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EU Tax Alert

- AG concludes - annul the FIAT State Aid decision, but not in FIAT's own appeal
- The commission publishes several legislative proposals - Misuse of shell entities, Pillar Two and the reform of the Energy Taxation Directive
- CJ rules on rejection of foreign VAT refund request (*CHEP Equipment Pooling N.V.*)

In this publication, we look back at recent tax law developments within the European Union. We will discuss, amongst other things, relevant case law of the national courts of the Member States, opinions of the Advocate Generals of the Court of Justice of the European Union as well as its case law. Furthermore, we set out important tax plans and developments of the European Commission and the Council of the European Union.

Highlights in this edition are:

- AG concludes - annul the FIAT State Aid decision, but not in FIAT's own appeal
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Highlights in this edition

AG concludes - annul the FIAT State Aid decision, but not in FIAT's own appeal

On 16 December 2021, Advocate General Pikamäe filed his Opinion in the appeals filed by FIAT and Ireland. While his conclusion in the appeal by FIAT itself was to uphold the General Court's judgment and the initial Commission decision, in the appeal filed by Ireland (as an interested party, not as the Member State concerned which was Luxembourg) he does call upon the EU to annul them.

In the FIAT appeal, the AG indicated that the General Court did not refer to an at arm's length principle directly derived from Article 107(1) TFEU, but to such principle being applicable even without it being expressly codified in national law, as the Luxembourg corporate tax system sought to treat integrated and stand-alone companies alike for tax purposes. He then allowed a challenge of the TNMM application and the relevant profit level indicator and the margin of appreciation left to Luxembourg tax authorities, but concluded that the General Court did not make any error of law in holding that the errors in calculating the remuneration for financing and treasury activities.

Also notable is that the AG held that it was up to FIAT and Luxembourg to prove that any advantage derived from a ruling had been neutralized at group level, as the Commission met its initial burden of proof by establishing an advantage for FIAT Finance and Trade as a single entity. He then stressed that such neutralization should take place within the same legal system and without reference to possible additional taxation abroad, given the limits inherent to State aid review. The AG also concluded that arguments against qualifying an advantage derived from a ruling as selective, individual aid were ineffective in the case at hand.

In the appeal by Ireland, the AG concluded more explicitly that there is no European at arm's length principle to be derived directly from Article 107(1) TFEU on which most of the Commission's primary line of reasoning in this case was based, as State aid necessarily relates to existing national law. He pointed out that Article 107(1) does not establish a general principle of requiring equal treatment of taxpayers and concluded that equal treatment of integrated and stand-alone undertakings has also not been developed by the EU legislature to date. The AG does point out that the General Court did base its analysis on national law instead, but he then questioned whether the equal treatment the General Court read into Luxembourg law could be upheld given the division of competences between the EU and its Member States as described. (The further application of Luxembourg law as it actually stood at the time with regard to transfer pricing had not been further questioned in this appeal.)

The CJ's ultimate decision may range from a full annulment of both the prior judgment and the underlying decision to letting them stand while effectively vacating the part on the Commission's primary line of reasoning (violation of an at arm's length principle directly based on Article 107(1) TFEU), while maintaining the secondary line of reasoning (non-compliance with the transfer pricing principles to the extent already established in Luxembourg law at the time) based on facts established by the General Court. Given that the judgment in FIAT will likely have broader implications, it is too early to tell how the CJ will decide.

The commission publishes several legislative proposals - Misuse of shell entities, Pillar Two and the reform of the Energy Taxation Directive

On 22 December 2021, the Commission released several legislative proposals that will impact corporate taxpayers. The proposals relate to the misuse of shell entities, Pillar Two and the reform of the Energy Taxation Directive. For more information about these proposals, we refer to the news Article on our website.

CJ rules on rejection of foreign VAT refund request (*CHEP Equipment Pooling N.V.*)

On 21 October 2021, the judgment of the CJ in the case *CHEP Equipment Pooling N.V.* (C-396/20) was published.

CHEP Equipment Pooling N.V. ('CHEP') is established in Belgium and filed a refund request for Hungarian VAT with the Hungarian tax authority. During the review of the refund request, it was established that the VAT amount in the refund request deviated from the total VAT amount paid by CHEP. If the VAT amount on the invoice was lower than the VAT amount in the refund request, the Hungarian tax authority only granted that lower amount. This procedure was also followed the other way around, in the case the VAT amount in the refund request was lower than the actual VAT amount charged on the invoice. The Hungarian tax authority did not make use of the option to request

CHEP to provide additional information regarding the VAT refund.

The Hungarian tax authority argued that it was bound by the amount of VAT stated by CHEP in the refund request and that it was not required to grant a higher refund than stated in that request (even if the amount of VAT stated on the invoices may have indicated a higher refund). In its judgment, the CJ stated that the principle of good governance also applies to tax authorities when processing VAT refund requests. Based on this, the CJ argued that if a tax authority discovers errors in a refund request, an obligation for the tax authority exists to notify the taxable person requesting the refund. In such a case, the taxable person should file a supplementary refund request in order to correct the initial refund request. The tax authority will then need to process the supplementary refund request.

State Aid/WTO

Danish VAT exemption for transportation costs raised serious difficulties in State aid assessment (*Post Danmark*)

Due to a decrease in the number of traditional post sent, Post Danmark faced a downsizing and restructuring in 2017. Post Danmark carries out the universal service obligation to, inter alia, deliver post and smaller parcels 5 days a week (not B2B), which were both exempt from VAT. Amongst the various forms of financial support offered by the Danish government in the past was a VAT measure, which exempted customers of mail order companies from VAT on the transportation costs charged if they chose to use Post Danmark as the designated transport service. The European Commission decided not to object to the State aid offered to Post Danmark to carry out its universal service obligation on the basis of Article 106(2) TFEU, and in doing so, it held that the earlier VAT exemption did not constitute State aid at all. Competitors then filed an appeal with the General Court arguing that given the existence of serious difficulties, the Commission should first have opened a formal investigation before deciding on the amount of compensation allowed. They also pointed out that there was an error in the assessment of the VAT exemption.

From 1990 to 2017, Danish law allowed for a reimbursement paid by customers to mail-order companies for transportation costs to be regarded as a direct transaction between the customer as end-user and Post Danmark as the transporting company, which allowed for the VAT exemption to apply. For this purpose, the payment made by the mail-order company to Post Danmark was treated as an expense incurred on behalf of their customers in accordance with Article 79(c) of the VAT Directive. The European Commission pointed out that the VAT exemption as such can be derived from Article 132(1)(a) of the VAT Directive and therefore, was not attributable to Denmark. However, the General Court held that, as argued by the applicants, it was the administrative practice of looking through the mail-order company as an intermediary that allowed for the exemption to apply.

The General Court pointed out that Article 78(b) of the VAT Directive calls for incidental expenses such as transportation to be included in the taxable amount, which would have meant that mail-order companies should normally have charged VAT regardless of the actual transporting company used by the mail-order company in turn. As Denmark itself had decided to abolish its administrative practice admitting that it had no basis in EU Law and the complaint filed by competitors clearly referred to this, the Commission should have looked into the question of whether the exemption was attributable to Denmark more closely. For this purpose, it should have opened a formal investigation to properly address the issues raised, which led to an annulment of the Commission’s decision not to object to the new aid offered to Post Danmark. (This decision is now being appealed at the CJ by the competitors that filed the initial complaint and the appeal that led to this judgment on points other than the VAT exemption; the Commission has not yet initiated a formal investigation.)

Direct Taxation

European Parliament adopts new country-by-country reporting rules

The Members of the European Parliament have given their final green light to new Directive on Country by Country Reporting (CbCR), in order to undermine tax avoidance. Multinationals and their subsidiaries with annual revenues over EUR 750 million - and which are active in more than one EU country - will now have to publish the amount of tax they pay in each Member State. This information will also need to be made publicly available on the Internet, using a common template and in a machine-readable format.

To facilitate an efficient use of the information exchanged and to increase transparency, the Parliament suggested to break down the reported data into specific items, including the nature of the company's activities, the number of full-time employees, the amount of profit or loss before income tax, the amount of accumulated and paid income tax and accumulated earnings. Subsidiaries or branches below the revenue threshold will also be required to publish their tax information if they are deemed to exist only to help the company avoid the new reporting requirements.

The directive will enter into force 20 days after publication in the Official Journal. Member States will then have 18 months to transpose the law into their national laws. This means that businesses will need to be complying with the first provisions of the directive by mid-2024. The CbCR will be examined on its effectiveness after four (4) years.

CJ rules that requesting information based on taxpayer's company status satisfies identification requirements (*État luxembourgeois (Informations sur un groupe de contribuables, C-437/19)*

F is a property company established under French law, and L is a company established under Luxembourg Law, which is F's indirect parent company. France, the requesting State, noted that F owns immovable property in France and that L also directly owns further immovable property in France. The same request explained, in that regard, that, pursuant to French law, natural persons directly or indirectly owning immovable property situated in France must declare that property, and that the French tax authority wished to know the identity of the shareholders and beneficial owners of L. However, L refused to provide such information and consequently, was charged a financial penalty. L did not agree with the legality of this financial penalty, based on the Article 47 of the Charter of Fundamental Rights of the European Union and on Article 1(1), Article 5 and Article 20(2)(a) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

The case was brought before the CJ (Case C-437/19). The CJ first ruled that Articles 1(1), 5 and 20(2) of the Directive on Administrative Cooperation (2011/16) (DAC) must be interpreted as meaning that a request for information must be regarded as relating to information that does not manifestly appear to be devoid of any probable relevance, when the persons that are the subject of a control or an investigation within the meaning of the latter provision are not identified by name and individually by this request, but that the requesting authority establishes, on the basis of clear and sufficient explanations, that it is carrying out a targeted investigation concerning a limited group of people, justified by a well-founded suspicion of non-compliance with a specific legal obligation.

Hereafter, the CJ addressed Article 47 of the Charter of Fundamental Rights of the European Union. It stated that this Article must be interpreted as meaning that a person in possession of information who:

- has been ordered to pay a financial administrative penalty for non-compliance with a decision ordering the communication of information in the context of an exchange between national tax administrations under Directive 2011/16, which is not susceptible to a contentious appeal under the domestic law of the requested Member State; and
- challenged the legality of this decision by incidental means in the context of a contentious appeal against the sanction decision for non-compliance with this injunction, having thus obtained knowledge of the minimum information referred to in Article 20(2) of this directive during the legal proceedings relating to this appeal,

must, following the definitive recognition of the legality of the said decisions issued in its regard, be granted the possibility of complying with the order of injunction to communicate information within the time limit initially provided for this purpose by national law, without this leading to the maintenance of the sanction that the taxpayer had to incur in order to exercise its right to an effective remedy. It is only if this person does not follow up on this decision within this period that the sanction imposed would legitimately become payable.

CJ rules that bringing an investment dispute to an arbitration tribunal is contrary to EU law (*Republiken Polen v PL Holdings S.à.r.l., C-109/20*)

PL Holdings is a company in Luxemburg that holds 99% of the shares in a Polish bank. The Polish Financial Supervision Authority decided to suspend the voting rights attached to these shares and to force a sale of the shares, as a result of which, PL Holdings started an arbitration procedure before an arbitral tribunal. This tribunal declared it had jurisdiction based on Article 9 of the bilateral investment treaty between Luxemburg, Belgium and Poland (**BIT**) and that Poland had to pay damages for infringing Article 9 of this BIT. Poland brought an action before the Svea Court of Appeal and argued first. that Articles 267 and 344 TFEU preclude a dispute between two Member States being brought before an arbitration body and that, therefore, Article 9 BIT was contrary to EU law. Second, it stated that it had timely challenged the jurisdiction of the tribunal. Last, Poland argued that it could not be inferred from its conduct that it intended to conclude an ad hoc arbitration agreement with PL Holdings. The Svea Court of Appel dismissed the action of Poland by stating that, even though the case *Achmea* (C-284/16) was applicable (i.e., Article 9 BIT being contrary to EU law), the invalidity of Article 9 BIT did not prevent a Member State from concluding an ad hoc arbitration agreement that is based on the common intention of the parties. According to the Svea Court of Appeal Poland also did not timely challenge the validity of the arbitration clause in Article 9 BIT. Poland brought an appeal to the Supreme Court which referred the question to the CJ as to whether Articles 267 and 344 TFEU, as interpreted in the case *Achmea* (C-284/16), mean that if an arbitration agreement contains an arbitration clause that is invalid since the agreement been concluded between two Member States, an arbitration agreement between a Member State and an investor is invalid because the Member State refrains from raising objections as to jurisdiction.

The CJ first observed that Poland did contest the jurisdiction of the tribunal based on the BIT and that there was an ad hoc arbitration agreement between Poland and PL Holdings whereby Poland was able to effectively challenge the validity of that agreement. Subsequently, it repeated that Articles 267 and 344 TFEU must be interpreted as precluding an arbitration provision in an international agreement between two Member States under which an investor in that Member State brings proceedings against the other Member State before a tribunal whose jurisdiction that Member State has undertaken to accept. This because by concluding such agreements, the Member States could remove disputes that might concern EU law from the system of judicial remedies which the TFEU requires Member States to establish in the fields covered by EU law. Allowing ad hoc arbitration agreements that are comparable to those types of agreements would, in fact, entail a circumvention of the obligations arising for that Member State. The CJ also ruled that it follows from the case *Achmea* (C-284/16) and from the principles of the primacy of EU law and of sincere cooperation (i.e., Article 4(3) TEU) that Member States should actively challenge the validity of an arbitration clause or the ad hoc arbitration agreement if a dispute is brought before an arbitration body based on an agreement which is contrary to EU law. This is also confirmed by Article 7(b) of the Agreement for the termination of Bilateral Investment Treaties between the Member States.

The CJ concluded that Articles 267 and 344 TFEU preclude national legislation that allows a Member State to conclude an ad hoc arbitration agreement with an investor in another Member State that makes it possible to continue arbitration proceedings initiated based on an arbitration clause that is identical to that agreement and that is contained in an international agreement between these Member States and whose content is invalid because it is contrary to those Articles.

On a final note, PL Holdings requested the CJ to limit the temporal effects of the judgment mentioned above. The CJ stated that such limitation is quite exceptional and can only be imposed if those concerned have acted in good faith and if there a risk of serious difficulties. It also stated that restricting temporal effects of the interpretation of EU law may be allowed only in the actual judgment ruling upon the interpretation requested. According to the CJ, this entails the case *Achmea* (C-284/16), in which the temporal effects were not limited by the CJ. The CJ also stated that there is no risk of serious difficulties since the present judgment only refers to ad hoc arbitration agreements concluded in circumstances such as those in the main case. Finally, the CJ stated that PL Holdings' individual rights should be protected within the framework of the juridical framework of Poland and that if there is a lacuna in the protection of those rights such lacuna cannot justify a failure to comply with Articles 267 and 344 TFEU and Article 4(3) TEU. The CJ, therefore, refused PL Holdings' request.

CJ rules that limited deductibility of statutory shares is not compatible with EU law (*XY v Finanzamt V, C-394/20*)

A deceased Austrian resident had immovable property in Germany. His daughter, also an Austrian resident, is his sole heir while his wife and son only receive the statutory share of the inheritance. Under German tax law, transfers based on an inheritance to children involving German immovable property are allowed a basic allowance of EUR 400,000 unless neither the deceased person nor the heir are German residents. In that case, the basic allowance is only available on the basis of pro rata (i.e., the value of the domestic assets subject to the limited tax liability divided by the total sum of assets received by the inheritance). Subsequently, the heir may deduct the costs related to the statutory shares as expenses in the case both the deceased and the heir are German residents. If neither are resident of Germany, only expenses that are directly economically connected with German immovable property are deductible. The daughter filed the inheritance tax return in Germany in which she claimed the basic allowance of EUR 400,000 and deducted the statutory shares as expenses. The German tax authorities only granted a reduced basic allowance based on the pro rata and refused the deduction of the statutory shares. The daughter appealed against this decision. For the Opinion of AG Richard de la Tour, we refer to EUTA 191.

With respect to the basic allowance, the CJ first ruled that the legislation should be considered a restriction on the free movement of capital pursuant to Article 63(1) TFEU. It then stated that based on Article 65(1) and (3) TFEU Member States can distinguish between resident and non-resident taxpayers provided that such a distinction does not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital. Therefore, it should be assessed whether the difference in treatment relates to situations that are objectively comparable or if the distinction is justifiable by an overriding reason in the public interest. The CJ ruled that the difference in treatment relates to objectively comparable situations given that an heir with limited tax liability is in a situation comparable to that of an heir with unlimited tax liability. This because neither the nature of the family relationship that connects the deceased and the heir nor the objective of partial exemption of the family estate depends on the place of residence. The difference in treatment, however, is justified by the need to preserve the coherence of the tax system since, among others, the legislation establishes a direct link between the allowance on which the heir may rely, and the extent of the tax jurisdiction exercised with respect to the enrichment he or she derives from the acquisition on death. The legislation also does not go beyond what is necessary to reach the objective pursued.

Regarding the deductibility of the costs related to the statutory shares, the CJ ruled that this legislation also entails a restriction on the free movement of capital and that the difference in treatment relates to objectively comparable situations. However, this restriction cannot be justified on the ground of the coherence of the German tax system since the liabilities on which the deduction is based do, at least in part, have a sufficient connection with the whole estate. The principle of territoriality and the need to ensure a balanced allocation of the Member States' powers to impose taxes also do not offer a justification because Germany did not set out the reasons why the taking into account of liabilities would give rise to Germany renouncing one part of its jurisdiction in favour of other Member States or would affect its taxation power.

Opinion AG Rantos on Bulgarian withholding tax on fictitious interest that is compatible with EU law (*Viva Telecom Bulgaria'EOOD v Direktor na Direktsia 'Obzhalvane I danachno-osiguritelna praktika' – Sofia, C-257/20*)

Viva Telekom Bulgaria is a Bulgarian company that concluded an interest-free loan agreement with its sole shareholder InterV Investment S.à r.l. in Luxemburg. The loan would mature in 60 years and could be converted into equity at any time. The Bulgarian tax authorities concluded that this construction constituted tax evasion pursuant to Article 16(2)(3) of the Bulgarian Corporate Income Tax Act (**CITA**) and argued that interest should be paid that was subject to 10% withholding tax. Viva Telekom Bulgaria appealed this decision and argued that the fictitious interest was calculated without considering the commercial interest in granting an interest-free loan. It further stated that Article 16(2)(3) CITA was contrary to the case law of the CJ as it denies taxpayers that have concluded an interest-free loan the opportunity to demonstrate there were economic reasons to do so. In the alternative, it argued that Bulgaria had exercised the option of Article 4(1)(d) of the Interest and Royalty Directive (**IRD**) to exclude the interest from the scope of the IRD. It, therefore, fell within the scope of the Parent- Subsidiary Directive (**PSD**) whereby the distributed profits should be exempt from withholding tax. Viva Telekom Bulgaria finally added that the loan constituted a contribution of capital within the meaning of Article 3(h) to (j) of the Directive concerning indirect taxes on the raising of capital whereby the loan should not be subject to any indirect taxes.

The Bulgarian Supreme Administrative Court referred the following questions to the CJ:

1. Does national legislation such as 16(2)(3) CITA conflict with the principle of proportionality in Articles 5(4) and 12(b) TEU and the right to an effective remedy and to fair trial in Article 47 of the Charter of Fundamental Rights of the European Union (i.e., the Charter)?
2. Are interest payments pursuant to Article (4)(1)(d) IRD profit distributions to which Article 5 PSD applies?

3. Does the rule laid down in Article 1(1)(b) and (3) and Article 5 PSD apply to payments on an interest free loan which becomes due in 60 years and which is covered by Article 4(1)(d) IRD?
4. Does national legislation and a tax practice according to which unpaid interest on an interest-free 60-year loan by a parent company registered in a different Member State is subject to withholding tax conflict with Articles 49 and 63(1) and (2) TFEU, the PSD and the IRD?
5. Does the taxation at source of fictitious interest income on an interest-free loan granted by a company in another Member State which is the sole shareholder conflict with the Directive concerning indirect taxes on the raising of capital?
6. Does the transposition of the IRD in 2011, that is prior to expiry of the transposition period laid down in the Act of Assession of Bulgaria and Rumania, in which the tax rate is set at 10% instead of the 5% prescribed in the Act of Accession and the Protocol, infringe the principles of legal certainty and legitimate expectation?

AG Rantos first pointed out that the issue must be examined on the ground of the free movement of capital and freedom of establishment. With respect to the first question the AG opines that Articles 5(4) and 12(b) TEU set out the principles that govern the implementation of the legislative process of the EU and do not concern national legislation. Article 47 of the Charter is only binding upon Member States when they apply EU law. Because 16(2)(3) CITA neither transposes an EU directive nor applies or implements any other provision of EU law, this Article should also not be applicable. The national legislation, therefore, does not conflict with the abovementioned Articles.

The second question is answered by the AG by stating that the IRD is not applicable given that fictitious interest cannot be considered as payment to a beneficial owner within the meaning of the IRD. Even if the fictitious payment could be considered a ‘payment’, it would not fall within the scope of the IRD in this case based on Article 4(1)(d) IRD. Finally, the AG stated that the IRD aims at the avoidance of double taxation in case of cross-border payments and there is no payment in this case. The AG therefore stated that Article 4 IRD does not require interest payments such as those referred to in Article 4(1)(d) to be classified as profit distributions to which Article 5 PSD applies.

The AG answered the third question by deciding that the fictitious interest that was solely established by the tax authorities as a means of subjecting to a tax transaction that was first concealed, could not be regarded a ‘distribution of profits’ within the meaning of the PSD. The PSD, therefore, should not apply.

With respect to the fourth question, the AG stated that it must first be examined whether Articles 49 and 63 TFEU preclude national legislation under which the scheme applied automatically to non-resident companies that, unlike resident companies, prevents them from deducting expenses on the loan. If so, it should be examined whether a mechanism for recalculating and refunding the tax can eliminate such difference and can be justified by overriding reasons of general interest. Lastly, the application of that restriction should then also be appropriate to achieve the objective pursued and does not go beyond what is necessary.

The AG noted that Article 16(2)(3) CITA applies to any interest-free loan (i.e., domestic or non-domestic) and the same rate of 10% applies irrespective of where the lender is established. However, the method of calculation does differ in both situations. The Bulgarian tax law provides the possibility for non-resident entities to opt for the same method of calculation as applied to resident companies. However, the AG opined that this mechanism has an optional nature which, based on EU case law, in itself does not correct the unlawful nature of a system under EU law. The AG, therefore, assessed whether there are any justification grounds and concluded that the legislation at issue constitutes reasons in the public interest. Since the objective of Article 16 CITA is to combat tax avoidance by transposing the at arm’s length principle into Bulgarian law, it is appropriate for ensuring the attainment of the prevention of tax abuse and to maintain the balanced allocation between Member States to impose taxes. The legislation also complies with the principle of proportionality.

The fifth question is answered by the AG by stating that the Directive concerning indirect taxes on the raising of capital is applicable since the loan, predominantly based on the option to convert and its long term, could be considered a ‘contribution of capital’. However, the provisions of the Directive do not preclude a withholding tax such as the one at issue in the present case as the Directive does not require Member States to exempt contributions of capital from all forms of direct tax.

The sixth and last question is devoid of purpose in the pending action, according to the AG, given that the IRD is not applicable in the present case.

Cumulation of sanctions is conditionally not contrary to EU law (*BV v Direction départementale des finances publiques de la Haute-Savoie, C-570/20*)

BV practiced as an accountant in France. As a result of inspections carried out in 2009, 2010 and 2011, the French tax authorities discovered that BV had declared less professional income than it had actually received, resulting in tax evasion in the amounts of EUR 82,507 in respect of VAT and EUR 108,833 in respect of non-commercial profits. For that reason, BV was charged with two offences: tax evasion by the concealment of taxable amounts and the omission of records from an accounting document.

After imposing tax fines of 40% of the tax evaded, the criminal court imposed a further 12 months' imprisonment sentence. BV disagreed and invoked the ne bis in idem principle, i.e., BV should not be faced with an administrative and a criminal penalty both imposed in relation to the same act. The French court referred preliminary questions in this case.

On 9 December 2021, AG Campos Sánchez-Bordona published his Opinion in this case. The AG started by referring to *Menci* (C-524/15) and *Garlsson Real Estate and Others* (C-537/16), in which the CJ specified the conditions to be met by national legislation for the purposes of limiting, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union (the Charter), the fundamental right not to be punished twice for the same acts, which is guaranteed by Article 50 of the Charter. Based on this, the AG concluded that Article 50 of the Charter does not preclude national legislation which permits the duplication of administrative and criminal proceedings and penalties in situations defined on the basis of clear and precise criteria that are laid down by law and properly defined by case law. Nonetheless, Article 50 of the Charter, however, does preclude national legislation which does not make it possible to ensure the required proportionality between the seriousness of the offence on the one hand, and the severity of all the combined penalties on the other.

The Commission sends Sweden a reasoned opinion on its rules with respect to the taxation of dividends paid to public pension institutions

Swedish public pension funds are tax exempt in Sweden whereas dividends paid to comparable non-resident pension institutions are subject to a Swedish withholding tax on dividends. The Commission deems that such tax treatment infringes the free movement of capital. Sweden now has two months to respond, after which the Commission might decide to refer the case to the CJ.

VAT

CJ rules on VAT refund in case refund request is issued too late (*Wilo Salmson France SAS*)

On 21 October 2021, the CJ published its judgment in the case *Wilo Salmson France SAS* (C-80/20).

The French company Pompes Salmson SAS ('Salmson') acquired manufacturing equipment in Romania. For these supplies, invoices were issued by the supplier in 2012. Salmson asked for a refund of the Romanian VAT under Directive 2008/9/EC, which regulates the VAT refund to VAT taxable persons established in the EU but not in the Member State where VAT is paid. This refund request was rejected by the Romanian Tax Authority due to non-compliance with all legal requirements for invoices. After being informed of this decision, the supplier credited the invoices initially issued (in 2012) and issued new invoices relating to the same purchases (in 2015). Salmson filed a new refund request for the year 2015, that was also rejected since the right to a VAT refund related to the 2012 invoices.

In its judgment, the CJ stated, based on previous case law, that the right to recover input VAT is subject to the twofold condition that the supplier has become liable for the VAT payment, and that the recipient of the supply possesses an invoice that fulfils all invoicing requirements. Those two conditions determine the period in which the right of VAT recovery has to be exercised and the moment when any time limit commences. An invoice exists when it includes information on the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT amount, which must be charged separately. It is for the national court to ascertain in the documents issued by the supplier in 2012 fulfil these conditions.

In connection to the issuance of the 2015 invoices, the CJ ruled that the cancellation of an invoice has no effect on a right of VAT recovery that has already arisen or on the period in which that right has to be exercised. The Romanian tax authority, therefore, was allowed to reject the 2015 refund request given that that request related to the supplies performed in 2012.

CJ rules on liability to declare VAT (*X-Beteiligungsgesellschaft mbH*)

On 28 October 2021, the judgment of the CJ in the case *X-Beteiligungsgesellschaft mbH* (C-324/20) was published.

X-Beteiligungsgesellschaft mbH ('X') assisted T-GmbH with the sale of an immovable property in 2012. In return for the intermediation services, X received a fee of EUR 1,000,000 from T-GmbH. This remuneration was paid by T-GmbH in five tranches of EUR 200,000. These tranches became due annually on 30 June, with the first payment being due on 30 June 2013. X argued that it was only liable to pay VAT upon receiving the tranche payments from T-GmbH. The German tax authority argued that X was liable to declare the full VAT amount in 2012 because the intermediation service had been completed in that year.

The taxable amount for VAT purposes includes everything which the supplier obtains in return from the customer for performing a supply of goods and/or services. The taxable amount is determined at the time when the taxable event occurs. In its judgment, the CJ ruled that the intermediation service was provided on one single occasion, as a result of which, X was directly liable for VAT over the full amount of EUR 1,000,000 in 2012. The fact that the recipient paid in five tranche payments does not imply that the intermediation services were rendered on a continuous basis. In the latter case, cash accounting would have been applicable for VAT purposes. The CJ also ruled that the payment in five different instalments should not be considered an event that may lead to a downward adjustment of the taxable amount in 2012, because such a downward adjustment may only be performed when the customer's payment becomes uncollectible indefinitely. This is not at hand in the present case, because X ultimately did receive the full remuneration of EUR 1,000,000 from T-GmbH.

CJ judgment on VAT exemption for educational services (*Dubrovin & Tröger GbR – Aquatics*)

On 21 October 2021, the judgment of the CJ in the case *Dubrovin & Tröger GbR – Aquatics* (C-373/19) was published.

Dubrovin & Tröger ('D&T') runs a swimming school in the form of a partnership governed by public law. D&T offers swimming tuition to children. In dispute is whether the VAT exemption for the provision of children's education applies to the activities of D&T.

The VAT exemption for educational services is aimed at encouraging activities in the public interest. The transfer of knowledge and skills between a teacher and students is the main element of an educational activity. Based on previous case law, the CJ noted that the VAT exemption for educational services does not apply to every activity performed in the public interest, but only to those activities explicitly mentioned in the legal provision in the VAT Directive. This is in line with the notion that VAT exemptions should be interpretated strictly because they infringe the general principle that VAT should be levied on all services supplied for consideration by a taxable person.

The CJ ruled that swimming tuition constitutes specialised tuition provided occasionally, which does not amount, in itself, to the transfer of knowledge and skills covering a wide set of subjects. This means that the VAT exemption for educational services may not be applied by D&T.

CJ rules on possibility to reject VAT recovery in case of revocation of VAT number (*Promexor Trade SRL*)

On 18 November 2021, the CJ published its judgment in the case *Promexor Trade SRL* (C-358/20).

The VAT identification number of Promexor Trade SRL ('Promexor') was revoked due to not reporting any transactions subject to VAT for six consecutive months. Promexor continued to perform supplies subject to VAT after the revocation of the VAT number. The Romanian tax authority ordered Promexor to pay the VAT amount due on those transactions, without allowing Promexor to recover the VAT paid on its expenses.

In its judgment, the CJ first established, based on previous case law, that the right to recover VAT on expenses is a cornerstone of the EU VAT system. The right to recover VAT is bound to material and formal conditions. In principle, the right to recover VAT exists when the material conditions are fulfilled (i.e., the use of the procured goods / services to perform activities subject to VAT), even if not all formal conditions are fulfilled. The CJ ruled that the VAT registration is a formal requirement that cannot compromise the taxable person's right to recover VAT, if and insofar the material conditions for VAT recovery have been fulfilled. The CJ ruled that the Romanian tax authority went beyond what is necessary to ensure the correct collection of VAT by making the right to recover VAT subject to compliance with formal obligations, such as the identification for VAT purposes, without taking into account whether the material requirements for VAT recovery had been fulfilled.

CJ rules on correction of output VAT in connection to bad debts (*ELVOSPOL, s.r.o*)

On 11 November 2021, the judgment of the CJ in the case *ELVOSPOL* (C-398/20) was delivered.

ELVOSPOL supplied goods to a company that was later declared bankrupt, as a result of which, ELVOSPOL never received the remuneration that it was entitled to. ELVOSPOL requested a refund of the VAT amount paid to the Czech tax authority in connection with these supplies of goods. This request was denied because the supplies at hand took place six months prior to the insolvency of the recipient. In such situations, the Czech VAT regulations do not allow a refund of VAT to the supplier.

In its judgment, the CJ ruled that this practice is not compatible with the EU VAT Directive. The VAT Directive stipulates that a taxable person is entitled to a refund of output VAT in case its recipient does not pay part or all of the remuneration due. Once it is established that claims are definitely irrecoverable, Member States are not allowed to reject such a refund request, even though the Member State may not be able to adjust the input VAT amount recovered by the recipient of the supply.

Member States are allowed to impose specific regulations aimed at ensuring the correct levy of VAT and preventing evasion. However, this policy option may not be used in such a way that it would undermine the fundamental principles of the EU VAT system. The Czech practice is not compatible with these principles, according to the CJ.

CJ rules on VAT recovery in connection to self-issued invoices concealing the name of the actual supplier (*Ferimet SL*)

On 11 November 2021, the CJ delivered its judgment in the case *Ferimet SL* (C-281/20).

Ferimet declared that it had acquired scrap metal from a supplier called Reciclatges de Terra Alta. In connection with these supplies, Ferimet self-issued invoices subject to the VAT reverse charge (which applies to the supply of scrap metal). The Spanish tax authority established that Reciclatges de Terra Alta could not have been the actual supplier of Ferimet, as a result of which Ferimet was denied the right to recover the self-charged VAT amount.

In its judgment, the CJ considered that the right to recover VAT is subject to the material conditions that the supplier is a taxable person for VAT purposes and that the recipient uses the procured goods and services for its own VAT taxed output transactions. In the case at hand, Ferimet concealed the true identity of the supplier, as a result of which the Spanish tax authority was not able to determine if the first condition was fulfilled. Based on this, the CJ argued that Ferimet should be denied the right to recover the self-charged VAT amount.

CJ rules on refusal of the right to recover VAT when true supplier is not identified (*Kemwater ProChemie*)

On 9 December 2021, the judgment of the CJ in the case *Kemwater ProChemie* (C-154/20) was published. This case is very similar the *Ferimet* case (C-281/20).

Kemwater ProChemie claimed a refund of VAT in respect of advertising services provided by a company called Viasat Service. The Czech tax authority found that Viasat Service had no knowledge that those services had been provided to Kemwater ProChemie and that Kemwater ProChemie was not able to demonstrate that that Viasat Service was indeed the supplier of the advertising services. Kemwater ProChemie was subsequently denied the right to recover VAT on the invoices relating to the advertising services.

In its judgment, the CJ considered that the right to recover VAT is subject to the material conditions that the supplier is a taxable person for VAT purposes and that the recipient uses the procured goods and services for its own VAT taxed output transactions. Due to the identity of the real supplier being unknown, it was not possible to determine whether that supplier qualifies as a VAT taxable person. The CJ, therefore, ruled that the Czech tax authority was indeed allowed to deny Kemwater ProChemie the right to recover VAT on the advertising expenses. In this regard, the CJ also ruled that there was no obligation for the Czech tax authority to demonstrate that Kemwater ProChemie had committed VAT fraud or that it knew or should have known that its transactions were connected with VAT fraud.

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