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IN THIS EDITION:

- Top News
- State Aid / WTO
- Direct taxation
- VAT
- Customs Duties, Excises and other Indirect Taxes

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Commission requests the Netherlands to amend discriminatory tax rules on fiscal unities

On 16 June 2011, the Commission formally requested the Netherlands to amend its tax legislation regarding its group taxation regime in order to allow two domestic subsidiaries held by a foreign parent company to form a fiscal unity between themselves. (See: Top News)

Developments in the Netherlands: Supreme Court rules that Netherlands restriction of loss compensation for holding and finance companies is not in breach of EU law

On 24 June 2011, the Netherlands Supreme Court ruled that the Netherlands restriction of loss compensation for holding and finance companies as laid down in Article 20 (4) of the Netherlands Corporate Income Tax Act is compatible with Article 49 TFEU. (See: Top News)

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Contents

Top News

- Commission requests the Netherlands to amend discriminatory tax rules on fiscal unities
- Developments in the Netherlands: Supreme Court rules that Netherlands restriction of loss compensation for holding and finance companies is not in breach of EU law

State Aid / WTO

- CJ upholds Commission's decision on Basque tax exemptions (*Territorio Histórico de Vizcaya - Disputación Foral de Vizcaya and Others v Commission*)
- EFTA Surveillance Authority finds Liechtenstein IP regime not to be State aid

Direct taxation

- Council adopts conclusions on the Code of Conduct on Business Taxation
- CJ rules on Austrian limitations on the deductibility of charitable donations in breach of the free movement of capital (*Commission v Austria*)
- CJ rules on former German imputation system incompatible with EU law (*Meilicke II*)
- Commission requests Poland to amend discriminatory tax legislation on foreign investment and pension funds
- Commission requests Estonia to amend discriminatory tax rules for non-resident investment funds
- Developments in the Netherlands: Haarlem Court rules that Netherlands legislation on fiscal unity breaches EU law
- Developments in the Netherlands: Legislation proposed on adapting the participation exemption regime to the CJ's *Deutsche Shell* ruling

VAT

- Report on VAT treatment of financial services on the Council's agenda
- Rules on private use may not be extended to transactions between connected parties for which the consideration received is lower than the open market value *(Campsa)*
- AG concludes that Hungarian provision for the carry forward of excess VAT is not in line with EU VAT law (*Commission v Hungary*)
- Preliminary questions referred to the CJ regarding the VAT consequences of a supply of goods in a customs warehouse (*Profitube*)
- Commission refers the Netherlands to the CJ over its VAT rules for travel agents
- Commission requests Hungary to amend its VAT rules on open-end leases of passenger vehicles

Customs Duties, Excises and other Indirect Taxes

- CJ rules on the competency of national authorities to levy import duties for temporary imported vehicles (*Laki Dooel*)
- CJ rules on the CN classification of plastic dialysis drainage bags and plastic urine drainage bags (*Unomedical A/S*)
- Commission requests Portugal to recover overdue customs duties payment
- Commission closes infringement procedure against Ireland with respect to air travel tax
- Commission steps up its efforts in fighting fraud against the EU budget
- Study on the role of customs in enforcement of EU legislation governing the protection of the environment and its best practice

Top News

Commission requests the Netherlands to amend discriminatory tax rules on fiscal unities

On 16 June 2011, the Commission formally requested the Netherlands to amend its tax legislation regarding its group taxation regime. The Commission's request takes the form of a reasoned opinion (the second step of the infringement proceedings set out in Article 258 Treaty on the Functioning of the European Union ('TFEU')). In the absence of a satisfactory response within two months, the Commission may refer the Netherlands to the Court of Justice ('CJ').

The Netherlands fiscal unity regime allows for a full consolidation of the companies included within the group perimeter. This allows a group of companies, inter alia, to file a single tax return, to offset profits and losses among the members of the group and to eliminate intra-group transactions. The legislation does not allow two domestic subsidiaries held by a foreign parent company to form a fiscal unity between themselves. This means that, in practice, companies which have their parent company in another Member State cannot benefit from the fiscal unity regime.

According to the Commission, the Netherlands legislation is in breach of the freedom of establishment provided for in Articles 49 and 54 TFEU as well as Articles 31 and 34 European Economic Area Agreement ('EEA'). In that regard, the Commission relied on previous case law of the CJ, in particular the *Papillon* case (C-418/07), where the Court ruled that a French parent company and its French sub-subsidiary should be allowed to be included in the French group taxation regime, although the intermediate subsidiary was located in another Member State.

Developments in the Netherlands: Supreme Court rules that Netherlands restriction of loss compensation for holding and finance companies is not in breach of EU law

On 24 June 2011, the Netherlands Supreme Court ruled that the Netherlands restriction of loss compensation for holding and finance companies as laid down in Article 20 (4) of the Netherlands Corporate Income Tax Act ('CITA') is compatible with Article 49 TFEU.

The case concerns a Netherlands taxpayer, a company resident in the Netherlands, which held, managed and financed subsidiaries established in France, Italy, Spain and Switzerland. The Netherlands taxpayer held at least an interest of 95% in two of its subsidiaries and incurred a tax loss in 2005. The Netherlands tax inspector decided that this loss had to be considered a so-called 'holding and finance loss' to which the restriction of Article 20 (4) CITA applied. According to Article 20 (4) CITA, losses of taxpayers whose actual activities entirely or practically entirely consist for the entire year or practically the entire year of holding participations or (in)directly financing related companies can only be compensated with profits realized in years in which the taxpayer meets the same conditions. In addition, the balance of receivables on and payables to related companies in the year in which the loss is offset may not exceed such balance at the end of the year in which the loss is incurred.

The taxpayer appealed against the decision of the tax inspector. The Lower Court rejected the appeal and the High Court confirmed the ruling of the Lower Court. One of the arguments raised by the taxpayer before the Supreme Court was that Article 20 (4) CITA constitutes a breach of the freedom of establishment provided for in Article 49 TFEU, since the provision in fact only applies to taxpayers with non-resident participations that are not able to avoid the restriction of Article 20 (4) CITA by entering into a Netherlands fiscal unity and not to taxpayers with domestic participations that are able to enter into such fiscal unity.

The Supreme Court observed that Article 20 (4) CITA does not make a direct or indirect distinction between holding companies with only non-resident participations without a permanent establishment in the Netherlands and holding companies with only domestic participations. The Supreme Court further observed that, with reference to the CJ's judgment in *X Holding* (C-337/08), it is not in breach of EU law that a Netherlands holding company is not able to enter into a fiscal unity with its non-resident subsidiary. According to the Supreme Court, this also applies if the main reason for entering into a fiscal unity in a domestic situation – to which the taxpayer compares itself – is to avoid the restriction of loss compensation as laid down in Article 20 (4) CITA. The Supreme Court considered that a fiscal unity results in more than just one tax consequences and that these are the same for all taxpayers that enter into a fiscal unity. Finally, the Supreme Court observed that the difference in treatment between holding companies with non-resident participations and holding companies with domestic participations is justified in view of the need to safeguard the allocation of the power to impose taxes between the Member States and does not go beyond what is necessary to achieve such objective. The Supreme Court added that this applies to all differences in treatment resulting from the fiscal unity regime including the restriction of loss compensation for holding and finance companies.

With its ruling the Supreme Court seems to reject the so-called 'per element approach' according to which a taxpayer should be able to invoke per element the advantages of the fiscal unity regime. It can be argued though that the need to safeguard the allocation of the power to impose taxes between the Member States cannot justify the denial of each and every advantage of the fiscal unity regime for groups with non-resident subsidiaries. Therefore, the Supreme Court might have ruled too hastily, without testing the elements one by one, that all differences in treatment resulting from the fiscal unity regime can be justified.

State Aid/WTO

CJ upholds Commission's decision on Basque tax exemptions (*Territorio Histórico de Vizcaya - Disputación Foral de Vizcaya and Others v Commission*)

On 9 June 2011, the CJ upheld the Commission's decision finding the Basque tax exemptions granted to newly established undertakings State aid incompatible with the common market (Joined cases C-465/09 P to 470/09 P). The CJ's judgment resulted from an appeal brought by the three Historical Territories of the Basque Country (Álava, Vizcaya and Guipúzcoa) against the decision of the General Court of 9 September 2009 which, similarly, upheld the Commission's negative decision.

In 1993, the Historical Territories which, under Spanish legislation, have autonomous powers to organize – under certain conditions – the tax systems within their respective territories, established 10-year tax exemptions for newly established firms. The exemptions were conditional upon, inter alia, substantial investment and the creation of at least 10 jobs. The Commission started a preliminary investigation in 1995. Having received new information the Commission started a formal investigation in 2000 which ended with three negative aid decisions in 2001, including an order to recover the unlawfully paid aid from the beneficiaries.

The CJ found that the General Court was correct in upholding the Commission's decision. The mere delay in starting the formal investigation did not lead to the tax exemptions being classified as existing aid preventing their recovery. In the absence of a clear and definitive statement by the Commission, no implicit or explicit authorisation could be inferred from the silence on the Commission's part. The CJ also considered that as the governments had not co-operated in 1996, by providing information requested by the Commission on the identity of the beneficiaries, they could not rely on either the procedure being excessively long or on legitimate expectations in order to prevent the recovery of the aid.

Only a complaint received by the Commission in 2000 provided information on the existence of a particular beneficiary. The period from this complaint to the final decision was not excessive in the CJ's view.

EFTA Surveillance Authority finds Liechtenstein IP regime not to be State aid

On 1 June 2011, the EFTA Surveillance Authority approved an 80% tax deduction of income from intellectual property rights from the basis of corporate income tax. It ruled that no aid was involved as the deduction was available to all businesses regardless of their size or sector and therefore, it was non-selective.

Direct Taxation

Council adopts conclusions on the Code of Conduct on Business Taxation

On 20 June 2011, the Council, meeting in the composition of Economic and Finance Ministers (ECOFIN), adopted conclusions with regard to the Code of Conduct on Business Taxation in which it:

- welcomed the progress achieved by the Code of Conduct Group during the Hungarian Presidency as set out in its report (doc. 10857/11 FISC 75);
- asked the Group to continue monitoring standstill and the implementation of rollback, as well as to carry on the work under the Work Package agreed by the ECOFIN Council on 5 December 2008 (doc. 16410/08 FISC 174);
- encouraged the Commission to continue discussions with the third countries as set out in the Group's report and to keep the Group regularly informed of the progress;
- invited the Group to report back on its work to the Council by the end of the Polish Presidency.

CJ rules on Austrian limitations on the deductibility of charitable donations in breach of the free movement of capital (*Commission v Austria*)

On 16 June 2011, the CJ rendered its decision in the *Commission v Austria* case (C-10/10). The case concerns the tax deductibility of charitable donations.

According to the Austrian Income Tax Act ('AITA'), charitable donations to certain listed institutions serving the purpose of scientific research, teaching and education are deductible business expenses. However, the deductibility is limited to charitable donations to institutions which

(i) have their seat in Austria (Art. 4, para. 4, points (a) to (d) AITA); or
(ii) are primarily concerned with scientific research and teaching in order to support the Austrian science or economy, irrespective of their State of residence (Art. 4, para. 4, point (e) AITA).

The Commission was of the opinion that these provisions of Austrian law violated the free movement of capital as laid down under EU and EEA law and, as Austria had not changed its laws according to Commission's request, it referred the latter to the CJ. In its application, the Commission only referred to Art. 4, para. 4, points (a) to (d) AITA and not to point (e) when asking the CJ to declare the infringement of EU/EEA law by the Austrian provisions.

In its judgment, the CJ followed the Opinion of Advocate General Trstenjak (see EU Tax Alert edition no. 91, April 2011). It first held that Art. 4, para. 4, points (a) to (d) AITA constitute a restriction on the free movement of capital under Article 56 EC (now Article 63 TFEU) and Article 40 EEA, as they treat charitable donations to research and teaching institutions established in Austria on the one hand, differently to research and teaching institutions established in other EU/EEA States on the other. In the view of the CJ, this might discourage taxpayers from making gifts to research and teaching institutions resident in other EU/EEA States.

The CJ rejected the view of the Austrian government that the institutions mentioned in Art. 4, para. 4, points (a) to (d) AITA are not comparable with institutions resident in another EU/EEA State due to the fact that unlike Austrian institutions, foreign institutions are not under the supervision of the Austrian official authorities. While the CJ acknowledged that Austria is free to determine the purposes which have to be served by charitable institutions in order to qualify for a treatment whereby donations granted to them are tax deductible, it also made clear that comparability cannot be denied only because the Austrian authorities do not supervise foreign institutions.

In the view of the CJ, the Austrian government had failed to show that intervention and influence on the management of the recipient institutions is necessary for guaranteeing the attainment of the objectives in the public interest which it seeks to promote.

Furthermore, the CJ pointed out, referring to the *Persche* case (C-318/07), that while a Member State can lawfully reserve the grant of tax advantages to bodies pursuing certain objectives in the public interest, it cannot, however, reserve the benefit of those advantages solely to bodies established in its territory. In the view of the CJ, the objective of Art. 4, para. 4, points (a) to (d) AITA, i.e. the promotion of Austria's position as a centre of learning and teaching, is defined in such a way that it automatically excludes research and teaching institutions in other Member States from the tax benefits at issue while almost all research and teaching institutions established in Austria qualify for such benefits. According to the CJ, the place of establishment of the recipient of the gift is not a valid criterion for establishing an objective difference between these situations.

The CJ also found that there was no overriding reason in the public interest that could justify the restriction of the free movement of capital in the case at hand. First, while promotion of research and development is regarded as a possible valid reason of public interest by the CJ, the CJ clarified that promotion of only national research and development would be contrary to the objective of the EU policy in the field of research and development.

Furthermore, the CJ held that, even assuming that the objective of promoting national education and training could constitute an overriding reason in the public interest, the Austrian government had also failed to show that this objective could not be achieved without the contested legislation or by applying less restrictive measures.

In addition, the CJ also rejected the budgetary argument of the Austrian government, according to which the Austrian institutions, unlike foreign institutions, fulfil tasks in the Austrian public interest and support the Austrian State in its obligation to carry out public services. A partial displacement of gifts to foreign institutions would reduce the means available to Austrian institutions and would necessitate higher budgetary expenditures to finance the public services at issue. The CJ recalled that it is settled case law that the need to prevent reduction of tax revenues cannot be regarded as an overriding reason in the public interest capable of justifying a restriction on a Treaty freedom.

As the above considerations may be transposed to Article 40 EEA, Art. 4, para. 4, points (a) to (d) AITA were held to be in breach of both Article 56 EC and Article 40 EEA.

CJ rules on former German imputation system incompatible with EU law (*Meilicke II*)

On 30 June 2011, the CJ rendered its decision in the *Meilicke II* case (C 262/09). The case concerns several questions with respect to the granting of a tax credit for the underlying foreign corporation tax paid by a dividend-distributing company resident in another Member State that have not been answered by the CJ in the preceding *Meilicke and Others* case (C-292/04).

According to German law, applicable at the time of the facts of the case, dividends distributed by capital companies fully taxable for corporation tax purposes in Germany were subject to a tax at 30%.The recipient therefore received a distribution of 70% of the pre-tax profits. In addition, he could claim a tax credit of 3/7 of the dividends received.

The applicant was resident in Germany and received dividends from shares in companies established in the Netherlands and Denmark in the course of the years 1995 to 1997. He claimed a tax credit of 3/7 of such dividends which was denied by the tax authorities as German law did not provide for such tax credit on dividends paid by companies that were not fully liable to tax in Germany. The applicant later amended his application by seeking a tax credit up to 34/66 of the gross dividends of Danish origin (reflecting the Danish tax rate of 34% at the time) and up to 35/65 of the gross dividends of Dutch origin (reflecting the Dutch tax rate of 35% at the time). In the *Meilicke and Others* case, the CJ ruled that Articles 56 and 58 EC (now Articles 63 and 65 TFEU) preclude a provision under which on a distribution of dividends by a capital company, a shareholder who is fully taxable in

a Member State is entitled to a tax credit, calculated by reference to the corporation tax rate on the distributed profits, if the dividend-paying company is established in that same Member State but not if it is established in another Member State.

In the light of this holding the tax credit had to be extended to dividends received from capital companies fully taxable for corporation tax purposes in another Member State. However, such credit was granted only if a corporation tax certificate was submitted which contained, *inter alia*, specific information on the amount of the dividend and a calculation of the underlying corporation tax.

German national law further provided in para. 175 of the General Tax Law (*Abgabenordnung*; AO) that a tax assessment had to be changed in case of an event that has retroactive effect. On 9 December 2004, para. 175 AO was amended and now states that the subsequent issuance or production of a certificate or confirmation shall not have the force of a retroactive event. This amendment applies to certificates or confirmations issued after 28 October 2004.

The first question referred by the Financial Court of Cologne concerns the calculation of a tax credit on foreign dividends under the former German imputation system in case no evidence of the foreign underlying corporation tax is provided by the tax payer. The CJ ruled that, if the evidence required under the legislation of the Member State of the dividend recipient is not adduced, the tax credit cannot be based on the tax rate for the underlying corporation tax according to German law (leading to a tax credit of 3/7) but has to be based on the rate of corporation tax on the distributed dividends applicable to the dividend-paying company according to the law of the Member State of establishment. However, the Member State of the dividend recipient is not required to grant such tax credit insofar as it exceeds the income tax to be paid on the dividends received by the shareholder.

The second and third questions concern the degree of detail which the evidence required must meet in order to benefit from a tax credit. The CJ holds that a Member State may not require a degree of detail and a form of evidence that is exactly the same as in a purely national situation. However, the tax authorities of the Member State of the dividend recipient are entitled to require that recipient to provide documentary evidence enabling them to ascertain, clearly and precisely, whether the conditions for obtaining a tax credit under national legislation are met without having to make an estimate of the tax credit. The tax authorities are not obliged to gain the necessary information themselves by submitting a request for information to the competent authorities of the other Member State in a mutual assistance procedure.

The fourth question concerns the provision of para. 175 AO which, retroactively and without any transitional period, precludes the application of the tax credit for the underlying corporation tax of another Member State on dividends received by submitting either a certificate relating to the underlying foreign corporation tax in accordance with the German legislation or by documenting evidence allowing the tax authorities to determine, clearly and precisely, whether the conditions for obtaining the tax credit are met.

The CJ held that while it is compatible with EU law to lay down reasonable time-limits for bringing proceedings, the principle of effectiveness requires new legislation to include transitional arrangements which allow an adequate period after the enactment of the legislation for lodging claims for repayment which persons were entitled to submit under the original legislation. Therefore, according to the CJ, the retroactive introduction of the amendment of para 175 AO without transitional period is precluded by the principle of effectiveness. The CJ stated that it is for the referring court to determine a reasonable period for the submission of a certificate or documentary evidence.

Commission requests Poland to amend discriminatory tax legislation on foreign investment and pension funds

On 16 June 2011, the Commission formally requested Poland to amend its tax legislation which discriminates against investment funds and pension funds from other Member States and EEA countries. The Commission's request takes the form of an additional reasoned opinion. The Commission had already sent a reasoned opinion on the same subject matter on 15 May 2009. Thereafter, Poland informed the Commission that it had changed the disputed legislation by amendment to the Corporate Income Tax Act in November 2010.

However, the Commission is of the view that those amendments have not entirely eliminated tax discrimination against foreign funds. Hence, it has now sent a second reasoned opinion. In the absence of a satisfactory response within two months, the Commission may refer Poland to the CJ.

Under Polish tax legislation, domestic investment funds and pension funds are unconditionally exempted from corporate income tax, whereas funds established outside Poland can only benefit from an exemption if they are subject to tax in their States of residence. The Commission considers that such discriminatory provisions place investment and pension funds based in other Member States and EEA States at a disadvantage compared to their Polish-based counterparts, and Polish citizens therefore, enjoy less choice of pension and investment funds. Thus, those provisions are in breach of EU law, in particular, the freedom to provide services and the free movement of capital (Articles 56 and 63 TFEU and Articles 36 and 40 EEA).

Commission requests Estonia to amend discriminatory tax rules for non-resident investment funds

On 16 June 2011, the Commission formally requested Estonia to amend its tax legislation as it discriminates against non-resident investment funds. The Commission's request takes the form of a reasoned opinion. In the absence of a satisfactory response within two months, the Commission may refer Estonia to the CJ.

Under Estonian tax law, domestic investment funds are treated more favourably than comparable investment funds established in other Member States or EEA countries. In particular, resident funds are entitled to an exemption on their real estate income, while comparable funds established in other Member States and EEA countries are subject to tax, thus creating a higher tax burden on the latter.

As these rules could dissuade citizens from investing in funds established in other Member States or EEA countries, the Commission considers that they do not comply with the provisions on the freedom to provide services and the free movement of capital (Articles 56 and 63 TFEU and Articles 36 and 40 EEA).

Developments in the Netherlands: Haarlem Court rules that Netherlands legislation on fiscal unity breaches EU law

On 9 June 2011, the District Court of Haarlem ruled that the Netherlands legislation on fiscal unity, which does not allow the formation of a fiscal unity between a Netherlands parent company and its Netherlands sub-subsidiary if this later company is held by a company established in another Member State, is in breach of the freedom of establishment provided for in Article 49 TFEU.

The case concerns a Netherlands company which held two intermediary German companies which in turn, held a Netherlands lower tier subsidiary. According to Article 15 (1) of the Corporate Income Tax Act ('CITA') a participation of at least 95% is required in order for companies to be included within the fiscal unity perimeter. In addition, pursuant to Article 15 (3) (c), in the case of a chain of shareholdings, all the participations should be held by entities established in the Netherlands (either a company or a permanent establishment of a foreign company). It was precisely this last requirement that was challenged before the Netherlands court. The argument raised was that such requirement constitutes a breach of the freedom of establishment laid down in Article 49 TFEU. The taxpayer relied on the CJ's decision in the *Papillon* case (C-418/07), in which the CJ considered that the French group taxation regime that denied the possibility to consolidate a French parent company with its French sub-subsidiary which was in turn, held by a company resident in another Member State, was a discrimination prohibited by EU law.

Based on the above arguments, the Haarlem Court considered that the requirement referred to above applicable to the Netherlands fiscal unity was indeed in breach of the freedom of establishment. However, the Haarlem Court added that this restriction could be justified by the need to prevent double use of losses that could arise namely in a situation where the foreign intermediate company would be liquidated. The Haarlem Court further considered that the restriction was not proportionate, considering: (i) the existence of a Directive on mutual assistance in the area of direct taxation which is applicable among Member States; and (ii) the existence of rules under Netherlands tax laws which already provide

for the prevention of double use of losses. Those rules are set out in the Decree of 17 December 2002 (as amended on 19 December 2006) regarding situations of lower tier subsidiaries which are held via a permanent establishment of a foreign intermediary company.

Developments in the Netherlands: Legislation proposed on adapting the participation exemption regime to the CJ's *Deutsche Shell* ruling

On 20 June 2011, a bill was submitted to the Netherlands Parliament proposing changes to the participation exemption regime in order to make it compatible with EU law as pronounced in the CJ's *Deutsche Shell* (C-293/06) ruling.

In 2008, in the *Deutsche Shell* case, the CJ held that Germany had to allow a deduction for the currency loss which arose in an Italian permanent establishment of a German company. The reasoning behind the ruling seems to have been that losses should always be deductible somewhere and because the profit of the Italian permanent establishment was naturally calculated in Italian lire, currency results on the lire could not be reflected in the books of the Italian permanent establishment. The losses did appear in the accounts of the head office which were kept in German mark (DM) and, consequently, it was Germany that had to allow the deduction.

The *Deutsche Shell* judgment in itself had no real impact in the Netherlands, as the Netherlands system has always been to grant double tax relief by reference to income of foreign permanent establishments calculated in the currency of the source State. As a result, gains and losses caused by fluctuations in the value of the source State currency are always taxable or deductible in the Netherlands, just as the CJ requires. It is perhaps for that reason that the Netherlands' analysis of the *Deutsche Shell* judgment has from the beginning focussed on whether the reasoning underlying that judgment could also be applied to investments in subsidiaries. The Netherlands participation exemption regime, like most similar systems in other countries, excludes gains and losses on investments in subsidiaries from taxable income, regardless of whether they are the result of currency fluctuations or whether they are based on real changes in value in the underlying business. Thus, losses caused by a decline in value of the local currency in the jurisdiction in which the subsidiary is established cannot be deducted by the Netherlands parent company. Of course, just as the lire loss in *Deutsche Shell*, such losses can also not be reflected in the taxable income of the subsidiary. The result is that the currency loss element cannot be deducted anywhere. Arguably this imposes an undue restriction on the freedom of establishment, much in the same way as the German rules in *Deutsche Shell* did.

The application of the *Deutsche Shell* thinking to participations in subsidiaries has not yet been tested in court, nevertheless, a significant number of taxpayers have submitted claims for the deduction of losses which would otherwise fall under the participation exemption regime. The Netherlands State Secretary of Finance has now made it clear that he takes these claims and their potential budgetary implications very seriously. The draft legislation sent to Parliament provides that a taxpayer who has successfully claimed deduction of a currency loss in respect of a participation will loose the right to the participation exemption in respect of currency gains on participations (to the extent that such gains would have been deductible had they been losses). The new rules apply not only to currency gains in the same year in which the taxpayer seeks to deduct the loss, but also to all future currency gains on all subsidiaries. Thus, the potential negative effect on taxpayers who maintain their claims for a deduction is virtually unlimited. The proposed measures also apply to cases where a taxpayer, after a successful '*Deutsche Shell* - deduction' transfers subsidiaries to a Netherlands affiliated company, which subsequently realises a currency gain.

If the new rules are adopted by the Parliament, they are to become effective retroactively to 17.00 hours on 8 April 2011, the date and time on which the plans for this legislation were first announced by press release.

VAT

Report on VAT treatment of financial services on the Council's agenda

The ECOFIN Council, in its meeting of 20 June 2011, took note of a report on the progress on a draft directive and draft regulation on the VAT treatment of insurance and

other financial services. The proposals, which date from 2007, are aimed at clarifying and updating the definitions of services that are exempted from the payment of VAT, in order to ensure consistent interpretation in the Member States. In addition, the Commission proposed a mechanism to establish cross-border cost sharing groups, and an extension of the option for service providers to apply normal VAT rules. The report provides an overview of progress achieved since the beginning of the year and identifies the main issues to be addressed.

Furthermore, the ECOFIN Council adopted a decision authorising Romania to designate, by derogation from Article 193 of the EU VAT Directive, the persons to whom supplies are made as liable to VAT, for supplies of certain cereals and oil seeds and a decision authorising Sweden to apply, in accordance with Article 19 of Directive 2003/96/EC, a reduced rate of electricity tax to electricity provided to vessels at berth in a port.

Rules on private use may not be extended to transactions between connected parties for which the consideration received is lower than the open market value (*Campsa*)

On 9 June 2011, the CJ rendered its decision in the *Campsa* case (C-285/10). The case concerns the sale by Campsa Estaciones de Servicio SA ('Campsa') of a number of service stations located in Spain. In view of the fact that the sale was concluded between connected parties and because the agreed price for the transaction was patently lower than the open market value, the Spanish tax authorities disputed the VAT return filed by Campsa. In this regard, the tax authorities claimed that the taxable amount should have been determined based on the open market value in line with the Spanish national provisions applicable to transactions between connected parties for which no consideration is received (private use). Consequently, the Spanish tax authorities imposed a VAT assessment on Campsa.

Eventually, the case reached the Spanish Supreme Court, which had doubts about the applicability of the national provisions for private use to the transaction in the case at hand. Moreover, the Court observed that Spain had obtained authorization to derogate from the main rule for determining the taxable amount only after the VAT assessment had been imposed.

The CJ indicated that there is a direct link between the supplies made by Campsa and the consideration received. Therefore, it concerned a transaction for consideration despite the fact that the consideration received was lower than the market value. As a consequence, the taxable amount had to be determined on the basis of the general rule. This means that the provisions for the calculation of the taxable amount for transactions for which no consideration is received (private use) cannot be extended to such a transaction. According to the CJ, the principle of equal treatment does not have a bearing on that conclusion because the two types of transactions cannot be compared.

Finally, the CJ indicated that the national provision that allowed Spain to derogate from the main rule for determining the taxable amount had not, at the time of the VAT assessment, been notified and authorized in accordance with the procedure laid down in Article 27 of the Sixth EU VAT Directive, and, therefore, could not be relied upon by the Spanish tax authorities against Campsa.

AG concludes that Hungarian provision for the carry forward of excess VAT is not in line with EU VAT law (*Commission v Hungary*)

On 26 May 2011, Advocate General Bot gave his Opinion in the *Commission v Hungary* case (C-274/10). The case concerned an infringement procedure initiated by the Commission against Hungary for failing to correctly implement Article 183 of the EU VAT Directive. This article stipulates that Member States can either refund excess VAT to taxpayers whose tax declaration for a given period results in a refundable amount, or to require those taxpayers to carry forward the excess amount to the following tax period. In Hungary the excess VAT has to be carried forward to the next tax period insofar as the taxable person has not paid the supplier the full amount for the purchase in question, meaning that refund is not granted with respect to this amount.

According to the Advocate General, Article 183 of the EU VAT Directive only offers two possibilities: the VAT can either be refunded or it can be carried forward to the next tax period. Considering that there is no third option that allows for the carry forward insofar as the amount has not actually been paid to the supplier, the Advocate General concluded that the Hungarian provision is not in line with Article 183 of the EU VAT Directive.

Finally, the Advocate General indicated that the Hungarian provision incorrectly has no temporal limit with the result that it may occur that a taxable person is required to carry forward an amount of excess VAT multiple times.

Preliminary questions referred to the CJ regarding the VAT consequences of a supply of goods in a customs warehouse (*Profitube*)

The Supreme Court of Slovakia has referred preliminary questions to the CJ in the *Profitube* case (C-165/11). The case concerns goods from a non-EU country that were placed in a warehouse in Slovakia and subsequently processed under an inward processing suspension procedure. Afterwards, the goods were not exported but sold in that warehouse by the processor of the goods to another company in Slovakia. The referring Court inquires whether the legal situation has been changed by the said sale to the extent that the transaction is subject to the Sixth EU VAT Directive, and in particular, whether it is possible to regard a public customs warehouse located in the territory of a Member State as part of the territory of the Community, or the territory of that Member State. Moreover, the referring Court wants to know whether it is possible under the doctrine of abuse of laws to take into account a supply for VAT purposes in Slovakia.

Commission refers the Netherlands to the CJ over its VAT rules for travel agents

On 16 June 2011, the Commission decided to refer the Netherlands to the CJ over its VAT rules for travel agents. The EU VAT Directive contains a special margin scheme for travel agents. This scheme does not apply, however, to travel agents who sell holiday packages to other companies, in particular, to other travel agents for re-sale. According to the Commission, the Netherlands has failed to properly implement this special margin scheme for travel agents by applying it to sales between travel agents.

Commission requests Hungary to amend its VAT rules on open-end leases of passenger vehicles

On 16 June 2011, the Commission sent a reasoned opinion to Hungary requesting it to amend its VAT legislation that does not allow lessees to benefit from VAT deductions in open-end leases of passenger vehicles. According to the Commission, the EU VAT Directive allows taxable persons to deduct VAT for such leases. Moreover, the Commission indicates that the Hungarian provision entered into effect only after Hungary's accession to the EU such that the restriction is not allowed on the basis of the standstill clause.

Customs Duties, Excises and other Indirect Taxes

CJ rules on the competency of national authorities to levy import duties for temporary imported vehicles (*Laki Dooel*)

On 16 June 2011, the CJ gave its judgment in the *Laki Dooel* case (C-351/10). The case concerns the levy of import duty for a vehicle which has entered the customs territory under the temporary importation procedure with total relief from import duties and, in breach of the customs regulation, was used in internal EU traffic.

On 14 April 2008, a vehicle and trailer belonging to Laki Dooel ('Laki') entered the customs territory of the European Union unladen, under the temporary importation procedure with total relief from import duties. An ECMT licence had been issued for that vehicle and its trailer to transport goods between Sweden and Germany.

In Sweden, the vehicle was loaded with goods intended for Germany and Austria. The goods dispatched to Germany were unloaded first. The other goods were

unloaded in Austria and the vehicle was loaded with goods for transportation to Sweden. At the point of crossing the Austrian border, the vehicle was inspected by the Austrian customs authorities.

On completion of that inspection, the Linz Wels Customs Office decided that the vehicle in question did not have a licence to transport goods in Austria and that, therefore, Laki had failed to comply with the conditions for the temporary importation of that vehicle with total relief from import duties. It required that undertaking to pay customs duties of EUR 7,524, and VAT at importation of EUR 10,909 in respect of the vehicle and its trailer.

Laki lodged an appeal against the decision of the Linz Wels Customs Office before the Independent Tax Tribunal of Linz, challenging the lawfulness of that decision. That court allowed the appeal, taking the view that the customs debt had been incurred as the result of an infringement due to the absence of a licence for transporting the goods to Austria, and that that infringement had been committed in Sweden, since the goods concerned had been loaded in that Member State. The Swedish customs authorities were, therefore, according to that court, responsible for claiming payment of the import duties at issue in the main proceedings.

The Linz Wels Customs Office lodged an appeal against that court's decision before the Administrative Court.

In its reference for a preliminary ruling, the national court states that Article 558(1)(c) of the Implementing Regulation provides that total relief from import duties is to be granted for vehicles used in internal traffic only where the national provisions in the field of transport, in particular those concerning admission and performance of such operations, authorise transport within the territory of the State concerned.

It therefore considers that in order to establish which authorities are responsible for establishing that there has been any infringement of that provision of the Implementing Regulation, it is necessary to define the term 'internal traffic' used in that provision.

The Administrative Court cites in that regard Case C-272/03 (*Siig*), in which the Court held that, in order to establish whether the use of a vehicle complies with the conditions of the temporary importation procedure with total relief from import duties, it is the transport operation itself which is decisive and not the final destination of the goods. The national court states, however, that that judgment concerns the interpretation of Article 670 of the Implementing Regulation in the version in force prior to that resulting from Regulation No 993/2001, which defined 'internal traffic' in the German version as meaning 'the carriage of goods loaded in the customs territory of the Community and unloaded at a place within that territory', whereas Article 555 of the Implementing Regulation, at issue in the main proceedings, defines 'internal traffic' as meaning 'the carriage of … goods … loaded in the customs territory of the Community for … unloading at a place within that territory'.

The national court queries whether that change may have an effect on the definition of the criteria for determining the State in which the infringement took place and thus on the designation of the authorities responsible for establishing the infringement. It raises, in particular, the question whether that change can be interpreted as a 'tightening-up' of the earlier rules, insofar as the fact of loading goods onto a vehicle with a view to transporting them without the required licence, and starting to transport them, already constitutes unlawful internal traffic and, therefore, whether the customs debt is incurred in the State in which the transport operation begins. It states that the new definition of 'internal traffic' contained in Article 555 of the Implementing Regulation could also be interpreted as a relaxation of the conditions laid down in the earlier rules, insofar as the unlawful internal traffic can be said to exist only where goods are actually transported and unloaded in a Member State without a licence. According to the latter interpretation, the customs debt is incurred only in the Member State which is the destination for the goods concerned.

In those circumstances, the Administrative Court decided to stay the proceedings and to refer the following questions to the CJ for a preliminary ruling:

1. Is Article 558(1) in conjunction with Article 555(1)(c) of [the Implementing Regulation], to be interpreted as meaning that there is an unauthorised use of a means of transport in internal traffic as soon as the means of transport is loaded and the transport operation begins, in cases where authorisation has been granted for a vehicle for commercial use to be employed in internal traffic between two Member States, the vehicle is loaded in one of the two Member States but the destination (the planned place of unloading) is situated in a Member State other than those two Member States and authorisation has not been granted in respect of that other Member State?

2. If the answer to the first question is in the affirmative, is Article 204(1)(a) in conjunction with Article 215 of the Customs Code to be interpreted as meaning that, in the abovementioned circumstances, the customs debt is incurred in the Member State of loading and that that Member State is responsible for collecting the import duties, even though it is established only upon unloading that the transport operation took place in a Member State in respect of which there is no authorisation for use in internal traffic?

3. Furthermore, if the answer to the first question is in the affirmative, is Article 61 of [the VAT Directive] to be interpreted as meaning that, in the abovementioned circumstances, importation takes place in the Member State of loading and that that Member State is responsible for collecting the import [VAT], even though it is established only upon unloading that the transport operation took place in a Member State in respect of which there is no authorisation for use in internal traffic?'

The CJ ruled that Article 555(1) and Article 558(1)(c) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001, must be interpreted as meaning that the irregularity in respect of the use of a vehicle imported into the European Union under the temporary importation procedure with total relief from import duties which is used for internal traffic must be regarded as occurring at the moment of crossing the border of the Member State in which the vehicle is used in breach of the national provisions in the field of transport, that is to say, without authorisation to unload given by the Member State of unloading, the authorities of that Member State being responsible for levying those duties. As a result, the Austrian Customs were entitled to levy import duty.

CJ rules on the CN classification of plastic dialysis drainage bags and plastic urine drainage bags (*Unomedical A/S*)

On 16 June 2011, the CJ gave its judgment in the *Unomedical A/S* case (C-152/10). The case concerns the levy of import plastic dialysis drainage bags exclusively for use with dialysers (artificial kidneys) and plastic urine drainage bags intended exclusively for use with catheters.

The CJ ruled that the Combined Nomenclature, set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, in the versions applicable to the dispute in the main proceedings, must be interpreted as meaning that a dialysis drainage bag, manufactured from plastic, which is specially designed for, and can be used only with, a dialyser (artificial kidney), had, between May 2001 and December 2003, to be classified under subheading 3926 90 99 of the Combined Nomenclature as 'plastics and articles thereof' and that a urine drainage bag, manufactured from plastic, which is specially designed for, and therefore can be used only in connection with, a catheter had, during the same period, to be classified under subheading 3926 90 99 of the Combined Nomenclature as 'plastics and articles thereof'.

Commission requests Portugal to recover overdue customs duties payment

On 16 June 2011, the Commission requested Portugal to comply with its obligations under EU law to collect and transfer the EU budget a payment linked to custom duties. The request takes the form of a reasoned opinion under EU infringement procedures. Should Portugal fail to notify the Commission within two months of measures taken

to recover the money in question and pay it into the EU budget, the Commission may decide to refer Portugal to the CJ.

Customs duties, which are charged on imports of goods coming from a non-EU state, are collected by Member States on behalf of the EU and paid to the common EU budget. Member States retain 25% of the amounts collected to cover collection costs. This traditional resource makes up only a small part of the EU budget's financial resources. In 2011, this will be approximately 12%.

Portugal failed to establish the customs debt on an international company's imports in due time. The Portuguese authorities started the investigation, but missed the three-year deadline for claiming customs duties according to the EU Customs law. The Commission considers Portugal financially liable for the EUR 62,000 in question.

The Commission's reason for taking action is to protect the common EU purse and to ensure fair treatment of all Member States. If a Member State fails to make available all the money due, other Member States may need to pay more as a result.

Commission closes infringement procedure against Ireland with respect to air travel tax

On 16 June 2011, the Commission announced that it had closed the infringement procedure against Ireland which it had initiated on the ground that Ireland charged a higher tax on flights to other Member States than on domestic flights.

Ireland introduced the air travel tax in March 2009. As originally structured, the tax was levied at a rate of EUR 10 on air passengers whose destination was greater than 300km from Dublin Airport. Shorter flights were taxed at only EUR 2 per passenger. Such distinction had the effect of imposing a higher tax on cross-border flights, as almost all cross-border flights were charged at the higher rate, whereas all domestic flights were covered by the lower rate. The Commission considered that the tax constituted a barrier to the freedom to provide services across borders. As such, it was in breach of Regulation 1008/2008 which forbids Member States from imposing higher charges or stricter administrative requirements on air services which cross borders within Europe than on domestic services operated within a single Member State.

In March 2010, the Commission sent Ireland a letter of formal notice regarding the air travel tax. In response, the Irish authorities modified the tax such that as of March 2011, it is levied at a single rate of EUR 3 per passenger, regardless of the destination of the flight.

The Commission considers that the tax now complies with EU law and accordingly, has decided to close the case.

Commission steps up its efforts in fighting fraud against the EU budget

According to an EU press release, in 2009 alone, Member States reported EUR 280 million in suspected fraud cases involving EU funds. Although this represents less than 0.2% of the EU's total budget, the Commission is determined to push the fight against fraud a step further. In this context, on 24 June 2011, the Commission adopted its new Anti-Fraud Strategy to update and modernise its policies to fight against fraud. This Strategy proposes a set of measures to ensure that the Commission will manage or supervise EU funds, at all levels and in all sectors, with the best possible tools to prevent and detect fraud to the EU budget. This new Strategy will cover the entire 'anti-fraud cycle', i.e. from the prevention and detection of fraud at an early stage to investigations, sanctioning and recovery of misused funds. It will also cover both the revenues and expenditure sides of the EU budget, including the budget which is partly managed by the Member States. An EU Action Plan to fight against the smuggling of cigarettes and alcohol along the EU Eastern border accompanies the adopted Strategy.

Study on the role of customs in enforcement of EU legislation governing the protection of the environment and its best practice

The study, published on 21 June 2011 and commissioned by the Directorate-General TAXUD concerning the role of customs in enforcement of EU legislation governing the protection of the environment and its best practice, addresses the issue of waste shipments between the

EU and Asian ASEM (Asia-Europe meeting) member countries. The issue was raised in the context of ASEM. The specific problem concerns exploitation of the legitimate trade in non-hazardous secondary raw materials to illegally export and dispose of hazard-contaminated and hazardous wastes, thereby creating an environmental and possible health hazard to the importing ASEM member countries.

The study was Customs-centred and focused on how Customs authorities might contribute towards eliminating this illegal trafficking and ensure compliance with the existing legal framework. The study engaged directly with Customs and Environmental Authorities together with a number of other agencies in the EU and Asian ASEM member countries. This was done through Study Visits and a comprehensive survey, conducted by questionnaire.

The study included:

- Targeted information from previous surveys, research, policy, and enforcement authorities in EU and Asian ASEM members
- Quantitative analysis of the ASEM waste trade
- Assessment of availability, reliability and relevance of waste trade statistics
- Assessment of the evidence of environmental pollution arising from the import of waste in Asian ASEM member countries
- Analysis of the role and capacity of Customs in EU Member States to enforce environmental controls
- Identification and assessment of the existing tools for information exchange on the waste trade between EU and Asian ASEM members.

The study makes a proposal and number of recommendations but with the condition that further detailed technical evaluation of a number of the proposals is required. The proposal is in the form of an option for consideration to systematically control the environmental quality and safety at the assembly point/ point of origin of the waste consignment destined for export.

The recommendations are directed at what Customs can do to help resolve the issues arising from the waste shipments and include measures in the following areas:

- Differentiation between 'product' and 'waste' in the Customs Single Administrative Document (SAD) to improve statistical data capture
- Systematic notification of Customs Authorities in cases where specific environmental controls / conditions are applicable to waste consignments
- Promotion of EU Authorised Operator Programme (AEO) and the WCO Framework of Standards
- Formal co-operation arrangements with legitimate traders, carriers and logistics operators to provide information and intelligence
- Inter-agency Co-operation
- Customs Post-Clearance Controls and Audit
- Customs 2013 Programme as a vehicle to promote best practice
- Customs participation in IMPEL (European Union Network for the Implementation and Enforcement of Environmental Law)
- The Promotion of Best Practice.

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