RECENT DEVELOPMENTS FOR TAX SPECIALISTS

LOYENS & LOEFF

EDITION 187

EU Tax Alert

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Highlights in this edition

Brexit & State Aid: The EU-UK Trade and Cooperation Agreement

The degree to which the UK would be subject to any kind of State aid-like control was one of the stumbling blocks in the negotiations that led to the EU-UK Trade and Cooperation Agreement in December 2020.

Even though some limitations remain as to the provision of State aid-like subsidies that affect trade between the EU and the UK, tax measures based on UK Acts of Parliament seem to be protected against any claims of recovery under the new Agreement. It will most likely be up to competitors to challenge UK tax incentives received by others in UK courts. While the new rules on subsidies may be used to get rid of certain tax schemes in the future, in the tax domain retroactive effect will be restricted to those benefits that did not arise directly from UK Acts of Parliament. The latter might happen in the case of incorrect implementation or application in an individual case.

Possibilities for the EU to invoke an arbitration panel exclude the panel from interfering with national decisions on individual subsidies or to check upon full and effective recovery, where called for under the new agreement. The regime thus created will most likely mean that as far as tax subsidies are concerned that find their basis in Acts of Parliament, traditional trade countermeasures will be the only sanctions that might remain for the EU itself.

Although the Agreement is already provisionally in force, it is still being scrutinized by the European Parliament which needs to grant its consent before it can be ratified on behalf of the EU.

Brexit & Direct Taxation: The EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement concluded between the EU and the UK (the TCA) only deals with the EU (direct tax) Directives in a limited way. The provisions that were included mainly relate to responsible tax governance and minimum standards.

For example, the TCA does not facilitate continued application of the Parent-Subsidiary Directive (2011/96/EC), the Merger Directive (2009/133/EC) and the Interest and Royalties Directive (2003/49/EC) vis-à-vis the UK. In other words, the UK is now considered a third country for purposes of these Directives, meaning that they are no longer applicable in relation to UK companies. The foregoing also means that the European legalisation facilitating cross-border legal mergers has lost effectiveness in relation to the UK. Needless to say, provisions implemented in national law (even if based on European Directives) remain applicable as long as they are not amended or repealed.

Notwithstanding the above, Articles 5.1 and 5.2 (Part two, Title XI, Chapter 5) of the TCA do provide some guidance regarding good governance and taxations standards. These provisions are, inter alia, of relevance for the Anti-Tax Avoidance Directive (ATAD) 1 and 2. In short, both the EU and the UK commit to maintain certain OECD standards. Hence, it is expected that most of provisions of ATAD 1 and 2 will be (largely) maintained. It is however yet to be seen whether the UK sees an opportunity to divert from European regulations as far as these are more stringent than the OECD standards.

In relation to the application of DAC 6 (EC/2018/822), the UK government has already undertaken action. On 31 December 2020, the scope of mandatory reporting under DAC 6 has been narrowed down substantially. Only cross-border arrangements falling under the Category D Hallmark (broadly, those that (a) have the effect of circumventing the OECD's Common Reporting Standard or (b) obscure beneficial ownership) will be reportable. This narrower reporting obligation will not only apply to future arrangements but will also apply to historic arrangements for the period prior to 31 December 2020. This implies that UK lawyers will (as far as the other Hallmarks are concerned) no longer be considered as "other intermediaries involved" which will create an additional administrative burden for other intermediaries.

Article SERVIN.2.3 of the TCA relates to the national treatment of inbound investments. Each Member State shall accord to investors of the UK no less favourable treatment than that it accords, in like situations, to its own investors, with respect to establishment and operation in that Member State. Further, enterprises from an investor in the UK shall be treated no less favourable in the Member State than enterprises from its own investors.

Article COMPROV.16 of the TCA states that (in principle) nothing in the TCA shall be construed as conferring rights or imposing obligations on persons. However, this does not necessarily preclude any (in)direct effect of the TCA, for example through an interpretation of other agreements in conformity with the TCA.

Brexit and VAT: the UK-EU Trade and Cooperation Agreement

As a result of Brexit, supplies of goods from the EU to the UK (and vice versa) will be regarded as 0% VAT taxed export supplies instead of intra-Community supplies. The formalities relating to the 0% VAT rate for export supplies can be different than those applied to the 0% VAT rate for intra-Community supplies. Further, there will no longer be an obligation to file EC Sales Listings in relation to goods supplied from the EU to the UK or the other way around.

UK businesses supplying goods in the EU may no longer benefit from the simplified procedure for triangular supplies, which could trigger additional VAT registrations of these businesses in the EU. This would only be different in case the UK taxable person already is registered for VAT purposes in one EU country. Similarly, EU business supplying goods in the UK may have to register themselves faster for UK VAT purposes.

Northern-Ireland will have a mixed status post-Brexit. It will remain part of the UK customs territory, while also having access to the EU single market for goods. This means that supplies of goods from the EU to Northern-Ireland and the other way around will be seen as intra-Community supplies. For these supplies, there still exists an obligation to file EC Sales Listings. Moreover, VAT numbers that will appear on invoices relating to supplies of goods from the EU to Northern Ireland will be required to have the prefix XI, to distinguish them from supplies of goods to Great Britain (i.e. England, Wales and Scotland).

The ending of the Brexit transitional period also impacts the right to deduct input VAT on direct and general costs for EU taxable persons providing financial and insurance related services to recipients established in the UK. The same applies inbound to UK companies providing these types of services to EU based customers. Due to Brexit, those services will now give rise to VAT deduction, while this was not the case when the UK was still part of the EU and during the transitional period where the UK was still deemed to be part of the EU for VAT purposes.

Brexit & Customs: the UK-EU Trade and Cooperation Agreement

Following the transition period allowed by the EU-UK Withdrawal Agreement, on January 1, 2021 the UK effectively left the EU customs union and became a third country for customs purposes. On 24 December 2020, the UK-EU Trade and Cooperation Agreement (TCA) was agreed, which entered into force on 1 January 2021.

The EU customs union has two critical aspects: The Member States have one external border with a common external tariff and are not allowed to levy import duties on goods crossing the internal EU borders.

Leaving the EU customs union among others means that the transfer of goods between the UK and the EU is subject to customs formalities, such as filing customs declarations for goods leaving the UK and entering the EU and the other way around. Next to customs formalities also customs duties and quotas may apply.

The three elements determining the level of customs duties that need to be paid are the tariff classification code, the customs value and country of origin of the product. On the basis of the origin of the product, among others, a preferential tariff may apply.

The TCA sets out such preferential arrangements between the EU and UK. It stipulates that trade between the UK and the EU will in principle be duty and quota free for goods originating from the other party's jurisdiction.

Depending on the type of the product certain rules apply to determine the preferential origin of a good under the TCA. In sum, these rules are:

- Wholly obtained;
- Change in tariff classification;
- Specific processing operation;
- A limited value of non-originating materials.

Importers must claim preferential treatment under the TCA. A claim for preferential tariff treatment under the TCA shall be based on:

- a statement on origin that the product is originating made out by the exporter; or
- the importer's knowledge that the product is originating.

Furthermore, to somewhat ease the administrative burden on traders, the TCA also provides for a cooperation between the EU and the UK in customs matters. Particularly notable is the mutual recognition programme of the Authorized Economic Operator authorization.

EU public country-by-country reporting (CBCR) proposal developments

On 25 February 2021, the EU Member States' Ministers of Internal Market and Industry discussed the *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches*, also known as the public country-by-country reporting (CBCR) proposal. The proposal, which has been stalled since 2016, entails, inter alia, public tax reporting obligations for companies with a total consolidated group revenue of at least EUR 750 million. The Portuguese Presidency of the Council concluded that there was a broad political support for the proposal. However, several Member States have expressed strong concerns with respect to the proper legal basis and the precedent it could potentially create. According to those states, the disclosure of income tax information must be based on Article 115 TFEU (special legislative procedure) since both the aim and the content of the proposal relate to fiscal provisions, rejecting thereby the appropriateness of the legal basis of the initial proposal, i.e. Article 50(1) TFEU (ordinary legislative procedure). Despite the dispute regarding the legal basis, the EU is to move ahead with the proposal to the next legislative phase. On 3 March 2021, the Member States' Ambassadors mandated the Portuguese Presidency to engage in negotiations with the European Parliament for the swift adoption of the proposal.

EU list of 'non-cooperative jurisdictions' (blacklist) updated

On 22 February 2021, the European Union list of 'non-cooperative jurisdictions' (the EU List) was updated by the Economic and Financial Affairs Council (ECOFIN).

With the ECOFIN update on 22 February 2021, the EU List is now composed of the following jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, the Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu. Barbados has been removed from the previous list and Dominica added with this update. This list is updated from time to time, typically resulting in certain jurisdictions being added to or removed from the list.

For more info about the tax implications for Luxembourg regarding this update see our flash.

Committee on Economic and Monetary Affairs (European Parliament) calls for Commission's immediate action on digital economy: European Digital Services Tax and Digital Levy

On 26 January 2021, the Committee on Economic and Monetary Affairs of the European Parliament called for an EU Action on taxing the digital economy.

This Committee praised the efforts in the G20/OECD IF to reach a global consensus as to find the solutions to address the challenges posed by the taxation of digital economy calling for a swift agreement by mid-2021. In particular, it highlighted the fact that the OECD proposal does not ringfence the digital economy but seeks a comprehensive solution. It further acknowledges the fact that both Pillars One and Two are complementary, supporting a solution in which one Pillar is not adopted without the other.

At the same time, this Committee regrets the failure of the OECD on finding a solution by October 2020 stressing that the COVID-19 has increased the transition to a digitalised based economy. Therefore, and regardless of the progress of the negotiations at the G20/OECD IF, it calls the Commission to present proposals by June 2021 and in particular, to consider introducing a European Digital Services Tax as a first step. It further welcomes the conclusions of the Council for the Commission to put forward additional own resources including a digital levy.

CJ rules that the applicability of an interest deduction limitation to payments made to a group entity in another Member State is in breach of the TFEU (*Lexel AB*)

On 20 January 2021, the CJ delivered its judgment in case *Lexel AB v Skatteverket*, (C-484/19). The case deals with a Swedish interest deduction limitation that applies to interest paid by a Swedish group company to another group company in France. The question raised was whether the denial of the interest deduction is in breach of the freedom of establishment in Article 49 TFEU.

Lexel AB (Lexel) is a Swedish company that acquired 15% of the shares in a group company. To finance this acquisition, Lexel took out a loan from a French group company that was part of a tax entity in France. Lexel made loan interest payments that were subsequently used to offset losses within the tax entity. In Sweden, interest expenses in relation to a debt owed to an associated company are non-deductible unless the interest income is subject to a nominal tax rate of at least 10% in the State of the beneficiary (the 10% rule). However, even if this 10% rule is met, the interest is still not deductible if the main reason for incurring the debt is to secure a substantial tax benefit (the exception). The Swedish Tax Agency (STA) confirmed that the 10% rule is applicable to the interest paid by Lexel, but nevertheless, refused the deduction of the interest payments in reliance on the exception. Lexel brought actions against the STA's decision during which it was stated that the exception could not have been applicable if the recipient of the interest had been established in Sweden. In that situation, Lexel and the recipient would then have been in a position to carry out intra-group financial transfers in accordance with the Swedish group contribution rules without it being inferred that the purpose of such a transaction was to secure a substantial tax benefit. The preliminary question referred to the CJ was whether it was compatible with Article 49 TFEU to refuse a deduction for interest paid based on the exception whereas such exception would not have been applied if both companies had been Swedish as they would then have been covered by Swedish group contribution rules.

The CJ started by observing that Lexel could have secured a deduction of the interest without the applicability of the exception if the recipient had been established in Sweden. Therefore, the exception is never raised against the deduction of interest charges related to a loan from another group company established in Sweden, whereas it is applicable if the beneficiary of the interest is in another Member State. Therefore, the CJ ruled that there was a difference in treatment between domestic and cross-border situations in breach of Article 49 TFEU unless it could be justified by an overriding interest in the public interest.

With respect to the justifications, the CJ first concluded that a justification by grounds relating to the fight against tax evasion and tax avoidance could not be accepted. In order to apply this justification, the objective of the restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality to escape the tax normally due. According to the Court however, the Swedish interest deduction limitation is expressly aimed at any substantial tax benefit whereby the application is not limited to purely artificial arrangements. The fact alone that a company desires the deduction of cross-border paid interest, in the absence of any artificial transfer, cannot justify a measure which undermines the freedom of establishment. Subsequently, the CJ noted that a justification by the need to safeguard the allocation of the power to impose taxes between the Member States cannot be accepted either. It stated that the exception in the Swedish law seeks to prevent the erosion of the domestic tax base and that such objective cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States. It noted that the interest would have been deductible if the recipient had not been an associated company and where the conditions of a cross-border intra-group or external transaction correspond to those on an arm's-length basis, there is no difference between those transactions in terms of the balanced allocation of the power to impose taxes between the Member States.

Overall, the CJ concluded that the Swedish legislation was not in line with the freedom of establishment as it prohibited interest deduction at the level of a company established in Sweden with respect to interest paid to a group company established in another Member State, on the ground that the principal reason for incurring the debt appears to be to secure a substantial tax benefit, whereas such a tax benefit would not have been deemed to exist if both companies had been established in Sweden as in that situation they would have been covered by the provisions on intra-group financial transfers.

CJ rules on VAT treatment of providing company vehicles to employees (*QM*)

On 20 January 2021, the CJ delivered its judgment in case *QM v Finanzamt Saarbrücken* (C-288/19). QM is an investment fund manager based in Luxembourg that made two vehicles, forming part of the assets of the business, available to staff members. The staff members both worked in Luxembourg and resided in Germany. The vehicles were used for both professional and private purposes. One of those vehicles was made available to the staff member free of charge, while QM deducted a portion from the salary of the other staff member in exchange for the use of the other vehicle. QM is subject to a simplified tax scheme in Luxembourg, which means that the act of making the two vehicles available was not subject to VAT, but also did not give rise to input VAT deduction relating to those vehicles.
QM registered for VAT in Germany to declare VAT concerning the act of making those vehicles available. Those tax returns were accepted by the German tax authority. At a later stage, QM lodged a complaint in respect of the tax assessments relating to those returns, which was denied by the German tax authority. QM considered that the requirements for the levy of VAT on the provision of company cars in Germany were not met as the employees did not make a payment of gave up part of their salary to enjoy the use of these cars.

In this case, the CJ was asked to clarify under what circumstances the provision of company vehicles to a staff member should be considered a rental service of a means of transport and, if so, where such a service is taxable with VAT in the employer's or the employee's Member State.

The CJ clarified that the provision of company vehicles, whereby the employee gives up part of his or her salary, forms a service rendered for consideration. For one of the staff members, this did not happen. Although the provision of the company car can still qualify as a fictitious service because of the use of company assets for private purposes of the employee, the CJ stated that such a service can never be regarded as a rental service of a means of transport due to the absence of an actual rent payment.

The other staff member did waive part of his or her salary. When an agreement exists with the employer on the duration and the right to use the vehicle and to exclude others from it (e.g., if the vehicle always remains at the disposal of the employee), the transaction should qualify as the long-term hiring of a means of transport, which is subject to VAT in the country of residence of the employees. This is for the referring court to determine.

Belgian Constitutional Court makes preliminary reference to the CJ on whether DAC6 is in breach of the EU Charter of Fundamental Rights

On 17 December 2020, the Constitutional Court (*Grondwettelijk Hof*) in Belgium took the decision to refer a preliminary question to the CJ with respect to DAC6 (C-620/19). The case deals with the question whether DAC6 infringes rights guaranteed in the Charter of Fundamental Rights of the EU (Case C-694/20). More information about DAC6 can be found here.

Under DAC6, intermediaries in EU Member States such as lawyers, accountants, tax advisers and – in some cases – taxpayers must report certain cross-border arrangements to the tax authorities of that Member State. Some intermediaries such as lawyers are bound by professional secrecy whereby they are not allowed to report cross-border arrangements to the tax authorities. Such intermediary must then notify any other intermediary involved that the obligation to report lies with this other intermediary or shifts to the relevant taxpayer (the notification obligation).

The Belgian Association of Tax Lawyers and other applicants argue before the Constitutional Court that it is impossible to fulfil their notification obligation towards other intermediaries without breaching professional secrecy. The information that is protected by professional secrecy in respect of the authorities is also protected in respect of other intermediaries who may be involved. Subsequently, the professional secrecy is an essential component of the right to respect for private life and the right of a fair trial. The obligation under DAC6, therefore, infringes the right of a fair trial and the right to private life as both are guaranteed in the Charter of Fundamental Rights of the EU. The preliminary question referred to the CJ by the Constitutional Court is whether the notification obligation infringes these rights.

State Aid/WTO

AG Kokott renders Opinion on Belgian Excess Profit case (*Commission v Belgium*)

On 3 December 2020, Advocate General Kokott published her Opinion in case *Commission v Belgium and Magnetrol International* - the Belgian Excess Profit (C-337/19P), which was brought to the CJ after the General Court annulled the Commission's initial decision.

At the centre of that case was the question whether the Commission could deal with a number of tax rulings at once, as they originated from a particular scheme in the Belgian Tax Code. The General Court found that it could not, mainly because a tax ruling was needed in each individual case in order to determine and actually implement the measure. The AG is of the opinion that the Commission should be allowed to use reliable sampling to point out that there is indeed a scheme, as the method used by Belgian tax authorities to calculate the benefit in each case seemed similar. Should the CJ follow the AG's reasoning that there is indeed an aid scheme and not just a series of individual measures, it might have to return the case back to the General Court first to reassess the reliability of the sampling (as this is a factual matter). If the sampling (of 22 out of a total of 66 rulings, concerning 55 companies) would be deemed acceptable proof of a consistent administrative practice based on new guidance by the CJ, the General Court could then finally render a judgment on the material aspects of the case, i.e., whether unlawful State aid had indeed been granted and whether or not the principle of legitimate expectations has been violated.

In the meantime, the Commission had already initiated 39 new formal investigations into some of the individual cases concerned in September 2019. It is yet unclear whether the Commission will await the CJ's judgment or whether it will continue with publishing a series of final decisions, which should normally happen in Spring of 2021, as the Commission normally strives to close procedures within 18 months (although it is not obliged to do so in cases of alleged unlawful aid). Whether or not the CJ will overturn the General Court's initial judgment in this case, excess profit rulings are most likely to end up with the General Court and the CJ again either way.

Direct Taxation

European digital levy roadmap and public consultation

On 14 January 2021, the Commission released a roadmap, including a public consultation, announcing its plans for the introduction of a digital levy. The background of the initiative is technological advancements and digitalisation, which are profoundly changing the world as we know it. These changes give rise not only to innovation, growth, and new business models, but also to important challenges. The COVID crisis has been a catalyst and accelerator of this change. In July 2020, the European Council requested the Commission to propose a digital levy for additional own resources to support the EU's borrowing and repayment capacity. According to the roadmap, the initiative will be designed in a way that is compatible with the international agreement to be reached in the OECD. Nonetheless, the roadmap states that the EU is still committed to reaching a global agreement.

While the Commission admits that digitalisation can increase productivity and consumer welfare, digital companies should also contribute their fair share to society. Against this backdrop, the EU needs a modern, stable regulatory and tax framework to appropriately address the developments and challenges of the digital economy. The initiative addresses the issue of fair taxation related to the digitalization of the economy.

The roadmap informs citizens and stakeholders about the Commission's plans and invites feedback on the intended initiative. A public consultation was opened by requesting stakeholders to fill in a questionnaire. In principle, all stakeholders are addressed, with a particular interest towards stakeholders operating in the digital economy. The consultation will close on 12 April 2021.

Proposed measures in the field of taxation to include crypto-assets and e-money (DAC8)

The Commission has started working on bringing crypto-assets and e-money within the scope of the automatic exchange of information rules by amending Directive 2011/16/EU (DAC8). It published a roadmap in November 2020 which was followed by a feedback period from 23 November 2020 up to and including 21 December 2020. The public consultation and the first proposal for a directive are planned for the first and third quarters of 2021 respectively. The proposal should provide tax administrations with information to identify taxpayers that are notably active in crypto-assets and e-money.

The two main problems that the DAC8 should tackle are:

(i) the lack of information at national tax administrations about the emergent use of crypto-assets and e-money that could possibly result in revenue losses for the EU budget; and,

(ii) the disparity in the sanctions applied based on the current provisions and other necessary improvements to be made to the DAC.

With respect to point (i), it is stated that the lack of centralized control for crypto assets, its pseudo-anonymity, valuation difficulties, hybrid characteristics and the rapid evolution of the underlying technology are challenging regarding tax obligations. Given that crypto assets can be used both for payment and investment purposes, their classification and the potential tax compliance becomes even more difficult. The DAC8 proposal should ensure adequate tax transparency with a view to ensuring correct taxation in that respect.

With respect to point (ii), there is a need to address some inefficiencies of the current DAC. The differences between Member States following from the limited provisions in DAC should be addressed by this proposal through a cohesive framework for sanctions. The significant differences between Member States should be scaled down by better defining the terms ‘effective, proportionate and dissuasive’ and lead Member States towards a more closely coordinated application of sanctions. Other necessary adjustments/improvements will also be addressed in the proposal.

Reflection paper on the EU tax policy post-implementation of Pillar 1 and Pillar 2

The Platform for Tax Good Governance published a reflection paper on the future of corporation tax policy in the EU. The paper takes as its baseline the assumption that both Pillar 1 and Pillar 2 of the OECD reforms are agreed and implemented in full in the EU. The purpose of this paper is to stimulate reflection and open discussion in the Platform on Tax Good Governance on the future of EU corporate tax policy.

Several potential developments are elaborated on, such as the impact on EU Secondary Legislation. The paper expects, for example, the Interest & Royalties Directive and the Anti-Tax Avoidance Directive to be affected by the implementation. Please note that the topics discussed in the paper are not exhaustive. The paper is finalized with several questions to help structure the discussion. One particularly relevant question is the effect of the implementation on proposed directives such as the CCTB and the CCCTB.

CJ declares itself incompetent to answer preliminary questions with respect to the interpretation of the General Data Protection Regulation (*GDPR*)

On 10 December 2020, the CJ delivered its judgment in case *Land Nordrhein-Westfalen v D.H.T.* (C-620/19). The case deals with preliminary questions of the German Bundesverwaltungsgericht on the interpretation of the restrictions of the GDPR.

D.H.T. is the liquidator in the insolvency of the German company J&S Service. D.H.T. requested information of the German tax authorities to determine whether it was opportune to initiate an *actio pauliana* in the context of the insolvency proceedings. The German tax authorities rejected this request and legal actions were brought against this decision. Finally, the German Bundesverwaltungsgericht stated that the GDPR is not directly applicable in this case given that the main proceedings do not concern personal data relating to a natural person within the meaning of the GDPR or the right to access data within the meaning of Article 15 GDPR. However, because the German law refers to the provisions of the GDPR, the court referred three preliminary questions to the CJ. In short, it would like to know whether tax authorities can restrict access to tax data based on the restriction grounds of the GDPR.

The CJ started by ruling that it is, in principle, obliged to answer preliminary questions that concern the interpretation of EU law. The CJ repeated that it has also jurisdiction to rule on cases in which the facts fall outside the scope of EU law (i.e., purely national situations) but the provisions of EU law are applicable because the national law refers to the content of these EU provisions. The CJ clarified however, that it can only examine provisions of EU law and may not determine the scope of reference to EU law under national laws of Member States. The limits which the national legislature may have placed on the application of EU law to purely national situations by virtue of national laws alone are matters of national law and, therefore, may only be examined by national courts.

Furthermore, the CJ noted that under German Law, the provisions of the GDRP, contrary to the GDPR itself, are also applicable to legal persons and that the person to whom the information requested relates is a legal person. Therefore, the preliminary questions concern the interpretation of the restriction grounds of the GDPR in a situation where those provisions have been declared applicable to legal persons. According to the CJ however, the provisions under German law, therefore, do not limit themselves to extending the scope of the provisions of the GDPR but also modify their purpose and scope. This because the aim and context in which the GDPR was adopted are fundamentally different from the aim and context of the German law, given that the aim of the GDPR is to ensure respect for the fundamental rights of individuals. German law, however, does not in fact refer to the protection of personal data of natural persons, which, under EU law, is governed by the GDPR, but to the concept of 'protection of personal data of legal persons', which is a specific feature of national law. In those circumstances, the preliminary questions do not really concern the interpretation of a provision of EU law, the scope of which has been extended by a provision of national law, but a concept of national law which has no equivalent in EU law. Therefore, the CJ concluded that it cannot be said that the provisions of EU law have as such been made applicable by national law, even if only outside the scope of the GDPR, and that it has no jurisdiction to answer the preliminary questions.

CJ rules that granting ordinary rather than full offsetting the taxation at source is not a discriminatory tax treatment (*Société Générale*)

On 25 February 2021, the CJ issued its judgement in case *Société Générale SA v Ministre de l'Action and des Comptes publics* (C-403/19). The case deals with the French ordinary credit method that limits the tax credit granted to the amount which the Member State of residence would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in the other Member State (of source).

SGAM Banque, established in France, is part of the tax-integrated group of which Société Générale, also established in France, is the parent company. During 2004 and 2005, SGAM Banque carried out securities lending transactions involving the remittance by the borrower of securities intended to guarantee those lent by SGAM Banque, which thus temporarily became the owner of the remitted securities. The standard contract signed between SGAM Banque and its contracting partners provided that SGAM Banque was required, in principle, to return to the borrower securities equivalent to those given as collateral, so that the borrower could benefit from the payment of the dividends attached to those securities and, in the absence of restitution, pay it a sum of money or remit property to it, of a value equal to the amount of those dividends. SGAM Banque also carried out fund structuring transactions consisting, in particular, in managing baskets of shares corresponding to management profiles set by its contracting partners. In that context, SGAM Banque received the dividends attached to securities included in the equity baskets, which it had acquired, but was required, in respect of the performance sold to its contractual partners, to repay a sum corresponding to the amount of dividends received and any increase in the value of the securities. In return, the customers paid SGAM Banque a fixed remuneration fee for managing the equity basket. In the context of those two types of transactions, SGAM Banque received, in the case of securities held by companies resident in Italy, the UK and the Netherlands, dividends less withholding tax paid on the dividends in those three countries respectively. Consequently, SGAM Banque offset – against the amount of corporate income tax due in France for the years ended 2004 and 2005 – tax credits corresponding to those withholding taxes on the basis of the tax treaties concluded with Italy, UK and the Netherlands.

Following an audit of the accounts, the competent tax authorities challenged the allocation of a fraction of those tax credits and revised upwards the amount of the corporation tax. Société Générale, considered that with reference to the judgments of 28 February 2013, *Beker and Beker* (C-168/11) and of 17 September 2015, *Miljoen and Others* (Joined Cases C-10/14, C-14/14 and C-17/14), that transactions made by companies subject to corporation tax in France involving the securities of foreign companies, are at a disadvantage compared to those involving securities of French companies, because of the method of calculating the ceiling of the tax credit under the applicable Tax Treaties, which would only allow for an insufficient amount of the tax levied by the Member State in which the dividends are paid to be offset against the corporation tax due in France.

As regards the exercise by France of its powers of taxation, the CJ started by observing that French resident companies are subject to corporate income tax. In addition, France grants companies receiving those dividends a tax credit that can be offset against corporation tax. That tax credit is equal to the tax paid in the Member State in which the income arises, and may not exceed the French corporation tax corresponding to that income. Finally, as regards the method of calculation of the tax credit deductible from the tax already paid on foreign-source dividends, the basis of assessment and the rate of corporation tax corresponding to that income alone appear to be the same as that of the corporation tax which would be due if the dividends were domestic-source dividends. Therefore, the CJ noted that it does not appear that dividends distributed by companies established in Italy, the United Kingdom and the Netherlands are subject to a higher rate of corporation tax in France than that applied to domestic-source dividends.

However, Société Générale maintained that methods for calculating the tax credit to which such a company is entitled allow only for an insufficient amount of the tax levied by the withholding State to be deducted from the corporation tax paid in France, with the effect that, for a company established in France, placing transactions involving securities of non-resident companies at a disadvantage compared to those involving securities of resident companies. In this regard the CJ observed that such a disadvantage results from a difference between the tax base applied by the Member State in which the dividends are paid and that of French corporation tax, which determines the maximum amount of the tax credit that can be deducted. Furthermore, the CJ reminded (in line with Gilly case judgment of 12 May 1998, C-336/96) that, the purpose of a tax treaty is not to ensure that the taxation to which the taxpayer is subject in one Member State is not higher than that to which he would be subject in the other Member State.

Therefore, the CJ concluded that in the absence of discriminatory exercise by a Member State of its tax jurisdiction, a disadvantage resulting from the double taxation of foreign-source dividends, such as that at issue in the main proceedings, arises from the parallel exercise of tax jurisdiction by the States of the source of those dividends and by the Member State of residence of the shareholder company. Therefore it concluded that, tn those circumstances, the national legislation at issue in the main proceedings cannot be regarded as reflecting a restriction on the free movement of capital prohibited under Article 63 TFEU.

Commission asks France and Sweden to amend its withholding tax rules on dividends

The Commission has requested France to change its withholding tax rules on dividends paid to ‘Unit Linked insurance’ companies established in other European Economic Area (EEA) Member States. Unit Linked insurance is a live insurance scheme where the premiums paid by the policy-holder are used to purchase units in investment funds selected by that person, and where the dividends paid out by the funds are passed on by the insurer to the policy holder. Unit Linked insurance companies established in EEA Member States are required to pay a final withholding tax on French dividends received. However, Unit Linked insurance companies established in France either pay no withholding tax on these dividends, or can credit the withholding tax paid against French corporation tax, which amounts to zero. The Commission deems that these rules infringe the free movement of capital (Article 63(1) of the TFEU and Article 40 of the EEA Agreement). France has two months to reply to the arguments raised by the Commission. Otherwise, the Commission may decide to send a reasoned opinion.

Furthermore, the Commission has notified Sweden of the potential incompatibility of its legislation with EU law on taxation of dividends paid to public pension institutions. Whereas Swedish public pension funds are, as government agencies, entirely exempt from tax liability, dividends paid to equivalent non-resident public pension institutions are subject to a withholding tax, commonly at a reduced rate of 15% as provided for in the tax treaties concluded between Sweden and other EU/EEA countries. The Commission considers that such a fiscal scheme under which dividends paid to foreign public pension institutions are subject to less favourable treatment than similar distributions in purely domestic situations may infringe the free movement of capital (Article 63(1) of the TFEU and Article 40 of the EEA Agreement). Sweden has two months to reply to the arguments raised by the Commission after which, the Commission may decide to send a reasoned opinion.

Belgian Court of Appeal rules on abuse of Parent-Subsidiary Directive

On 1 December 2020, the Ghent Court of Appeal (Court) ruled on the question whether the exemption of withholding tax (WHT) laid down in the Parent-Subsidiary Directive (PSD) could be refused on the basis of abuse. This case is particularly relevant because it is the first time that a Court of Appeal has applied the *Danish cases* (see EU Tax Alert – April 2019 for more information on these cases). Solely the EU law relevant element 'abuse' in this case will be discussed.

In 2003, a United States private equity group acquired a Belgian group via a Netherlands limited partnership (*commanditaire vennootschap*: 'CV'). At the time, the Belgian group had operational companies located in Belgium and the Czech Republic. The group was restructured in 2006/2007 and again in 2012. The restructuring in 2012 involved the WHT exemption laid down in the PSD (as implemented in Belgium), which was relied upon in respect of the dividend distributed by a Belgian company to a Luxembourg holding company.

Pursuant to the *Danish cases* the Court ruled that the prohibition of abuse should be considered a general principle of EU law. The Court, therefore, held that although the General Anti-Abuse Rule (GAAR) could not as a matter of principle be applied in this case, abuse of the PSD could still be sanctioned under the general EU law principles. Furthermore, the Court ruled that, for the application of the GAAR, it is not required that the taxpayer pursues a tax benefit for himself: it is sufficient that he (knowingly) cooperates in abusively obtaining a tax benefit for another taxpayer.

The Court evaluated the indications of abuse presented by the CJ in the *Danish cases*. Pursuant to those cases (and other CJ case law), all facts and circumstances and overall balance between the indications of abuse and the business interest relied upon should be taken into account. Consequently, the Court concluded that indications of abuse were present, shifting the burden of proof to the taxpayer. The Court ruled that the taxpayer did not provide sufficient counterproof.

In line with the interpretation of the term 'beneficial ownership' by the CJ in the *Danish cases*, the Court stated that the term beneficial owner should be given a broad economic interpretation (substance over form approach). This implies that the recipient of the income is only the beneficial owner if it benefits economically from the income and has the power to freely determine how to use that income.

Altogether, the Court concluded that - taking into account all facts and circumstances - there was no doubt that the Luxembourg holding company was used as a flow-through company with the intention of allowing the profits (including capital gains) to accrue tax-free to the ultimate shareholders. The Court thus held that the entire context provides sufficient proof of the subjective and objective element of abuse of the PSD.

Netherlands Court rules that KA Deka is not entitled to the requested dividend tax refunds (*Köln Aktienfonds Deka*)

On 21 January 2021, the Court of Zeeland-West-Brabant (the Court) ruled that Köln Aktienfonds Deka (KA Deka) is not entitled to the requested Dutch dividend withholding tax (DWT) refunds.

Previously, the Court had referred preliminary questions to the Netherlands Supreme Court, which in turn referred preliminary questions to the CJ concerning the compatibility with EU law of the differences in the DWT regime, depending on whether the recipient is a non-resident Undertakings for Collective Investments in Transferable Securities Directive (UCITS) or a Netherlands resident UCITS qualifying as a so-called 'fiscal investment fund' (*fiscale beleggingsinstelling*: 'FBI'). In short, on 30 January 2020 (C-156/17), the CJ ruled that it is not contrary to EU law for the Netherlands to impose shareholder requirements for the refund of the DWT. The requirements should apply to both resident and non-resident UCITS. The requirement that profits are to be distributed to shareholders within eight months of the end of the financial year, however, was considered to be in breach of EU law (see EU Tax Alert of May 2020 for more information on this case).

Based on this judgment, on 23 October 2020, the Netherlands Supreme court issued its ruling, which states that non-resident UCITS are in principle objectively comparable to an FBI. Furthermore, the non-resident UCITS must agree to make a 'substitute payment' (in the form of a reduction of the DWT) to the Dutch Tax Authorities (DTA) to qualify for an actual refund. The DTA will only refund the DWT to the amount the claim of a refund of DWT exceeds the amount of the substitute payment.

In this case, KA DEKA did not take a position regarding the substitute payment, nor did it provide a calculation on the substitute payment. The Court considered that this would, in itself, be grounds for refusal of the refund. Subsequently, the Court found that KA Deka did not make a plausible cause for meeting the shareholder requirement. The Court, therefore, saw no reason to refer preliminary questions to the CJ on the 'substitute payment', as prescribed on 23 October 2020. The Court refused the refund of DWT to KA Deka.

VAT

CJ rules on VAT exemption for granting of credit and transactions concerning other negotiable instruments (*FRANCK*)

On 14 December 2020, the CJ delivered its judgment in case *FRANCK d.d. Zagreb v Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak* (C-801/19). Franck, a Croatian coffee and tea trader, made funds available to Konzum, a Croatian retailer. Parties did so through three types of contracts concluded simultaneously:

1. *Financial Loan Agreement*
   Based on this contract, Konzum issued a bill of exchange to Franck. Franck undertook to pay Konzum the sum mentioned in that bill of exchange in cash.
2. *Contract for Assignment of Trade Receivables*
   Pursuant to this contract, Franck transferred the bill of exchange to a factoring company. The factoring company paid Franck 95% to 100% of the amount as mentioned in the bill of exchange. Franck transferred that amount to Konzum's account while acting as guarantor of its repayment on the due date of the bill of exchange.
3. *Commercial cooperation agreement*
   Under this agreement, Konzum reimbursed Franck for the interest and costs charged to Franck by the factoring company. Further, Konzum also paid Franck a remuneration of 1% of the amount mentioned in the bill of exchange.

During an audit, the Croatian tax authority found that the remuneration of 1% under the commercial cooperation agreement had been treated as VAT exempt by Franck. The tax authority challenged this VAT treatment, also imposing a VAT assessment including penalties and interest on Franck. In short, the CJ was asked by the national administrative court to clarify whether the VAT exemptions for the granting of credit and transactions concerning other negotiable instruments apply to the transaction described above.

The CJ stated that the economic purpose of the transaction was to satisfy Konzum's capital requirements, as Konzum was unable to borrow funds from financial institutions in Croatia due to its level of indebtedness and that of the group to which it belonged. From this, the CJ established that the main service provided by Franck consisted in making funds available to Konzum, which funds Franck obtained from a factoring company. The other services provided by Franck pursuant to the contracts are ancillary to this main service.

The CJ ruled that this service of Franck should be exempt from VAT because the nature of the supply is the granting of credit. However, it is for the national court to verify that the remuneration which Franck received relates to making the funds concerned available. For that analysis, it is irrelevant that the funds made available were reimbursed not to Franck but to the factoring companies.
Furthermore, the CJ clarified that the service provided by Franck is also covered under the VAT exemption for negotiable instruments, as the bills of exchange issued by Konzum must be regarded as such, provided that they contain an obligation on Konzum, as issuer, to pay the specified amount to the holder on their maturity. This must also be verified by the referring court. Furthermore, this conclusion is not overturned by the fact that Konzum was referred to in the contracts relating to the bills of exchange as a lender and Franck as a borrower.

CJ rules on the economic activity concept (*AJFP and DGRFP*)

On 20 January 2021, the CJ issued its judgment in case *AJFP Sibiu and DGRFP Braşov* (C-655/19). This case concerns the question if the sale of a property that was acquired under an enforcement procedure constitutes an economic activity subject to VAT.
LN provided several loans to JM. The repayment of these loans was secured by property mortgages. Ultimately the loans were not repaid, resulting in three properties being auctioned to LN. LN sold all properties. The Romanian tax authority conducted a tax audit at LN, where it determined that the three transactions resulted in LN qualifying as a taxable person for VAT purposes. The turnover received from the property sales exceeded the turnover threshold, which led to a VAT assessment being imposed on LN (including interest and penalties). LN appealed this decision and the CJ delivered its judgment on 20 January 2021.

The CJ based its judgment on the fact that LN acquired the immovable properties due to confiscations in the course of enforcement proceedings that were initiated with the aim of repaying the loans provided by LN to JM. The CJ considered that the mere purchase and sale of an immovable property does not constitute exploitation of property for the purposes of obtaining income on a continuing basis, as the only turnover realized in such a transaction is the profit on the sale of the property. Furthermore, it considered that the mere exercise of ownership also does not form an economic activity. Based on this reasoning, and by taking into consideration that LN only sold with the intention of collecting its claims and did not actively take any steps to sell real estate, the CJ ruled that LN's sales were not an economic activity and, hence, not subject to VAT.

CJ rules on VAT treatment of commissionaire services (*UCMR-ADA*)

On 21 January 2021, the CJ issued its judgment in case *UCMR-ADA* (C-501/19). This case concerns the VAT treatment of the fees received by an organization in charge of the licensing of copyrighted works in their own name, but on behalf of the copyright owners.

UCMR-ADA is an organization for the collective management of the property rights associated with copyrighted musical works. It was designated by the Romanian Copyright Office as the sole organization in charge of collecting the copyright-related fees regarding the use of these works at concerts and other artistic events. For its own service, UCMR-ADA retained a commission from the amount of the royalties collected from the users. The remainder of the payment was then channelled to the copyright owners. The cultural association 'Soul of Romania' refused to pay the royalties claimed by UCMR-ADA. The Romanian court ruled that Soul of Romania had to pay these royalties, but also ruled that the fees for the copyright licence paid to UCMR-ADA should not have been subject to VAT. UCMR-ADA disagreed with this, arguing that the fees should be considered as the consideration for a supply of services within the meaning of the VAT Directive.

First of all, the CJ considered that the copyright owners supplied services within the meaning of the VAT Directive in favour of the music promoters. The fact that the royalties were collected by UCMR-ADA does not make this any different, as UCMR-ADA collected the royalties in its own name but for the account of the copyright owners. Because of this, the CJ also ruled that UCMR-ADA takes part in the supply of these services pursuant to article 28 of the EU VAT Directive, which implies that it shall be deemed to receive the supplies of services carried out by the copyright owners and to supply these services to the music promoters. In this respect, the royalty received by the collecting society shall be subject to VAT as the consideration for a supply of services.

AG Kokott delivers Opinion on joint-and-several liability for default interest (*Alti ODD*)

On 14 January 2021, AG Kokott delivered her Opinion in case *Alti ODD* (C-4/20). Alti OOD ('Alti') is a Bulgarian company that bought a harvester, a tractor and other agricultural equipment from one supplier. Alti paid the invoices issued by its supplier and deducted the input VAT charged on this payment. Alti's supplier had previously acquired the equipment from a UK supplier, thus declaring an intra-Community acquisition in Bulgaria. In a tax audit, it was found that the supplier had not paid the corresponding VAT liability. As a result, the supplier was held liable for this amount including default interest. At a later stage, the tax authority also decided to audit Alti, ultimately holding Alti jointly and severally liable for the amounts of VAT mentioned on the invoices issued, but not paid, by the supplier. This liability also related to the default interest due by the supplier on these amounts of VAT.

In her Opinion, the AG focusses on the question if it possible to hold someone other than the taxable person jointly and severally liable for the default interest. The VAT Directive empowers Member States to provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT. The question is, what is the scope of this provision? Does it only relate to the payment of VAT or is the scope broader, also covering default interest and possibly other penalties?

The AG has advised the CJ that the joint-and-several liability provision should only relate to the payment of VAT based on a textual interpretation of this provision. Despite the procedural autonomy of the Member States for penalties, it is not allowed to extend the secondary VAT liability to default interest (and penalties). According to the AG, no fraud had been committed in the case at hand and, hence, the liability cannot be based on combatting fraud.

AG Kokott opines on payment of deferment interest in VAT cases (*technoRent International and others*)

On 21 January 2021 AG Kokott delivered her Opinion in case *technoRent International and others* (C-844/19). The case comes from a request for a preliminary ruling which is based on two different appeals. The first applicant is CS, who claimed a VAT refund in 2017, which was partly granted at first. In 2013, the remainder (excess VAT) was paid out to CS after several legal procedures. The second applicant is technoRent International GmbH, who claimed a VAT refund due to downward purchase price adjustments in 2005, which was only paid out in 2013. Both applicants requested the Austrian tax authority to reimburse deferment interest, i.e., interest due because the tax authority refunded the VAT amounts too late. The Austrian tax authority rejected these appeals, stating that Austrian VAT law does not provide for payment of interest on excess VAT or on an entitlement to a VAT refund.

On 21 January 2021, AG Kokott of the CJ delivered her Opinion on this matter. AG Kokott reasoned that, in both cases, a taxable person is charged too much VAT, which he has paid either indirectly through his suppliers or directly to the State. Based on settled CJ case law, the AG stated that when a refund of the excess VAT or a VAT credit is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue are compensated through the payment of default interest. This means that the AG argues that both CS and technoRent International GmbH are entitled to an interest payment.

However, the Austrian VAT Act does not contain a provision regulating such a reimbursement. The EU Refund Directive (Council Directive 2008/9/EC) states ‘If no interest is payable under national law in respect of refunds to established taxable persons, the interest payable shall be equal to the interest or equivalent charge which is applied by the Member State of refund in respect of late payments of VAT by taxable persons’. The words ‘if no interest is payable under national law’ do not mean that it is possible to not lay down any rules on interest on VAT refunds. According to the AG, there is however no rule of Council Directive 2008/9/EC with direct effect concerning the specific application of interest to such entitlements. The AG, therefore, has advised the CJ to rule that the referring court must be obliged to do everything within its power to produce a result in conformity with EU law, for example, by means of an application by analogy or a broad interpretation of national law in conformity with EU law.

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