

# Kluwer International Tax Blog

## The Contents of EC Tax Review, Volume 32, Issue 05, 2023

Ben Kiekebeld (General Editor EC Tax Review and tax adviser at Ernst & Young Belastingadviseurs LLP) · Friday, September 22nd, 2023

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

### *Georg Kofler, Curia Locuta, Causa Finita: Some Further Conclusions from W AG*

The Court's decision in W AG on the cross-border utilization of treaty-exempt foreign losses has not only turned its back on Lidl Belgium and sparked an intense debate not only on the implications for other landmark cases, such as Marks & Spencer and K, but also on the transparency, certainty, and clarity regarding of the Court's (substantive) 'overruling' of its precedents. A number of key issues following W AG have now been addressed by the German Bundesfinanzhof. In two recent judgments, it dealt with the standard of comparability established by W AG and the potential impact of the principle of equality in the light of Article 20 of the Charter and Article 3 of the German Basic Law and the ability-to-pay principle on the cross-border utilization of losses.

### *Cees Peters, A Governance Analysis of BEFIT: How the Member States' Wish to Obtain more Regulatory Authority is Driving a Revolution*

This contribution analyses the ongoing BEFIT proposal (Business in Europe: Framework for Income Taxation) of the EC (European Commission) from a governance perspective. For this matter, it considers the proposed replacement of the arm's length standard with a system of unitary taxation and formulary apportionment (FA) as a changing regulation strategy to tax multinational companies. It argues that the BEFIT proposal indicates a change from a reflexive regulation strategy to a command and control regulation strategy. The future approval of this proposal would imply that the Member States no longer want to count on the relative freedom of taxpayers to allocate profits, but attempt to take full responsibility for that allocation instead. This contribution concludes that this wish of the Member States to obtain more regulatory authority to tax multinational companies is the catalyst of the ongoing BEFIT revolution.

### *Michael Stöber, The Charter of Fundamental Rights and EU Tax Directives*

In Germany, it is undisputed that the fundamental rights of the German constitution, the Basic Law (Grundgesetz), set limits for tax legislation at the national level. It has not yet been fully clarified whether and to what extent legal acts of the European legislator in the field of taxation must be measured against the standard of the Charter of Fundamental Rights of the EU (CFR). In a ground-

breaking ruling of 8 December 2022 (C-694/20), the CJEU has now affirmed this in relation to Directive (EU) 2018/822, which provides for an EU-wide reporting obligation with regard to cross-border tax arrangements. The CJEU declared a specific provision of the said directive invalid due to a violation of the fundamental right under Article 7 CFR to respect for private communications. This paper sets out the far-reaching consequences of the CJEU's ruling for the directive in question in particular, and for EU tax directives in general.

***Sam van der Vlugt, The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties***

The principle of legality of taxation has gained a supranational status by means of its transplantation out of the national setting to a general principle of EU law by the Court of Justice of the European Union (CJEU). In this article the two cases in which the Court has given a first supranational interpretation of the principle are discussed, as well as the Research Note the Court published before rendering its judgment in these two cases. This European translation contains an uncertainty as to the representative democratic elements of the principle that are closely connected to its historical development in several national legal contexts of Member States. With the European principle being rooted in the national legal orders of the Member States, this current discrepancy stands at odds with the material scope in several Member States, which ascribes clear democratic elements to the principle. Thus, the main question addressed after taking a look at the national interpretations and the representative democratic elements contained therein in the Netherlands, France, Italy and Germany, is if the omission of these democratic elements can prove to become an obstacle for future harmonization or integration in taxation. The focus will lie on the current mode of norm-creation in above-state settings and the creation of 'genuine' own resources for the EU.

***Robert Attard-Tax Penalty Regimes, A Call for Harmonization***

Recent Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) judgments imply that some form of 'European Intervention' providing for a coordinated approach towards the determination, and quantification of tax penalties has become necessary. Disproportionate tax penalties and concurrent penalties pose a serious hurdle to achieving the European Commission's political mission to put a tax system in place 'where everybody pays their fair share' of taxation. Given current judicial trends, the situation calls for the creation of an ad hoc taxpayers' charter which imposes red lines for tax penalty regimes. Matters such as ultra duplum, minimus vitalis, non bis in idem, ceiling rates for cumulative penalties and the coordination of punitive measures call for an element of harmonization.

---

*To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe [here](#).*

## **Kluwer International Tax Law**

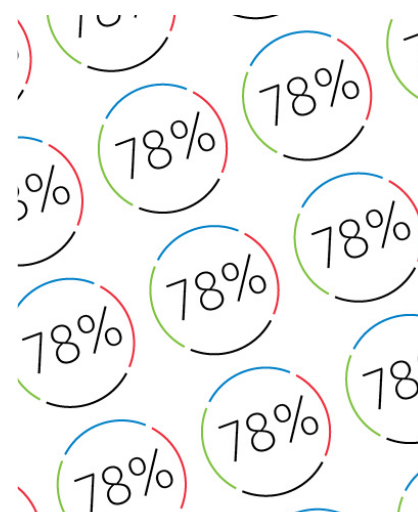
The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

---

78% of the lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity.

**Discover Kluwer International Tax Law.**  
The intuitive research platform for Tax Professionals.



2022 SURVEY REPORT  
The Wolters Kluwer Future Ready Lawyer  
Leading change

This entry was posted on Friday, September 22nd, 2023 at 10:00 am and is filed under [BEFIT](#), [CJEU](#), [EC Tax Review](#), [EU law](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.