LOYENS LOEFF

EDITION 184

EU Tax Alert

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Highlights in this edition

Council approves conclusions on strengthening administrative cooperation especially as regards digital platforms

On 2 June 2020, the Council adopted conclusions aimed at strengthening the efforts to improve administrative cooperation to fight tax fraud and tax evasion. In particular, the Council requested the Commission to come with proposals aimed at addressing the identified shortcomings of existing elements of Directive 2011/16/EU (Directive on Administrative Cooperation: 'DAC') and provide the tax authorities of the Member States with useful and relevant information on taxpayers who generate income (revenue) through the digital platform economy;

While noting that the Member States have already begun to apply measures in their national law as regards reporting of income (revenue) generated through digital platforms, the Council stressed the need to establish a common standard at EU level for the reporting and tax information exchange mechanisms in this area;

In this regard, it is worth recalling that recent amendments have been made to Council Implementing Regulation 282/2011/EU establishing data collection and record-keeping obligations for digital platform operators as regards taxpayers who generate income (revenue) through such digital platforms.
However, the Council reiterates the importance of an effective and coherent EU regulatory framework and of aligning Directive 2011/16/EU and Council Implementing Regulation 282/2011/EU where appropriate in order to increase efficiency, utility and cost-effectiveness by making use of data that are already available with due consideration to the differences and specific challenges in the field of direct taxation;

Furthermore, any new EU-level measures in this area should also aim to create and maintain a level playing field between EU and non-EU based digital platforms, which are subject to taxation in Member States, through which income (revenue) is generated;

Commission proposes two possible new EU taxes as part of the recovery plan

On 27 May 2020, the Commission put forward its proposal for a major recovery plan. As part of this plan, the Commission proposes two possible new EU own (tax) resources to fund this recovery plan.

- A levy based on the operation of large companies that draw huge benefits from the EU single market (levied at EU level) (expected revenue around EUR 10 billion on an annual basis; and
- An EU new digital tax that will be levied at EU level. A digital tax applied on companies with a turnover above EUR 750 million could generate up to EUR 1.3 billion per year for the EU budget.

The year 2024 is suggested as the introduction date of these new taxes.
Please note that that these taxes will flow directly into the EU treasury (EU own resources), thus strengthening the EU budget. This is a new development for direct taxation.

In relation to the fight against tax fraud, the Commission states that CCCTB would provide business with a single rulebook to compute their corporate tax base in the EU considering that 'Tax simplification can improve the business environment and contribute to economic growth.'

CJ rules Luxembourg fiscal unity regime infringes EU law (*B & others*)

On 14 May 2020, the CJ delivered its judgment in case *B and Others v Administration des contributions directes* (C-749/18). The Court concluded that the Luxembourg fiscal unity regime, which still now separates vertical and horizontal fiscal unities, is contrary to the freedom of establishment.

Legal background

Luxembourg's fiscal unity regime allows offset of the individual taxable results of the entities forming part of the fiscal unity.

Up to and including 2014, Luxembourg law only accommodated so-called vertical fiscal unities, i.e., between an integrating Luxembourg company and one or more of its subsidiaries. As from 1 January 2015, following the CJ's 2014 judgment in case *SCA Group Holding* (joined cases C-39/13 to C-41/13), Luxembourg amended its legislation to also accommodate horizontal fiscal unities, i.e., between sister companies held by a common non-integrating parent. However, Luxembourg tax law does not provide for a combination of a vertical and a horizontal fiscal unity: it is thus not possible to include sister companies of the integrating Luxembourg company in an existing vertical fiscal unity, even if the conditions of the horizontal fiscal unity are met.

Factual background

The case concerned a multinational group with a series of Luxembourg subsidiaries all held directly or indirectly by the same French parent company. The group had initially formed a vertical fiscal unity headed by a Luxembourg company. In 2014, further to the *SCA Group Holding* judgment, the group filed requests to extend the existing fiscal unity to sister companies of the Luxembourg integrating company for the years 2013 and 2014. Those requests were rejected. The Luxembourg courts rejected the subsequent appeal as regards 2013; for 2014, the court of first instance sided with the group. The administrative court, in appeal, referred three questions to the CJ.

CJ ruling

The CJ first found, in line with the existing case law, that the pre-2015 regime was contrary to EU law insofar as it did not accommodate horizontal fiscal unities. The CJ confirmed that this created an unjustified discrimination between Luxembourg and EU (but non-Luxembourg) resident parent companies.
Second, which is also relevant to the current regime: the CJ found that the strict separation between vertical and horizontal fiscal unities is contrary to EU law. Where there is a Luxembourg (integrating) parent company, it can add to the fiscal unity subsidiaries which are sisters of the existing integrated companies. On the contrary, Luxembourg law would (even now) still prevent a similar addition of sister subsidiaries (of the integrating Luxembourg company of a vertical unity) when there is a foreign (non-integrating) parent company, unless the vertical fiscal unity is first broken up. This may have an adverse impact in the case a break-up of a fiscal unity occurs during the relevant 5-year minimum period.

Finally, the company had not filed a request to form the fiscal unity in 2013 until the end of 2014, i.e., after the deadline laid down in the law. The CJ rejected the taxpayers' argument that filing a request before the *SCA Group Holding* judgment was useless and considered that the requirement to file the request prior to the end of the relevant year was not contrary to the principles of equivalence and effectiveness.

Impact and next steps

The case will return to the Luxembourg administrative court, which should rule in line with the positions of the CJ. Because of the primacy of EU law, the current restrictions, including those in the Luxembourg rules which were found contrary to EU law, would need to be set aside, even without a change of law. Hence, other taxpayers who are looking at 'combining' a horizontal and vertical fiscal unity, e.g., by including a sister company of the integrating company in an existing vertical fiscal unity, will be able to rely on the CJ judgment, provided a request to that effect is filed in time. If not filed beforehand, the request needs to be filed before the end of this year in order to enjoy the benefit of a combined vertical and horizontal fiscal unity for the year 2020.

CJ rules on fixed establishment for VAT purposes (*Dong Yang Electronics*)

On 7 May 2020, the CJ delivered its judgment in the case *Dong Yang Electronics* (C-547/18). The case concerned the question whether a subsidiary that is established in the European Union should be regarded as a VAT fixed establishment of a parent company established outside the European Union and, if so, how a service provider should assess whether his services have been provided to the parent company or the fixed establishment.

Dong Yang entered into a service agreement with LG Korea concerning the assembly of circuit boards. Those circuit boards were provided to Dong Yang by LG Poland Production, a subsidiary of LG Korea. Once assembled, Dong Yang returned the circuit boards to LG Poland Production.
LG Poland Production assembled TFT-LCD modules from components owned by LG Korea under its own contractual obligations with LG Korea (toll manufacturing). The finished goods were sold by LG Korea to another Polish subsidiary after which, the goods were sold to the European market.

As a main rule, Dong Yang's services are taxable in Korea, because that is where Dong Yang's customer, LG Korea, has established its place of business. This would be different if LG Korea had a VAT fixed establishment in Poland. Because LG Korea did not employ staff in Poland and furthermore, did not own any property or technical equipment in Poland, LG Korea assured Dong Yang that it did not have a VAT fixed establishment in Poland. Therefore, Dong Yang did not charge Polish VAT on its services to LG Korea. However, the Polish tax authorities took the view that Dong Yang's services should have been subject to Polish VAT, because they were, in fact, supplied to a Polish VAT fixed establishment of LG Korea in the form of LG Poland Production.

The CJ ruled that it is possible that a VAT fixed establishment could exist through a parent-subsidiary relationship. However, the qualification of an establishment as a fixed establishment for VAT purposes depends on the fulfilment of the material conditions (i.e. sufficient degree of permanence and a suitable structure in terms of human and technical resources) laid down in the VAT implementing regulation. Those conditions should be assessed in the light of the economic and commercial reality. It follows from this that the existence of a VAT fixed establishment cannot be derived from the mere fact that LG Korea has a subsidiary company in Poland. Under the circumstances in this case, LG Poland Production, therefore, could not be considered as a fixed establishment of LG Korea.

The second part of the CJ's judgment focuses on the question whether or not Dong Yang is required to assess the contractual relations between LG Korea and LG Poland Production in order to determine the existence of a VAT fixed establishment (from which it follows in which country Dong Yang's services are taxed). The CJ ruled that no such obligation existed for Dong Yang. Therefore, Dong Yang can rely on the criteria laid down in the VAT implementing regulation, such as the nature and use of the service by the recipient, the VAT number communicated by the recipient, as well as the party that pays for the services (i.e. information provided by LG Korea).

Direct Taxation

CJ rules that allocation of taxing rights on pensions pursuant to a tax treaty is not in breach of the TFEU (*Istitulo Nationale della Previdenza Sociale*)

On 30 April 2020, the CJ delivered its judgment in case *HB, IC v Istituto nazionale della previdenza sociale (INPS*), (Joined cases C-168/19 & C-169/19). The case deals with the taxation of two Italian nationals, former employees of the Italian public sector, who moved to Portugal and the alleged difference in tax treatment under the tax treaty between Portugal and Italy of Italian pensioners in the private sector and Italian pensioners in the public sector resident in Portugal.

HB and IC, of Italian nationality, are former employees of the Italian public sector. They are each in receipt of a retirement pension paid by the INPS. After transferring their residence to Portugal, they requested the INPS, in 2015, that they receive, pursuant to Article 18 and Article 19(2) of the Italian-Portuguese tax treaty, the gross amount of their monthly retirement pension, without deduction of tax at source by the Italian Republic. The INPS rejected those requests, taking the view that, pursuant to Article 19 of the Italian-Portuguese tax treaty, unlike Italian pensioners in the private sector, retired employees in the Italian public sector must be taxed in Italy, and only in that Contracting State. HB and IC each brought actions against those decisions claiming that the Italian-Portuguese tax treaty introduces inequality of treatment between Italian pensioners in the private sector and Italian pensioners in the public sector resident in Portugal, in so far as the former indirectly enjoy more advantageous tax treatment than the latter, which constitutes, according to that court, an obstacle to the freedom of movement guaranteed to every EU citizen.

The CJ started by observing that the objective of tax treaty is to prevent the same income from being taxed in each of the two States. It is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other contracting State. Therefore, it is not unreasonable for Member States to use the criteria followed in international tax practice and, in particular, as the Italian Republic and the Portuguese Republic have done in the present case, the Model Tax Convention on Income and on Capital drawn up by the OECD, Article 19(2) of which, in the 2014 version, provides for connecting factors such as the paying State and nationality. Therefore, for the CJ, where, in a tax treaty concluded between the Member States, the criterion of nationality appears in a provision which is intended to allocate fiscal sovereignty, there is no justification for considering such differentiation on the basis of nationality as constituting prohibited discrimination. Similarly, the designation of the State responsible for payment of the retirement pension (the 'paying State') as being competent to tax pensions received from the public sector cannot, in itself, have negative repercussions for the taxpayers concerned, in so far as the favourable or unfavourable nature of the tax treatment of those taxpayers does not derive strictly speaking from the choice of connecting factors, but from the level of taxation of the competent State, in the absence of harmonisation, at EU level, of the scales of direct taxes. Therefore, the CJ concluded, that the difference in treatment which the applicants in the main proceedings claim to have suffered arises from the allocation of the power to impose taxes between the parties to the Italian-Portuguese tax treaty and from the disparities existing between the respective tax systems of those contracting parties. The choice of various connecting factors, made by those parties for the purpose of allocating powers of taxation between them, such as, in the present case, the State responsible for paying the retirement pension and nationality, must not be regarded, as such, as constituting discrimination prohibited by the TFEU.

Commission requests Luxembourg to amend its implementation of the ATAD interest deduction limitation rule

In a formal notice of 14 May 2020, the Commission has requested that Luxembourg amend the way it has implemented the interest deduction limitation rule (**IDLR**) into its domestic tax law. When transposing the first anti-tax avoidance directive (**ATAD I**), Luxembourg included securitization special purpose entities falling within the scope of EU Securitisation Regulation (No 2017/2402) (**SSPEs**) into the definition of financial undertakings that are exempt from the IDLR. This rule has been applicable since the tax year 2019.

The Commission considers that the carve-out granted to SSPEs goes beyond what is allowed under the financial undertaking exemption and requires Luxembourg to adapt its legislation to its reading of ATAD I within the next four months. Failing to do so may lead to the Commission sending a reasoned opinion to Luxembourg, potentially followed by an infringement procedure before the European Courts. A likely outcome is that the Luxembourg IDLR rules will be amended to exclude SSPEs from the scope of the financial undertaking exemption. It is currently unclear when a change of law would take effect, i.e., as of 1 January 2020, as of the date on which the amending law enters into force or as of another point in time.

If an SSPE no longer qualifies as an exempt financial undertaking under ATAD I and earns taxable income other than interest and economically equivalent income, it may no longer be able to deduct all of its interest expenses and/or commitments towards its investors. Their interest deductions would be, subject to certain grandfathering rules, capped at the higher amount of 30% of EBITDA or EUR 3 million. This may notably be the case for SSPEs that invest in distressed or discounted debt with a view to realizing capital gains. Such SSPEs may thus face a substantially higher tax burden than initially projected. This would only be different if capital gains on the distressed or discounted debt were viewed as interest or economically equivalent income or if the deductions taken by the SSPE would not qualify as interest or interest equivalent. So far, there is no clear guidance on these questions.

Commission asks Denmark to amend its rules on the taxation of dividends paid to charities

On 14 May 2020, the Commission sent a letter of formal notice to Denmark requesting it to amend its legislation regarding the taxation of dividends paid to charitable organisations. Under Danish tax law, dividends paid to domestic charities are exempt from tax, whereas dividends paid to charities established in other EU Member States or EEA States are taxed at a rate of 22%, or at a reduced rate of 15%, if the competent authority in the state in which the charity is domiciled exchanges information with Danish authorities.

According to the Commission, this difference in treatment of domestic and cross-border dividend distributions constitutes a restriction on the free movement of capital. If Denmark does not act within the next four months, the Commission may send a reasoned opinion to the Danish authorities.

Commission asks Finland to amend its rules on tax deductibility of group contributions

On 14 May 2020, the Commission sent a reasoned opinion to Finland regarding its legislation providing for deductibility of group contributions between affiliated companies only if the company receiving the contribution is resident in Finland.

Such group contributions made to affiliated companies in other EU/EEA States are not deductible, even in situations where these cover definitive losses incurred by the latter. According to the Commission, the lack of deductibility in such situations constitutes a restriction on the freedom of establishment. If Finland does not amend its legislation such to remedy the infringement within the next four months, the Commission may decide to bring the case before the CJ.

VAT

CJ rules on the application of the exemption for medical care on medical consultation services by phone (*X-GmbH*)

On 5 March 2020, the CJ issued its judgment in the case *X GmbH v Finanzamt Z* (C-48/19). X is a private limited liability company under German law. In February 2014, it held telephone consultations on various health topics on behalf of the statutory health insurance funds and provided programs consisting of telephone counselling for patients suffering from chronic or long-term illnesses. These services were performed by nurses and medical assistants who, for the largest part, were trained 'health coaches'. In more than one third of the cases, a doctor was called upon to take over or provide a second opinion.

For the provision of the aforementioned services, X requested the application of the exemption in Article 132, paragraph 1, sub c of the VAT Directive. This concerns the exemption for the provision of medical care in the exercise of the medical and paramedical professions. X's competent tax authorities, however, deemed the services to be VAT taxable. X eventually appealed to the Bundesfinanzhof (Highest Federal Court of Germany), which referred two questions to the CJ for a preliminary ruling. With its questions, the referring court essentially asked the CJ whether (i.) the medical consultations by telephone (independent of any specific medical treatment or merely preceding such treatment) can fall under the medical care exemption, and (ii.) whether the quality standards to which the 'traditional' medical professions are held in light of Article 132, paragraph 1, sub c of the VAT Directive, also suffice for the medical care without personal contact or whether additional conditions are required.

The CJ considered that the concerning provision does not specify a required place of service. It follows from EU case law that the provision is meant to apply to medical care provided at any place outside of hospitals (as opposed to sub b which applies solely to medical care provided in hospitals). Thus, the medical care exemption applies irrespective of the place of service, as long as the provision's conditions are met. This also prevents a conflict with the neutrality principle. Otherwise, an inconsistent VAT treatment would result with respect to the performance of the same services, by service providers of an equivalent qualitative level, only varying in the place of service. It is up to the referring court to determine to what extent the services can be considered medical care.

CJ rules on the application of the exemption for hospital and medical care (*Idealmed III*)

On 5 March 2020, the CJ delivered its judgment in the case *Idealmed III* (C-211/18). Idealmed is a Portuguese private limited liability company which operates five healthcare institutions. Under Article 377 of the VAT Directive, Portugal may, by way of derogation from the VAT Directive, exempt medical services not covered by the VAT exemption of Article 132, paragraph 1, sub b VAT Directive, which Article provides for medical services provided by and in hospitals and similar institutions to be VAT exempted. Article 391, VAT Directive allows taxpayers the right to opt for taxation of the otherwise exempt activities. At the time that Idealmed opted for taxation of its activities on 6 January 2012, this option was accessible under Portuguese VAT law to hospitals and similar institutions which are not owned either by public bodies or by private institutions which form part of the national healthcare system. Idealmed opted for this facility, which was fixed for a period of five years after the filing date. In September 2012, Idealmed concluded various agreements with public bodies for the provision of medical services by Idealmed against fixed prices. Then, in 2016, the Portuguese national VAT law was amended in such a way that the option for taxed medical services is only available if the services to be provided *do not* follow from agreements with the State in the context of the national healthcare system.

In an audit regarding the period of April 2014 to June 2016, the Portuguese tax authorities came to the conclusion that a large part of the services performed by Idealmed arose from the ‘State contracts’ and thus the applicability of the VAT exemption should not have been in question and the option for taxation was not available for those services. With the foregoing in mind, the referring court (the ‘Tribunal Arbitral Tributário’) referred four questions to the CJ for a preliminary ruling questions, the second to fourth questions of which were answered collectively.

With its first question, the referring court essentially asked whether a company like Idealmed should be deemed to act under social conditions similar to those for public bodies or institutions given that the largest part of Idealmed’s services are performed based on State contracts against fixed prices, roughly 70% of Idealmed’s ‘customers’ benefit therefrom as a result of the public healthcare system and lastly, the activities serve the public interest. The CJ started by pointing out that the medical exemption pertains to the specific activities and not to the service provider, and thus the ratio between the services performed ‘under social conditions’ and the total number of activities is not relevant. The CJ, however, did confirm that the fact that services are provided based on government agreed fixed prices can be a factor in determining whether the medical care exemption applies.

With its second to fourth questions, the referring court asked in essence whether the medical care exemption should be precluded with respect to services (i.) provided by a private hospital, which falls within Article 132 paragraph 1 sub b VAT Directive as a result of a change in the conditions under which it carried on its activities, (ii.) which change occurred only after it opted for the taxation regime laid down in the national law of the Member State concerned, (iii.) which Member State laid down the requirement for all taxable persons exercising that option to remain subject to that regime for a certain period, and (iv.) where such a period has not yet expired. To this end, the CJ considered that the exception of opting for taxation as provided by the VAT Directive was available for services that did not fall under Article 132, paragraph 1, sub b of the VAT Directive. That provision obliges Member States to apply the VAT exemption if the conditions are met. Consequently, the CJ ruled that once a private hospital provides such services falling under aforementioned provision, these services are to be VAT exempt in spite of the fact that it has opted for taxation with respect to the services that do not fall under aforementioned provision. Moreover, Idealmed cannot support its view on the argument that the Tax Authorities had created a legitimate expectation regarding the treatment of the concerning services (at least during the five-year period). This is because the conditions under which Idealmed acted changed only after Idealmed opted for taxation. Thus, the medical care exemption applies to Idealmed’s services performed under social conditions similar to those for public bodies or institutions.

CJ rules on VAT on secondment services (*San Domenico*)

On 11 March 2020, the CJ delivered its judgment in the case *San Domenico Vetraria* (C-94/19). The case concerns an Italian company called San Domenico Vetraria SpA (‘San Domenico’), which received secondment services from its parent company ‘Avir’ in 2004. The secondment concerned a director of Avir who was seconded to one of San Domenico’s branches. For its services, Avir charged San Domenico amounts equal to the costs borne at the level of Avir in connection with the seconded director. Furthermore, Avir issued invoices including VAT and San Domenico recovered said input VAT in its VAT returns. However, the Italian Tax Authorities (‘ITA’) took the view that the secondment between Avir and San Domenico qualified as being outside of the scope of VAT based on national VAT legislation. This is because the Italian VAT legislation states that secondment, for which the compensation is only made up of cost reimbursements (and no additional fee or mark-up), is regarded as not relevant for VAT purposes (i.e. out of scope). This dispute eventually ended up before the ‘Corte suprema di cassazione’ (the High Court), which decided to stay the proceedings and refer to the CJ for a preliminary ruling on the question whether the Italian rule with respect to secondment against sole reimbursement of costs is compatible with the Sixth Directive, which was still applicable in the period of the dispute (in particular, Articles 2 and 6 of the Sixth Directive, which provisions provided the definitions of respectively taxable activities and services).

The CJ started by recalling that supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT. Also, any transaction that does not constitute a supply of goods constitutes a supply of service(s). In this respect, it was not in discussion whether Avir could be considered a taxable person (which it is). Furthermore, the referring court had already established that the services took place within the country concerned. Thus, the only question that remained to be answered is whether the services were effected 'for consideration', as required by Article 2 of the Sixth Directive.

The CJ considered that a supply of service is effected for consideration if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. In other words, if one can determine a direct connection between a supply of goods or services on the one hand and the consideration received on the other hand. The CJ noted that Avir's services were carried out on the basis of a legal relationship of a contractual nature between Avir and San Domenico Vetraria. Furthermore, the CJ acknowledged a reciprocal performance, namely the secondment of a director from Avir to San Domenico Vetraria, on the one hand, and the payment by San Domenico Vetraria to Avir of the amounts invoiced to it, on the other. The CJ dismissed the European Commission's view that the services were not provided for consideration because the remuneration for Avir's services did not surpass the costs borne by Avir. In this respect, it is not relevant whether the consideration is higher or lower than the costs borne by the service provider. The only requirement relevant in this respect is that the services and the consideration are interdependent. In other words, the consideration is only paid because the services were supplied (and vice versa). Thus, in conclusion, (secondment) services supplied against consideration are *not* out of scope for VAT purposes if the consideration only constitutes the reimbursement of costs borne by the service provider.

CJ rules on conditions for VAT zero-rated intra-EU supplies (*Herst*)

On 23 April 2020, the CJ delivered its judgment in the case *Herst* (C-401/18). In essence, the case focuses on which transaction in a cross-border supply chain of goods should be regarded as the VAT exempted intra-Community supply when there is only one physical movement of goods to the final customer.

The Czech company, Herst, is active in the transport sector and owns several petrol stations. Using its own vehicles, Herst transports fuel under suspension of excise duties from other EU Member States to the Czech Republic. The goods are resold multiple times, but only transported once by Herst to the final customer in the Czech Republic. Upon arrival in the Member State of destination, the fuel was brought into free circulation in the EU. The Tax Authorities in the Czech Republic are of the opinion that the supplies made to Herst were carried out in the Member State of departure of the goods and qualify as VAT zero-rated intra-EU supplies. Because of this, the issued invoices stating Czech VAT would not entitle Herst to deduct input VAT. In order for a specific transaction to qualify as intra-EU supply, it should be determined when and where the power to dispose of the goods as owner is transferred.

In its judgment, the CJ ruled that a taxable person who carries out a single intra-Community transport of goods under the excise-duty suspension arrangements, with the intention of acquiring those goods for the purposes of his economic activity once they have been released for free circulation in the Member State of destination, shall obtain the power to dispose of those goods as an owner, provided that he is able to take decisions which may affect the legal situation of those goods, including, in particular, the decision to sell them. In the case of Herst, this criterion is met, which means that the supplies made to Herst should indeed be regarded as VAT zero-rated intra-EU supplies. This judgment is in line with previous case law from the CJ (e.g. *AREX CZ*, C-414/17).

CJ rules on interest paid on late VAT refunds (*Sole-Mizo Dalmandi*)

On 23 April 2020, the CJ delivered its judgment in the combined case *Sole-Mizo Dalmandi* (C-13/18 and C-126/18). The cases revolve around the Hungarian tax authorities' ('HTA') administrative practice of paying taxpayers interest on late refunds of VAT. This practice follows from an unpublished ruling of the CJ in 2014, in which the CJ ruled that EU law prohibits the HTA from not refunding interest on excess input VAT that could not be refunded within a reasonable time span due to national legislation declared incompatible with EU law. The Hungarian Supreme Court tested the conditions applicable with respect to these refunds of interest. Regular tax rules for refunding interest apply between the deadline for submitting the VAT return and the deadline for submitting the next VAT return. This interest is based on the base rate of the Hungarian Central Bank. The regular rules for the refund of interest for late payment apply for the period from the date on which the tax authorities became liable for the interest to be paid until the date on which this interest is actually paid. This interest is based on twice the base rate of the Hungarian Central Bank.

Two Hungarian companies, 'Sole-Mizo' and 'Dalmandi' requested the HTA to pay them (i.) interest following the late VAT refunds, and (ii.) late payment interest following the fact that the HTA had also not met their obligations in timely paying the prior mentioned interest. In short, the HTA granted the companies the VAT refund interest, but denied the requested interest for late payment by the HTA. Those disputes were eventually referred to the CJ for a combined preliminary ruling, in which a large number of questions from the referring courts are answered (together, where so deemed appropriate by the CJ).

The first question is essentially whether EU law precludes a tax authorities' practice whereby interest on excess deductible VAT which has been withheld for more than a reasonable period is calculated on the basis of an interest rate corresponding to the base rate of the national central bank. The second question was whether EU law precludes the application of a limitation period of five years to requests for payment of interest on excess deductible VAT which has been withheld by the HTA contrary to EU law. Furthermore, the CJ was asked whether EU law precludes a practice whereby the taxable person must submit a special request for payment of interest and that interest is only applied starting after a period of 30 or 45 days for the tax authorities to process the taxpayer's request. Finally, the last question posed by the referring courts was whether EU law precludes a practice whereby interest for late payment is granted only to the extent that the taxable person has an excess of deductible VAT in *that* period concerned.

As to the first question, the CJ considered that the national Central Bank rate is not appropriate as this rate only applies to credit institutions. Taxpayers like Sole-Mizo and Dalmandi would face a higher rate of interest on loans to cover the cash flow disadvantage created by the HTA. Furthermore, as the taxpayers are not compensated for any monetary depreciation in the period between the end of the VAT return period and the actual moment the interest is paid, the taxpayers are not relieved from the economic burden of the amounts of VAT unduly withheld by the HTA. Thus, this practice is prohibited based on EU law and the principle of effectiveness in particular. As to the second question regarding the limitation period, the CJ considered that in the absence of specific rules in EU law, it is to the discretion of the Member States (taking into account the principles of EU law) to lay down the conditions under which interest is paid following amounts of VAT unduly taxed (or in this case, unduly withheld VAT refunds for an unreasonable period of time). The CJ thus ruled that EU law does not preclude the use of a limitation period of five years for the submission of an application for the refund of interest. Nor does it preclude the obligation to submit an application for the late payment interest, which interest only starts to accumulate after a period of 30 or 45 days after receipt of that application by the tax authorities.

CJ rules on retroactive adjustments to input VAT recovery (CTT - Correios de Portugal)

On 30 April 2020, the CJ delivered its judgment in the case *CTT Correios de Portugal* (C-661/18) on the possibility for taxable persons to perform retroactive adjustments to input VAT recovery in the case a supply has wrongly been treated as VAT exempt.

CTT operates on the market for postal services in Portugal. It has public service obligations on this market. CTT's transactions fall within the scope of the VAT postal services exemption and therefore, do not give rise to VAT deduction. CTT also performs VAT taxed activities that do give rise to input VAT recovery. The Portuguese postal services market was liberalized on 1 January 2013. In 2015, doubts first arose regarding the VAT consequences of the liberalization of the postal services market. CTT started to pay VAT on postal bill-payment services from April 2015. In a binding tax ruling of 20 November 2015, the Portuguese Tax Authorities clarified the impact of the liberalization of the market on the VAT exemption and specified that postal bill-payment services carried out from 1 January 2013 no longer fell within the scope of the VAT exemption for public postal services, in light of the CJ judgment of 23 April 2009, *TNT Post UK* (C-357/07). Consequently, CTT paid VAT in respect of postal bill-payment transactions carried out from 1 January 2013 and filed adjusted VAT declarations for the years 2013, 2014 and 2015. In addition, in those adjusted declarations, CTT changed the method used to calculate the VAT recovery ratio from the turnover based method to the actual use method. Following an audit, the Portuguese Tax Authorities pointed out that the deduction method may not be altered once a final proportion has been applied.

The CJ ruled that – in principle – the rules on VAT deduction must be interpreted as not precluding a Member State from prohibiting a taxable person from changing the deduction method once the final proportion has been fixed. However, the CJ also ruled that the VAT Directive, read in the light of the EU law principles of fiscal neutrality, effectiveness and proportionality, must be interpreted as precluding national legislation under which a taxable person who deducted VAT charged on the acquisition of goods and services used for both VAT-taxed and VAT-exempt transactions based on the turnover method ('pro rata'), is denied the opportunity to correct those deductions once the final proportion has been fixed in a situation where:

- the EU Member State concerned allows taxable persons to deduct VAT based on the actual use method;
- the taxable person was unaware and acting in good faith, that a transaction which it regarded as VAT exempt was in fact VAT taxed,
- the general limitation period fixed by the national VAT law for the purposes of adjusting the deductions has not yet expired, and
- the change in the deduction method makes it possible to establish more precisely the proportion of VAT relating to transactions in respect of which VAT is deductible.

Given that all four above-mentioned criteria are met, the CJ ruled that CTT was indeed allowed to make retroactive adjustments to the input VAT recovery ratio.

CJ rules on VAT deduction concerning non-concluded contracts (*EUROVIA*)

On 30 April 2020, the CJ delivered its judgment in the case *EUROVIA Ipari, Kereskedelmi, Szállítmányozási és Idegenforgalmi Kft. ('Eurovia')*, C-258/19.

In 1996 and 1997, Eurovia concluded a number of contracts for the execution of works relating to an aerial telecommunications network. A dispute arose between Eurovia and the contractor concerning the amount of remuneration. As a result, Eurovia only paid a part of the total amount to the contractor. After a civil dispute with the contractor, Eurovia was ordered to pay more than HUF 19 million plus interest. On 15 June 2011, the contractor drew up an invoice, stating 6 June 2011 as the date of performance of the contracting works at issue in the main proceedings. In its VAT return for the second quarter of 2011, Eurovia deducted a VAT amount of HUF 3,940,679 on the basis of this invoice. The Hungarian tax authorities refused this input VAT deduction, arguing that the services were not rendered to Eurovia in 2011 and that the statute of limitation for retroactive VAT deduction on these services had already passed.

The CJ ruled that it deemed itself not competent to answer questions asked by the Supreme Court of Hungary because the relevant transaction had taken place and the procedure concerns a period prior to the accession of Hungary to the EU. This is in line with the CJ judgment of 27 June 2018 in *Varna Holideis* (C-364/17).

CJ rules on conditions to defer VAT refund (*Agrobet CZ*)

On 14 May 2020, the CJ delivered its judgment in the case *Agrobet CZ, s.r.o.* (C-446/18). The case concerns the question whether or not tax authorities are allowed to defer a total VAT refund when only a small part of that refund is subject to an ongoing tax inspection.
Agrobet is a Czech entrepreneur involved in the trading of agricultural products. In its VAT return, Agrobet requested a VAT refund relating to the purchase of rapeseed oil which Agrobet had sold to a Polish taxable person free of VAT (0% rated intra-Community supply). The Czech tax authorities initiated a tax inspection because it had doubts with regard to the VAT treatment of the rapeseed oil transactions. Given those doubts, the tax authorities did not grant a VAT refund. After that, Agrobet offered to secure the part of the refund still under inspection, so that the amount of deductible VAT not under review could be refunded in advance of completion of the inspection. The tax authorities declined that offer on the ground that the excess VAT was indivisible and related to the tax period as a whole. As a result, the tax authorities decided to withhold the full refund until the audit had been closed.

The CJ ruled that the right to recover VAT should not be understood in relation to the total amount, but rather in relation to an identifiable transaction. As a result, VAT amounts that are undisputed and require no further inspection must be paid promptly. Furthermore, the CJ stated that the excess VAT amount is not indivisible from the total VAT amount reclaimed, and therefore, the argument of the Czech tax authorities should be rejected. In short: it is, in principle, possible to distinguish between disputed and undisputed amounts of deducted VAT and to carry out a partial VAT refund accordingly.

Opinion of AG on the subject of the management services (*Blackrock Investment Management (UK) Limited*)

On 11 March 2020, AG Pikamäe delivered his Opinion in the case *BlackRock Investment Management (UK) Ltd* (C-231/19). BlackRock Investment Management (UK) Limited is a fund management company that manages both Special Investment Funds ('SIFs') (for the purpose of collective investment) and other funds. For the performance of its fund management activities, Blackrock procures services from BlackRock Financial Management Inc. ('BFMI'), established in the United States. BFMI makes use of an IT platform known as Aladdin available to BlackRock, which provides a broad range of investment management services, such as market analysis, monitoring performance, risk assessment, monitoring regulatory compliance and implementing transactions.

Following the reverse charge mechanism, BlackRock is required to declare VAT on the services it receives from BFMI (a non-EU service provider). As indicated above, BlackRock manages both SIFs and other funds; the first type to a (far) lesser extent. BlackRock takes the view that a part of the fees paid to BFMI should be VAT exempt under the exemption for management services in relation to SIFs, Article 135, paragraph 1, sub g of the VAT Directive. The Tax Authorities took the view that BFMI's services should be fully VAT taxable given that the largest part of the received services is used for BlackRock's services to non-SIF funds. The referring court determined that the IT platform services of BFMI should be considered a single supply of fund management services to BlackRock.

With that said, the court is left with the question whether the purchase of a single fund management service, used for two varying purposes may be partially exempted, depending on the extent to which the service is used for either of the two purposes (for SIFs or for non-SIFs).

AG Pikamäe stated, first of all, that the referring court found that the service provided by BFMI to BlackRock constituted a single supply of service which must be regarded as management within the meaning of the fund management exemption. The AG added to this stating that, although the services of BFMI comprise several elements, all elements are placed on the same footing, in particular from the perspective of the portfolio managers. Furthermore, the AG recalled that VAT exemptions are an autonomous concept of EU VAT law, meant to be interpreted strictly. Interpretation of the provision should be consistent with the objectives pursued by the exemption and should not be in conflict with the principle of fiscal neutrality.

Blackrock supported its view of a pro rata partial exemption of BFMI's services with a reference to the case *Commission v Luxembourg (C-274-15)*. In that case, the CJ had ruled in the context of the VAT exemption for Independent Groups of Persons ('IGP') that part of a single supply of service by such an IGP to its members may be exempt from VAT and, not unintentionally, the other part should be VAT taxed. The AG noted in this respect that a general rule cannot be derived from *Commission v Luxembourg* as that case is based on the specific purpose and wording of the IGP exemption and the purpose and wording of the VAT exemption for fund management services is very different.

Following on from the foregoing considerations, the AG went on to discuss the essential question at hand: 'should the existence of a minority of SIFs, the management of which should be exempt, within a company that holds different funds, call for the tax base to be split?'. The AG answered this question in the negative, followed by a summary of reasons. First, allowing the (SIF) fund management exemption to apply to BFMI's service (as a whole) would contradict the objective of that exemption as the funds Blackrock manages are for the greatest part other types of funds. Next, the AG dismissed Blackrock's suggestion that a partial VAT exemption could be determined based on the value of the assets under the management of the SIFs, on the one hand, and the others, on the other. Not only does this not fit the wording of the VAT exemption, which attaches to 'transactions' instead of 'assets'; such a mechanism would be contrary to the nature of the VAT system and would be practically unworkable (as the VAT consequences would vary continuously depending on the value of the various funds).

The AG concluded by noting that the situation could have turned out differently (to the benefit of the taxpayer) if, by way of detailed information, the various services (now forming one supply of service) could have been clearly distinguished from one another, and a VAT exemption could then have applied on the services relating to the SIF's only. Nevertheless, now that the facts are not as such in the case at hand, the VAT exemption must be interpreted strictly, as a result of which, the exemption cannot be granted to the services provided by BFMI to Blackrock, even though a minority share of Blackrock's fund management activities pertain to SIFs.

AG opines on adjustment mechanism provided in the VAT directive (*Stichting Schoonzicht*)

On 3 March 2020, AG Bobek delivered his Opinion in the Netherlands case, *Stichting Schoonzicht* (C-791/18). Stichting Schoonzicht (hereinafter: 'Schoonzicht') is a foundation that had an apartment complex built.

This complex comprised seven residential apartments, construction of which started in 2013 and was finished in July 2014. Given that Schoonzicht intended the complex to be used for VAT taxable purposes, Schoonzicht fully recovered the VAT it incurred in this respect. Subsequently, in August 2014, Schoonzicht rented out four apartments for which the first use of the apartments was VAT *exempt*. The other apartments were unoccupied during 2014. Based on Netherlands VAT legislation, the previously recovered VAT pertaining to the four apartments used for VAT exempt services, should be adjusted *at once* in the taxable period of first use, given that the use thereof now deviated from the intended use. Member States are allowed to apply such a pre-adjustment correction following Article 189(b) of the VAT Directive. Schoonzicht, however, took the view that Article 187, VAT Directive regarding capital goods is independent from the general regime for VAT recovery. Schoonzicht considered that Article 187 prescribes that the initial deduction for capital goods must be spread over a number of years and thus, the Netherlands 'pre-adjustment correction' is not in line with the VAT Directive. Schoonzicht eventually appealed to the Supreme Court of the Netherlands ('*Hoge Raad*'), which referred the question of the Netherlands 'first-use full adjustment' requirement's compatibility with Article 187, VAT Directive to the CJ. But first, AG Bobek has been asked to provide his Opinion, which can be summarized as follows.

The AG first went into the (potentially) applicable rules of the VAT Directive. In this light, the AG recalled that the adjustment mechanism laid down in Articles 184 to 186, VAT Directive has the purpose to ensure that transactions carried out at an earlier stage continue to give rise to the right to deduct input *only* to the extent that they are used to make supplies subject to VAT. Articles 187 to 192 provide specific rules for capital goods, which regard the 'spread out' adjustment of initially recovered input VAT over a period of at minimum five years (at most 20 years). In the Netherlands, this adjustment period starts in the taxable period of first use and lasts 10 years.

It follows from case law that the rules on adjustment are intended to enhance the precision of deductions by monitoring the extent to which the taxable person *actually* uses the goods concerned for deductible purposes. The adjustment relies on the premise that a change of use can occur during the period in which the capital goods are used. It is, however, as the AG stated, a very different matter to extend that logic to the period that precedes the first use. In brief, how can there be a change of use if there is no initial use in the first place. Moreover, a taxpayer would be able to receive a financial advantage based on only the intention to VAT taxable activities despite the fact that no VAT taxable use has taken place (on the contrary), as the taxpayer would only be required to pay back the funds in proportionate fractions over the years. Conversely, a taxpayer making exactly the same non-taxable use of similar capital goods would not obtain such an advantage if he or she had refrained from deducting input VAT in the first place. Consequently, the AG took the view that the first-use full adjustment does not follow from Article 187, VAT Directive and thus, is not incompatible with said Article of the VAT Directive. The AG, however, was of the opinion that the first-use full adjustment falls under Article 184 VAT Directive, under reference to the case *SEB Bankas*. In that case, the CJ had stated that Article 184 'does not exclude, a priori, any foreseeable situation of undue deductions'. The AG thus concluded that the case in question falls under that broad definition of 'undue deductions' and consequently, advises the CJ to rule that the VAT Directive *does not* preclude a first-use full adjustment in the context of capital goods.

AG Kokott opines on VAT groups (*Kaplan International Colleges UK Limited*)

On 23 April 2020, AG Kokott of the CJ delivered her Opinion in the case, *Kaplan International Colleges UK Limited* (C-77/19). The appellant, Kaplan International Colleges UK Limited ('KIC') operates as group holding company of a number of UK subsidiaries running higher education colleges ('international colleges'). Except for one, all international colleges are fully owned by KIC. KIC and its subsidiaries form a VAT group in the UK (including other affiliated companies). The international colleges are entitled, with respect to their economic activities, to the VAT exemption for educational services. The international colleges recruit their students by deploying recruitment agents from 70 different countries, which, in return, are paid commission. KIC also made use of the services of various representative offices which provided the agents with promotion, marketing and training services. Prior to October 2014, the agents and the representative offices contracted directly with KIC and KIC was liable to pay VAT on the services received following the reverse charge mechanism (which VAT was non-recoverable for KIC). In October 2014, the international colleges (as members to be) established a so-called Cost Sharing Group ('CSG') in Hong Kong named Kaplan Partner Services Hong Kong Limited ('KPS'), owned for 94% by KIC. KIC itself, however, was not a member of the newly established

CSG. The contractual arrangements were then transferred to KPS and since then, the recruitment agents and local representative offices have rendered their services to KPS. As a result, those services are no longer liable to tax for VAT purposes in the UK and Hong Kong does not levy VAT. KPS thus receives the services free of VAT. Thereafter, KPS charges each of the international colleges (members) for its respective shares in the costs (without VAT). Consequently, through the establishment of the CSG in Hong Kong, the members saved entirely the VAT that was charged in connection with the services formerly provided to KIC. The referring court noted that artificiality and/ abuse of law is not in question. The UK Tax Authorities, however, imposed an additional VAT assessment on KIC in relation to the services which KIC (as head of the VAT group) has received from KPS, as those services do not fall within the scope of the CSG exemption and therefore, are subject to the reverse charge mechanism. KIC appealed the assessments, and the dispute ended up being referred to the CJ for a preliminary ruling on three 'main topics' for AG Kokott to address. These are (i.) the territorial scope of the CSG exemption, (ii.) the interpretation of the criterion of absence of distortion of competition and (iii.) the relation between the CSG exemption and the regulations for VAT group taxation.

AG Kokott pointed out the important difference between the situation where KPS renders services to KIC directly and the situation where KPS renders those services to one of the international colleges with whom KIC forms a single taxable person for VAT purposes. The AG noted that the 'loss of independence' VAT purposes only works intercompany-wise and is of no effect in relation to third parties. In the case the services are performed for KIC directly, the KPS could not apply the CSG exemption because KIC is not a member of the CSG. The AG thus narrowed the questions down to the situation where the services are rendered by KPS to the international colleges/ members of the CSG in the UK. As to the territorial scope of the CSG exemption, the AG concluded that the CSG exemption of Article 132(1)(f) of the VAT Directive does not cover cross-border situations based on the wording of the provision and the historic interpretation and placement of the provision in the VAT Directive. The AG, however, has addressed the remaining questions in the case the CJ should decide that the CSG exemption could be applied by a CSG in a non-EU State. To this end, the AG concluded that if a CSG provides services to its members and only claims the correct reimbursement of their share in the costs, this should not, in principle, lead to a distortion of competition, provided that the exemption is not unduly applied. As to the relationship between the CSG exemption and VAT groups, the AG noted that she disagrees with the European Commission and the UK that the VAT group's result of a single taxable person for VAT purposes should be interpreted as resulting in one single CSG member. Finally, the AG noted that Article 11 of the VAT Directive providing Member States the option of VAT groups does prevail over the CSG exemption in cases where the members of the CSG are persons who are all are part of a single VAT group.

CJ rules on VAT regarding construction projects (*Valstybinė mokesčių inspekcija*)

On 23 April 2020, AG Kokott of the CJ delivered her Opinion in the case *Valstybinė mokesčių inspekcija* (C-312/19). In this case, two persons carried out a construction project for several buildings. However, only one of them actively conducted himself publicly, whereas his business partner, who funded 70% of the acquisition costs, was involved in project decisions and received a corresponding share from the applicant on completion of the joint project and the sale of the new buildings. Where two persons work together, but only one person conducts himself publicly in his own name, the question arises which of them is the taxable person liable for payment of the VAT charged. The answer is important, not only in terms of the supplier's tax liability, but also in terms of the customer's right of deduction, as the customer needs an invoice on which the name and address of the taxable person who performed the supply must be stated.

First, AG Kokott analysed whether or not the partnership as a whole could qualify as the relevant taxable person. The AG cannot answer this question, as the referring court is required to decide, based on the rules of the national legal system, whether the form of cooperation can, in fact, act in legal transactions or whether it is, on the contrary, merely an undisclosed partnership that cannot conduct itself publicly. If the national legal system recognizes the capacity of this form of cooperation between the applicant and his business partner to enter into such legal relationship, then it can also be a taxable person. However, it cannot be a taxable person if the national legal system does not recognize that capacity for this form of cooperation.

Under the circumstances in this case, the AG has concluded that only the applicant can be regarded as a taxable person. This is because the applicant appears to be the taxable person liable for payment of the VAT.

He alone acted in his own name and on his own behalf (or possibly on behalf of a third party) and thus, at his own risk in relation to his customers (that is, towards the public).

AG Kokott opines on VAT deduction concerning acquisition of shares that ultimately does not take place (*Sonaecom SGPS SA*)

On 14 May 2020, AG Kokott of the CJ delivered her Opinion in the case *Sonaecom SGPS SA* (C-41/19). The case concerns the deduction of input VAT incurred in relation to the acquisition of shares when said acquisition ultimately does not take place.

Sonaecom SGPS S.A. is a Portuguese holding company active in the acquisition, holding and management of companies. Sonaecom wished to acquire the shares in a telecommunications provider. To that end, Sonaecom used consultancy services which studied the market with a view to Sonaecom's possible acquisition. The service providers charged VAT on their service invoices. Further, Sonaecom paid a commission fee to an investment bank to organize the placement of a private issue of bonds. Sonaecom intended to use the capital obtained to acquire shares in the target company. The investment bank also charged VAT on the commission fees.

Upon acquisition of the shares, Sonaecom intended to provide VAT taxed technical support and management services to the target company. As a result, Sonaecom recovered the VAT charged on the consultancy services as well as the commission fee in its VAT return. However, in the end, the acquisition of the shares in the target did not materialize. After it became clear that the acquisition would not take place, Sonaecom decided to make the obtained capital available to its parent company by means of an interest-bearing loan (VAT exempt activity). The Portuguese Tax Authorities did not agree with the VAT deduction in respect of the consultancy services as well as the commission fee.

The AG advised the CJ that Sonaecom should be granted full VAT deduction on the consultancy services, provided that Sonaecom intended to perform VAT taxed services to the target company. Based on settled case law of the CJ, the AG pointed out that the right to deduct VAT also arises if the acquisition ultimately does not materialize and applies irrespective of the amount of VAT that would be payable if the planned services had actually been performed.

The VAT deduction in respect of the commission fee is the more relevant aspect of this case. Sonaecom had planned to utilize the capital raised through the issue of the bonds for the acquisition of shares in the target. If a taxable person carries out VAT exempt activities, rather than the originally planned VAT taxed activity, the question arises whether this affects the deduction which has already taken place. Ultimately, this is a question of the relationship between the planned activity and the activity actually carried out in respect of the deduction. According to the AG, the actual use within the VAT filing period in which the right to deduct arose has precedence over the original intention. Consequently, Sonaecom would not be entitled to deduct any VAT on the commission fees incurred.

AG P Pikamäe opines on VAT for investment management services (*United Biscuits (Pensions Trustees) Limited, United Biscuits Pension Investments Limited*)

On 14 May 2020, AG Pikamäe of the CJ delivered his Opinion in the case *United Biscuits (Pension Trustees) Ltd and UB Pension Investments Ltd* (C-235/19). The case concerns the question whether investment management services supplied by a third-party fund manager to pension fund trustees should be regarded as VAT exempt insurance transactions.

United Biscuits Pension Fund is a defined benefit pension scheme whose members are the employees of United Biscuits (UK). It is managed by the trustee, United Biscuits (Pension Trustees). It follows from settled case law that the management of a defined benefit pension scheme is not exempt from VAT. The trustee entered into a fund management contract with a third-party fund manager. The fund manager manages the investments of the pension scheme on behalf of the trust. According to the trust, said investment management services are exempt from VAT because they qualify as 'insurance services' under various local Insurance Directives. The British tax authorities did not agree with this view.

The AG has advised the CJ that the investment management services are not to be regarded as insurance transactions. The very essence of an insurance transaction lies in the fact that the insured protects himself against the risk of financial loss, which is uncertain but potentially significant, by means of a premium payment. Furthermore, insurance transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance. The request for a preliminary ruling clearly states that 'the investment managers do not contract with the applicants to provide any form of indemnification against the materialization of risk', so that the pension fund management services at issue do not entail any assumption of a risk by the investment managers for consideration. Furthermore, the EU VAT Directive does not contain a provision which states that the term 'insurance services' has to be given the same meaning as in the Insurance Directive.

Small Business Exemption extended to cross-border activities

On 18 February 2020, the Council of the EU agreed to extend and simplify the VAT exemption for small businesses (SMEs).

Currently, Member States are allowed to exempt supplies by SMEs with an annual turnover not exceeding a given (Member State specified) threshold. This relieves the SMEs from the administrative burden of VAT filing obligations and relatively high compliance costs. At the same time, it provides the Member States' tax authorities with the same relief (i.e. not having to administratively process every small business whose actual VAT taxable turnover is insignificant).

Currently, cross-border supplies cannot benefit from the SME exemption, no matter how *small* the (VAT taxed) business. After the extension however, a Member State may exempt an SME from its VAT filing obligations, despite the SME not being established in the Member State concerned (where the supply is taking place), provided that the turnover in concern stays below the national threshold and as long as the SME's annual turnover in the Union as a whole stays below EUR 100,000.

SMEs will be able to declare their transactions using a 'single registration window' in their Member State of establishment. This way, no additional VAT registration and reporting is required of the SME. All in all, this should contribute to a level playing field for businesses, regardless of where they are established in the EU. The new and improved VAT (filing) exemption for SMEs is intended to enter into force on 1 January 2025.

New payment data exchange requirements adopted

On 18 February 2020, the Council of the EU agreed to new measures to facilitate the detection of tax fraud in cross-border e-commerce transactions.

The new measures supplement the EU's 'e-commerce package' which enters into force on 1 January 2021. The supplementary rules require payment service providers (most notably banks) to establish and maintain a register of cross-border payments. The information gathered has to be suitable for electronic submission to the Member States' Tax Authorities. The information collected by the Member States will be stored centrally in what has been dubbed the 'central electronic storage system of payment information' ('CESOP'). From this system, all Member States will be able to extract the necessary information for processing by the national anti-fraud officials.

The additional rules for collection and storage of information naturally also require additional rules on the protection of personal data. In this light, information may, for example, only be stored for a limited time and only the information necessary for combatting VAT fraud may be collected. Moreover, stored information will only be accessible to designated VAT fraud investigation officials. The new measures are intended to enter into force as of 1 January 2024.

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