LOYENS LOEFF

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EU Tax Alert

- CJ rules on Luxembourg State aid case (*Fiat Chrysler Finance Europe v Commission - Ireland v Commission*, Joined Cases C-885/19 P and C-898/19 P)
- ECOFIN amends the Code of Conduct for Business Taxation
- CJ rules on deductibility of final losses incurred by a non-resident permanent establishment (*W AG*, C-538/20)
- Council adopts Regulation on an emergency intervention to address high energy prices
- 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)
- CJ rules on obligation to repay VAT previously recovered when intended VAT taxed activities fail to materialize (*UAB Vittamed technologijos*, C-293/21)

LOYENS & LOEFF

In this publication, we look back at recent tax law developments within the European Union. We 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:

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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.

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.

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 (C 650/16), 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.

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 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.

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.

State Aid/WTO

Judgment of the Court on the offsetting of foreign levied taxes against a retroactive tax liability arising from incompatible aid (*Fossil (Gibraltar) Limited*, C-705/20)

The case concerns Gibraltar's Income Tax Act 2010 (**ITA 2010**). Under the ITA 2010, as originally enacted, passive interest and royalties were not chargeable to tax, irrespective of the source of the income or the application of the territoriality principle. By way of Decision 2019/700, the Commission considered that the State aid scheme in the form of the income tax exemption for passive interest

and royalties is incompatible with the internal market. On that basis, the United Kingdom had to recover all incompatible aid granted on the basis of the passive interest and royalty exemptions.

Fossil (Gibraltar) Limited (**Fossil Gibraltar**) applied the exemption of royalties from income tax. The implementation of Decision 2019/700 lead to retroactive tax liability for Fossil Gibraltar on the royalty income. All royalty income received by Fossil Gibraltar was (also) included in the United States taxed at the level of its shareholder, against a rate of 35%. In that respect, Section 37 of the ITA 2010 provides a tax relief for taxpayers who have paid income tax both in Gibraltar and in other countries in respect of the same profits. In accordance with that provision, Fossil Gibraltar requested that the taxes paid in the United States were to be set-off against Fossil Gibraltar's royalty income. The retroactively prescribed taxation of the royalty income would therefore, in essence, not need to be paid, as it could be set-off against the taxes levied on that same income in the United States.

The Court considered that Decision 2019/700 only requires the competent national authorities to recover the tax which should have been levied in the absence of the incompatible State aid. It does not address the possibility to rely on deductions and reliefs laid down in national legislation, which could have been applied when calculating the tax due. Hence, Decision 2019/700 is not concerned with the application of Section 37 of the ITA 2010 and the tax relief should be available.

The only relevant question after that was whether the set-off of a tax paid abroad should in itself be regarded as prohibited aid. Here, the Court considered that a measure such as that referred to in Section 37 of the ITA 2010 (as part of the fiscal autonomy of the Member States) cannot be considered incompatible State aid, unless it is established that it is based on discriminatory parameters. The Court remains silent about whether such discriminatory parameters exist or not in the present case.

General Court decides on Commission's decision on State Aid granted through a prolongation of rescue aid and fiscal exemptions (*Siremar v Commission*, T-668/21)

On 26 October, the General Court upholds the Commission's decision C (2021) 4268 final of 17 June 2021 as regards the Italian prolongation of rescue aid to Siremar and the fiscal exemptions related to the privatization process of Siremar is unlawful and incompatible with the internal market ('the Contested Decision').

The case at hand has its origins in the privatization of the companies of the former Tirrenia Group. This group was originally owned by the Italian State and comprised six companies. In October 2010, a tender procedure started to find a buyer for the Siremar branch of the company. Italy granted fiscal exemptions from indirect taxes on operations and acts related to the transfer of the Siremar business branch, and from the corporate income tax on the proceeds from the sale of the Siremar business branch. Moreover, Italy prolonged rescue aid to Siremar in the period from 28 August 2011 to 18 September 2012.

In the Contested Decision, the Commission had found that: (i) the extension of the rescue aid granted to Siremar constituted unlawful and incompatible aid,
(ii) the exemption from fiscal exemptions related to the privatization process of Siremar constitutes aid that is unlawful and incompatible with the internal market, and
(iii) that the investigation procedure was not excessively long, and did not breach the principles of legal certainty.

In its judgment, the General Court dealt with the three issues referred to above. In relation to the first issue, the General Court considered that the different guidelines regarding rescue aid are to ensure that rescue or restructuring aid has very limited effects on the internal market, which is ensured, inter alia, by the temporary and reversible nature of the support granted. In the present case, that was to result in the repayment of the rescue aid within a maximum period of six months, subject to the submission, within that period, of a restructuring or liquidation plan. Based on this, the Court upheld the Commission's decision and concluded that the extension of the rescue aid constituted an unlawful State aid scheme.

As regards the second issue, the General Court upheld the Commission's Contested Decision that the fiscal exemptions related to the privatization process of Siremar were unlawful and incompatible with the internal market. The General Courts noted that any exemption from the payment of certain taxes enabling an undertaking in serious financial difficulties to continue to be present on the market is necessarily liable to distort the conditions of competition on the market.

In relation to the third issue, the General Court noted that the administrative procedure had lasted almost

ten years which, at first sight, may appear excessive. However, it should be borne in mind that, in accordance with the case law, the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of each case. Based on the relevant circumstances in this case, the General Court considered that the length of the investigation procedure was not excessively long and did not breach the principles of legal certainty.

Opinion of AG Pikamäe regarding the Spanish tax lease system (*Kingdom of Spain, Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión SA v Commission and Caixabank SA and Others v Commission*, Joined Cases C-649/20 P, C-658/20 P and C-662/20 P)

On 29 September 2022, AG Pikamäe delivered his Opinion in the case *Kingdom of Spain, Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión SA v Commission and Caixabank SA and Others v Commission* (Joined Cases C-649/20 P, C-658/20 P and C-662/20 P). These cases concern the Spanish tax lease system ('the STL system') which had previously been subject to an Article 108(2) TFEU procedure initiated by the Commission. In this procedure, the Commission found that the STL system constituted State aid and obliged Spain to put an end to the aid scheme. The parties involved in the joined cases sought annulment of this decision.

The STL system enables shipping companies to purchase ships built by Spanish shipyards at a rebate between 20% and 30%. For each ship order, the following parties are involved: a shipping company, a shipyard, a bank, a leasing company and an Economic Interest Grouping ('EIG') set up by the bank and investors who purchased shares in the EIG. The EIG would lease the ship from a leasing company as soon as construction of the ship began and would then charter it to the shipping company under a bareboat charter. The EIG would acquire the vessel at the end of the leasing contract while the shipping company would acquire it at the end of the bareboat charter contract. According to the decision at issue, that tax planning scheme was intended to generate tax benefits for the investors in a tax transparent EIG and transfer part of those benefits to the shipping company in the form of a rebate on the price of the ship.

The Opinion focuses on the selectivity of the alleged aid and the determination of the amount of aid to be recovered because those were grounds for appeal in all three cases. The appellants took issue with how the selectivity of the STL system had been analysed in the decision by the General Court because the General Court did not utilize the three-step analysis. Instead, the General Court stated that the STL system as a whole was selective because the tax authority had discretionary powers to grant the use of the STL system. This discretionary power alone was deemed sufficient to render the entire STL system as selective. The AG was of the opinion that the use of the three-step analysis is not necessary in this case given that the use of discretionary powers by the tax authority will derogate from a previously established reference framework.

Furthermore, the appellants alleged that the General Court did not actually examine whether the use of discretionary powers meant that certain operators were treated more favourably than others in a comparable situation. According to the judgment in *Commission v Fútbol Club Barcelona*, such reasoning is incorrect and disregards the notification requirement. The Commission must prove that a tax scheme 'is such as to favour its beneficiaries, by ascertaining that the scheme, taken as a whole, is, given its particular characteristics, capable of resulting, at the time of its adoption, in the tax liability being lower than it would have been if the general tax regime had been applied'. This is an ex ante analysis and not an ex post which is what the appellants suggest. The AG considered that minor arguments brought forward by the appellants regarding lack of any examination in regard to the comparability of the situations and selectivity of the STL system as a whole to be unfounded by the AG. The AG therefore proposed that the CJ reject the ground of appeal which concerns selectivity.

The AG then continued with grounds of appeal that concern recovery of the received aid. The General Court indicated the investors in the EIG to be the direct beneficiaries of the aid and wanted to recover all the provided aid from them. The appellants state that the recovery of aid should be limited to the aid they actually benefited from because part of the aid they received was systematically transferred to the shipping companies. The AG indicated the importance of limiting the recovery of aid to the actual advantage gained by the aid scheme, otherwise the recovery would constitute a penalty.
Even though the EIG had no legal obligation to do so, it transferred part of the received aid over to the shipping

companies. This transfer of aid to the shipping companies was an integral part of the STL system. The contractual structure was also set up at the initiative of the shipping companies while the part of the tax advantage that remained with the EIG was conceived as remuneration for their participation as intermediary. When assessing the possible authorization of the STL system, the tax authority took all of the economic effects into account, including the transfer of aid to the shipping companies. Therefore, the AG proposes that the CJ take into account the transfer of the tax advantage to the shipping companies when calculating the amount of aid to be recovered from the EIG investors as this would reflect the economic reality.

Direct Taxation

CJ rules on whether a limitation on the transfer of carried forward deductibles in case of a merger is in line with Directive 90/435 (*Allianz Benelux SA v État belge, SPF Finances*, C-295/21)

On 20 October 2022, the CJ delivered its judgment in the case *Allianz Benelux SA v État belge, SPF Finances* (C 295/21). The case concerns multiple insurance companies which had 'definitively taxed income' (**DTI**) surpluses and, after a sequence of mergers, joined a company named Allianz Benelux. The underlying dispute in the present case was that Allianz Benelux had carried forward the full amount of the aforementioned DTI surpluses to subsequent tax periods and such full deferral was refused by the Belgian tax authorities. In this context, the Belgian Court of Appeal in Brussels asked the CJ whether Directive 90/435 (former EU Parent-Subsidiary Regime) must be interpreted as precluding legislation of a Member State which provides a 95% deduction on dividends received and makes it possible, where appropriate, to carry this deduction forward to subsequent tax years, but which, nonetheless, where that company is absorbed in the context of a merger, limits the transfer of the carry-forward of that deduction to the absorbing company in a given proportion (i.e. the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company).

The CJ first noted that Directive 90/435 does not provide for the possibility of unconditionally carrying forward surpluses which constitute DTI from an absorbed company to an absorbing company. Second, it stated that neither Directive 90/434 nor any other provision of EU law provides for such possibility in the context of mergers, The Court then noted that, in the case at hand, it is necessary to assess whether the Belgian system leads to direct or indirect taxation of dividends received, as such would be incompatible with Directive 90/435. In relation to the former, the Court found that the Belgian scheme does not entail direct taxation of the dividends received. To assess whether this is also the case with regard to indirect taxation, the CJ made a comparison between two situations. First, the situation in the main proceedings, in which, at the time of a merger by absorption, the same limitation on a pro rata basis was applied to the carry forward of both the losses and the DTI surpluses of the absorbed company, and, second, the situation where the Member State concerned introduced a simple exemption system providing for the exclusion of dividends from the basis of assessment and where a pro rata limitation is applied only to the carry forward of losses and not to the carry-forward of DTI surpluses. Under the Court's view, the aforementioned comparison shows that tax neutrality appears to be respected in both situations.

Furthermore, the Court highlighted that if the DTI surpluses were transferred in full to the absorbing company, that company would be in a more favourable situation than if Belgium had provided for a simple exemption. The CJ also noted that the Member States are free to determine the manner in which the result prescribed in Article 4(1) of Directive 90/435 is achieved. The CJ concluded that the answer to the question referred for preliminary ruling is that Article 4(1) of Directive 90/435 does not preclude the aforementioned legislation implemented by Belgium.

CJ rules on difference in treatment of dividends received from third country without a convention with the residence state (*Pharol*, C-67/22)

On 17 October 2022, the CJ delivered its judgment in the case *Pharol* (C-67/22). This case concerns the difference in treatment of dividends distributed by a domestic company and dividends distributed by a company resident in a third country that is not linked to the resident state by any convention.

Pharol SGPS SA (**Pharol**) is the parent company of the PT Group. The PT Group received dividend from Unitel, a related company established in Angola in 2005. In determining the profits for 2005, the PT Group included the amount corresponding to the dividends distributed

by Unitel and did not deduct this sum from its taxable profit under Portuguese domestic legislation. After paying this amount to the tax authorities on the basis of a reverse charge system, Pharol lodged an application with the tax authorities seeking, *inter alia*, the annulment of such applied system and the corresponding refund of the amount which it considered it had wrongly paid. These was based on Pharol's understanding that the impossibility of deducting the dividends distributed by Unitel from its taxable profit under Portuguese legislation was contrary to Article 63 TFEU (Free movement of capital). Pharol grounded this claim on the fact that dividends received from domestic or EU Member State resident related companies are deductible. The Portuguese tax authority rejected Pharol's request and, after an appeal, the case was brought before the Administrative Supreme Court of Portugal. This latter court asked the CJ whether Articles 63 and 65 TFEU must be interpreted as precluding national legislation aimed at eliminating economic double taxation of dividends under which a company resident in the Member State concerned may deduct from its taxable profits dividends which have been distributed to it by another resident company, but may not deduct dividends distributed by a company established in a third country on the ground that the latter is not bound to the Member State of taxation by any contractual obligation to communicate tax information, whereas: (i) that national legislation does not make that tax deductibility dependent on the existence of such a contractual obligation, and (ii) the taxpayer concerned has the means of proof to himself demonstrate that he complies with the conditions for granting that deduction.

The CJ noted that a difference in treatment can discourage resident companies from investing their capital in companies established in third countries. This restriction may, however, be justifiable in the case of overriding reasons relating to the public interest, such as needed to ensure the effectiveness of fiscal supervision.

Referring to its settled case law, the Court noted that where the rules of a Member State make the benefit of a more advantageous tax regime dependent on the fulfilment of conditions (e.g. the liability to tax of the company making the distribution), which the tax authorities must be able to verify that this was satisfied, compliance with which can only be verified by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant this advantage if, because of the absence of a contractual obligation to that effect, it is impossible to obtain this information from the third country.

Moreover, the Court noted that in a situation involving the free movement of capital between Member States and third countries, the possibility for the taxpayer to provide supporting documents (to demonstrate that he complies with the conditions for taking a deduction) must be assessed by reference to the existence of administrative and regulatory measures that permit a review of the veracity of those documents. The CJ then mentioned that, in the absence of a regulatory framework for mutual administrative assistance between a Member State and the relevant third country, the former is not required to grant the taxpayer the opportunity to provide himself with evidence necessary to obtain the relevant advantage. This is because the third country is not under a contractual obligation to assist the Member State in checking the veracity of the information provided by the taxpayer.

Based on the above, the CJ concluded that Articles 63 TFEU and 65 TFEU must be interpreted as not precluding national legislation aimed at the elimination of the economic double taxation of dividends under which a company resident in the Member State may deduct from its taxable profits dividends distributed to it by another resident company, but may not deduct dividends distributed by a company established in a third country on the grounds that the latter is not bound by any treaty obligation to provide tax information with the taxing Member State. In addition, it concluded that a Member State is not required to grant the taxpayer the possibility to produce for himself or herself the evidence to show that the necessary conditions to obtain the deduction are satisfied where, due to the absence of a convention obligation, that Member State cannot verify the veracity of that evidence.

CJ rules on the obligation to submit tax documentation for cross-border intercompany transactions and on the application of a related tax surcharge in case of non-compliance (*X GmbH & Co. KG*, C-431/21)

On 13 October 2022, the CJ delivered its judgment in *X GmbH & Co. KG* (C-431/21). The case concerns the issue of whether the freedom of establishment must be interpreted as precluding German legislation under which, in the first place, a taxpayer must provide documentation on its cross-border business transactions with interdependent parties; and, in the second, applies a rebuttable presumption for determining its taxable income and a surcharge in the case of non-compliance.

In this case, X, a limited partnership established in Germany, received management services from its limited partner's sole shareholder (Y), a company established in the Netherlands. In the context of a tax audit on the management fees paid by X to Y, the former was required to provide documentation to the German Tax Authorities under an obligation set out in the German Tax Code. X submitted certain documents which were deemed unusable by the German tax authorities. As a consequence, those authorities ordered X to pay a tax surcharge as provided by the German Tax Code. X opposed this decision and argued that the provision of the German Tax Code on the basis of which the tax surcharge was imposed, infringed the freedom of establishment. In those circumstances, the Finance Court of Bremen asked the CJ whether Article 49 TFEU must be interpreted as precluding legislation under which: (i) the taxpayer is subject to an obligation to provide documentation on the nature and content of its cross-border business transactions, with parties with which it has a relationship of interdependence, and (ii) in the case of infringement of that obligation, not only that its taxable income in the Member State concerned is rebuttably presumed to be higher than declared, but also that a surcharge is imposed, unless non-compliance with that obligation is excusable or if the fault involved is minor.

The CJ first examined the obligation to submit a tax declaration and, in that regard, it noted that the obligation to provide fiscal documentation is only imposed on resident companies with cross-border transactions with undertakings of interdependence and not on companies with comparable, but purely domestic transactions. Such a difference in treatment is, according to the CJ, liable to constitute a restriction to the freedom of establishment. However, the CJ found that the obligation to furnish fiscal documentation is justified and appropriate for ensuring the preservation of the allocation of the power of taxation between Member States. When assessing the proportionality of the obligation to provide fiscal documentation, the CJ found that it does not appear that such an obligation goes beyond what is necessary to attain the objective pursued. Thus, the CJ concluded that Article 49 TFEU does not, in principle, preclude such an obligation.

Regarding the tax surcharge, the CJ noted that, although systems of penalties in the field of taxation come within the powers of the Member States, such systems should not have the effect of jeopardising the freedoms provided for by the TFEU. The Court acknowledged that the surcharge in this case is capable of constituting a restriction which could be justified on the need to ensure compliance with national rules and subject to the condition that the nature and amount of the penalty imposed is proportional. Furthermore, the Court noted that the fact that less severe penalties would apply in a purely internal situation is irrelevant for the purpose of assessing the necessity of the tax surcharge (which, pursuant to the Court, pursues a different objective, namely, that of preserving the balanced allocation of the power of taxation between the Member States).

The CJ then stated that the tax surcharge does not appear to be disproportionate, supported by the fact that: (i) the setting off of the amount of that penalty according to a percentage of the adjustment of taxable income makes it possible to establish a correlation between the amount of the fine and the seriousness of the failure to fulfil the obligation; and (ii) the tax surcharge is not applicable in the case of an excusable or only minor fault. Consequently, the Court concluded that Article 49 TFEU must be interpreted as meaning that it also does not preclude a tax surcharge such as that at issue in the main proceedings.

CJ rules on whether the Italian measures to prevent tax avoidance via the use of shell companies is compatible with the freedom of establishment (*Agenzia delle Entrate v Contship Italia SpA*, Joined cases C-433/21 and C-434/21)

On 6 October 2022, the CJ delivered its judgment in the joined cases *Agenzia delle Entrate v Contship Italia SpA* (C-433/21 and C-434/21). The cases address a question of whether an exclusion provided by the Italian regime to prevent tax avoidance via the use of shell companies (the Italian Shell Regime) is compatible with the freedom of establishment.

The Italian Shell Regime includes a provision which determines the taxable income of companies considered to be 'shells' on the basis of presumed minimum income. This regime provides an exclusion from the scope of this anti-avoidance measures, which only benefits companies and entities whose securities are traded on Italian regulated markets.

Borgo Supermercati (later acquired by a company named Contship) was a limited liability company governed by Italian law and wholly owned by Eurokai KGaA, a company listed on the stock exchange in Germany. During the relevant periods, Borgo was a 'pure holding' company. The

Italian tax authorities issued two notices of assessment against Borgo. It considered that, pursuant to its Shell Regime, Borgo met the criteria of a shell company and, therefore, it applied the anti-avoidance measure mentioned above. After several appeals, the case reached the Italian Supreme Court of Cassation, which referred the case to the CJ, asking whether the freedom of establishment precludes legislation, such as the aforementioned exclusion under the Italian Shell Regime, which restricts the ability to take advantage of such exclusion only to companies whose securities are traded on national regulated markets, excluding from its scope other companies, whether national or foreign, whose securities are not traded on national regulated markets but which are controlled by companies and entities listed on foreign regulated markets.

In its judgment, the CJ first noted that in the case at hand, it is irrelevant whether a company is the subsidiary of a company listed in Italy or abroad, given that the legislation in question allows only companies which are themselves listed on the Italian regulated market to take advantage of the exclusion from the scope. Thus, what matters for the Italian Shell Regime is whether the subsidiary itself is listed on the Italian regulated market or not. As Contship (which acquired Borgo) had never issued securities on the Italian regulated market, it could not take advantage of the ground for exclusion. As a result, if Contship had been controlled by a company listed in Italy instead of a company listed in Germany, it could not have relied on the ground for exclusion either. On such bases, the Court understands that the provision does not result in any difference in treatment.

Second the CJ emphasized that Article 49 TFEU, the freedom of establishment, also precludes any national measure, even if applicable without discrimination, which is likely to hinder or render less attractive the exercise of such freedom. In the case at hand, the CJ noted that it is apparent from the legislation at issue that if a parent company is listed on the Italian regulated market, its subsidiary cannot take advantage of the exclusion ground if that subsidiary is not itself listed on the Italian regulated market. Therefore, a subsidiary whose parent company is listed on the Italian regulated market is not subject to a tax treatment which confers an advantage on such subsidiary. The CJ thus concluded that the freedom of establishment does not preclude the Italian anti tax avoidance measures regarding shell companies.

Opinion of AG Rantos regarding whether UK's group transfer rules constitute a restriction to the freedom of establishment (*Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs*, C-707/20)

On 8 September 2022, AG Rantos delivered his Opinion in the case *Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs* (C-707/20). The case concerns the issue of whether the United Kingdom's (**UK**) group transfer rules might constitute a restriction on the freedom of establishment in so far as they provide a different tax treatment to transfers of assets between group companies established in the UK and in another Member State.

Gallaher Limited (**GL**) is a company resident in UK for tax purposes. GL made two transactions with its sister companies which are not resident in the UK for tax purposes. Those transactions consisted, first, of a disposal of intellectual property rights relating to tobacco brands to a sister company of GL, resident for tax purposes in Switzerland ('the 2011 disposal'), and second, of a disposal of shares in a subsidiary of GL to its intermediate parent company, resident in the Netherlands ('the 2014 disposal'). Following these transactions, the UK tax authorities adopted certain decisions determining the amount of chargeable gains and taxable profits accrued in the context of the disposals. As the assignees were not UK residents, the gains on the assets were subject to an immediate tax charge and no provision of UK tax law provided for the deferral of that charge or for their payment in instalments. GL rejected such decisions claiming that there is a difference in tax treatment that is incompatible with the freedom of establishment given that, if the assets had been transferred to a group company resident in the UK (or with a PE therein), the tax charge at issue would not have arisen. GL further argued that the denial to defer payment of the tax is incompatible with the freedom of establishment (as regards both disposals) and with the free movement of capital (as regards the 2011 disposal).

After a series of appeals, the case reached the UK's Upper Tribunal which referred several preliminary questions to the CJ. Among them, those addressed by the AG in his Opinion refer, in essence, to: (i) whether, in the circumstances of the 2011 disposal, the UK rules constitute a restriction on the freedom of establishment of the (Dutch) parent company, in circumstances where such a transfer would be made on a tax-neutral basis if the

sister company were also resident in the UK (or carried on a trade there through a PE); and (ii) whether, if there was a restriction on the freedom of establishment as a result of the group transfer rules (which, in principle, would be justified on overriding grounds of public interest, namely, the need to preserve the balanced allocation of taxing powers), such a restriction might be considered to be necessary and proportionate, in particular in circumstances in which the taxpayer in question had realised, in consideration for the disposal of the asset, proceeds equal to the full market value of the asset.

The AG first noted that the freedom of establishment is the principal freedom to which the national measure at issue relates. Then, in what concerns the 2011 disposal, he stated that the UK does not treat the subsidiary of a company resident in another Member State less favourably than a comparable subsidiary of a company resident in the UK and that Article 49 TFEU does not preclude the imposition of an immediate tax charge in the present circumstances. Thus he concluded that the freedom of establishment must be interpreted as not precluding national legislation relating to group transfer rules which imposes an immediate tax charge on a transfer of assets by a company resident in the UK to a sister company resident for tax in Switzerland (and does not carry on a trade in the UK through a PE) in a situation where those companies are both wholly owned subsidiaries of a common parent company which has its tax residence in another Member State (the Netherlands), and in circumstances in which such a transfer would be made on a tax-neutral basis if the sister company were resident in the UK (or carried on a trade there through a PE).

In relation to the second issue, the AG opines that a restriction on the right to freedom of establishment resulting from the difference in treatment between national and cross-border transfers of assets may, in principle, be justified by the need to preserve a balanced allocation of taxing powers, without there being any need to provide for the possibility of deferring payment of the charge in order to ensure the proportionate nature of that restriction, where the taxpayer concerned has realized proceeds by way of consideration for the disposal of the asset equal to the full market value of that asset. The AG highlights that the aforementioned answer is only relevant in relation to the 2014 disposal. The AG bases his conclusion on the fact that in the current case, no liquidity problems arise as the UK group transfer rules tax realized gains and, therefore, the case is materially different from those in which exit taxes are levied and liquidity problems do arise.

Opinion of AG Rantos regarding the electricity tax exemption on electricity which is used to generate electricity (*RWE Power Aktiengesellschaft v Hauptzollamt Duisburg*, C-571/21)

On 13 October 2022, AG Rantos delivered his Opinion in the case *RWE Power Aktiengesellschaft v Hauptzollamt Duisburg* (C-571/21). The case concerns the scope of the electricity tax exemption under Directive 2003/96 /EC and the issue of what type of electricity consumption is exempt from the electricity tax when the relevant consumption is used for the production of electricity (i.e., mining, storing and processing the lignite which RPE Power used to fuel their power plants).

RPE Power argued that this is indeed the case, as the lignite mine and storage facilities and the power plant constitute an inseparable technical electricity production unit whereby the lignite mining and storage is necessary to ensure uninterrupted electricity production. Thus, it understood that, in accordance with Directive 2003/96, the electricity used for extracting and processing the lignite should be exempt from electricity tax because the lignite qualifies as an energy product. Hauptzollamt Duisburg (Main customs office in Duisburg, Germany) disagreed with this interpretation of Directive 2003/96 and denied the application of the electricity tax exemption. It understood that only electricity directly related to, and necessary for, the production of electricity is exempt and that electricity used to process lignite is only indirectly related to the electricity production process.

In relation to whether electricity used for the mining and processing of lignite falls within the scope of the exemption, the AG agreed with the distinction made by the Commission: electricity used for mining of the lignite does not fall within the scope of the exemption, however, electricity used for the processing of the lignite possibly does. The AG noted that the objective of Directive 2003/96 is twofold: avoid distortions of competition and further the pursuit of environmental goals. Based on the background and objectives of Directive 2003/96, as well as the need to give a restrictive interpretation of the tax electricity exemption which is set out in the Directive, the AG opined that the exemption does not apply to the electricity used in the mining process of lignite through to the lignite being stored. However, the AG found that the exemption does apply to the electricity used for the further refinement and processing of the lignite for use in the power plant because then, the lignite qualifies as an energy product. The AG

concluded that the exemption applies to electricity used in operations which take place within the same undertaking or at least in ancillary and auxiliary installations which sole purpose is to further convert or process the energy product for use in power plants.

The AG then moved to the question of whether the exemption also applies to electricity used in storage facilities for the lignite and the means of transport necessary for the uninterrupted operation of the power plants. In this regard, he noted that the exemption explicitly mentions the activities that are exempt, namely *'electricity used for the production of electricity'* and *'electricity used to maintain the ability to generate electricity'*. The AG acknowledged that RWE Power has set up its facilities with the objective of uninterrupted generation of electricity and power in mind and that its storage facilities and transport vehicles serve exactly that purpose. The AG thus concluded that the exemption applies to electricity used in operations which are indispensable for the generating of electricity such as the aforementioned storage facilities and transport vehicles for energy products.

European Commission publishes consultation on a new framework for business taxation in EU

On 13 October 2022, the European Commission published a consultation on a new framework for income taxation for businesses. This new proposal is known as Business in Europe: Framework for Income Taxation (BEFIT). This initiative aims to address the complexity and high costs that businesses, notably those with cross-border activities, face as a result of having to comply with 27 different corporate tax systems when doing business across the EU.

The consultation period runs from 13 October 2022 to 5 January 2023. This public consultation aims at collecting views from stakeholders on the key principles that define the features of a common corporate tax base in the EU. It will investigate stakeholders' perceptions of the problem and its possible development, and collect their views on the objectives of the initiative, the various policy options and possible design aspects. It is important to mention that the inception impact assessment published by the EU Commission on this initiative mentions that the BEFIT proposal should be consistent with, and where possible build on, the principles that underlie the OECD's two-pillar approach. Stakeholders are invited to provide input by the 5 January 2023 deadline.

Belgian Constitutional Court brings new questions before the CJ on DAC6

On 15 September 2022, the Belgian Constitutional Court delivered a judgment (FR/NL) in which it partially annulled Belgium's implementation of DAC6 and referred various additional questions to CJ on the compatibility of DAC6 with the Treaty on the Functioning of the European Union (TFEU), the EU Charter of Fundamental Rights (Charter) and the European Convention on Human Rights (ECHR). The questions put to the CJ refer to whether DAC6 infringes:

- The principle of equality and non-discrimination, insofar as under DAC6, the notification obligation for cross-border arrangements subject to notification is not limited to corporate income tax, but applies to all taxes that fall within the scope of the Directive on administrative cooperation, which in Belgian law does not only cover corporate income tax, but also other direct taxes than the corporate income tax and indirect taxes, such as registration fees?
- The principle of legality in criminal matters, the general principle of legal certainty and the right to private life, insofar as the concepts of 'arrangement' (and therefore the terms 'cross-border arrangement', 'marketable arrangement ' and 'custom arrangement'), 'intermediary', 'participant', 'affiliated company', the qualification 'crossing border', the various 'essential hallmarks' and the 'main benefit test', which are used in the Directive to determine the application area and scope of the reporting obligation for cross-border reporting constructions, are not sufficiently clearly and precisely defined?'
- The principle of legality in criminal matters and the right to a private life, insofar as the starting point of the thirty-day notification period within which the intermediary or the relevant taxpayer must comply with the reporting obligation for a notifiable cross-border arrangement is not sufficiently clearly and accurately defined?
- The right to a private life, to the extent that the reporting obligation for reportable cross-border arrangements would lead to an interference with that right of the intermediaries and the relevant taxpayers that is not reasonably justified nor proportionate to the objectives, and which would not be necessary to guarantee the proper functioning of the internal market?

It should be noted that the present case raises additional questions to those posed by the same Belgian Court in the case *Orde van Vlaamse Balies and Others* (C-694/20) which is still pending (see EUTA 194 for an overview of AG Rantos' Opinion on this case).

Italian Supreme Court rules on whether a treaty withholding tax rate on dividends higher than the domestic dividend tax rate violates the free movement of capital

On 9 September 2022, the Supreme Court of Italy published its judgments in the cases *Natwest Markets NV v Agenzia Delle Entrate* (No. 26681/2022) and *RBS Nominess (Netherlands) NV v Agenzia Delle Entrate* (No. 26684/2022). The cases address the issue whether a treaty withholding tax rate on dividends that is higher than the domestic Italian dividend tax rate is contrary to the free movement of capital (Art. 63 TFEU).

Under the Italy-Netherlands tax treaty, the withholding tax rate on dividends distributions from Italian subsidiaries made to entities resident in the Netherlands is 15%. By contrast, the domestic Italian dividend tax rate is 1.65%. The cases at hand involved Dutch banks Natwest Markets NV and RBS Nominess, both of which received a dividend payment from their Italian subsidiary Capital SpA. This Italian subsidiary applied the reduced 15% withholding tax rate on the distributed dividends based on Article 10, paragraph 2 of the Italy-Netherlands tax treaty. Natwest Markets and RBS Nominess brought an action before the Italian Supreme Court seeking a complete refund or, at maximum, to be taxed only at the domestic Italian dividend tax rate of 1.65%.

In its judgment, the Italian Supreme Court ruled that a treaty withholding tax rate on dividends higher than the domestic Italian dividend tax rate constitutes a restriction on the free movement of capital. To arrive at such conclusion, the Italian Supreme Court referred to the judgment of the CJ in the case *Commission v Italy* (C-540/07), where the CJ ruled that a higher tax rate on cross-border dividends as compared to domestic dividend is a restriction of the free movement of capital. Based on that precedent, the Italian Supreme Court ruled that a treaty withholding tax rate on dividends higher than the domestic dividend tax rate of 1.65 percent is contrary to Article 63 TFEU. Therefore, the Italian Supreme Court ruled that Natwest Markets NV and RBS Nominess are entitled to a refund equal to the difference between the Italy-Netherlands tax treaty withholding tax rate of 15% and the domestic Italian dividend tax rate of 1.65%.

VAT

CJ rules on national joint and several liability rules when taxable person fails to declare VAT (*MC,* C-1/21)

On 13 October 2022, the CJ delivered its judgment in the case MC (C-1/21). This case concerns the lawfulness of joint and several liability rules for managers of legal persons when that legal person fails to declare VAT to the tax authorities.

MC was the executive manager of a commercial company. The Bulgarian tax authorities imposed enforcement proceedings on the commercial company to recover unpaid VAT. MC was held jointly and severally liable for the VAT amounts that could not be recovered from the commercial company. In dispute was whether these national joint and several liability regulations are compatible with EU VAT law.

The CJ established that the designation of a joint and several debtor for another person's debts must be justified by the factual and/or legal relationship between these persons and be in accordance with EU general principles, in particular, the principle of proportionality.

The CJ ruled that the Bulgarian national joint and several liability regulations are compatible with these principles because:

- the person held jointly and severally liable is the executive manager of the legal person;
- the person held jointly and severally liable made, in bad faith, payments from the legal person's assets which could be characterised as a hidden distribution of profits or dividends;
- the acts carried out in bad faith by the person had the effect of rendering the legal person unable to pay all or part of the VAT for which it is liable;
- the joint and several liability is limited to the amount by which the legal person's assets were depleted as a result of the acts carried out in bad faith; and
- that joint and several liability is incurred only in the alternative, where it proves impossible to recover from the legal person the amounts of VAT payable.

CJ rules on VAT consequences of synthetic securitization transactions (*O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A.*, C-250/21)

On 6 October 2022, the CJ delivered its judgment in the case *O. Fundusz* (C-250/21).

This case concerns the VAT consequences of the procurement of loan receivables by an investment fund from various bank institutions under so-called 'sub-participation contracts'. The investment fund paid to bank institutions an upfront (discounted) amount in return for obtaining the net proceeds of the receivables of the loans granted to debtors. The receivables remain in the assets of the bank institutions (and are thus not transferred to the investment fund).

The procurement of the receivables by the investment fund constitutes a service for VAT purposes. The remuneration for this service is typically equal to the face value of the loan receivables and the discounted payment made by the investment fund to the bank. In dispute is whether the service rendered by the investment fund is VAT exempt under the exemption for credit-related activities.

The CJ ruled that the service of the investment fund should be VAT exempt because the nature of this service concerns the making available of a financial contribution to the bank institutions in exchange for payment of the proceeds from the receivables.

CJ rules that a contractual agreement can qualify as a VAT invoice (*Raiffeisen Leasing,* C-235/21)

On 29 September 2022, the CJ delivered its judgment in the case *Raiffeisen Leasing* (C-235/21).

Raiffeisen Leasing concluded a sale-and-lease back agreement with RED, based on which Raiffeisen Leasing acquired a plot of land from RED and subsequently leased that plot of land to RED. Raiffeisen Leasing did not charge VAT to RED and also did not pay the VAT amounts due to the Slovenian tax authorities. RED reclaimed the VAT amounts mentioned in the sale-and-lease back agreement from the Slovenian tax authorities. The Slovenian tax authorities assessed Raiffeisen Leasing for the VAT amounts mentioned in the sale-and-lease back agreement for the lease of the land to RED. In dispute is whether the contractual arrangement could be considered as an invoice for VAT purposes.

The CJ ruled that the sale-and-lease back agreement, for which no (other) invoice was drawn up by Raiffeisen Leasing, qualifies as an invoice for VAT purposes. VAT that is charged on an invoice remains due by the supplier, as a result of which the VAT assessment was correctly imposed on Raiffeisen Leasing, according to the CJ.

Opinion of AG Rantos regarding VAT implementing regulation for electronic services platforms (*Fenix International Limited,* C-695/20)

On 15 September 2022, AG Rantos delivered his Opinion in the case *Fenix International Limited* (C-695/20). This case concerns the application of the undisclosed agent regulations for persons taking part in the provision of electronic services.

Fenix International is the operator of the online content platform, Only Fans. Fenix collects and distributes the payments made by users to content creators that are active of the platform. Fenix withholds 20% of the remuneration paid by the user for its own services. In dispute is whether VAT was due by Fenix based on the withheld remuneration or over the full remuneration paid by the user.

The undisclosed agent provisions of article 28 of the VAT Directive stipulate that, where an undisclosed agent is acting in its own name but for the account of its principal, that principal is deemed to sell its product to the undisclosed agent and that the undisclosed agent is deemed to on-sell this product to the customer. Article 9a of the VAT Implementing Regulation stipulates that a taxable person taking part in the provision of electronic services is presumed to be acting in its own name, but on behalf of the electronic service provider (unless that service provider is explicitly assigned as the person liable for VAT and this is also reflected in the various contractual arrangements).

Opinion of AG Kokott regarding the possibility to obtain a refund of amounts of VAT that were wrongfully charged (*P GmbH*, C-378/21)

On 8 September 2022, AG Kokott of the CJ delivered her Opinion in the case *P GmbH* (C-378/21). This case

concerns the right of a supplier to obtain a refund of amounts of VAT that were wrongfully charged.

P GmbH is the operator of an indoor playground and charged 20% VAT to its customers, but the correct VAT rate turned out to be 13%. P GmbH requested the Austrian tax authorities for a refund of the VAT amount that was overpaid.

The AG concluded that P GmbH should be entitled to reclaim the VAT overcharged as its customers were consumers that could not reclaim the VAT charged by P GmbH. There is also no unjust enrichment of P GmbH given that its prices include any VAT due. Hence, no risk of loss of VAT revenues would occur if the VAT refund were granted to P GmbH. This outcome would be different if the customers of P GmbH were businesses. In that case, P GmbH would only be entitled to a VAT refund if it acted in good faith or if it made sure that no risk of loss of VAT revenues would occur.

Customs Duties, Excises and other Indirect Taxes

Opinion of AG Collins regarding the second suspension of the authorisation to operate a tax warehouse (*Dual Prod SRL v Tribunalul Satu Mare, Regional Court, Satu Mare, Romania*, C-412/21)

On 20 October 2022 AG Collins delivered his Opinion in the case *Dual Prod SRL v Tribunalul Satu Mare, Regional Court, Satu Mare, Romania* (C-412/21). Dual Prod is an authorized warehouse keeper that produces alcohol and alcoholic beverages at its tax warehouse. On 1 August 2018, during an inspection by the customs authorities, a system of pipes was discovered through which alcohol was removed from the tax warehouse without it being duly accounted for. The customs authorities suspended Dual Prod's authorisation and sealed the tax warehouse because of this discovery. In 2020, Dual Prod also became a suspect in the criminal proceedings concerning this discovery and Dual Prod's authorisation was suspended again, pending the outcome of the criminal proceedings. Dual Prod challenged the second suspension of its authorisation with the Romanian regional court which decided to refer two questions to the CJ for a preliminary ruling.

The first question is whether Article 48(1) of the Charter, which concerns the principle of presumption of innocence, read in conjunction with Article 16(1) of Directive 2008/118, precludes a legal situation in which an administrative measure suspending an authorisation to operate as a producer of alcohol may be adopted on the basis of mere presumptions which are the subject of an ongoing criminal investigation? The second question is whether Article 50 of the Charter, which concerns the principle ne bis in idem, read in conjunction with Article 16(1) of Directive, precludes a legal situation in which two penalties of the same nature, differing only in the duration of their effect, are imposed on the same person in respect of the same facts?

The AG first examined whether the second suspension was criminal in nature. The AG noted that the suspension is temporary and preventative in nature. Furthermore, the suspension is not particularly severe because Dual Prod remains free to conduct business on Dual Prod's premises as long as this does not involve the production or storage of alcohol. The AG is therefore unsure if the suspension is criminal in nature and leaves this up to the CJ to decide. For his proposed answers, the AG assumes the suspension not to be criminal in nature.

With regard to the first question, the AG noted that EU law does not govern evidential standards. Directive 2008/118 recognizes and encourages the national courts' ability to suspend or withdraw authorisations whenever tax warehouses breach, or are likely to breach, national legal conditions to which their operation is subject. Provided that the investigation into Dual Prod's activities has been impartial, diligent and with observation to Dual Prods rights under EU law, the suspension is not contrary to Directive 2008/118, according to the AG. The AG proposes that the answer to the first question should be that Article 48(1) of the Charter, read in conjunction with Article 16(1) of Directive 2008/118, does not preclude the imposition of an administrative sanction to suspend an authorisation for the purposes of preventing any possible evasion or abuse before a final conviction in criminal proceedings has been delivered; nor does it preclude reliance being placed upon a presumption in that context. The AG does not propose an answer to the second question because the suspension is assumed to be not criminal in nature meaning that the *ne bis in idem* principle would not apply. The AG notes that there is considerable uncertainty about whether the material facts that led to each of the two suspensions are the same, as this was not explained in sufficient detail in the reference.

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