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LAW & TAX

EU Tax Law
Highlights of 2022

In the course of 2022 there have been several important developments in the field of EU tax law. This annual edition of the EU Tax Alert provides an overview of those developments.

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Introduction

In this publication, we look back at the most important tax law developments within the European Union during 2022. We discuss, amongst other things, important tax plans and developments of the European Commission and the Council of the European Union, as well as relevant case law of the Court of Justice of the European Union (CJ) and the national courts of the Member States.

Highlights in this annual edition are:
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- Council adopts Regulation on an emergency intervention to address high energy prices
- CJ judgment in Luxembourg State aid case (*Fiat Chrysler Finance Europe v Commission* - Ireland v Commission, Joined Cases C-885/19 P and C-898/19 P)
- CJ strikes down publicly accessible UBO-register (*Luxembourg Business Registers*, Joined Cases C-37/20, C-601/20)
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If you are interested in other tax law developments within the European Union during 2022, please see the editions 192-198 of the EU Tax Alert available in our website.

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Highlights of 2022

EU Member States formally adopt directive implementing Pillar Two

On 12 December 2022, the Council of the EU announced that Member States had reached the required unanimity for the adoption of the Directive implementing Pillar Two at EU level.

Following this announcement, on 15 December the Council formally adopted the Directive's compromise text of 25 November 2022 together with a statement stressing the EU's commitment to also adopt Pillar 1. As part of a larger political deal, all Member States voted in favour with one Member State abstaining. In addition, it was agreed that the Commission will have to report to the Council on the progress on Pillar 1 by June 2023. If appropriate, the Commission will have to submit a legislative proposal by the end of 2023 to address the tax challenges arising from the digitalization of the economy, if there is no agreement on Pillar 1. This entails that the proposal for an EU digital levy could be revived in the absence of an agreement on Pillar 1.

The Pillar Two Directive should be transposed into Member States' national law before 31 December 2023 and some Member States have already presented concrete implementation plans. For groups with a consolidated turnover of at least EUR 750 million, the transitional rules would, however, already have been in effect as from December 2021.

For more information about this development, please see our website post on the announcement and on the adoption.

ECOFIN amends the Code of Conduct for Business Taxation

On 8 November 2022, the Economic and Financial Affairs configuration of the Council of the European Union (ECOFIN) approved a Revised Code of Conduct for Business Taxation. This is the first revision of such Code of Conduct since 1997.

The revised code of conduct introduces, in particular, the concept of 'tax features of general application'. Whereas previously only preferential measures (such as special regimes or exemptions from the general taxation system) were examined, under the new rules the scope will also include tax features of general application. These will be regarded as harmful if they lead to double non-taxation or the double/multiple use of tax benefits. Furthermore, the revised code of conduct clarifies the review process in the code of conduct group, which is responsible for the administration of the code.

For more information on this development, please see the Commissions' documents published in this regard.

Council adopts Regulation on an emergency intervention to address high energy prices

On 6 October 2022, EU Member States formally adopted the Council Regulation on an emergency intervention to address high energy prices (hereinafter referred to as the 'Regulation'). Published in the EU Official Journal on 7 October 2022, the Regulation is currently applicable in the European Union This legislation introduces a common and interdependent set of measures to reduce electricity demand and to collect and redistribute the energy sector's surplus revenues to households and small and medium-sized enterprises. Among these measures, the Regulation includes: (i) a revenue cap of EUR 180/MWh for 'inframarginal' electricity producers (e.g., renewables, nuclear and lignite); and (ii) a temporary solidarity contribution (windfall tax) on profits of businesses active in the crude petroleum, natural gas, coal, and refinery sectors.

CJ judgment in Luxembourg State aid case (*Fiat Chrysler Finance Europe v Commission - Ireland v Commission*, Joined Cases C-885/19 P and C-898/19 P)

On 8 November 2022, the CJ delivered its judgment in the case *Fiat Chrysler Finance Europe v Commission - Ireland v Commission* (Joined Cases C-885/19 P and C-898/19 P). In its judgment, the Court set aside the EU General Court's judgment of 2019 and annulled the Commission's decision of 2015. The CJ found that the Commission should have assessed Fiat's Luxembourg's transfer pricing arrangement solely in light of Luxembourg rules and administrative guidance on transfer pricing, instead of merely abstractly looking at the 'objective pursued by the general corporate income tax system'. The Commission used a similar approach and reference framework in other still pending cases. The CJ's final judgment in this case may weaken the Commission's stance in other still pending cases on State aid and transfer pricing. For more information, please see our website post on this CJ judgment.

CJ strikes down publicly accessible UBO-register (*Luxembourg Business Registers*, Joined Cases C-37/20, C-601/20)

On 22 November 2022, the CJ delivered its judgment on the compatibility of the public access to UBO-information contained in a register with the fundamental right to protection of private life and the right to protection of personal data. This judgment was issued in response to preliminary questions raised by the Luxembourg court.

The CJ declared the prescribed public accessibility to the UBO-register invalid. The CJ found the public access to UBO-information to constitute a serious interference with the fundamental rights to respect private and family life and the right to protection of personal data which is not limited to what is strictly necessary and is disproportionate to the objective pursued. For more information, please see our website post on this CJ judgment.

CJ rules on whether DAC6 infringes the right to respect communications between a lawyer and his/her client (*Order of Flemish Bars and Belgian Association of Tax Lawyers v Flemish Government*, C-694/20)

On 8 December 2022, the CJ delivered its judgment in the case of *Order of Flemish Bars and Belgian Association of Tax Lawyers v Flemish Government* (C-694/20). The case addresses the question referred by the Belgian Constitutional Court regarding Directive 2018/822 (**DAC6**) and the right to respect communications between a lawyer and his or her client. Under DAC6 intermediaries are obliged to report a Reportable Cross-border Arrangement (**RCBA**) to the competent Tax Authorities. Intermediaries are waived from reporting an RCBA if the reporting obligation would breach the legal privilege under national law of a Member State. In such a case, the lawyer bound by legal privilege is required to inform the other intermediaries concerned in writing, stating reasons, that he or she cannot fulfil his or her reporting obligation. The question referred by the Belgian Constitutional Court is whether this obligation to notify other intermediaries under DAC6 is contrary to Articles 7 and 47 of the Charter.

As a preliminary point, the CJ first noted that the referring court is in fact only seeking to ascertain the validity of the reporting obligation under DAC6 in so far as the notification must be made by the lawyerintermediary to another intermediary who is not his or her client. The Court notes that a notification is not contrary to the rights and freedoms guaranteed by Articles 7 and 47 of the Charter if made by the lawyerintermediary to his or her client, regardless of whether that client is another intermediary or the relevant taxpayer.

The CJ then recalled that Article 7 of the Charter protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. That specific protection afforded to lawyers' legal privilege is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. That role requires that any individual is able to seek advice freely from his or her lawyer, a principle recognized in all Member States. Legal privilege also covers legal consultation, both with regard to its content and its existence. Other than in exceptional situations, clients must have a legitimate expectation that their lawyer will not disclose to anyone that they are consulting him or her.

However, pursuant to the CJ, the obligation for a lawyer-intermediary subject to legal privilege to notify other intermediaries of their reporting obligations implies that those other intermediaries become aware of the identity of the lawyerintermediary. They also become aware of his or her analysis that the tax arrangement at issue is (or may be) reportable and of his or her having been consulted in connection with the arrangement. Thus, in the Court's view, that obligation to notify entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. The fact that other intermediaries are required to inform the Competent Tax Authorities of the identity of the lawyer (exempt intermediary) also leads indirectly to a second interference with the right to legal privilege. The Court then examines whether those interferences may be justified, in particular whether they meet objectives of general interest recognized by the EU and whether they are necessary for the pursuit of those objectives.

The Court recalled that DAC6 forms part of international tax cooperation intended to contribute to the prevention of the risk of tax avoidance and evasion, which constitute objectives of general interest recognized by the EU. Nevertheless, the CJ found that the obligation to notify other intermediaries is not necessary to achieve the objective of DAC6. The Court arrived at this conclusion on the following grounds. All intermediaries are required to report an RCBA to the Competent Tax Authorities. No intermediary can claim that he or she was unaware of the reporting obligations - which are clearly set out in the Directive - to which he or she is directly and individually subject. By expressly providing that legal privilege may lead to a waiver from the reporting obligation, DAC6 makes a lawyer-intermediary a person from whom other intermediaries cannot, *a priori*, expect any initiative capable of relieving them of their own reporting obligations. Any intermediary who is exempt from the reporting obligation because of the legal privilege is nevertheless still required to notify his or her client of his or her reporting obligations. Pursuant to the CJ, being able to disclose the identity of the lawyer subject to legal privilege upon reporting by another intermediary is not necessary to obtain the Directive's objective. The reporting obligation on other intermediaries who are not subject to legal privilege and, if there are no such intermediaries, on the relevant taxpayer, ensure, in principle, that the tax authorities are informed. Although mentioning the identity can enable the tax authorities to ascertain whether that lawyer-intermediary is justified in relying on legal privilege, the purpose of the reporting and notification obligations laid down in DAC6 is not to check that lawyer-intermediaries operate within their limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion, by ensuring that the information concerning an RCBA is filed with the competent Tax Authorities.

The Court thus concluded that the obligation laid down in DAC6 to notify other intermediaries that are not the client is invalid in view of the right to respect for communications between a lawyer and his or her client.

EU Commission publishes long-awaited 'VAT in the Digital Age' proposal

On 8 December 2022, the European Commission published a legislative proposal regarding VAT in the digital age ('ViDA initiative') as part of its action plan for fair and simple taxation. This package aims to improve VAT efficiency and to minimize VAT fraud. This is done by modernizing VAT reporting obligations and facilitating e-invoicing, extending the scope of the VAT rules for the platform economy and moving towards businesses having one single VAT registration in the EU. It concerns significant changes for businesses.

What are the changes?

The ViDA initiative is aimed at three subjects: (1) digital reporting obligations; (2) the VAT treatment of the platform economy; and (3) the single VAT registration.

Digital reporting obligations

E-invoicing

Starting 1 January 2024, Member States may require businesses to issue e-invoices. The e-invoice must in that case comply with European e-invoicing formats. It may not be subject to any prior validation (from tax authorities) and/or acceptance by the customer. Member States that have already implemented a certain e-invoicing regime may continue this regime until 1 January 2028.

Taking effect 1 January 2028, e-invoicing will become the default for intra EU B2B transactions. E-invoices must be issued within two working days after the transaction takes place. Member States may still authorize paper invoices in domestic situations.

Transaction based reporting

As per 1 January 2028, intra-EU B2B transactions must be reported to the tax authorities electronically within two working days from the invoice date. It will no longer be required to submit periodical EC Sales Listings. Member States shall provide for the electronic means for submitting such transactions and may also require domestic and other transactions to be reported in a transaction-based way. Member States should make sure that before 1 January 2028, existing reporting systems are in line with the new rules.

Platform Economy

Taking effect 1 January 2025, VAT reporting liabilities will be further centred around digital intermediary platforms.

The existing VAT liability for platforms facilitating supplies of goods within the EU will be extended to capture all B2C and B2B supplies of goods regardless of where the supplier is located. It will also become mandatory for platforms facilitating B2C distance sales of imported goods with a low consignment value to account for VAT through the Import One Stop Shop arrangement (I-OSS). The European Commission further intends to implement flanking measures to prevent I-OSS number VAT fraud.

A new VAT liability will be introduced for platforms facilitating services relating to short-term accommodation rental and passenger transport. This liability will apply if the actual supplier is not liable for VAT itself, for example due to the small businesses scheme. These service platforms will also be required to collect and store information regarding services relating to short-term accommodation rental and passenger transport for which it is not held liable for VAT.

Another new VAT liability will be introduced for fulfilment platforms facilitating the intra-EU shipments of own goods by businesses. These rules are aimed at platforms that operate a fulfilment warehouse, from which businesses supply their products.

The VAT place-of-service rules will be amended to achieve that VAT on B2C facilitation services provided by all platforms will become due in the Member State where the underlying transaction takes place.

Single VAT Registration

The ViDA initiative aims at decreasing businesses' VAT compliance obligations by taking away the need to maintain foreign VAT registrations. As a result, businesses will only have to maintain one single VAT registration in one Member State.

On 1 January 2025, a mandatory VAT reverse charge mechanism will be introduced for all B2B supplies of goods and services where the supplier is not established in the Member State in which VAT is due and its customer maintains a VAT registration in that Member State. Further, the scope of the existing One Stop Shop (OSS) scheme will be extended to cover domestic supplies of goods by suppliers that are not established in the Member State in which VAT is due. This includes, for example, domestic supplies and installation supplies of goods.

Also taking effect 1 January 2025, a new scheme will be implemented to report all cross-border transfers of own goods within the EU. Call-off stock can also be reported in this scheme. During 2025, the current scheme can still be applied to call-off stock arrangements which are in place at the latest on 31 December 2024.

For whom is this relevant?

Please note that the ViDA initiative is a legislative proposal that still has to be adopted by the EU Council. The ViDA initiative fits in the broader VAT trend of more digital and real-time reporting obligations, enabling businesses to cut compliance costs by minimizing VAT registration requirements and concentrating VAT liabilities around digital intermediary platforms. Given the broad scope of the proposed changes, the ViDA initiative will impact all businesses, especially those involved in international trade and the broader platform economy.

CJ rules on obligation to repay VAT previously recovered when intended VAT taxed activities fail to materialize (*UAB Vittamed technologijos*, C-293/21)

On 6 October 2022, the CJ ruled that the input VAT deducted based on the intention to perform VAT taxed economic activities, has to be paid back when this intention ceases to exist.

The business activities of Vittamed consisted of technical scientific research. Vittamed acquired goods and services that were used in the production of licenses (intangible capital goods) and prototype devices (tangible capital goods). Vittamed operated at a loss in the years following the conclusion of this project. In absence of actual turnover, it was decided to place Vittamed in liquidation and to de-register Vittamed as a VAT taxable person.

Vittamed was entitled to reclaim the VAT charged upon procurement of the goods and services given the intention to use those procurements for VAT taxed purposes. This concerns the initial VAT recovery right. In dispute is whether Vittamed is obliged to repay (part of) the VAT previously recovered due to the VAT revision rules.

The CJ ruled that the direct link between the procurements and the VAT taxed activities is broken when the taxable person's intention to perform these activities ceases to exist. The taxable person is obliged to revise the initial VAT recovery due to the application of the VAT revision rules.

CJ judgment on benefits-in-kind between members of VAT Group (*Finanzamt T*, C-269/20)

On 1 December 2022, the CJ delivered its judgment in the case *Finanzamt T* (C-269/20).

S operates a university school of medicine and, in that capacity, it provides VAT exempt patient care services for consideration. S also provides teaching services that are governed by public law for which it is not considered a taxable person for VAT purposes. S is the controlling company of U-GmbH, which provided cleaning services in respect of the premises used for the business activities of S. S and U-GmbH considered that these cleaning services were not subject to VAT due to the existence of a VAT Group between S and U-GmbH. The German Tax Authority disagreed by arguing that the services provided by U-GmbH constituted a benefit in kind, which constituted a deemed supply over which non-recoverable VAT would have been due (given the use of the services for the non-taxable educational activities performed by S).

In its judgment, the CJ ruled that Germany was allowed to designate S as the sole taxable person for VAT purposes under the condition that S is able to impose its will on the other VAT Group members and this designation does not lead to a loss of VAT revenues.

The CJ further seems to have ruled that VAT Group members can still carry out independent economic activities to other VAT Group members despite being part of the same VAT Group, thereby suggesting that intra VAT group transactions are not out of the scope of VAT. This deviates from the practice currently applied in many EU countries. The CJ ruled that no VAT corrections should place based on the VAT correction rules for expenses used for non-business activities because the cleaning services of U-GmbH were used for the non-economic business activities of S. For more information on this case, please see our web post.

CJ judgment on German VAT Grouping Scheme (*Norddeutsche Gesellschaft für Diakonie mbH*, C-141/20)

On 1 December 2022, the CJ delivered its judgment in the case Norddeutsche Gesellschaft für Diakonie mbH (C-141/20).

Norddeutsche Gesellschaft für Diakonie (NGD) considered that it was part of a VAT Group with its majority shareholder. According to the tax authorities, NGD was not financially integrated with its majority shareholder because the latter did not hold a majority of the voting rights in NGD.

In its judgment, the CJ ruled that Member States are allowed to designate the majority shareholder as the sole taxable person for VAT purposes under the condition that it is able to impose its will on the other VAT Group members and this designation does not lead to a loss of VAT revenues. In that regard, the CJ ruled that Member States cannot require the condition that an entity holds the majority of voting rights in addition to a majority of the shares to determine that an entity can ‘impose its will’ on the other entities. To form a VAT group, it is not necessarily required that an entity be subordinate to the other entity.

Furthermore, the CJ also ruled that Member States are not allowed to designate certain entities as non-independent merely because these entities are part of a VAT Group. This seems to imply that VAT Group members can still carry out VAT taxed economic activities to other VAT Group members despite being part of the same VAT Group. This deviates from the practice currently applied in many EU countries. For more information on this case, please see our web post.

State Aid/WTO

General Court judgment on the Commission’s State aid decision on the UK CFC rules (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19)

On 8 June 2022, the General Court delivered its judgment in the case United Kingdom and ITV plc v Commission (T-363/19 and T-456/19). In the case, the Court ruled that an exemption in the controlled foreign company (CFC) rules applicable in the United Kingdom (UK) until 31 December 2018 constitutes State aid.

The UK CFC rules essentially determine the conditions under which profits of a CFC are considered to be artificially diverted from the United Kingdom. These profits are then taxed in the UK. The judgment of the General Court concerned the so-called non-trading finance profits. These non-trading finance profits from a CFC are taxed in the UK (among others) insofar as they arise from activities where the significant people functions are carried out in the UK (UK activities). There are three specific exemptions that fully or partially exempt the taxpayer from a CFC charge on non-trading finance profits, provided (among others) that the relevant loans from which the profits are derived constitute qualifying loans. Hence, non-trading finance profits from qualifying loans may be (partially) exempt from the CFC charge, whereas that exemption cannot be applied to non-trading finance profits from non-qualifying loans.

The General Court followed the European Commission in its conclusion that the group financing exemption scheme constituted State aid, insofar as it applied to non-trading finance profits from qualifying loans. Here, it followed its (standard) approach, which entails the identification of the reference system. After the reference system has been established, it must be assessed whether the measure constitutes a derogation from the reference system and whether such derogation can be justified.

The General Court held that the CFC rules should be qualified as a separate body of tax rules within the general UK corporation tax system. The Court based itself on the objective criteria of the CFC charge, among others the definition for taxable persons, taxable events, tax rates and interaction with other taxes. Therefore, the body of CFC rules in itself constitutes the reference system. The exemption for non-trading finance profits from qualifying loans then constitutes a derogation from the general rule and is considered a benefit. The exemptions are granted irrespective of whether significant people functions have been carried out in the UK. It could not be ruled out that the exemptions also applied if significant people functions were carried out in the UK. Therefore, the exemption could apply to artificially diverted profits. From that perspective, exempting only CFCs non-trading finance profits arising on qualifying loans could lead to a difference in treatment as opposed to CFCs non-trading finance profits from non-qualifying loans. The two situations were also found to be comparable in the light of the purpose of the CFC rules, which is to protect the tax base of the corporation tax in the UK through the taxation of artificially diverted profits.

As regards the justification, the General Court did not agree with the UK that the derogation was justified for reasons of administrative practicability. It was for the UK to show that such reason justified the measure, but it had not shown (sufficient) evidence to substantiate that position. Second and more interesting, the UK argued that it adopted a reasonable approach to comply with the freedom of establishment. More specifically, it referred to the case of *Cadbury Schweppes* (C-196/04), in which case, the CJ considered the UK CFC rules to be (partially) contrary to the freedom of establishment. The General Court held that where the profits are attributable to an entity resident of the UK which was responsible for the significant people functions carried out in connection with the profits, then they are regarded as having been artificially diverted and, therefore, as being taxable in the UK through a CFC charge. For that reason, the General Court considered that this system cannot be regarded as constituting an obstacle to the freedom of establishment. As the imposition of such a charge cannot be regarded as constituting an obstacle to the freedom of establishment, the exemption from that tax cannot be justified to ensure compatibility with the freedom of establishment. Other (more subsidiary) arguments were also dismissed by the General Court.

Direct Taxation

EU Commission proposes a debt-equity bias reduction allowance (DEBRA)

On 11 May, the EU Commission published a Directive proposal on the debt-equity bias reduction allowance (DEBRA). The proposed Directive entails both a notional deduction on growth in equity and an additional interest deduction limitation for corporate income tax (CIT) purposes. The DEBRA proposal applies to all taxpayers, which are subject to CIT in one or more Member States, except for certain financial undertakings. The proposed date of entry into effect of the DEBRA Directive is 1 January 2024. For a more detailed explanation of the proposal, please see our news article.

Council adopts Regulation on foreign subsidies distorting the internal market

On 28 November 2022, EU Member States formally adopted the Council Regulation on foreign subsidies distorting the internal market (Regulation). This Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the EU (the exact date is not yet known).

Currently, no existing EU instruments address distortions caused by foreign subsidies. This legislation introduces a new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field. In particular, the new tool complements EU State aid rules which deal with distortions in the internal market caused by EU Member State subsidies.

To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission will be the sole authority competent to apply this Regulation. The Commission will have the power to examine any foreign subsidy to the extent it is within the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources.

CJ judgement on the compatibility of Bulgarian withholding tax on fictitious interest with EU law (*Viva Telecom Bulgaria'EOOD v Direktor na Direktsia 'Obzhalvane I danachno-osiguritelna praktika'* – Sofia, C-257/20)

On 24 February 2022, the European Court of Justice (herein after referred as "CJ" or the "Court") delivered its judgement in the case Viva Telecom Bulgaria'EOOD v Direktor na Direktsia 'Obzhalvane I danachno-osiguritelna praktika' – Sofia (C-257/20). Viva Telekom 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's maturity was 60 years and it could be converted into equity at any time. The Bulgarian tax authorities considered that such arrangement entailed tax evasion pursuant to article 16(2)(3) of the Bulgarian Corporate Income Tax Act ("CITA") and argued that the interest that should have had to be paid for such loan would have been subjected to a 10% withholding tax. Viva Telekom 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 that there were economic reasons to do so. In subsidiarity, Viva Telekom 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 such Directive. It, therefore, fell within the scope of the Parent- Subsidiary Directive ("PSD") whereby the distributed profits should be exempt from withholding tax. The company further argued that the loan constituted a contribution of capital within the meaning of the article 3(h) to (j) of the Directive concerning indirect taxes on the raising of capital ("DITRC") whereby the loan should not be subject to any indirect taxes.

The Bulgarian Supreme Administrative Court referred the following six questions to the CJ: (i) Does national legislation such as 16(2)(3) CITA conflict with the principle of proportionality in article 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 (the "Charter")? (ii) Are interest payments pursuant to article (4)(1)(d) IRD profit distributions to which article 5 PSD applies?; (iii) 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?; (iv) 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 article 49 and 63(1) and (2) TFEU, the PSD and the IRD?; (v) 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 DITRC?; and (vi) Does the transposition of the IRD in 2011 (i.e. 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 Assession and the Protocol) infringe the principles of legal certainty and legitimate expectation? For the opinion of Advocate General ("AG") Athanasios Rantos, please see EUTA 192.

In response to the defendant's claim that the second to fourth question referred to the Court should be declared inadmissible, the CJ first rules that these questions are indeed admissible. In this regard, it notes that the CJ may only refuse to rule on a referred question if: (i) the interpretation sought bears no relation to the facts or the object of the main action, (ii) the problem is hypothetical or (iii) the CJ does not have the factual or legal material necessary to give a useful answer. According to the CJ, these exceptions are not applicable in the current case. Subsequently, the CJ recalls that where a matter has been the subject of exhaustive harmonization, the national measure must be assessed in the light of that harmonizing measure and not in that of primary EU law. The CJ therefore states that the questions referred will first be examined as far as they concern the IRD, PSD and DITRC and next, if there is no exhaustive harmonization, in so far as they concern primary EU law.

In relation to the IRD, the CJ rules that this Directive is not applicable since the concept of 'beneficial owner of the interest' included therein must be interpreted as referring to an entity that benefits in economic terms from the interest paid and that has the power to freely avail of that interest. The CJ further notes that, in case of fictitious interest, the lender receives no interest and cannot be regarded as an 7 'actual beneficial owner'. For the same reason, in the CJ's view, article 4(1)(d) IRD does not apply. Since the IRD is considered not applicable, the sixth question is therefore not further examined by the Court.

As regards to the PSD, according to the CJ such Directive is also not applicable. The reason for this is that, in the Court's view, fictious interest cannot be regarded as distributed profits since in such case there is no actual payment. With respect to the DITRC, the CJ notes that this Directive does not require Member States to exempt contributions of capital from all forms of direct tax. It then rules that, since the withholding tax at issue must be regarded as a direct tax, the DITRC directive is also not applicable in the present case.

Based on the aforementioned considerations, the CJ concludes that the provisions of secondary EU law in question (i.e. the IRD, PSD and DITRC) must be interpreted as not precluding national legislation which provides for the taxation in the form of a withholding tax of notional interest that a resident subsidiary, which has been granted an interest-free loan by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions.

After dealing with EU secondary law, the CJ examines whether the articles 49 and 63 TFEU and articles 5(4) and 12(b) TEU and article 47 of the Charter preclude a withholding tax that applies to the gross amount of the fictitious interest, without granting the taxpayer the possibility to deduct, at that stage, expenses related to that loan (non-resident taxpayers need to make a subsequent application for the purpose of recalculating that tax and making a possible refund).

In this respect, the CJ first rules that the withholding tax at issue falls predominantly within the scope of the free movement of capital (article 63 TFEU) and that, therefore, an independent examination in light of article 49 TFEU (freedom of establishment) is not justified. The CJ then rules that the cash-flow advantage arising from the fact that a resident company may deduct from the outset the expenses directly related to their notional interest income, whereas a non-resident company may request these expenses to be taken into account only at a later stage (by means of the submission of an application, after having paid the withholding tax calculated on the gross amount of its notional interest) constitutes a restriction on the free movement of capital.

The CJ subsequently examines whether there is a justification for this restriction. In that respect it first rules that Bulgaria chose to exercise its tax jurisdiction over interest-free loans concluded between resident borrowing companies and non-resident lending companies and that, therefore, non-resident companies must be considered in a comparable situation regarding the expenses directly related to the loans. However, the CJ rules that in the present case the restriction is justified by the objective of safeguarding a balanced allocation of taxing rights between Member States and of the effective collection of taxes. Furthermore, the CJ founds the national legislation at issue to be proportionate, considering its swift refund procedure (i.e. within 30 days and, exceptionally, up to 3 years) and the tax authorities' obligation to pay interest as from 30 days after the filing of the tax return by the taxpayer. In any case, the Courts notes that this is subject to further verification by the referring court.

Finally, in relation to the question of whether the irrebuttable presumption of tax avoidance contained in the legislation at issue is compatible with articles 5(4) and 12(b) TEU and article 47 of the Charter the CJ states that it does not have jurisdiction to reply to a question where it is evident that the provisions referred to are not applicable. The CJ then rules that article 5(4) TEU is not applicable since it relates to actions of EU institutions. The same logic is applied by the Court to article 12(b) TEU, which does not refer to national legislation but to EU draft legislative acts. Finally, the Court finds that article 47 of the Charter does not apply either, since the irrebuttable presumption of tax avoidance does not fall under the IRD, PSD and the DITRC and should not be considered a restriction of the free movement of capital (as the irrebuttable presumption applies both to residents and non-resident companies).

CJ judgement on the application and compatibility of GDPR with a request of information addressed to an internet advertising company in relation to its clients (*SS SIA* - Case C-175/20)

On 24 February 2022, the CJ decided the case SS SIA (Case C-175/20) which concerns the application and compatibility of Regulation (EU) 2016/679 ("GDPR") with a request of information issued by the tax authorities of Latvia to an internet advertising company (SS SIA) in relation to information held by the latter in relation to its clients.

SS SIA is a Latvian internet company that provides online advertising services to sellers of second-hand vehicles. In 2018, the Latvian tax authorities requested SS SIA to: (i) renew the access that such authority already had in relation to the chassis numbers of the vehicles advertised on its Internet portal, and to the telephone numbers of the sellers; and (ii) provide it with information on the advertisements published in a specific section of the aforementioned portal during a 45 days period. The tax authorities' request specified that such information (including the link and text of the advertisement, as well as the brand, model and price of the vehicle), should be provided electronically, in a format allowing the data to be filtered or selected. In addition, in the event that it was not possible to renew access to these information, SS SIA was required to indicate the reason for this and to provide, no later than the third day of each month, the relevant information relating to the notices published in the previous month. SS SIA considered that this is contrary to the principles of proportionality and data minimization laid down in the GDPR. The Latvian court referred the case to the CJ for a preliminary ruling.

In its decision, the CJ first holds that the collection of information by a tax authority involving a substantial amount of personal data from an economic operator is subject to the requirements of the GDPR, in particular those of article 5 (1) thereof. The CJ further holds the tax authority of a Member State may not derogate from Article 5 (1) GDPR where there is no clear and precise legal basis in the EU or national law, the application of which is predictable for those to whom it applies, which determines the circumstances and conditions under which the scope of the obligations and rights provided for in that Article 5 may be restricted.

Based on the above, the CJ concludes that GDPR does not preclude the tax authority of a Member State from requiring an internet advertising service provider to supply information on taxable persons who have placed advertisements in one of the sections of its internet portal, provided that: (i) the information in question is necessary for the specific purposes for which it is collected; and (ii) the period during which such data is collected does not exceed what is strictly necessary to achieve the public interest objective behind such collection.

CJ judgment on whether Belgian legislation requiring digital platforms to provide relevant information on tourists accommodation establishments is in line with EU law (*Airbnb Ireland v Région de Bruxelles-Capitale*, C-674/20)

On 27 April 2022, the CJ published its judgment in the *Airbnb* case (C-674/20) which deals with the issue of whether Belgian legislation requiring intermediaries of tourist accommodation establishments to provide the tax authorities with certain information on particular tourist operators is within the scope of the Directive on Electronic Commerce and aligned with the freedom to provide services (Article 56 TFEU.

Belgium has in place a harmonized regime for the taxation of tourist accommodation establishments in the Brussels Region, under which a flat-rate tourist tax is imposed on the operators of these type of establishments. Intermediaries such as Airbnb are neither liable to pay that tax nor required to levy it. However, one specific provision of this Belgian regime (the 'Provision') obliges intermediaries to report, upon the written request of the tax authorities, certain information about the particular operators of tourist establishments. A failure to comply with such duty renders the intermediary liable to an administrative fine.

In application of the aforementioned Provision, the tax authority of the Central Brussels Region sent two requests for information to Airbnb asking for information concerning the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight accommodation establishments and of accommodation units operated during the year end. As a result of Airbnb not complying with these requests, the Brussels tax authority imposed several fines. Airbnb questioned the relevant requests by means of an action for annulment of the Provision brought before the Constitutional Court of Belgium (the referring court). Airbnb argued that it provides an 'information society service' under the E-Commerce Directive (Directive 2000/31) and that the Provision fell within the scope of this directive (even when such directive expressly states that it is not applicable to 'the field of taxation'). Uncertain about the interpretation of those terms and the appropriate classification of the Belgian Provision in that regard, the Belgian Court referred the case to the CJ.

The main issues addressed by the Court in its judgment relate to: (i) Whether the E-commerce Directive must be interpreted as meaning that the Provision falls within the 'field of taxation' and must, therefore, be regarded as excluded from its scope; and (ii) Whether or not Belgian legislation at issue contravenes the prohibition laid down in Article 56 TFEU (freedom to provide services).

Regarding the first point, the Court considers that the Belgian Provision must be regarded as being indissociable, as regards its nature, from the legislation of which it forms part and, accordingly, falls within the 'field of taxation' which is expressly excluded from the scope of the Directive on electronic commerce.

In relation to the second point, the CJ finds the Belgian Provision not to contravene the prohibition laid down in Article 56 TFEU on the following grounds. First, the Court considers the Provision not discriminatory as it lays down an obligation to comply with a request for information from the tax authorities for all intermediaries whose activity concerns tourist accommodation establishments located in the Brussels Capital Region, irrespective of where those intermediaries are established (and, consequently, regardless of the Member State in which they are established), and irrespective also of the way in which those economic operators mediate (whether by digital means or in accordance with other methods of connection). In this regard, the court recognizes that the development of technological means and the current configuration of the specific market led to the finding that intermediaries providing their services by means of an online platform are likely, under legislation such as that at issue, to be faced with an obligation to transmit data to the tax authorities which is more frequent and greater than that imposed on other intermediaries. However, the Court understands that such greater obligation is merely a reflection of a larger number of transactions by those intermediaries and their respective market shares.

Second, the CJ observes that even when the Belgian reporting obligation may create additional costs (in particular, in connection with the search for and storage of the data concerned), particularly in the case of intermediation services provided by digital means, the data at issue are stored by intermediaries with the result that the additional cost to those intermediaries created by this obligation appears to be limited.

CJ judgment on compatibility of Portuguese withholding tax applicable to non-resident collective investment undertakings with the free movement of capital (*Allianzgi-Fonds Aevn* C-545/19)

On 17 March 2022, the CJ ruled on the case *Allianzgi-Fonds Aevn*, (C-545/19) which concerns the compatibility of the Portuguese withholding tax applicable to non-resident collective investment undertakings (UCITs) with the free movement of capital (Article 63 TFEU).

Under Portugal's tax regime, dividend distributions made to UCITs formed under Portuguese law are exempt from CIT. In lieu of such tax, Portuguese UCITs are subject both to a stamp duty (charged quarterly on the UCITS' net book value) and to a specific tax on dividends received by resident UCITs under certain specific conditions. On the other hand, the aforementioned CIT exemption does not apply to non-Portuguese UCITs, which must pay withholding tax on the dividend they receive.

The case at hand involved Allianzgi-Fonds Aevn, a German based UCIT that received dividends from some Portuguese undertakings in 2015-2016. As a consequence of the tax regime described above, such dividend distributions were subject to Portuguese withholding tax of 25%. Under the understanding that the Portuguese regime provided for a discriminatory tax treatment of non-resident UCITs, Allianzgi-Fonds Aevn lodged an appeal against the relevant tax assessments through which the Portuguese tax authority applied the withholding tax. As a result of such appeal being rejected by the tax authority, the applicant questioned this latter decision against the Portuguese Tax Arbitral Tribunal, which finally referred the case to the CJ for a preliminary ruling. Advocate General (AG) Kokott published her Opinion on 6 May 2021.

In its judgment, the CJ first rules that the case should only be examined from the perspective of the free movement of capital, as any restriction on the freedom to provide services resulting from the relevant legislation is an inevitable consequence of the former and does not, therefore, justify an independent examination of the case in the light of the latter. The Court then finds that the Portuguese legislation introduced an unfavourable treatment for dividends paid to non-resident UCITs which could deter non-resident UCITs from investing in entities resident in Portugal and discourage Portugal-based investors from acquiring shares in such undertakings. The CJ thus concludes that such unfavourable treatment restricts the free movement of capital.

When analysing whether this unfavourable treatment concerned objectively comparable situations, the Court finds that, when receiving dividends, the situation of a resident UCIT is similar to that of a non-resident UCIT since, in both cases, there is a risk of economic double taxation of dividends paid by companies resident in Portugal. Finally, when assessing whether the unfavourable treatment was justified by overriding reasons in the public interest, the CJ rules that neither the preservation of the balanced allocation of the power to impose taxes between Member States nor the preservation of the coherence of the Portuguese tax system are sufficient reasons to justify the restriction on the free movement of capital existing in the case at hand.

EFTA court rules on whether a denial of an interest deduction under Norwegian legislation is contrary to the freedom of establishment (*PRA Group Europe AS v the Norwegian Government*, E-3/21)

On 1 June 2022, the EFTA Court published its decision in the case *PRA Groupe Europe AS* (E-3/21). The case concerns the issue of whether a denial of an interest deduction resulting from the combined application of the Norwegian limited interest deduction rules and group contribution rules is contrary to the freedom of establishment as provided in the Agreement on the European Economic Area (EEA).

The case at hand involved PRA Group Europe Holding S.à.r.l. (PRA Holding), a company established in Luxembourg which holds all the shares of PRA Group Europe Subholding AS (PRA Subholding), a subsidiary established in Norway. PRA Subholding was partly financed with a loan granted by PRA Holding and a deduction of the interest paid in connection with such loan was claimed by the former subsidiary entity in Norway. As a consequence of this interest deduction being disallowed by the Norwegian tax administration, the PRA group contested this decision, claiming that the interest deduction limitation was in breach of the freedom of establishment of Article 31 of the EEA. This because, if PRA Holding were established in Norway, it would have maximized the maximum tax deduction for the interest at the level of PRA Subholding by benefiting from the Norwegian group contribution rules (which would lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies). The Oslo District Court referred the case to the EFTA Court asking whether such Norwegian scheme is a restriction to the freedom of establishment within the meaning of Article 31 EEA, read in conjunction with Article 34 EEA.

The EFTA court first stated that the maximum deduction (which corresponds to 30% of EBITDA) rule applies to all companies and that the Norwegian group contribution rules may be used to lessen or remove the impact of this deduction limitation. The court then noted that a Norwegian tax resident company belonging to a group of companies established in another EEA State will not be able to avoid or lessen the impact of the interest deduction limitation in the same way that Norwegian resident companies belonging to a Norwegian group would. According to the EFTA court, this restricts companies' exercise of the freedom of establishment.

Subsequently, and in line with the *Lexel* case C-484/19 (please see EUTA 187), the EFTA court ruled that a company established in one EEA State paying interest to another group company in another EEA State is no different from a situation where the recipient is established in the same EEA State. The fact that no actual group contribution was made in this case does not alter this conclusion. Therefore, the Court found that the Norwegian legislation at issue constitutes a restriction on the freedom of establishment.

With respect to potential justifications for this restriction, the EFTA Court first ruled that the difference in treatment existent in the case, does not appear justified by the need to safeguard the allocation of the power to impose taxes between EEA States. The Court held this based on the understanding that, if an EEA State grants a deduction in a domestic situation (and renounces part of its taxation rights), that EEA State cannot argue that the same taxing right is important in the cross-border situation in an attempt to limit equal treatment. Finally, in relation to whether the restriction can be justified by the prevention of tax avoidance, the EFTA Court clarified that a restriction may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, the Court noted that, if the Norwegian legislation (which is for the referring court to determine) does not provide the taxpayer with the opportunity to demonstrate that the transaction was arm's length, it goes beyond what is necessary to pursue that objective.

Dutch Supreme Court refers case on Dutch interest deduction limitation to the CJ for potential breach of EU law

On 2 September 2022, the Supreme Court of the Netherlands referred a case to the CJ regarding the Dutch interest deduction limitation rule and its potential breach of EU law. The case concerns the deductibility of intra-group interest payments that are at arm's length. The ruling of the CJ is expected to further clarify the Court's recent judgment in the Swedish Lexel case (*Lexel AB v Skatteverket*, C-484/19). For more information, please see the news item published by Loyens & Loeff on this matter.

CJ rules on deductibility of final losses incurred by a non-resident permanent establishment (*W AG*, C-538/20)

On 22 September 2022, the CJ delivered its judgment in the case W AG (C-538/20). The case concerns the deduction of final losses in Germany incurred by a UK permanent establishment (**PE**) in the situation in which Germany has waived its power to impose taxes under a double taxation convention (**DTC**).

W AG (**W**), a public limited company established in Germany, operates a securities trading bank. In August 2004, W opened a PE in the United Kingdom, which was closed in 2007 after incurring losses. The Tax Office in Germany refused to take account of those losses. Unsure about whether the losses incurred by W's PE should be taken into account under freedom of establishment, the German Federal Finance Court asked to the CJ whether Articles 49 and 54 TFEU must be interpreted as precluding a tax system of a Member State under which a company resident in that Member State may not deduct from its taxable profits the final losses incurred by its PE situated in another Member State where the Member State of residence has waived its power to tax the profits of that PE under a DTC.

Referring to the *Bevola* case (C650/16), the CJ first reiterated its settled case law which states that the freedom of establishment is also valid where, as in the present case, a company established in one Member State carries on business in another Member State through a PE. However, the Court noted that, different to the Bevola case (where the Member State of residence of the company which requested that the final losses incurred by its non-resident PE be taken into account had unilaterally waived its power to tax that EP's profits), in the present situation, Germany had waived its power to tax the foreign PE's profits by means of a DTC and the same applies, symmetrically, to the PE losses. Under such circumstances, the CJ found that a resident company which has such an establishment is not in a situation comparable to that of a resident company which has a PE situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, the double taking into account of losses. Consequently, the Court concluded that in a situation such as that at issue in the present case, no restriction on the freedom of establishment can be established.

VAT

The Council adopts Directive 2022/542 to provide more flexibility for EU Member States to differentiate VAT rates

The Council of the European Union formally adopted Council Directive (EU) 2022/542 on 5 April 2022. This legislative proposal entails that Member States will have more policy freedom in respect of implementing (super) reduced and zero VAT rates.

Member States must still apply the standard rate of at least 15% and may choose to implement two reduced rates of at least 5% for products listed in Annex III of the EU VAT Directive. However, new categories have been added to that list under the new VAT rate system. These include, amongst others, the supply of pharmaceuticals, medical products, digital and/or physical publications, admissions to (digital) events, the supply and construction of housing as part of a social policy and solar panels.

Member States will further be allowed to implement a super-reduced rate (lower than 5%) and a 0% rate to certain universal products such as pharmaceuticals. These options are restricted to certain products such as medicines and medical equipment, foodstuffs and solar panels.

The proposal also stipulates that fossil fuels and chemical pesticides and fertilizers will no longer benefit from the reduced VAT rate from 2030 and 2032 respectively.

CJ judgment on VAT fixed establishment concept (*Berlin Chemie A. Menarini SRL* – C-333/20)

On 7 April 2022, the CJ issued its judgment in the case *Belin Chemie* (C-333/20) which concerns the interpretation of the VAT fixed establishment concept in the case where a parent company procures sales support services from its foreign subsidiaries.

The business operations of Berlin Chemie AG consist of the supply of pharmaceutical products in, amongst others, Romania. For that purpose, Berlin Chemie AG acquired local marking and sales support services from its Romanian subsidiary. The Romanian company issued invoices to Berlin Chemie AG subject to the reverse charge mechanism on the basis that its services were taxable in Germany. The Romanian tax authorities argued that

Romanian VAT was due in respect of the services because Berlin Chemie AG maintained a fixed establishment for VAT purposes in Romania as a result of the procurement of the services.

For VAT purposes, the 'fixed establishment' concept refers to any foreign establishment characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable the taxable person to receive and use the procured services for its own needs. In that regard, the question raised in the present case is whether it is necessary for those resources to belong to Berlin Chemie itself or whether it is already sufficient to have immediate and permanent access to such resources through the Romanian subsidiary company.

In its judgment, the CJ states that it is not a requirement for a taxable person to own the human or technical resources itself in order to maintain a fixed establishment in another Member State. The taxable person should have the right to dispose of those human and technical resources in the same way as if they were its own (for example, based on employment or leasing contracts).

In this case, the Court notes that it was clear that Berlin Chemie did not have its own human and technical resources in Romania, but that those resources belonged to the Romanian company. The Romanian company was also not directly involved in the supplies of pharmaceutical products by Berlin Chemie in Romania. The CJ, therefore, considers that the sales support services were, in principle, received by Berlin Chemie in Germany after which Berlin Chemie used its German human and technical resources to conclude the Romanian pharmaceuticals contracts. In the CJ's view, this means that Berlin Chemie did not maintain a fixed establishment in Germany for VAT purposes.

CJ rules on whether VAT revision rules apply in situations where a deduction has not been exercised on time or not exercised correctly (*X* -C-194/21)

On 7 July 2022, the CJ delivered its judgment in the case *X* regarding the questions whether a VAT taxable person is entitled to a VAT refund when that VAT refund was erroneously not claimed upon being chargeable by the supplier (C-194/21).

X acquired ten plots of VAT taxed building land with the intention of constructing mobile homes on these plots. Initially, X did not reclaim the VAT charged by the supplier, even though X had the intention to use the plots for VAT taxed purposes. Ultimately, the business plan was not implemented due to economic circumstances. X sold two of the acquired plots back to the original seller in 2013. X did not report VAT due on this sale. The VAT inspector imposed a VAT assessment for VAT being due on this sale, which assessment was opposed by X who argued that he was still entitled to deduction of input VAT on his initial sale.

The CJ ruled that X was not entitled to reclaim in 2006, the VAT paid in 2013. The deduction must be claimed in the period in which it arose. If the deduction has not been exercised in the period in which it arose, the deduction may be granted if the national conditions set for this purpose are met.

The VAT revision rules are only applicable where VAT recovery has taken place by the taxable person and cannot give rise to VAT recovery in situations where the deduction has not been exercised on time or not exercised correctly. The right to reclaim VAT without any temporal limit would be contrary to the principle of legal certainty. This means that X had failed to reclaim the VAT in time and that this VAT recovery right has been permanently lost due to the expiration of the applicable limitation period.

CJ rules that no right exists to recover VAT for holding company on costs that are used to provide capital contribution in kind to subsidiaries (*W GmbH*, C-98/21)

On 8 September 2022, the CJ delivered its judgment in the case *W GmbH* (C-98/21). The CJ ruled that a holding company cannot recover the input VAT on costs used to provide a capital contribution in kind to its subsidiaries.

W GmbH is the shareholder of X KG and Y KG. X KG and Y KG perform VAT exempt activities relating to residential real estate. W GmbH contributed services, which W GmbH had acquired with VAT, to X KG and Y KG in exchange for a share in the general profits of X KG and Y KG. W GmbH also provides VAT taxed administrative services against remuneration to X KG and Y KG.

W GmbH reclaimed the input VAT on the services acquired, which it had contributed free of charge to X KG and Y KG. W GmbH argued that it could reclaim all input VAT as it is a management holding company that performs

VAT taxed services to its subsidiaries. This input VAT deduction on the contributed services was disputed by German tax authorities.

The CJ ruled that W GmbH could not reclaim the input VAT charged on the services acquired as these services were not used by W GmbH to provide its own administrative services to X KG and Y KG. According to the CJ, the services solely related to the holding of shares, which is in itself not an economic activity and does allow to recover VAT on expenses.

Customs Duties, Excises and other Indirect Taxes

CJ rules on payment of interest in case of refunds of amounts levied in breach of EU law (*Gräfendorfer, Reyher and Flexi Montagetechnik*, joined cases C-415/20, C-419/20 and C-427/20)

On 28 April 2022, the CJ delivered its judgment in joined cases *Gräfendorfer, Reyher and Flexi Montagetechnik* (C-415/20, C-419/20 and C-427/20), which concern the interpretation of the principles of EU law relating to the repayment of duties levied by Member States in breach of EU law and to the payment of the corresponding interest.

This case concerns three German companies that are active in Europe in the export or import of products. Although the facts differ per case, in all three cases the companies did not agree with the levy of a certain duty and requested repayment, including the payment of interest.

In the *Gräfendorfer* case, the German authorities incorrectly applied EU law, based on a misinterpretation of EU law, when they refused to grant export refunds and imposed a financial penalty. In the *Reyher* and *Flexi Montagetechnik* cases, the German authorities incorrectly applied EU law, based on an error of law or an error in the assessment of the facts, when they imposed, respectively, anti-dumping and import duties.

The companies were repaid the duties which were incorrectly levied by the German authorities in breach of EU law but were denied the payment of interest on those amounts. This is the main dispute of the cases in question.

Based on settled EU case law, a person has the right to obtain not only the repayment of the sum of money levied although not due, but also the payment of interest intended to compensate for the unavailability of that money. However, this case law concerned situations where a national authority imposed the payment of duties based on an EU act which proved to be invalid.

The referring courts, therefore, wondered whether the right to obtain the payment of interest also applies when the payment of duties has been refused or imposed by a national authority on the basis either of an incorrect interpretation of EU law or of an incorrect application of that law, as had occurred in the present cases.

The CJ stated that the rights to repayment and to the payment of interest which rights persons derive from EU law are the expression of a general principle, the application of which is not limited to certain breaches of EU law or excluded where there are other breaches. Thus, they may also be relied on, where payment of duties is made based on national legislation contrary to EU law provisions or it is found that a national authority has misapplied, in the light of EU law, an EU act or national legislation implementing or transposing such an act when it imposed the payment of a tax on that person.

Noteworthy is that the CJ stated that legislation which provides interest to be only due if proceedings seeking repayment have been brought, is in principle allowed, provided that this does not have the effect of making the exercise of the rights which persons derive from EU law excessively difficult.

CJ rules on the determination of the customs value by using the transaction value of identical or similar goods (*FAWKES Kft.*, C-187/21)

On June 9, 2022, the CJ delivered its judgment in the case *FAWKES Kft.* (C-187/21), which concerned the use of Articles 30(2) (a) and (b) of the Community Customs Code ('CCC') in the determination of the customs value, based on the transaction value of identical or similar goods.

After having rejected the transaction value as customs value used by FAWKES upon importation into the European Union (EU) of textile products originating in China, the Hungarian customs authorities determined the customs value based on Article 30(2) (a) and (b) CCC by using information from a national database covering a period of 90 days, 45 days before and 45 days after customs clearance.

According to FAWKES, the authorities should have established the customs value determined based on Article 30(2) (a) and (b) CCC by consulting the databases managed by the EU, taken account of the transaction values relating to other imports by them and taken account of a relevant period of more than 90 days.

In this respect, the CJ considered that in view of the obligation imposed on them to exercise due care when implementing Article 30(2) (a) and (b) CCC, customs authorities are required to consult all the information, sources and databases available to them to establish the customs value in the manner that is most accurate and closest to the actual value (see to that effect, judgments of 9 November 2017, C-46/16 LS Customs Services, EU:C:2017:839, paragraph 56, and of 20 June 2019, C-1/18 *Oribalt Rīga*, EU:C:2019:519, paragraph 27).

Taking this into consideration, according to the CJ, the customs authority of a Member State may confine itself to using information contained in the national database which it compiles and manages, without that customs authority being required, where the information is sufficient for that purpose, to access information held by the customs authorities of other Member States or by the EU services and institutions, without prejudice, if that is not the case, to the possibility for that customs authority to make a request to those authorities or to those services and institutions in order to obtain additional data for the purposes of that determination.

Also, the concept of goods exported 'at or about the same time' as the goods being valued, must be interpreted as meaning that, when determining the customs value, the customs authority of a Member State may confine itself to using data relating to transaction values covering a period of 90 days, including 45 days before and 45 days after the customs clearance of the goods being valued, provided that the transactions relating to exports, into the European Union, of goods which are identical or similar to the goods being valued over that period enable it to determine the customs value of those goods in accordance with that provision.

Finally, the customs authority of a Member State may exclude transaction values relating to other transactions performed by the applicant for customs clearance, when determining the customs value, even if those values have not been challenged either by that customs authority or by the customs authorities of other Member States, provided that these transaction values are first called into question in accordance with applicable customs legislation and for the transaction values relating to imports into other Member States, the customs authority substantiates its grounds for exclusion.

CJ rules on the use of national databases for determining the customs value in the context of related parties (*Baltic Master*, C-599/290)

On 9 June 2022, the CJ delivered its judgment in the *Baltic Master* case (C-599/20), which concerns the use of the reasonable means method for customs valuation purposes when parties may - de facto - be related.

Between 2009 and 2012, Baltic Master imported into Lithuania various quantities of goods originating from Malaysia, which it had purchased from Gus Group ('the seller'). In the customs declarations, those goods were presented as 'parts of air-conditioning machines'. Those declarations referred to only one TARIC code, together with the total weight of those goods in kilograms. In those declarations, Baltic Master indicated as the customs value the transaction value of those goods, that is to say, the price indicated on their purchase invoices.

Lithuanian Customs, however, were of the view that the circumstances surrounding the conclusion of transactions were, on the basis of objective evidence, characteristic and not of the performance of economic activities under normal conditions. For example, cases were identified in which Baltic Master's employees acted on behalf of the seller under an authorisation and used its corporate stamp.

Subsequently, the transaction should be considered as one taking place between related persons and the transaction value should not be applied, as this would not reflect the real economic value. The customs value should be determined with the data available in the national authorities' customs information system because the customs value could not be determined by the other valuation methods, as, among others, too limited information was available.

In appeal, the referring court brought two questions before the CJ. The first question concerned interpreting when parties are related, and the second question was whether the customs value can be determined based on the information provided in a national database with regard to the customs value of goods with just the same origin and which are ascribed to the same TARIC code.

The CJ considered that, in principle, the transaction value is used to determine the customs value of imported goods. According to the Community Customs Code (CCC), the transaction value of the goods cannot, however, be used for determining the customs value where the buyer and seller are related and the transaction value is not acceptable for the purposes of determining the customs value.

Parties may be regarded as being related if they are legally recognized partners in business or when one of them directly or indirectly controls the other or both are directly or indirectly controlled by a third person.

In this respect, the CJ ruled that the buyer and the seller may not be deemed to be related in a situation in which no documents exist to prove such a relationship, but the buyer and seller may be deemed to be related if, substantiated by objective elements, it can be demonstrated that one of the parties is de facto in control of the other, or both are controlled by a third party. This is for the referring court to decide.

With regard to the determination of the customs value, the general rule should be followed. First, the customs value needs to be determined with the transaction value, as mentioned above. If the transaction value method cannot be applied, alternative methods, such as the customs value of identical goods, should be applied. In the case, however, the customs value still cannot be determined according to these methods, the means that are chosen should be based on the available data, need to be reasonable and need to be in accordance with the relevant legal framework.

The CJ confirmed that the CCC must be interpreted as not prohibiting the authorities from using the national databases containing the customs value of goods which have the same origin and which are ascribed under the same TARIC code to determine the customs value (i.e., based on reasonable means), in the case sufficiently accurate or reliable information is not provided.

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