LOYENS & LOEFF

EDITION 185

EU Tax Alert

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- Commission presents new tax initiatives (*Tax Package*)
- Commission communication on COVID 19 financial support and non-cooperative jurisdictions
- CJ rules on VAT consequences of bad debts (*SCT*)
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Highlights in this edition

EU General Court annuls European Commission's decision in Apple State aid case (*Apple*)

The General Court's judgment confirms the Commission's right to investigate tax rulings under EU State aid rules and the applicability of the arm's length principle but finds that the Commission did not sufficiently demonstrate that a selective advantage was granted to these companies.

On 15 July 2020, the General Court of the EU delivered its judgment in Cases T-778/16, *Ireland v Commission*, and T-892/16, *Apple Sales International and Apple Operations Europe v Commission.* The Court annulled the Commission's decision of 30 August 2016, finding that Ireland had granted illegal State aid to two Irish-incorporated Apple group companies. Apple had to repay a record amount in excess of EUR 13 billion. The Commission may appeal the judgment before the Court of Justice. The judgment analyses transfer pricing arguments in depth and therefore, will likely have an impact on the interpretation of transfer pricing rules in the EU.

Factual background

The tax rulings of 1991 and 2007 issued by the Irish tax authorities confirmed that nearly all sales profits recorded by two Apple group companies incorporated but not tax resident in Ireland were attributable to head offices outside Ireland, rather than to their Irish trading branches. Ireland only taxed the profits of the branches.

The Commission's decision argued that the allocation of profit to the foreign head offices was not at arm's length, based on three lines of reasoning:

- The primary line of reasoning relied on the fact that the foreign head offices had no employees or substance and therefore, could not perform the functions or bear the risks related to certain IP assets that are key value-generating assets. The Commission argued that the functions and risks, therefore, had necessarily to be allocated to the Irish branches which, in its view, performed much more than low value-adding routine functions.
- The subsidiary line of reasoning accepted the allocation of the IP assets (and related share of profits) outside of Ireland but claimed there were several mistakes in the application of the transfer pricing method known as 'TNMM' (transactional net margin method).
- The alternative line of reasoning in part relied on the subsidiary line and in part, argued that the discretion of the Irish tax authorities in granting the rulings was excessively broad, thereby resulting in a selective advantage granted to the two Apple group companies.

Motives for the annulment

In the judgment, the General Court first confirmed its earlier Fiat and Starbucks judgments (see our tax flash of 24 September 2019) that the Commission may check the compatibility of tax rulings with EU State aid rules. It also confirmed that the tax treatment of the beneficiaries of the rulings should be assessed against the general tax system in force in Ireland.

It then dismissed the three lines of the Commission:

- On the primary line, the General Court accepted that the Commission can use the arm's length principle as a tool to check whether the profit allocation reflects market values. It also accepted the use of the authorised OECD approach to assess the split of profits allocable to the head office and to a branch under transfer pricing rules. However, it found that the Commission did not properly apply the rules by presuming, rather than showing, that the functions and risks related to the value-generating IP were in Ireland.

The General Court accepted Ireland's and Apple's arguments that the key functions were performed outside of Ireland (essentially in the United States).
- On the subsidiary line, the General Court pointed to a contradiction between the acceptance to allocate the complex, value-generating IP to the head offices and the claim that the Irish branches would have a more complex functional profile than the head offices. The lack of transfer pricing documentation when the rulings were granted was 'regrettable' but cannot lead to a presumption of aid. Also, the Commission failed to demonstrate that the choice of profit level indicator (operating costs) was inappropriate; the Commission had, furthermore, wrongly allocated certain risks to the Irish branches. Finally, the Commission did not establish that the level of return on costs was too low and did not demonstrate that the transfer pricing studies submitted by Apple were unreliable.
- As regards the alternative line of reasoning, to the extent it relied on the subsidiary line, it was also necessarily annulled. On the second part, the General Court found that the Commission had failed to show that the Irish tax authorities had exercised (too) broad discretion in this case.

Consequences

Taxpayers engaged in intragroup transactions in the EU should review the General Court's positions, as the reasoning may affect transfer pricing analyses and audits going forward. The judgment should also be considered in the context of State aid risk assessments (e.g., as part of FIN48 analyses).

Next steps

The Commission may appeal the judgment on matters of law before the Court of Justice. As the General Court dismissed the factual findings of the Commission, it is quite uncertain whether an appeal would be successful.

Status of other State aid cases

An appeal of the Commission in the Belgian Excess profit ruling case and of Fiat in the *Fiat* case are already pending before the Court of Justice. The *Amazon* and *ENGIE* cases are still pending before the General Court. The Commission also, still has formal investigations pending into the tax treatment of Nike and Inter IKEA in the Netherlands, Huhtamäki in Luxembourg and 39 Belgian companies which benefited from an Excess profit ruling. It is rumoured that more investigations will be opened shortly.

The Commission's decision to extend the scope of its formal investigation into tax rulings granted to Inter IKEA in the Netherlands was recently published. It takes into account changes of facts compared to those described in the tax ruling, but the challenge remains essentially the same: the Commission considers that a Netherlands entity purchased IP rights for an excessively high price, which was left outstanding and converted into a loan. As a result, the Netherlands company was allegedly wrongly entitled to deduct an excessive amount of interest (because the principal amount is too high), part of which should be requalified into a hidden profit distribution. For the same reason (excessively high purchase price), the Commission considers that the amortization expenses are excessive and should partly not be deductible.

Commission presents new tax initiatives (*Tax Package*)

On 15 July 2020, the European Commission presented various initiatives that are intended to further increase tax transparency and compliance with tax obligations, simplify certain tax rules and procedures (notably with respect to VAT) and promote "fair taxation". The effectiveness of these initiatives will depend on EU Member States' willingness to adopt the appropriate EU and national legislation.

The Tax Package contains three separate but related initiatives:
1. a Tax Action Plan;
2. a proposal to amend the Directive on Administrative Cooperation; and
3. Communication on Tax Good Governance.

The Tax Package does not cover the taxation of digital services or minimum effective taxation. These topics are currently being developed at OECD level (see our publication of 17 February 2020).

Tax Action Plan

The Tax Action Plan contains a set of 25 actions that the Commission will propose and implement until 2024. The actions are aimed at:
- reducing administrative obstacles for businesses operating within the EU; and
- helping EU Member States to exploit the potential of data and new technologies to better fight tax fraud, improve compliance and reduce administrative burdens.

The actions are mostly related to VAT. Among others, the Commission proposes to move towards a single EU VAT registration system, to extend the scope of the

VAT One Stop Shop (OSS), to modernize the VAT rules in order to ensure that they are adapted to the online platform economy and to introduce a mechanism to prevent and solve VAT disputes. Other noteworthy actions are establishing an expert group on transfer pricing and assessing the harmonization of the criteria to determine tax residence within the EU.

Commission communication on COVID 19 financial support and non-cooperative jurisdictions

On 14 July 2020 the Commission issued a Communication on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions. The COVID-19 outbreak has prompted unprecedented action at national and Union level to support Member States' economies and facilitate their recovery. This includes State intervention to ensure liquidity and access to finance for undertakings, considerable part of which has been subject to Union State aid rules.

In order to ensure that the financial support can flow to eligible undertakings, the Commission is of the view that Member States should establish reasonable requirements to demonstrate the absence of links to a jurisdiction that features on the EU list of non-cooperative jurisdictions. At the same time, it is essential to guarantee that undertakings cannot circumvent the requirements for entitlement to financial support.

Therefore, the Commission recommendation sets out a coordinated approach to making the granting of financial support by Member States conditional on the absence of links between the recipient undertaking and jurisdictions which feature on the EU list of non-cooperative jurisdictions. According to the Commission and in order to receive financial support, undertakings should not be:

a. be resident for tax purposes in, or incorporated under the laws of, jurisdictions that feature on the EU list of non-cooperative jurisdictions;
b. be controlled, directly or indirectly, by shareholders in jurisdictions that feature on the EU list of non-cooperative jurisdictions, up to the beneficial owner, as defined in Article 3 point 6 of Directive 2015/849;
c. control, directly or indirectly, subsidiaries or own permanent establishments in jurisdictions that feature on the EU list of non-cooperative jurisdictions; and
d. share ownership with undertakings in jurisdictions that feature on the EU list of non- cooperative jurisdictions.

The recommendation also includes carve-outs. In accordance, Member States may disregard the existence of links to the listed non-cooperative jurisdictions, when the undertaking provides evidence that one of the following circumstances is met:

a. where the level of the tax liability in the Member State granting the support over a given period of time (e.g. the last three years) is considered adequate when compared to the overall turnover or level of activities of the undertaking receiving the support, at domestic and group level, over the same period.
b. where the undertaking makes legally binding commitments to remove its ties to EU listed non-cooperative jurisdictions within a short timeframe, subject to appropriate follow-up and sanctions in case of non-compliance.

In any case, the Commission adds that Member States should disregard the existence of links to the listed non-cooperative jurisdictions where the undertaking has substantial economic presence (supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances) and performs a substantive economic activity in listed non-cooperative jurisdictions.

CJ rules on VAT consequences of bad debts (*SCT*)

On 11 June 2020, the CJ delivered its judgment in the case *SCT* (C-146/19) regarding the VAT consequences of bad debts.

SCT issued invoices to one of its customers that remained unpaid due to the customers bankruptcy. SCT did not file the unpaid invoices with the Community bankruptcy register and, therefore, did not receive any compensation from the bankruptcy cash-pool. SCT requested a refund for the amount of VAT remitted to the tax authorities with regard to the unpaid invoice. This request was denied by the tax authorities on the ground that SCT should have tried to claim compensation via the bankruptcy cash-pool first. The referring court asked if the EU VAT rules on bad debts allow a Member State to deny a VAT refund to a taxable person in case of definitive non-payment of his customer, when the non-payment is effectively caused by the fact that the taxable person did not take proper action against its debtor.

The CJ ruled that it is not allowed to deny a taxable person the right to a VAT refund in the case the taxable person has failed to file a claim against the debtor in the debtor's

bankruptcy proceedings. This judgment is based on the principle of neutrality, which states that taxable persons – as tax collectors on behalf of the EU Member States – must be fully relieved of the VAT which has been paid in the course of his VAT taxable activities. In the light hereof, it should not be accepted that a Member State does not grant a VAT refund in case the taxable persons' customer does not (fully) pay an invoice.

CJ rules on interpretation of VAT concerning distance selling rules (*Krakvet*)

On 18 June 2020, the CJ delivered its judgment in the case *Krakvet Marek Batko (C-276/18)*. This case concerns the interpretation of the transport requirement for the application of the VAT distance selling rules.

Krakvet is a company established in Poland. Krakvet sells animal products which it markets via its website. Krakvet had several B2C customers in Hungary. It offered on that website the possibility for purchasers to conclude a contract with a transport company established in Poland for the purposes of delivering the goods, without Krakvet itself being a party to that contract. Purchasers could also choose a carrier other than the one recommended by Krakvet.

Krakvet was uncertain about where (Poland or Hungary) VAT was due on these sales. As a general rule, the sale of goods is taxed in the country of dispatch of the goods (Poland in this case). For B2C-sales, such as the sales at hand in this case, this would be different if the sale qualifies as a so-called distance sale. Distance sales are taxed in the country of arrival of the dispatch of goods (Hungary in this case). In order for a supply to qualify as a distance sale, the decisive criterion is that the goods are transported 'by or on behalf of the supplier' (transport requirement). This case concerns the question whether or not the transport requirement is also met when the supplier intervenes indirectly in the transport of the goods.

The CJ stated that the objective of the distance selling rules is that VAT is levied as far as possible in the Member State of consumption of the goods. Because of this, in combination with the fact that economic and commercial realities form a fundamental criterion for the application of the common system of VAT, the CJ ruled that the transport requirement is met in the case the supplier's role is predominant in terms of initiating and organizing the essential stages of the dispatch or transport of the goods. This is to be ascertained by the referring court, taking into account all the facts and circumstances of the dispute in the main proceedings.

The transport requirement is to be amended, entering into effect on 1 July 2021, as part of the VAT E-commerce Directive, so that it is unambiguously clear that the transport requirement will be met in the case the supplier intervenes indirectly in the transport of the goods. It basically follows from the *Krakvet* case that this was already the case under the current EU VAT rules. The codification of the transport requirement into the VAT Implementing Regulation, therefore, be regarded as a clarification of the interpretation of the transport requirement.

State Aid/WTO

CJ annuls State aid suspension order (*Hungary v Commission*)

In 2015, the European Commission started a formal investigation into, inter alia, a new progressive tax levied from tobacco produces and traders in Hungary, based on turnover. It was intended to serve as a health contribution to the State budget. When opening the investigation, the Commission also ordered its immediate suspension. The latter decision was upheld by the General Court in 2018. However, on 4 June 2020, the CJ ruled that such an injunction must be both necessary and proportionate, as there is already the standstill obligation (Case C-456/18P *Hungary v Commission*). The Commission should have stated the reasons for such a suspension, as mere violation of the standstill obligation as such did not suffice. The Court held that the Member States should either have failed to suspend the measure once the investigation was opened, or there should be sufficient evidence to presume that it will not do so, which is for the Commission to provide.

Proposal to amend the Directive on administrative cooperation (*DAC7*)

The Commission proposes to further amend the Directive on Administrative Cooperation (most recently amended in 2018 by a directive (DAC6) to include mandatory disclosure rules for intermediaries on certain cross-border arrangements). The amendments, which the Commission aims to have in effect as of 2022 (subject to prior adoption by the Council of the EU and implementation by the EU Member States), would extend the EU tax transparency rules to digital platforms.

The proposal would require certain digital platform operators to perform specific due diligence procedures and collect and report information on parties that use their platforms to sell goods, provide certain services or invest and lend in the context of crowdfunding. The information reported would be automatically exchanged between EU Members States.

Furthermore, the proposal seeks to strengthen administrative cooperation by reinforcing existing rules. For example, royalties would be added to the categories of income on which information is automatically exchanged between EU Member States. In addition, a framework is proposed to be introduced for the conduct of joint audits between two or more EU Member States.

Communication on Tax Good Governance

The Communication on Tax Good Governance states how the EU can further promote the principles of transparency and fair taxation.

The Commission intends to start a reform of the Code of Conduct for Business Taxation (the Code), while awaiting the outcome of the international tax reform discussions at OECD level. The Code is a soft law instrument that sets out principles for fair tax competition and is used to determine whether a tax regime or measure is harmful. The Commission proposes to widen the scope of the Code to cover additional types of tax measures and general aspects of national corporate tax systems, as well as relevant taxes other than corporate tax.
The Commission also intends to modify the selection process and screening criteria of non-EU jurisdictions for purposes of the EU list of non-cooperative jurisdictions. The Commission proposes to update the scoreboard being used to select the most relevant jurisdictions to screen by the end of 2020.

The EU list of non-cooperative jurisdictions is already used for two types of countermeasures. First, key EU funding legislation prevents EU funds from being invested in or channeled through listed jurisdictions. Second, EU Member States committed themselves in December 2019 to adopt as from 2021 at the latest at least one defensive tax measure recommended by the EU Code of Conduct group (e.g., denial of deductions of certain payments made to entities in listed jurisdictions or a withholding tax on such payments).

In the Communication, the Commission also urges EU Member States to mirror the EU efforts when it comes to the use of their own funds. It will seek alignment of EU and national funding policies and consider alignment between the use of funds and the application of EU Member States' defensive measures. The Commission aims to conduct an evaluation of the defensive measures used by EU Member States by 2022. The Commission may then consider putting forward a legislative proposal to coordinate defensive measures.

Commission issues White Paper on dealing with foreign subsidies (and tax incentives)

On 17 June 2020, the Commission adopted the 'White Paper on foreign subsidies in the Single Market' to consult stakeholders as part of its new industrial strategy. Current EU rules dealing with State aid and subsidies to avoid distortion of the internal market do not suffice to deal with subsidies (including tax incentives) granted by non-EU governments. The Commission, therefore, is looking into several possible options.

First is a module to deal with foreign subsidies, such as redressive payments, if such subsidies have a negative impact on the internal market. This would likely go beyond current international trade rules on subsidies. Second, companies receiving foreign subsidies if attempting to acquire EU-based companies of a certain size should report to the Commission as supervisory authority, possibly blocking transactions facilitated by foreign subsidies. Third, recipients of foreign subsidies could be excluded from public procurement biddings, EU public tenders or EU grants, if those subsidies have unfairly affected such procedures. Imposing a notification obligation on companies that received foreign subsidies is being considered as part of these modules.

If current EU rules on State aid and subsidies may serve as a reference for these proposals when it comes to defining what subsidies are, this development is of particular importance to foreign State-owned enterprises not subject to normal tax at home, to companies mainly involved in providing services (trade in goods is covered in part by the current EU anti-subsidy regulation) as well as to other companies receiving substantial investment incentives or other kinds of extraordinary tax breaks abroad not generally available in the country providing the benefit.
It may take several years before it is clear which of the modules mentioned will be implemented, and in what form.

Direct Taxation

AG Kokott rules on judicial protection against exchange of information for tax purposes (*B & others*)

On 2 July 2020, AG Kokott delivered her Opinion in Joined cases *B & Others* (C-245/19 and C-246/19). The cases deal with the Luxembourg legislation that explicitly excludes the possibility of a legal remedy against information orders. In essence, the referring court wishes to know whether Article 47 of the Charter must be interpreted as meaning that the addressee of an information order, the taxpayer concerned and third parties concerned must have an effective remedy against the information order issued by the requested authority. In this regard, it is of significance whether the rights of the aforementioned groups of persons under Articles 7 and 8 of the Charter (respect for private life, protection of personal data) may have been violated.

The AG started by opining that the exclusion of a legal remedy against an information order constitutes an infringement of Article 47 of the Charter for the addressee of the information order if the latter may violate his or her rights or freedoms guaranteed by EU law. In this regard, it is true that Directive 2011/16 lays down rules only for administrative cooperation between Member States and therefore, does not contain any rights for individuals. However, a person who may be the subject of administrative measures may rely on Article 47 of the Charter and defend his or her case before a tribunal in the context of the application of Directive 2011/16. Regarding the addressee of the information order, specific fundamental rights of the Charter may also be violated. This is because, the imposition of such an obligation to provide information - and one which is subject to a fine - is not merely a preparatory step. First, the addressee is directly obliged to carry out a specific act, in this case the release of information. Second, it is not the case that an onerous measure against the party required to provide information is being prepared. At most, the information order could be a preparatory step for the tax assessment notice for the taxpayer. The information order is also not a preparatory step for an administrative order imposing a fine. This is because administrative orders imposing a fine penalise failures to comply with an information order and are not its objective. Therefore, the AG concluded that the addressee of an information order issued in the context of an exchange between tax authorities of Member States pursuant to Directive 2011/16 is entitled, under Article 47 of the Charter, to judicial review of the legality of that decision.

Subsequently, the AG also provided clarification as to whether the exclusion of a legal remedy for a taxpayer indirectly concerned by an information order in respect of another party constitutes an infringement of Article 47 of the Charter. In this regard and in order for Article 47 of the Charter to apply, the taxpayer's own rights or freedoms would have to be affected. An interference with taxpayer's fundamental right to the protection of personal data is conceivable if a tax authority requires another party (in Case C-246/19, a bank) to provide information on bank accounts, shareholdings and financial assets of that taxpayer. Under Article 8(1) of the Charter, everyone has the right to the protection of personal data concerning him or her. The present case concerns information on accounts, account balances, other assets and shareholdings of a natural person, that is to say, personal data. Therefore, the AG concluded that the protection afforded by Article 8 of the Charter is applicable. The obligation of the addressee of the information order to transmit this data to the tax administration constitutes, in itself, an interference with the taxpayer's fundamental right. According to the AG, an indirect legal remedy against the collection of data by means of a legal remedy against the tax assessment notice is, nevertheless, not an effective remedy within the meaning of Article 47 of the Charter. Such a remedy is no longer capable of effectively preventing interference with the protection of personal data. This had already occurred when the data was collected.

The AG then also dealt with the issue as to whether Article 47 of the Charter is to be interpreted as meaning that a legal remedy against orders of the requested tax authority must also be permissible for third parties concerned. In that context, those third parties concerned are themselves neither addressees of the orders of the requested tax authority nor parties to the tax proceedings of the requesting tax authority. In the proceedings that led to Case C-246/19, the Luxembourg tax authorities asked the bank A to provide, in particular, information on bank accounts and assets that also concerned third parties (the companies B, C and D). As in the case of the taxpayer, the information order must also be liable to breach 'rights and freedoms guaranteed by the law of the Union' (Article 47 of the Charter) in the case of third parties concerned. For the AG, the implications of an interference with Article 7 of the Charter for third parties concerned may be similar to those for the addressee of the order of the requested authority

and the taxpayer. Accordingly, the request for information and the subsequent order issued by the requested authority could be based on incorrect facts concerning third parties. The transfer of the data to a public authority gives an unknown person access to that data, irrespective of whether the owner of the data has consented to this. However, this is precisely what Article 7 of the Charter seeks to prevent. Therefore, if one tax authority requires another party to provide it with information on bank accounts and assets belonging to third parties, it may be violating the rights of those third parties under Article 7 of the Charter. Accordingly, the right of third parties concerned under Article 47 of the Charter is violated by the exclusion of a legal remedy against the information order. This is the case when no effective remedy is guaranteed for the third parties concerned.

The AG then went on to also address the interpretation of the meaning of foreseeable relevance and, in particular, the question of whether subsequent amendments to the Commentary to the OECD Model Tax Convention are relevant to the interpretation of Directive 2011/16. For the AG, the change in the interpretation of Article 26 of the OECD Model Tax Convention in the commentary thereto does not automatically entail a change in the interpretation of Article 5 in conjunction with Article 1(1) of Directive 2011/16. Even if the experts of the OECD member countries are now in agreement that a request for information regarding all the accounts of a taxpayer and all unspecified accounts of other persons connected with the taxpayer in question held with a particular bank is an example of foreseeable relevance within the meaning of Article 26 of the OECD Model Tax Convention, it does not automatically follow that the same applies to Article 1(1) and Article 5 of Directive 2011/16.
The Court may — if convinced by the interpretation of Article 26 of the OECD Model Tax Convention — adopt the OECD approach and interpret the Directive in a similar way. However, and for the AG, there is no legal automatism in this respect.

DAC 6 deadlines officially postponed in Luxembourg

The EU mandatory disclosure directive (known as DAC 6) has been implemented in Luxembourg by law of 25 March 2020. The first DAC 6 reports were due to be submitted by the end of July 2020. Due to the COVID-19 crisis, the EU Council decided to allow EU Member States to defer, by up to six months, the time limits for the filing and exchange of arrangements caught by DAC 6.

Under the initial Luxembourg DAC 6 law, as from 1 July 2020, intermediaries and, in some cases, taxpayers with a link to Luxembourg have become subject to new reporting obligations towards the Luxembourg tax authorities. Exempt intermediaries are not subject to this reporting obligation but to a notification obligation towards other intermediaries involved and, in some cases, taxpayers. More background information is available here.

The retroactive entry into force on 30 June 2020 of the Luxembourg law implementing the optional deferral proposed by the EU means that intermediaries and taxpayers have more time to determine whether they have been involved in reportable cross-border arrangements (**RCBAs**), and if so, when they must comply with their reporting or notification obligation.

1. Three categories of RCBAs timewise

Timewise, there are now three categories of RCBAs:

i. historical RCBAs – the reporting and notification trigger point occurred between 25 June 2018 and 30 June 2020;
ii. deferral period RCBAs – with a trigger point occurring between 1 July and 31 December 2020;
iii. regular RCBAs – with a trigger point occurring as from 1 January 2021.

2. New reporting deadlines

Historical RCBAs must be reported by 28 February 2021, and deferral period RCBAs by 31 January 2021. Regular RCBAs remain subject to the default rule: they must be reported within 30 days, commencing either on the day after the RCBA is made available or is ready for implementation, or when the RCBA first step is implemented, whichever occurs first. Thus, the earliest reporting deadline for regular RCBAs will be 30 January 2021.

These deadlines apply to:

- non-exempt intermediaries; and
- taxpayers subject to a reporting obligation (either because no intermediary is involved or because the reporting obligation has shifted to them due to an intermediary being exempt).

For non-exempt intermediaries providing assistance with respect to the design, marketing or implementation of an RCBA, the deadline for reporting regular RCBAs remains 30 days after the day on which they provided such assistance. This 30-day period commences on 1 January 2021 for deferral period RCBAs. The reporting deadline for historical RCBAs is 28 February 2021.

3. New notification deadlines
Exempt intermediaries must meet their notification obligation relating to regular RCBAs within 10 days, commencing either on the day after the RCBA is made available or is ready for implementation, or when the RCBA first step is implemented, whichever occurs first. The earliest notification deadline for regular RCBAs will thus be 10 January 2021. This 10-day notification period commences on 1 January 2021 for deferral period RCBAs. Although not clearly stated in the law, the notification deadline for historical RCBAs will likely be Thursday, 25 February 2021, to assist non-exempt intermediaries and relevant taxpayers in meeting their own reporting obligations.

4. How to prepare meeting these new obligations
The deferral of six months is a welcome development, even though some Member States (such as Germany) have opted not to allow the delay. The extra time now available for preparation should not lead to complacency. Taxpayers and their service providers should continue to review their past arrangements. Where appropriate, they should set up a tax risk governance framework enabling them to allocate responsibilities, provide adequate internal training, identify potential RCBAs, collect and store relevant data, manage reputational risks in case of leaks and (preferably) ensure a seamless coordination between taxpayers and service providers.

DAC 6 deadlines postponed also in the Netherlands and Belgium

On 26 June, the Dutch Ministry of Finance announced to opt for deferral of the reporting deadlines, which will now start on 1 January 2021. In this context, the Dutch Ministry of Finance has published guidelines providing additional guidance in respect of the Dutch implementation of Mandatory Disclosur (DAC 6). The guidelines are available via: https://zoek.officielebekendmakingen.nl/stcrt-2020-34991.html.

Similarly, Belgium has also opted to postpone for 6 months the reporting obligations under DAC 6.

VAT

CJ rules on VAT consequences of quantitative discounts (*World Comm Trading*)

On 28 May 2020, the CJ delivered its judgment in the case *World Comm Trading* (C-684/18) on the VAT consequences of quantitative discounts. In the case at hand, the dispute concerns the obligation for the recipient of such a discount to correct the amount of VAT initially deducted.

World Comm, established in Romania, engaged Nokia to supply mobile phone products. Nokia supplied these products to Romania from Finland, Germany, Hungary and Romania, charging VAT on the domestic supplies in Romania, and treating the other supplies as intra-community supplies (0% VAT rate). World Comm declared intra-community acquisitions for these supplies in its Romanian VAT return. World Comm deducted input VAT with regard to the domestic as well as the intra-community acquisitions.

Nokia granted World Comm discounts on a quarterly basis. These discounts were based on the total volume of products supplied irrespective of the Member State of dispatch of the goods. These discounts were documented in a single document that reflected a negative balance and included the Finnish VAT number of Nokia. This happened because Nokia Romania had ceased its economic activities and deregistered, so the whole discount was granted via the VAT registration number of Nokia Finland. World Comm accounted for the entire amount of the discounts in Romania via the mechanism for intra-community acquisitions, even though part of the discounts related to domestic supplies. World Comm, therefore, did not differentiate between inland supplies and intra-community supplies with regard to the VAT accounting on Nokia's discount invoice.

Because World Comm acted as if the discounts were entirely associated with intra-Community transactions, the adjustments for the VAT amounts remitted and the VAT amounts recovered were reported as intra-Community VAT. The Romanian tax authorities assessed World Comm for the input VAT that had been recovered with regard to the local Romanian purchases via the mechanism for intra-Community acquisitions (including penalties and interest). The CJ ruled that a price discount should always lead to a downward adjustment of World Comm's total

VAT recovery, even in the absence of a (credit) invoice specifying the supplies to which the discount relates. For the adjustment of the VAT recovery, it is also irrelevant that Nokia could no longer issue a credit invoice because it has ceased its activities. Even in the absence of such an invoice, World Comm is required to adjust the VAT recovery applied initially. Further, the CJ ruled that the deductible VAT amount must also be adjusted, regardless of whether the supplier can claim reimbursement of the overpaid VAT.

CJ rules on VAT rules for fictitious intra-Community transactions CHEP Equipment Pooling (*CHEP*)

On 11 June 2020, the CJ delivered its judgment in the case *CHEP Equipment Pooling* (C-242/19) regarding the application of the VAT rules for fictitious intra-Community transactions.

CHEP is a Belgian company specialized in pallet rental services across Europe. CHEP subleases its pallet stock in certain EU Member States to companies that are also part of the CHEP concern (in the case at hand, CHEP Romania) and those companies, in turn, rent the pallets to the end customers. To perform this activity, CHEP purchased new pallets locally in Romania. CHEP also rented out pallets that had been transported to Romania from other EU Member States. To reclaim the VAT on the local pallet purchases in Romania, CHEP filed a VAT refund request under the Directive 2008/9 (i.e. VAT refund procedure for non-registered VAT taxable persons).

The Romanian tax authorities argued that CHEP should have been registered for VAT purposes in Romania because the transport of pallets from the other EU Member States to Romania qualified as fictitious intra-Community transactions. As a result, CHEP should have registered for VAT in order to declare fictitious intra-Community acquisitions for the pallets in Romania and CHEP should also have reclaimed the input VAT on the local purchases via the Romanian VAT return (instead of via a refund request under Directive 2008/9). The referring court, therefore, asked the CJ to clarify whether the transport of pallets to Romania, with the aim of subleasing them, should be treated as a fictitious intra-Community transaction that triggers a VAT registration liability in Romania.

The CJ ruled that the transfer of the pallets should not be treated as a fictitious intra-Community transaction when the pallets are to be subleased in Romania only temporarily and they are dispatched or transported from the Member State in which the taxable person has established its business (i.e. Belgium). Whether or not this is the case, should be assessed by the referring court, taking into account the contractual relations between CHEP and CHEP Romania. If no registration obligation exists, CHEP is entitled to a VAT refund based on Directive 2008/9. However, the CJ also ruled that the provisions of Directive 2008/9 should be interpreted as precluding Romania from denying CHEP a right to a VAT refund on the sole ground that CHEP has been or should have registered for VAT purposes in Romania. As a result, CHEP is entitled to a VAT refund on the local pallet purchases in Romania under Directive 2008/9 even in the case a VAT registration obligation exists in Romania.

CJ rules on VAT treatment of termination fees (*Vodafone*)

On 11 June 2020, the CJ delivered its judgment in the case *Vodafone Portugal* (C-43/19) on the VAT treatment of termination fees.

Vodafone Portugal ('Vodafone') is involved in the supply of e-commerce services. Vodafone concludes services contracts with its customers, some of which include special promotions subject to conditions which tie those customers in for a minimum period ('the tie-in period'). Under those terms and conditions, customers commit to maintain a contractual relationship with Vodafone and to use the goods and services supplied by Vodafone for the tie-in period, in exchange for benefiting from advantageous commercial conditions, usually related to the price payable for the contracted services. Failure by customers to comply with the tie-in period for reasons attributable to themselves results in their paying the amounts provided for in the contracts. Those amounts seek to deter such customers from failing to comply with the tie-in period. According to national legislation, it was only allowed to ask for a reimbursement of the costs (i.e. Vodafone may not be compensated or receive another remuneration which could include profit elements as well).

Vodafone remitted VAT to the Portuguese tax authorities with regard to the termination fees in respect of non-compliance with the tie-in period. Subsequently, Vodafone filed an appeal challenging that VAT is due on the termination fees, arguing that such fees were not subject to VAT given the facts and circumstances. The referring court requested the CJ for a preliminary ruling.

The CJ brought to mind that the supply of services for consideration by a taxable person acting as such is to be subject to VAT. A supply of services is carried out ‘for consideration’ if there exists a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. From previous case law, the CJ concluded that this criterion was met with regard to a predetermined amount received by a supplier when a service contract with a minimum commitment period is terminated early by its customer, even though that termination results in the end of the provision of the goods and services concerned.

Based on case law, the CJ ruled that the termination fees received by Vodafone in connection with the premature termination of a minimum contract should also be regarded as remuneration for a service provided for consideration. The termination fees reflect the recovery of some of the costs associated with the supply of the services by Vodafone. From the perspective of economic reality, the amount due upon termination of the contract seeks to guarantee the operator a minimum contractual remuneration for the services provided. Therefore, the amounts received constitute the remuneration for a supply of services subject to VAT. This does not depend on the fact that the termination fees do not enable Vodafone to obtain the same income as that it would have received if the customer did not terminate the contract. In short, the termination fees at hand are VAT taxed, because they were pre-agreed upon and quantified and identified in the contract.

CJ rules on VAT treatment of fund management service (*BlackRock*)

On 2 July 2020, the CJ delivered its judgment in the case BlackRock Investment Management *(UK) Limited v Commissioners for Her Majesty’s Revenue and Customs* (C-231/19). This case concerns the question whether a single fund management service can be split into a VAT taxed part and a VAT exempt part.

BlackRock manages special investment funds and other funds. The management of special investment funds is VAT exempt, whereas the management of the other funds is VAT taxed. The majority of funds managed by BlackRock are other funds. For the management of all its funds, BlackRock receives supplies of services from BlackRock Financial Management Inc. (‘BFMI’), a group company established in the United States. Those services are provided through a software platform called ‘Aladdin’ and comprise a combination of hardware, software and human resources. Aladdin provides portfolio managers with market analysis to assist them in making investment decisions. Aladdin also monitors regulatory compliance and enables portfolio managers to implement trading decisions.

As BFMI is not established in the UK, BlackRock accounts for VAT under the reverse charge mechanism. BlackRock considered that the services used for the management of special investment funds should be exempt from VAT pursuant to Article 135(1)(g) of the EU VAT Directive, with the result that it accounted for VAT only on services used for the other funds, the value of those services being calculated pro rata in accordance with the amount of those funds within the total funds managed. On the contrary, the tax authority contends that all the services that BlackRock benefits from, by means of the Aladdin platform, must be VAT taxed, as most of those funds that the company manages are not special investment funds. The referring court requested the CJ for a preliminary ruling.

In the first place, the CJ ruled on whether or not the elements of the fund management services provided through Aladdin should be taken into account as one single supply (with one VAT treatment) or as separate supplies (each having their own VAT treatment). The CJ ruled that the services of analysing markets, monitoring performance, evaluating risk, monitoring regulatory compliance and implementing transactions correspond to successive steps, all of which are equally necessary to allow investment transactions to be made under good conditions. As a result, the elements must be regarded as a single supply comprising various elements of equal importance.

Next, the CJ ruled that the supply must be subject to one and the same VAT treatment. This treatment cannot be determined according to the nature of the funds managed. Because of that, the CJ rejected the position taken by BlackRock. Based on settled case law, the CJ stated that in order for the supply to be exempt from VAT, it should comprise of specific and essential functions of the management of special investment funds. BlackRock and the tax authority are in agreement that the service at issue was designed for the purpose of managing investments of various kinds and that, in particular, it may be used in the same way for the management of special investment funds as for the management of other funds. Therefore, that service cannot be regarded as specifically for the

management of special investment funds. As a result, the CJ ruled that the supply is fully taxed with VAT.

CJ rules on VAT of colocation services provided by data centers (*A Oy*)

On 2 July 2020, the CJ delivered its judgment in the case of *A Oy* (C-215/19). This case concerns the VAT treatment of so-called colocation services provided by data centers.

A Oy provides colocation services to IT operators established in various EU Member States, who make telecommunications connections available to their own customers through servers. The servers are placed in data centers with the necessary telecommunications connections and where the humidity and temperature are precisely controlled. The colocation services include the provision of a server cabinet with lockable door, power supply and services to ensure the best operating environment for the use of the servers, such as temperature and humidity control, cooling, power failure protection and smoke detectors for fire prevention. A Oy's customers place their equipment in the server cabinets; that equipment is screwed into the floor and can be removed in a matter of minutes. The customers are not provided with their own key to the room in which their server is placed but can request a short-term key upon presentation of an identification document to the concierge.

In its judgment, the CJ first answered the question whether the colocation services qualify as the lease of real estate. If the colocation services do not qualify as rental services, the CJ was also asked to answer if the colocation services are to be regarded as real estate related services. When either of the two is the case, the colocation services are taxed in the Member State where the data room is physically located. If not, the VAT treatment of the colocation services is based on the B2B main rule, which states that the service is taxable in the country of establishment of the recipient of the service.
In the first place, the CJ ruled that the colocation services do not qualify as the lease of real estate, because A does not passively make available an area within the data room to its customer (due to the additional supplies) and also does not grant the customer an exclusive right to this area. Also relevant is the fact that, according to the CJ, the server cabinets are not an integral part of the building in which they are located.

In the second place, the CJ ruled that the colocation services also do not qualify as real estate related services. For this to be the case in this specific situation, it also was required that A would grant its customers an exclusive right to use that part of the building in which the servers are located. As a result, VAT will be due on the colocation services in the country of establishment of the recipient of such services.

CJ rules on correction of VAT invoices (*Terracult*)

On 2 July 2020, the CJ delivered its judgment in the case *SC Terracult SRL* (C-835/18).

During an audit, the Romanian tax authorities found out that Terracult had incorrectly applied the VAT exemption for intra-Community supplies to its supplies to a German company called Almos Alfons Mosel Handels GmbH ('Almos'). Terracult was unable to provide evidence that the goods had left the territory of Romania. Therefore, the tax authorities in Romania imposed a VAT assessment on Terracult. Terracult issued corrective invoices in accordance with the tax assessment to Almos.

After that, Almos found out that its German VAT number had erroneously been mentioned on these corrective invoices and Almos requested Terracult to amend the invoices, this time stating the identification details of Almos' tax representative in Romania. In this regard, it should be noted that a local reverse charge mechanism applies to the supplies at hand (rapeseed) in Romania. Therefore, Terracult applied the reverse charge mechanism to the amended invoices and, thus, shifted the VAT liability to Almos' tax representative. As a result, Terracult requested a VAT refund for the VAT paid to the tax authorities following the tax audit (as, formally, this VAT was not due because of the application of the reverse charge).

According to the Romanian tax authorities, Terracult was not entitled to a VAT refund because the tax assessment had already become final following the tax audit. They also took the position that the fact that, based on new information, the reverse charge mechanism should have been applied is irrelevant in this regard. The Romanian court thereupon requested a preliminary ruling.

The CJ ruled that Romania was acting contrary to EU law by not allowing Terracult to correct its invoices, simply because a tax assessment has already become final as a result of a tax inspection. In this light it is important to

note that following the imposition of the tax assessment, it has become apparent that transactions to which the reverse charge mechanism applies have been carried out. It is irrelevant that the transactions were carried out during a period that has already been the subject of a tax audit. Nor is it important that an assessment has been imposed as a result of the audit, to which no objections have been raised.

CJ rules on adjustment of input VAT deduction (*HF*)

On 9 July 2020, the CJ delivered its judgment in case *HF v Finanzamt Bad Neuenahr-Ahrweiler* (C-374/19) on the adjustment of the input VAT deduction relating to the construction of a cafeteria annexed to a retirement home. HF operates a retirement home exempt from VAT. In 2003, HF constructed a cafeteria which was accessible to visitors through an outside entrance and to residents of the retirement home via the home's dining room. HF initially stated that it would use the cafeteria exclusively for taxable transactions as it was intended for use by external visitors and not by residents of the retirement home, who were supposed to remain in the home's dining room. Following an audit, the tax authorities found out that HF no longer carried out VAT taxed transactions in the cafeteria from 2009 to 2012 and that HF had been removed from the commercial register in February 2013. During this period, the cafeteria's premises were used exclusively for VAT exempt transactions (i.e. the cafeteria was only visited by people from the retirement home).

As the cafeteria was no longer used at all for transactions giving rise to the right to deduct input VAT during this period, the tax authorities assessed HF for the amount of input VAT initially deducted on the construction of the cafeteria. HF disagreed, stating that the fact that the cafeteria was no longer used for VAT taxed activities should not lead to an adjustment of the deducted input VAT, because the cafeteria not being used should be understood to be the result of a bad investment.
Given that the cafeteria was no longer used to carry out any VAT taxed activities, the CJ ruled that HF's input VAT position needed to be amended, resulting in a payment from HF to the tax authorities. The CJ also clarified that this would not be different in the case the closing of the cafeteria to non-resident users is beyond HF's control.
The usage of the cafeteria had shifted from mixed use for VAT taxed activities and VAT exempt activities to exclusive use for VAT exempt activities, thus giving rise to an adjustment of the input VAT position of HF.

CJ rules on VAT registration exemption for small enterprises (*AJFP*)

On 9 July 2020, the CJ delivered its judgment in case *AJFP Caraş-Severin* (C-716/18) on the VAT registration exemption for small enterprises. This case concerns the question if real estate rental services must be taken into account as ancillary turnover when calculating the turnover threshold for this exemption.

The appellant in this case works as a university professor and also practices a number of 'liberal' professions, such as working as an accountant, tax consultant, insolvency practitioner and lawyer. He also occasionally receives copyright royalties. Next to that, the appellant also received rental income from the rental of a property to a company in which the appellant is a shareholder and director.
The turnover threshold for the small entrepreneurs' scheme is EUR 65,000 in Romania. The Romanian tax authorities took the position that the appellant should have registered for VAT purposes, because the turnover threshold was met. The consequence of this is that the appellant would need to charge VAT on the services he performs. In their calculation, the tax authorities took into account the rental income received from the real estate rental services. The appellant disagreed with the calculation and, more specifically, with the rental income being included in the calculation because, according to the appellant, this income should be regarded as ancillary turnover that should not have been taken into account.

In its judgment, the CJ clarified that the concept of 'ancillary transaction' covers transactions which do not fall within the ordinary professional activity of the taxable person. This is the case when such transactions are only of secondary importance or accidental in relation to the overall turnover of the taxable person. With regard to the appellant, whose economic activity consists in the exercise of several liberal professions as well as in the rental of immovable property, the CJ ruled that such rental does not constitute an 'ancillary transaction' when this transaction is carried out within the framework of the taxpayer's usual professional activity. Whether or not this is the case needs to be verified by the referring court itself.

CJ rules on concept of taxable person for VAT purposes (*UR*)

On 16 July 2020, the CJ delivered its judgment in the case *Cabinet de avocat UR* (C-424/19) concerning the concept of 'taxable person' for VAT purposes.

UR is a law firm established in Romania. UR requested to be removed from the register of taxable persons for VAT purposes with effect from 2002. Also, UR requested the Romanian tax authorities to reimburse the VAT amount paid by UR during the period 1 January 2010 to 31 December 2014, on the ground that UR had wrongly been entered in that register. In support of its appeal, UR relied on the authority of *res judicata* attaching to a judgment of 30 April 2018 which had become final, that held that a taxpayer such as UR which practises the profession of lawyer does not engage in any economic activity and, consequently, cannot be regarded as carrying out transactions for the supply of goods or services, as the contracts concluded with its clients are contracts for providing legal aid and not contracts for the provision of services. The appeal was rejected, and the Romanian court requested the CJ for a preliminary ruling.

For VAT purposes, a 'taxable person' is any person who, independently, carries out in any place any economic activity, whatever the purpose or result of that activity is. Any activity of producers, traders or persons supplying services, including the activities of the professions, shall be regarded as an 'economic activity'. Given that the profession of lawyer is a liberal profession, the CJ unsurprisingly ruled that a person practicing such a profession qualifies as a taxable person for VAT purposes. With regard to the principle of *res judicata*, the CJ first clarified that to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question.

However, if the applicable domestic rules of procedure provide the possibility for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law. Consequently, in the event that the referring court has the possibility, under the applicable procedural rules of Romanian law, of dismissing the action in the main proceedings, it is for that court to make use of that possibility and to ensure that EU law is given full effect and to disapply, on its own authority, the interpretation which it adopted in its judgment of 30 April 2018, because that interpretation is not compatible with EU law.

AG Hogan delivers Opinion on VAT rules for services (*WTL*)

On 25 June 2020, AG Hogan of the CJ delivered his Opinion in the case *Wellcome Trust Ltd* (C-459/19) on the interpretation of the EU VAT rules for services.

WTL performs economic activities and therefore, qualifies as a taxable person for VAT. Next to these activities, WTL also performs non-economic activities, such as the purchase and sale of shares in the course of the management of the assets of the charitable trust. These management activities are not performed against remuneration and thus do not qualify as an economic activity. With regard to these non-economic activities, WTL acquired investment management services from a supplier established outside the EU. WTL did not provide its VAT number to any of the investment management suppliers. WTL accounted for VAT on these services under the reverse charge mechanism on the basis that the place of supply was the UK (i.e. the country of establishment of WTL). Ultimately, WTL claimed that it had overpaid VAT in relation to these services, because it did not qualify as a taxable person *acting as such* within the meaning of article 44 of the EU VAT Directive (based on which the services where taxed in the UK). As a result, the services would not be taxable in the UK, according to WTL. HMRC did not agree with the position taken by WTL and the referring court requested a preliminary ruling with regard to the place of supply of the investment management services in dispute. The key question at hand is whether or not WTL should be regarded as a taxable person *acting as such* within the meaning of article 44 of the EU VAT Directive, despite the services being exclusively attributable to non-economic activities.

AG Hogan concluded that Article 44 of the EU VAT Directive applies to all services rendered to a taxable person, unless that person acquires them for his own personal use or for that of his staff. The term *acting as such* in that provision solely aims to exclude supplies made for a taxable person's personal use or for that of his staff. However, according to the AG, the term *acting as such* does not exclude taxable persons that acquire services

exclusively attributable to non-economic activities. As a result, the AG came to the conclusion that the investment management services should be taxable in the UK for VAT purposes.

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