resources from it.

According to the General Court, the aid granted to Banca Tercas was not attributable to the Italian State since it was not sufficiently proved that the intervention granted by the FITD was adopted under the influence or effective control of the Italian State. Moreover, it was not proved that the aid was financed through State resources, since the intervention of the FITD took place with resources provided by its member banks and in their own interests.

According to the CJEU, the General Court had been correct when it held that the intervention of FITD did not constitute State aid. In particular, the CJEU took the view that the General Court correctly applied the case-law based on which the burden to demonstrate that a specific aid measure is imputable to the State is on the European Commission, and it did not require the European Commission to meet a higher standard of proof as regards the imputability of an advantage to the State solely on account of the fact that the FITD was a private entity.

In that respect, the CJEU pointed out the appropriate evidence for the purpose of demonstrating the imputability of an aid measure necessarily arises from the context and the circumstances in which that measure was taken, highlighting that the absence of a link of a capital nature between the entity concerned and the State was clearly relevant in that regard.
-- Claudio Valz, Luca la Pietra and Guglielmo Ginevra, PwC Italy; claudio.valz@pwc.com

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# ABOUT THE EUDTG

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