LOYENS & LOEFF

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EU Tax Alert

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- CJ rules on VAT treatment of supplies between head office and branch *(Danske Bank)*
- Council of the EU adopts new rules to strengthen administrative cooperation and include sales through digital platforms *(DAC7)*
- CJ rules that an adverse tax regime for non-residents is in breach of the TFEU even if its applicability is optional *(MK)*

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Highlights in this edition

CJ rules on conditions to form a VAT group *(M-GmbH)*

On 15 April 2021, the CJ delivered its judgement in the case *M-GmbH* (C-868/19).

PD is a German Kommanditgesellschaft. A-GmbH was its general partner. M-GmbH, D-GbR and natural persons C, D and E were its limited partners. Most decisions in PD were adopted by simple majority. In this regard, M-GmbH had six votes and the remaining four partners had one vote each. M-GmbH therefore held the majority of the voting rights in PD. A-GmbH and M-GmbH had the same director. PD was economically and organizationally integrated into M-GmbH. PD believed that it was also financially integrated with the M-GmbH and therefore met all conditions to form a VAT group.

M-GmbH and the partnership could not form a VAT group because Germany only allows legal persons to form a VAT group and further requires that only persons who are financially integrated into the partnership of the controlling company can be part of a VAT group.

In its judgment, the CJ ruled that Germany is not allowed to maintain this rule and that non-legal persons can also be part of a VAT group. EU countries have the option to implement the rules enabling the VAT group scheme. The CJ considers that the close financial links must be clarified on a national level. However, when a Member State has implemented the VAT grouping scheme, the close financial links required to form a VAT group must be interpreted autonomously and uniformly by EU countries. This interpretation is mandatory despite the optional character of the VAT grouping scheme. In this case, the CJ ruled that there are sufficient financial links between PD and M-GmbH to form a VAT group because M-GmbH could impose its will on PD by means of decisions taken by majority vote.

The CJ also addressed the issue that the VAT grouping scheme might be subject to certain restrictions. However, those restrictions must then be in line with the objectives of the VAT Directive, such as the prevention of tax abuse, fraud or avoidance. When a Member State imposes such restrictions, the principles of proportionality and fiscal neutrality should be respected. In this case, the CJ ruled that the restrictions imposed by Germany are not compatible with these principles.

Council of the EU adopts new rules to strengthen administrative cooperation and include sales through digital platforms *(DAC7)*

On 22 March 2021, the Council of the EU adopted new rules to address the issue of loss of tax revenue and the unfair advantage to traders on digital platforms over traditional businesses as income through digital platforms is often unreported and tax is not paid. These rules will apply as from 1 January 2023 and create the obligation for digital platform operators to report the income earned by sellers on their platforms and for Member States to automatically exchange this information. The reporting will only take place in one Member State. Furthermore, the exchange of information and cooperation between EU tax authorities will be improved, e.g., it will become easier to obtain information on groups of taxpayers.

CJ rules that an adverse tax regime for non-residents is in breach of the TFEU even if its applicability is optional *(MK)*

On 18 March 2021, the CJ delivered its judgment in case *MK v Autoridade Tributária e Aduaneira* (C-388/19). The case deals with the non-Portuguese resident MK that is subject to a more adverse tax regime than the tax regime applicable to Portuguese residents, whereas it was possible for MK to opt for this last-mentioned regime.

The question raised was whether this more adverse tax regime combined with the option to opt for the more favourable tax regime is in breach of the Articles 18, 63 and 65 TFEU.

MK is a French resident that realized a capital gain on Portuguese immovable property. Under Portuguese tax law, such capital gain is 50% subject to a progressive tax rate if realized by Portuguese residents, whereas such capital gain is fully subject to a single rate if realized by non-Portuguese residents. In the tax return, however, EU residents such as MK can choose to be taxed in conformity with the tax regime for Portuguese residents. MK did not choose this option in its tax return whereby the Portuguese tax authorities applied the single rate to the entire capital gain. MK challenged the tax assessment on the ground that the legislation discriminates against taxable persons in other EU Member States and claimed that the legislation constitutes a restriction on the free movement of capital in Article 63 TFEU. MK based this claim on the *Hollman* case (C-443/06) in which the CJ had ruled that the Portuguese legislation constituted a restriction on the movement of capital. The tax authorities, on the other hand, argued that further to the *Hollman* case, the Portuguese legislature had amended the legal framework by introducing the possibility for EU residents to opt for the tax regime that applied to Portuguese residents and that MK simply did not choose this option in its tax return. MK pointed out that the CJ had ruled before in the *Gielen* case (C-440/08) that a choice between a discriminatory and non-discriminatory tax regime is not capable of remedying the discriminatory effects of such discriminatory tax regime. Therefore, the preliminary question referred to the CJ was whether Articles 18, 63 and 65 TFEU preclude legislation that enables capital gains not to be subject to a more adverse tax regime for non-residents by virtue of a choice made by the taxable person.

The CJ started by observing that Article 18 TFEU only applies independently to situations governed by EU law for which the TFEU lays down no specific rules of non-discrimination. Given that Article 63 TFEU provides for such rule and the liquidation of the immovable property constitutes a movement of capital, this freedom is applicable in this case. Subsequently, the CJ recalled based on the *Hollman* case that applying an assessment of 50% that only applies to capital gains realized by Portuguese residents and not to those realized by other EU residents constituted a restriction on the movement of capital. That conclusion, according to the CJ, is not called

In the spotlight

CJ rules on VAT treatment of supplies between head office and branch *(Danske Bank)*

On 11 March 2021, the CJ delivered an important judgment in the *Danske Bank* case (C-812/19).

The Danish head office of Danske Bank is part of a VAT group with Danish group companies. Danske Bank also had a branch in Sweden. That branch could not be part of the Danish VAT group due to the territorial scope of the Danish VAT grouping regime. The head office charged costs to its Swedish branch for the use of a computer platform. The question referred to the CJ was whether these on-charges were subject to VAT in Sweden under the reverse charge mechanism. This is relevant because such self-assessed VAT would not be deductible by the Swedish branch due to its limited right to recover input VAT.

Generally speaking, on-charges between a head office and its branches are not subject to VAT because they take place within the same group of the taxable person. In 2014, the CJ delivered its judgment in the landmark *Skandia* case (C-7/13), where it ruled that internal recharges between a head office and a branch that is part of a VAT group are subject to VAT. The reasoning behind this judgment seemed to be that the head office and the branch are no longer part of the same taxable person due to the existence of the VAT group.

The *Danske Bank* case is often referred to as the *'reverse Skandia'*, because the head office is part of a VAT group instead of the branch. According to the CJ, this should not lead to a different outcome. The CJ, therefore, ruled that that the head office and its branch are to be considered separate taxable persons for VAT purposes also in the *Danske Bank* case. Based on the *Danske Bank* case, it is now clear that in the case of a VAT group, all services between a head office and its branch – and vice versa – fall within the scope of VAT.

It is to be expected that the *Danske Bank* ruling will have a big impact on the market in general, specifically in the financial services industry. Some Member States, like the Netherlands, allow in practice a foreign head office and its branch to be absorbed into one single VAT group.
This gives rise to the question whether these practices will need to be adjusted in view of the Danske Bank ruling.

into question based on the *Hirvonen* case (C-632/13), in which the CJ ruled that the difference in tax treatment between non-residents and residents could be compatible with EU law provided that the single rate is not higher than that which would actually apply to residents.

This because the CJ noted that in this case, non-residents are systematically subject to a tax burden greater than that applied to residents where capital gains are realized on the sale of property. Therefore, the CJ ruled that the basis for assessment at 50% for capital gains realized by Portuguese residents but not for non-residents who have opted for the tax regime for non-Portuguese residents constitutes a restriction on the free movement of capital unless this restriction could be objectively justified under Article 65 TFEU.

With respect to the justifications, the CJ first stated that the distinction between unequal treatment that is permitted under Article 65(1)(a) TFEU and arbitrary discrimination that is prohibited under Article 65(3) TFEU must be made. In that respect, the difference in treatment must either relate to situations which are not objectively comparable or be justified by an overriding reason relating to the public interest. The CJ ruled, however, that neither is the case with respect to the Portuguese legislation. The CJ again recalled that based on the *Hollmann* case, the tax advantage granted to Portuguese residents in any event outweighs the consideration for that advantage (i.e., the application of a progressive rate). Therefore, a direct link between the tax advantage and the offsetting of that advantage by a particular tax levy was not established, whereby the restriction could not be justified by the need to ensure the cohesion of the tax system. Finally, the CJ ruled that a choice as offered in the Portuguese legislation is not capable of excluding the discriminatory effects of the tax regime in dispute. Based on the *Gielen* case, the CJ stated that the Portuguese legislation which restricts the free movement of capital remains incompatible with EU law, even if its application is optional.

In summary, the CJ concluded that Article 63 TFEU, read in conjunction with Article 65 TFEU, precludes legislation of an EU Member State that entails a more adverse tax regime for non-residents combined with the option to opt for the more favourable tax regime applicable to residents of that Member State.

State Aid/WTO

General Court dismisses case against aviation tax deferrals in France *(Ryanair)*

In 2020, Ryanair challenged various decisions from the European Commission approving various types of State aid to competing airline companies. On 17 February 2021, the General Court gave one of its first decisions, which concerned a deferral of aviation taxes in France. Ryanair's principal argument was that it was being discriminated against as COVID-19 induced deferrals of aviation taxes required a principal place of business in France. Its main plea was that this resulted in discrimination on ground of nationality in violation of Article 18 TFEU and an infringement of the freedom of services.

Under EU aviation regulations liberalizing the market, each EU-based airline can only have one principal place of business. The General Court had to consider whether a difference in treatment would be permitted by Article 107(2)(b) TFEU, which requires the Commission to approve of aid aimed at addressing exceptional circumstances. The Court found that the condition allowed French authorities to monitor the financial situation of the recipients and established a link between the damage caused by travel restrictions imposed by French authorities and the lockdown. The Court also held that, in light of limited resources, aiding those airlines most severely affected by those French measures was a proportional restriction. Ryanair only generated about 8% of its business in, to and from France compared to, for instance, 99% by Air France.

The Court also found that there were sufficient safeguards against overcompensation, should the benefit from deferring aviation taxes exceed the actual damage caused by COVID-19. Hence, the aid scheme at issue satisfied the requirements of the derogation included in Article 107(2)(b) TFEU and the conditions were deemed necessary for that purpose. This finding is now being contested at CJ level; Ryanair filed an appeal in April 2021.

CJ overturns General Court judgment in the Spanish football cases *(FC Barcelona)*

On 4 March 2021, the CJ set aside a General Court judgment overturning the Commission's decision in the Spanish football cases.

Upon the introduction of a corporate tax regime for professional Spanish sport clubs, four clubs (FC Barcelona, Athletic Club Bilbao, Atlético Osusana and Real Madrid) were allowed to remain in the regime for non-profit legal persons, which had enjoyed a lower special income tax rate until 2016. The General Court held that the Commission had failed to prove the presence of an advantage, as non-profit persons also enjoyed less favourable deduction rates for reinvestments of extraordinary profits.

The CJ pointed out that the reduced tax rate as such benefited each of the four football clubs for an indefinite period of time and to an unlimited amount, without any further implementing measures being needed. As a result, the Commission could indeed find this to be an aid scheme, notwithstanding the possibility that upon recovery the actual benefit per club might be reduced by certain disadvantages that accompany the non-profit regime. As the Spanish regime had not been notified, FC Barcelona, who separately appealed the Commission's decision next to Spain, could not invoke the protection of legitimate expectations.

Commission takes UK to court on Gibraltar exemption for passive interests and royalties

In March 2021, the European Commission decided to take the UK to court as it had failed to recover illegal State aid that arose from a Gibraltar tax exemption for passive interests and royalties from two benefitting companies. As the recovery decision dates from 2018, it is pre-Brexit. In line with the Withdrawal Agreement, the failure to implement the decision in time arose before the end of 2020, hence bestowing the CJ competence to rule on the matter. The two companies involved already have appeals pending, one with the General Court contesting the recovery decision as such (without requesting an interim order to suspend recovery) and the other with a domestic court. The Gibraltar court decided to refer the matter to the CJ and to stay the recovery order, as the company involved might be entitled to relief of taxes already paid in the US on said royalties, which the Commission rejected.

While the CJ can deal with a failure to recover directly, especially as in the first case, the appeal has no suspensory effect (without filing for an interim order by the Union's Courts), it is questionable whether in the second case, the Member State is to blame as the national courts can decide, in rather extreme cases where domestic law is clearly misapplied, to provide interim relief next to filing an immediate request for a preliminary ruling by the CJ.

Direct Taxation

Eurogroup statement on the euro area fiscal policy response to the COVID-19 crisis and the path forward

On 15 March 2021, the Eurogroup has published a statement concerning the fiscal policy response to the COVID-19 crisis in the euro area, and the path forward. First, the Eurogroup positively concludes that the European measures have supported confidence, protected millions of jobs, and cushioned the impact of the pandemic crisis on companies, thereby shielding incomes and productive capacity from the worst effects of the pandemic. Close coordination of these fiscal support measures within the Eurogroup are a key part of the joint economic policy response to date. The Eurogroup states that it will continue to protect the economy in the euro area through the development of the necessary level of fiscal support. In a second stage, once the health situation improves, fiscal measures should gradually shift towards more targeted actions to promote a resilient and sustainable recovery. In a third stage, once the recovery is firmly under way, the focus should shift towards increased public debt levels by implementing sustainable medium-term fiscal strategies, with an emphasis on improving the quality of public finances, raising investment levels and supporting the green and digital transitions.

Commission launches public consultation on DAC8

In EU Tax Alert 187 (March 2021), it was discussed that the Commission had 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). After the published roadmap in November 2020 and the subsequent feedback period from 23 November 2020 up to and including 21 December 2020, the Commission has now launched the public consultation. The consultation lasts from 10 March 2021 until 2 June 2021. The first proposal for a directive is still scheduled for the third quarter of 2021.

Commission launches public consultation with respect to the planned 'Recommendation to Improve the Situation of Taxpayers in the Single Market'

As part of the 'Tax Action Plan – Communication for fair and simple taxation supporting the recovery', the Commission announced it will publish a Communication taking stock of taxpayers' existing rights under EU law (roadmap published on 30 October 2020) together with a Recommendation to facilitate the implementation of taxpayers' rights and to simplify tax obligations. The public consultation with respect to the Recommendation started on 10 March 2021 and will last up to and including 2 June 2021. The Communication and the Recommendation are planned for adoption in the third quarter of 2021.

According to the Commission, the complexity of tax rules and procedures often leads to many taxpayers not making full use of the possibilities of the national legal framework to protect their interests. This non-optimal use of existing taxpayers' rights can have a negative effect on economic and business behaviour and it may hamper the proper functioning and full potential of the single market. Increasing awareness of taxpayers' rights can help smoothen the relationship between taxpayers and tax administrations and can improve tax compliance. The Commission's initiative, therefore, aims at recommending to Member States how relationships between taxpayers and tax administrations could be enhanced. It will, therefore, first analyse the selected list of issues related to the rights under EU law after which, it will reflect on possible ways to enhance the relationship between taxpayers and tax administrations. In the end it will reflect on how to make better use of taxpayers' rights and observe how to further improve this relationship.

CJ annuls Commission Decisions to start formal investigation procedure and on State aid *(Commission v Poland)*

On 16 March 2021, the CJ annulled both Commission Decisions to start the formal investigation procedure and on State Aid with respect to the new Polish tax on the retail sector in case *Commission v Poland* (C-562/19 P). The CJ ruled that the Commission had made an error in determining the reference system to determine whether a selective advantage was given and that the Commission had based its provisional classification of the tax measure at issue as new aid on a manifestly incorrect analysis.

Background

The Polish legislature adopted a new tax on the retail sector that entailed a progressive tax rate of which the basis of assessment was monthly turnover.
The Commission adopted a decision to initiate the formal investigation procedure and required the Polish authorities to suspend the application of the new tax (suspension injunction). Following the procedure, the Commission adopted a negative decision in which it decided that the new tax constituted State aid within the meaning of Article 107(1) TFEU. In the Commission's view, the new tax with its progressive tax rate would entail a transfer of State resources in favour of undertakings with a low turnover and therefore, did constitute an advantage for those undertakings. In respect of the examination of the condition of selectivity, the Commission decided that the relevant reference tax system was the new tax excluding the progressive tax rate. Applying such progressive tax rate was a derogation from the reference system that was not found justified by the nature or general scheme of the reference system. Furthermore, the redistributive purpose of the new tax put forward by the Polish authorities is not compatible with a turnover-based tax because it is levied on undertakings on the basis of their volume of activity and not on the basis of their charges, profitability, ability to pay or facilities from which, according to those authorities, only large undertakings can benefit.

The Polish authorities brought two actions before the General Court and both decisions were annulled.
The Commission appealed before the Court.
Hungary is the intervener at first instance (we also refer to the comparable case *Commission v Hungary* (C-596/19) in this EU Tax Alert).

Procedure before the Court

First ground of appeal
First, the Commission stated that the General Court infringed Article 107(1) TFEU by finding that the progressive nature of the new tax did not give rise to a selective advantage.

The CJ recalled the conditions that must be satisfied to classify a national measure as State aid. With respect to the condition that the advantage must be 'selective', the CJ observed that the Commission must begin by identifying the reference system in order to determine whether there is a derogation from this system that could not be justified. In that regard, the CJ observed that the determination of taxes falls within the discretion of the Member States in accordance with their fiscal autonomy. Therefore, it ruled that the progressive tax rate forms part of the reference system and that EU law does not preclude progressive taxation from being based on turnover as the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay. That profit in itself may constitute a better indicator is irrelevant in matters of State aid according to the CJ, as EU law only seeks to remove selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. Subsequently, the CJ stated that the Commission did not establish that the progressivity of the tax rates was designed in a manifestly discriminatory manner with the aim of circumventing the requirements of EU law on State aid. In the end, the CJ concluded that the progressivity of the tax rates is part of the reference system whereby there is no selective advantage for certain undertakings. The appeal is unfounded.

Second ground of appeal
Second, the Commission claimed that the General Court infringed Article 108(2) TFEU and Article 13 of Regulation 2015/1589 by annulling the decision to initiate the formal investigation procedure including the suspension injunction. According to the Commission, the General Court carried out a comparable review in respect of the negative decision, whereas it should have confined itself to a review in respect of a manifest error of assessment. Subsequently, it argued that the suspension injunction had been annulled because of the annulment of the decision to initiate the formal investigation procedure, whereas the legality of the suspension injunction had to be assessed independently.

The CJ stated that a review by the EU judicature of the legality of a decision to initiate the formal investigation procedure and a suspension injunction is limited to ascertaining whether the Commission has made a manifest error of assessment. It noted, however, that the Commission must examine sufficiently whether State aid could be considered present based on the information provided by the relevant Member State at the moment the procedure was initiated. If it appears that this was clearly not the case at that moment, the decision to start a formal investigation procedure must be annulled. The CJ rule in this case that the Commission had based its provisional classification of the new tax on a manifestly incorrect analysis. Both the decision and the suspension injunction, therefore, had to be annulled and by doing so, the General Court only carried out a review of the manifest error of assessment. Finally, the CJ rules that the General Court did not just annul the suspension injunction simply because of the annulment of the decision to start the formal investigation procedure. This is because the manifest error of assessment by the Commission also justified the annulment of the suspension injunction.
The appeal is unfounded.

CJ annuls Commission Decisions to start formal investigation procedure and on State aid *(Commission v Hungary)*

In the case *Commission v Hungary* (C-596/19 P) of 16 March 2021, the CJ annulled the Commission Decision on State Aid with respect to the new Hungarian advertisement tax. The CJ ruled that the Commission had made an error in assessing the reference system to determine whether there was a selective advantage with respect to the new advertisement tax and that no selective advantage was given by introducing a partial loss carry forward for loss-making undertakings in financial year 2013 connected to this new tax.

Background

In Hungary, a new advertisement tax was introduced that applied progressively by bands on turnover derived from broadcasting or publication of advertisements. The new tax also provided that taxable persons (i.e., any person who broadcasts or publishes advertisements in Hungary), who reported a loss or zero profit in financial year 2013, could deduct 50% of the losses carried forward from their 2014 taxable amount (loss mechanism). The Commission decided that the new tax and the loss mechanism both constituted State aid. According to the Commission, the progressivity of the new tax was a derogation from the reference system comprising a flat-rate tax and favoured smaller undertakings over larger undertakings. The loss mechanism also had to be considered a derogation from the reference system comprising taxation based on turnover (i.e., no deductibility of costs and/or losses contrary to the practice in relation to taxation of profits). Such mechanism introduced an arbitrary distinction between undertakings that had losses carried forward and did not make a profit in 2013 and undertakings that had a profit in 2013 whereby it favours undertakings with significant losses carried forward.

The Hungarian authorities brought an action before the General Court and the decision was annulled.
The Commission appealed before the Court. Poland is the intervener at first instance (we also refer to the comparable case *Commission v Poland* (C-562/19) in this EU Tax Alert).

Procedure before the Court

First ground of appeal
First, the Commission argued that the General Court infringed Article 107(1) TFEU by finding that the progressive nature of the new tax did not give rise to a selective advantage.

The reasoning of the CJ with respect to this ground of appeal is comparable to the reasoning it had followed with respect to the first ground of appeal in *Commission v Poland* (C-562/19 P). In short, the CJ observed that the determination of taxes falls within the discretion of the Member States in accordance with their fiscal autonomy. It therefore ruled that the progressivity of the tax rates is part of the reference system which does not result in a selective advantage for certain undertakings. The appeal, therefore, is unfounded.

Second ground of appeal
Second, the Commission argued that the General Court had erred in law in finding that the loss mechanism was not a selective advantage.

The CJ started by recalling that the fact that only certain taxpayers satisfying the conditions of a measure can benefit from the measure, cannot in itself make it a selective measure based on case *Commission v World Duty Free Group and Others* (C-20/15 P and C-12/15 P). Its selectivity could also not be inferred from the mere fact that the measure is of a transitional nature as the decision to limit its application in time, in order to ensure a gradual transition between old and new taxes, falls within the fiscal autonomy of the Member States. According to the CJ, however, the fact that the loss mechanism was intended to be transitional leads to the conclusion that it cannot be regarded as part of the reference system or as a normal tax regime. Therefore, it should be assessed whether the loss mechanism introduces a difference in treatment between operators which are, in the light of the objective pursued by the advertisement tax, in a comparable factual and legal situation.

The CJ noted that the loss mechanism introduces a distinction between undertakings with losses carried forward without a profit in 2013 and undertakings that made a profit in 2013 since the latter are not entitled to carry forward their losses. The CJ ruled however that, considering the objective of redistribution of the new advertisement tax given the progressive tax rates, the two categories of undertakings are not in a comparable factual and legal situation. The choice of turnover as basis of assessment for the new advertisement tax does not lead to the conclusion that a transitional measure taking profit into account is inconsistent with the objective of redistribution according to the CJ. After all, profit also constitutes a neutral and relevant indicator of undertakings' ability to pay taxes. The criterion relating to the lack of profits in 2013 is, in that regard, objective as the undertakings concerned have had a lesser ability to pay taxes during 2014 on the date of entry into force of the new advertisement tax. The fact that the undertakings that would benefit from this loss mechanism were identifiable at the moment of the introduction of the new advertisement tax is in itself not capable of changing that conclusion. Finally, the CJ recalled, based on case *Commission and Spain v Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P), that tax measures with a condition linked to the profits made by a taxable person could not, on that account alone, be regarded as selective as such profits are a consequence of the contingent factor of the undertaking being profitable or not. This reasoning should also apply when the advantage entails a reduction of the tax assessment based on turnover taking into account the profits and the existence of losses of a taxable person whereby the advantage falls within the objective of redistribution which is structured around the ability to pay of undertakings. The appeal is unfounded.

AG Hogan opines on relief from mortgage registration tax and land registry fee *(UBS Real Estate Kapitalanlagegesellschaft mbH)*

On 25 February 2021, Advocate General Hogan (AG Hogan) issued his Opinion in the case *UBS Real Estate Kapitalanlagegesellschaft mbH v Agenzia delle Entrate* (joined cases C-478/19 and C-479/19). UBS Real Estate Kapitalanlagegesellschaft mbH (UBS Real Estate) is a mutual fund portfolio management company of two real estate investment funds, which has its headquarters in Germany and was constituted under German law. In 2005, UBS Real Estate acquired two real estate complexes located in Italy. When registering the acquisition of the two properties, UBS Real Estate paid the Italian tax authorities, on behalf of both funds, the registration tax (3%) and the registry fee (1%). At a later stage, UBS Real Estate requested the Italian tax authorities to reduce the registration and land registry tax by 50% - as would be provided by the Italian Decree-Law No. 223/2006. The Italian tax authorities, however, were of the opinion that UBS Real Estate, as an open-ended fund, is not entitled to this reduction. The Italian tax authorities claimed that the reduction only applied to closed-ended funds.

The dispute was brought before the Italian Supreme Court, which subsequently referred preliminary questions to the CJ. The preliminary question read whether EU law, in particular the freedom of establishment and the free movement of capital, preclude the application of a provision of national law, which grants a 50% tax reduction only in respect of closed-ended real estate investment funds (and therefore not to open-ended real estate investment funds).

AG Hogan first observed that this case should be examined solely from the perspective of the free movement of capital. The case concerns passive investments rather than the establishment of a business or otherwise the use of the real estate in question. AG Hogan continued pointing out that, should the provision only apply to funds subject to Italian law or managed by management companies governed by Italian law, there would be a direct discrimination on the basis of nationality and, as such, would likely breach the free movement of capital. However, the use of a criterion based on the open-ended or closed-ended nature of a fund as a condition for obtaining a tax reduction could represent indirect discrimination as, under Italian law, real estate investment funds could only be established in the form of closed-ended funds. In line with this, it is observed in practice that Italian law only disallows the tax reduction to certain foreign real estate investment funds, i.e., open-ended funds.

Although indirect discrimination is present according to AG Hogan, he concluded that it is not contr ary to EU law for Italy to grant reductions in registration and land registration taxes only to closed-end real estate funds. AG Hogan justifies the indirect discrimination as it safeguards the relevant real estate market against systematic risk, provided that there is no direct discrimination based on factors such as whether the funds are administered in Italy or are otherwise governed by Italian law.

AG Bobek opines that the exceptions to the duty to refer must be revisited *(Consorzio Italian Management and Catania Multiservizi SpA)*

On 15 April 2021, Advocate General Bobek issued his Opinion in the case *Consorzio Italian Management e Catania Multiservizi v Rete Ferroviaria Italiana SpA* (C-516/19).

Central to the case is the question whether a national court of last instance is required, in principle, to make a reference for a preliminary ruling on a question concerning the interpretation of EU law even where the question is submitted to it by one of the parties to the proceedings after that party has lodged its initial pleading, or even after the case has been set down for judgment for the first time, or indeed even after a reference has already been made to the CJ for a preliminary ruling.

The AG is of the opinion that a request for a preliminary ruling may be made at any time, irrespective of a previous preliminary judgment of the CJ issued within the same proceedings, as long as the referring court is of the view that the CJ's answer is necessary to deliver a judgment. That decision should always be taken by the national court, in the light of any reasonable doubt that it may still have regarding the correct application of EU law in the case at hand.

Furthermore, the AG suggests that it is time that the CJ revisited the *CILFIT* case (C-283/81). In the *CILFIT* case, the CJ ruled that there are three exceptions to the duty to refer, being (i) if the question is not relevant to deliver a judgment, (ii) the question is materially identical to a question which has already been dealt with by the CJ (acte éclairé), or (iii) the answer to the question is sufficiently clear (acte clair). The AG concludes that there are multiple problems with the *CILFIT* case and therefore, this case should be revisited. In that regard, the AG suggests that a national court of last instance refer the case to the CJ provided that it raises (i) a general issue of interpretation of EU law (as opposed to its application); (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case law of the CJ (or with regard to which the referring court wishes to depart from that case law). In addition, if a national court of last instance is of the view that one of the three conditions is not met, that court should obliged to identify clearly which one of the three conditions is not met and state the reasons why it believes that to be the case.

Commission publishes roadmap on communication on business taxation for the 21st century

The Commission has published a roadmap with respect to its Communication that aims to set out a medium-term vision for business taxation in the EU and a medium-term agenda for the Commission's action in this area. According to the Commission the current corporate tax framework is not aligned with the globalized and digitalized economy and is even less fit for the challenges to come (e.g., climate change and population aging). It will therefore set out principles and priorities for the EU business tax agenda over the coming years. It will also coordinate EU action with the discussions at an international level on taxation of the digital economy and minimum effective taxation. Given the focus of this Communication, targeted consultations will be the basis for engaging with stakeholders.

The feedback period lasted from 4 March 2021 until 1 April 2021, during which feedback was received from 20 parties. The Commission's adoption is scheduled for the second quarter of 2021.

Netherlands Supreme Court rules on three cases for refund of Dutch dividend withholding tax for foreign investment funds

On 9 April and 16 April, the Netherlands Supreme Court ruled on three cases regarding a refund of Dutch dividend withholding tax (DWT). These cases are connected with the *KA DEKA* case (C-156-17) in which the compatibility with EU law of the differences in the DWT regime was the central subject, depending on whether the recipient is a non-resident Undertaking(s) for Collective Investments in Transferable Securities Directive (UCITS) or a Netherlands resident UCITS qualifying as a so-called 'fiscal investment fund' *(fiscale beleggingsinstelling* (FBI)). Under Netherlands tax law, UCITS qualifying as an FBI may claim a refund of Netherlands dividend withholding tax. Please see EU tax alert 184 (May 2020) and EU Tax Alert 187 (March 2021) for more information on this case.

British open-ended UCIT case

The party concerned in this case is an open-ended UCIT, located in the United Kingdom. The party concerned qualifies as an umbrella fund with ten separate sub-funds. The Netherlands Supreme Court referred in its judgment to the conditions under which a non-resident UCIT is in a situation comparable to that of an FBI with regard to the so-called redistribution requirement, as laid down in its judgment of 23 October 2020 in the *KA DEKA* case.
In short, foreign UCITS are deemed to have distributed all of the profit available for distribution, calculated according to Dutch standards, and that profit should be taxed at the level of the investors as if it had been distributed. The Netherlands Supreme Court ruled that the party concerned did not meet this requirement and therefore, was not objectively comparable to an FBI. The refund of DWT was denied.

Scottish unit trust case

The party concerned is an open-ended authorized unit trust, which is based in Scotland. In question was whether the legal form of the party concerned, i.e., a *unit trust*, was comparable to an open-ended mutual fund (*fonds voor gemene rekening*: FGR), and therefore would have access to the FBI regime. The Netherlands Supreme Court ruled that the Scottish unit trust is not objectively comparable to an FGR because its participation certificates are not freely marketable as they could only be sold to the Scottish unit trust itself. In addition, the Netherlands Supreme Court ruled that the Scottish unit trust cannot be regarded as special-purpose fund (*doelvermogen*) because these funds does not have parties entitled to a share in the profits. For that reason, the Scottish unit trust would not be subject to the Dutch CIT if it were established in the Netherlands. Altogether, the Scottish unit trust is not entitled to a DWT refund.

United States open-end diversified management company case

The party concerned is an open-end diversified management company located in the United States. The party concerned received dividends subject to DWT in several years after 2008. Before 2008, the refund scheme was in place.
In short, an FBI was granted a refund, upon application, of dividend tax withheld at its expense in any year.
The refund scheme was in place in all of the forementioned cases. The refund scheme was replaced by the deduction scheme in 2008, which provides a withholding agent that is considered an FBI for Dutch CIT purposes a reduction to the dividend tax it is required to pay on the profits it distributes to its shareholders.

The party concerned invoked EU law, the free movement of capital to be precise and argued that it was comparable to an FBI, i.e., it should be entitled to a refund of DWT.
The Court of Appeal 's-Hertogenbosch referred preliminary questions to the Netherlands Supreme Court on whether the change from the refund scheme to the reduction scheme has led to the introduction of an obstacle to the free movement of capital that did not previously exist within the meaning of Article 64(1) TFEU. The Netherlands Supreme Court ruled that the deduction scheme in an economic sense is not comparable to the refund scheme because the deduction differs per UCIT. For that reason, the free movement of capital is not hindered by the deduction scheme. Furthermore, the Netherlands Supreme Court does not consider it necessary to refer preliminary questions to the CJ as the two schemes differ in an economic sense.

VAT

CJ rules on VAT consequences transformation of perpetual usufruct into full ownership *(Gmina Wrocław)*

On 25 February 2021, the CJ delivered its judgement in the case *Gmina Wrocław* (C-604/19).

The Municipality of Wroclaw ('Municipality') held the legal ownership of Polish real estate. These ownership rights were subject to perpetual rights of usufruct which granted the user the exclusive right to use the land.
The user paid the Municipality an annual fee as

consideration for the perpetual usufruct for its duration (generally between 40 and 99 years). According to Polish VAT law, the lease of land in perpetual usufruct constituted a supply of goods due to the transfer of (economic) ownership. As a result, the annual fees paid by the user were subject to VAT. Eventually the Polish law system was transformed, which resulted in the rights of usufruct being transformed into full ownership. The new legal owners had to pay a so-called 'transformation fee' to the Municipality.

The CJ was asked if these transformation fees were also subject to VAT because of the transfer into full ownership being considered a supply of goods. The CJ was also asked to address the question if the Municipality acted in its capacity as public authority, as a result of which these activities would not be subject to VAT.

The VAT Directive defines the concept of 'supply of goods' as the transfer of the right to dispose of tangible property as owner. There also exists a *lex specialis* to this main rule, stipulating that the transfer of the ownership of real estate, in pursuance of the law, against payment of compensation is to be regarded as a supply of goods as well. The CJ ruled that the transformation of the right of usufruct into full ownership qualifies as a supply of goods due to this *lex specialis* provision. Because of that, the CJ no longer had to clarify whether, for VAT purposes, an actual supply of the land by the Municipality had taken place pursuant to the main rule.

Next, the CJ addressed whether the Municipality received the transformation fees in its capacity as public authority. Although the Polish law governing the transformation required the Municipality to carry out an administrative procedure, the transformation fee was not fixed by the Municipality under a special legal regime. The CJ stated that this seems to indicate that the Municipality does not exercise powers conferred by public law in relation to the transformation of the rights of usufruct into full ownership. Although this is for the national court to verify, the CJ hinted that the Municipality does not act as a public authority, as a result of which the transformation fees are in principle subject to VAT.

CJ rules on VAT treatment nutrition monitoring and advice *(Frenetikexito)*

On 4 March 2021, the CJ delivered its judgement in the case *Frenetikexito* (C-581/19).

Frenetikexito operated a sports facility, where it promoted health related services, such as nutrition monitoring and advice. These services were performed by a qualified nutritionist accredited for that purpose. Frenetikexito offered different programs to its members. Some programmes included only well-being and fitness services, whereas others also included nutrition monitoring. If a customer signed up for a nutrition monitoring service, that service would be billed to him no matter the number of consultations that took place. It was possible to sign up for nutrition monitoring services separately from any other services.
In both situations, Frenetikexito did not declare any VAT on the nutrition monitoring services.
In its judgment, the CJ analysed whether the nutrition monitoring services should be regarded as a separate service from the fitness services, and if so, if the nutrition monitoring services are exempt from VAT due to the VAT exemption for medical care. The concept of 'medical care' must necessarily have a therapeutic purpose in order for the VAT exemption to apply. This therapeutic purpose relates to protecting, including maintaining or restoring the health of persons. In this case, it is not disputed that a nutrition monitoring service may be a tool to prevent certain conditions, such as obesity. However, according to the CJ, the same applies to exercising itself as that may limit the occurrence of cardiovascular diseases. The CJ observed that the nutrition monitoring services have a health purpose, but not necessarily a therapeutic purpose.
Accordingly, the CJ ruled that the medical care exemption did not apply to the nutrition monitoring services.

CJ rules on VAT treatment of discount under health insurance scheme *(Firma Z)*

On 11 March 2021, the CJ delivered its judgement in the case *Firma Z* (C-802/19).

Firma Z is a pharmacy established in the Netherlands that sold medicines to customers in Germany. Firma Z had two types of German end-consumers:

- private individuals insured by private insurance companies. These transactions were treated by Firma Z as distance sales for VAT purposes, as a result of which Firma Z charged German VAT to the end-consumers.
- end-consumers insured compulsory by health insurance companies pursuant to social security law. These supplies were treated as intra-Community supplies subject to the 0% VAT rate in the Netherlands.

Firma Z distributed the medicines directly to the private individuals they insured. In both cases, Firma Z offered a price discount directly to end-consumers for answering a questionnaire about their illnesses. Due to these price discounts, Firma Z asked for a refund of German VAT through a downward adjustment of the taxable base for the distance sales to the end-consumers. The refund request related to the discounts granted by Firma Z on both types of flows.

In its judgment, the CJ ruled that Firma Z was not entitled to a VAT refund for the discounts granted to the end-consumers secured pursuant to social security law. The transaction between Firma Z and the insurance company was subject to the 0% VAT rate and because of that there was no taxable amount to decrease according to the CJ.

CJ rules on place of supply rules *(Wellcome Trust Ltd)*

On 17 March 2021, the CJ delivered its judgement in the case *Wellcome Trust Ltd* (C-459/19).

Wellcome Trust Limited ('WTL') performs economic activities and therefore qualifies as a taxable person for VAT. As such, WTL is also registered for VAT purposes. Next to these activities, WTL also performs non-economic activities, such as the purchase and sale of shares in connection to the management of the assets of a charitable trust. WTL acquired investment management services from a supplier established outside the EU that were used for these non-economic activities. WTL did not provide its VAT number to any of the investment management suppliers. The CJ was asked to determine whether these services acquired are subject to UK reverse charge VAT pursuant to the rules for services rendered to taxable persons.

The CJ ruled that a taxable person is also acting as such when services are procured that relate to non-economic activities when these activities are carried out in a business capacity. WTL's activity is unarguably a business activity. Because of that, the CJ ruled that UK VAT was due by WTL.

CJ rules on revision of incorrectly charged VAT *(UAB 'P')*

On 18 March 2021, the CJ delivered its judgement in the case *UAB 'P'* (C-48/20).

UAB 'P.' is a Lithuanian company which provided fuel cards to Lithuanian transport companies allowing them to purchase fuel at service stations located in Polish territory. P. considered that it had purchased fuel from the service station and subsequently resold that fuel to its customers. Therefore, P. issued invoices including VAT to its customers. In a legal dispute, it was ruled that the fuel was supplied directly by the service stations to the transport companies for VAT purposes. P.'s actual activity was thus to finance the purchase of fuel at those service stations by Lithuanian transport companies using fuel cards.
That activity constitutes a financial service exempt from VAT in Poland under the Law on VAT.

Any input VAT incurred by P. in connection to the fuel purchases is therefore not deductible. Further, the VAT amounts incorrectly charged by P. to its customers remained due. Normally, it would be possible to adjust these amounts by issuing credit invoices. In that case, the VAT amount paid by P. would be refunded, also because P.'s customer would pay back some of the input VAT previously deducted. The Polish VAT act stipulates that such a refund will not be granted if the credit invoices are issued as a result of an audit carried out by the Tax Authority. Since this was the case, P. was not given a VAT refund. In its judgment, the CJ addressed whether this practice was in breach with the principles of proportionality and neutrality.

The general rule is that any person who charges VAT on an invoice is liable to pay the VAT amount indicated on that invoice. This rule is intended to eliminate the risk of loss of tax revenue, which may be present if the recipient of that invoice would claim deduction of input VAT.

The CJ clarified that Member States may adopt measures to ensure the correct levy of VAT and the prevention of tax evasion, but those measures must not go beyond what is necessary to attain these objectives and may not be used in such a way that they would undermine the neutrality principle. The CJ ruled that the Polish practice breached the neutrality principle. P. acted in good faith and without being granted a VAT refund for the incorrectly charged amount, P. would be imposed with a VAT burden in breach of the neutrality principle.

CJ rules on neutrality principle in connection to intra-Community acquisitions of goods *(A)*

On 18 March 2021, the CJ delivered its judgement in the case *A* (C-895/19).

A acquired goods in Poland from other Members States that were used for A's business activities. Taxable persons are required to self-assess VAT in connection to such intra-Community acquisitions. These self-assessed VAT amounts may also be deducted simultaneously in the same VAT return as the one in which the declaration takes place. Therefore, the net VAT payment on intra-Community acquisitions is in principle zero. In Poland, this 'neutral' outcome depends on the taxable person fulfilling certain formal requirements, such as that the amount of self-assessed output VAT is reported correctly and no later than three months after the end of the month in which the tax obligation arose.

In practice, invoices from foreign suppliers are often received too late as a result of which taxable persons do not always meet this deadline. Once this three-month period has expired, the amount of self-assessed VAT becomes payable together with penalties and interest for late reporting. This implies that the amount of input VAT deducted no longer equals the amount of VAT paid (including penalties and interest).

In its judgment, the CJ ruled that the abovementioned limitations imposed under the Polish VAT law breach the neutrality principle of the EU VAT system. This judgment might have a broader impact because the same limitations apply to intra-Community acquisitions of services and imports of services in Poland. Based on this judgment, these rules should also be considered as being in breach of the VAT Directive.

CJ rules on VAT exemption for insurance relates services *(Q-GmbH)*

On 25 March 2021, the CJ delivered its judgement in the case *Q-GmbH* (C-907/19).

Q GmbH develops, markets and places insurance products. F-Versicherungs-AG ('F') engaged Q to render the following services in return for a brokerage fee:

- provision of a user license for an insurance product designed to cover special risks;
- placement of insurance contracts on behalf of F (including risk assessment); and
- management of insurance contacts and settlement of claims.

The referring court established that these services should be classified as a single supply for VAT purposes, where the granting of licenses for the use of insurance products is the main component. Q argued that these services are exempt from VAT. The German Tax Authorities disagreed and concluded that the services should be fully taxable with VAT.

In its judgment, the CJ first analysed the referring court's assumption that the three services qualify as one single supply. Because the insurer has no formal obligation to make use of Q's mediation services, the CJ concluded that these services are not essential to the distribution of the insurance product to future insured persons. Instead, it appears as if this mediation service constitutes an independent activity, which is a matter for the referring court to determine.
The referring court must also ascertain whether the insurance contract management services are part of one single supply with the license granting activity.
The CJ then considered the VAT treatment of the provision of the user license. More specifically, the CJ assessed whether this service is exempt from VAT as an insurance and reinsurance transaction. The main characteristic of such a service is that an insurer covers a risk borne by the insured party in return for prior payment of a premium. These insurance services necessarily imply the existence of a contractual relationship between the insurer and the insured. Q's service cannot be classified as an insurance service because Q has no contractual relationship with the insured parties and is also not responsible for covering the risks insured on the basis of the insurance product it has licensed.

In the second place, the CJ considers if the VAT exemption for services related to insurance transactions performed by insurance brokers and insurance agents applies. The term 'related' covers different services that are closely connected with insurance transactions and constitute the essential parts of those transactions (such as the settlement of claims). The CJ argued that the granting of the user license may qualify as such. However, it is also required that the service be supplied by an insurance broker or agent.
The essential aspect of the work of an insurance agent is to find prospective clients and introduce them to the insurer with a view to concluding insurance contracts. In connection to the granting of user licenses for insurance products, it seems as if this condition has not been met.

CJ rules on use-and-enjoyment rule *(SK Telecom Co.)*

On 15 April 2021, the CJ delivered its judgement in the case *SK Telecom* (C-593/19).

The South Korean company SK Telecom provided roaming services in Austria for users who live in South Korea but are temporarily staying in Austria. In order to enable these users to use their cell phones while in Austria, an Austrian network operator made its network available to SK Telecom against payment of remuneration in the form of a usage fee (including Austrian VAT). SK Telecom charged a roaming fee to its customers and argued that no Austrian VAT was due on these fees since they were taxable in South Korea for VAT purposes.

SK Telecom asked for a refund of the VAT charged by the Austrian network operator. This request was rejected by the Austrian Tax Authority because SK Telecom did not pay Austrian VAT on the roaming fees received from its customers. In South Korea, the roaming services were not subject to a sales tax comparable to Austrian VAT, as a result there would be a double non-levy of VAT on the roaming services. To prevent this mismatch, Austria made use of the policy option offered in the VAT Directive to shift the place of service to Austria when the 'actual use' of the services takes place in Austria.

In its judgment, the CJ ruled that roaming services for the use of the Austrian mobile phone network by South Korean residents should be considered as services the actual use of which takes place in Austria. According to the CJ, this also applies if the clients are residents of South Korea, but temporarily reside in Austria. The tax treatment of the roaming services in South Korea is not relevant for this assessment.

CJ rules on compatibility of sanctions with EU law *(Grupa Warzywna Sp. z o.o.)*

On 15 April 2021, the CJ delivered its judgement in the case *Grupa Warzywna Sp. z o.o* (C-935/19).

Grupa Warzywna sp. z o.o. ('Grupa') acquired an immovable property. This acquisition was treated as being subject to VAT and this input VAT was simultaneously deducted by Grupa. During an audit, the Polish Tax Authority considered that this acquisition was exempt from VAT. This implies that Grupa claimed a refund of incorrectly charged VAT. Such incorrectly charged VAT may not be deducted. Grupa adjusted its VAT return, which then resulted in a lower VAT refund. The Polish Tax Authority imposed a 20% penalty on Grupa because it had filed an incorrect VAT return. This penalty was based on the amount of input VAT that was wrongly deducted by Grupa.

Member States have the possibility to take measures in order to prevent fraud and to secure VAT revenues. From the reference for a preliminary ruling, it follows that that Grupa and its supplier mistakenly treated the supply as subject to VAT. Since Grupa corrected its VAT return there was also no risk of VAT revenue shortfalls. Because of that, the CJ ruled that the penalties imposed by Poland were not compatible with EU law. More specifically, such penalties breached the principles of proportionality and neutrality.

CJ rules on VAT treatment of restaurant services *(J.K.)*

On 22 April 2021, the CJ delivered its judgement in the case *J.K.* (C-703/19).

J.K. is a franchisee in a chain of fast-food restaurants that sell meals and other prepared foods. The offered products can be consumed inside or outside the restaurant. J.K.'s sales take place in-store, via a drive-through and in food courts. According to the Polish Tax Authority, J.K. offered restaurant services for which an 8% VAT rate applied. On the other hand, J.K. argued that its transactions should be regarded as supplies of food, for which a lower 5% VAT rate applied.

In its judgment, the CJ sheds light on whether the transactions performed by J.K. should be regarded as supplies of food or as restaurant services. The final assessment will need to be made by the referring court. The CJ ruled that the concept of 'restaurant, catering and hospitality services' includes the supply of food accompanied by sufficient additional services designed to enable the immediate consumption of that food by the final consumer. Important aspects in this respect are:

- the presence of waiters,
- the provision of services such as taking orders and serving food,
- the availability of closed and heated rooms specially equipped for the consumption of the food,
- the availability of checkrooms, toilets, furniture and tableware.

If a consumer chooses not to make use of the human and technical resources made available to him, the CJ argued that it should be assumed that the supply of foodstuffs is not accompanied by any additional service. By stating this, the CJ hinted that J.K.'s transactions should be regarded as supplies of goods for which a lower VAT rate applies in Poland.

AG Kokott opinion on conditions to exercise VAT refund *(Wilo Salmson France SAS)*

On 22 April 2021, AG Kokott of the CJ delivered her opinion in the case *Wilo Salmson France SAS* (C 80/20).

The French company Pompas Salmson SAS ('SAS') acquired manufacturing equipment in Romania. For these supplies, invoices were issued by the supplier in 2012. SAS asked for a refund of the Romanian VAT under Directive 2008/9/EC, which stipulates the VAT refund to VAT taxable persons established in the EU but not in the

Member State where VAT is incurred. This refund request was rejected by the Romanian Tax Authority due to non-compliance with all legal requirements. For example, SAS did not provide proof that it had paid the invoices. After being informed of this decision, the supplier credited the invoices initially issued (in 2012) and issued new invoices relating to the purchases (in 2015). SAS filed a new refund request for the year 2015, that was also rejected since the right to a VAT refund related to the 2012 invoices.

The AG argues that the right to deduct input VAT is subject to the twofold condition that the supplier has become liable for the VAT payment, but also that the recipient of the supply possesses an invoice that fulfils all invoicing requirements. Those two conditions also determine the period in which the right of VAT deduction has to be exercised and the time when any time limit commences. According to the AG, an invoice exists when it includes information on the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT amount, which must be charged separately. The (mutually agreed or unilateral) cancellation (annulment) of an invoice has no effect on a right of deduction that has already arisen or on the period in which it is to be exercised. The AG advised the CJ to conclude that the national court should ascertain whether the 2012 invoices already fulfilled the necessary requirements in order to grant a refund of input VAT.

Customs Duties, Excises and other Indirect Taxes

CJ rules that transportation costs already included in the price should not be added to the transaction value for customs valuation purposes *(Lifosa UAB)*

On 22 April 2021, the CJ delivered its judgment in the case *Lifosa UAB v Muitines departamentas*, (C-75/20). The preliminary question raised was whether the costs actually incurred by the producer for the transport, should be added to the transaction value in order to determine the customs value, when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer and those costs exceed the price actually paid by the importer, but that price corresponds to the real value of the goods.

The case concerns the import of fertilizer products into the customs territory of the European Union ('EU') by the Lithuanian importer (Lifosa). The goods were transported from Belarus via rail to the border crossing point with Lithuania. It was agreed between parties that the transport costs were to be borne by Naftan JSC ('the producer') up to the agreed place of delivery at the border in accordance with the Incoterm 'Delivered at Frontier' ('DAF'). However, the price paid by Lifosa to Naftan JSC was not high enough to cover these transportation costs.

Under EU customs law, the transaction value of the imported goods constitutes the 'primary basis' for their customs value and is the price actually paid or payable for the imported goods. If not already included in the price, certain element needs to be added, in order to reflect the real economic value of those goods. One of these elements is the cost of transport up to the place where goods are brought into the EU.

The Lithuanian customs authorities submitted that, if, for the purpose of determining the customs value of the imported goods, the transaction value is not adjusted by adding the transport costs incurred by the producer, the customs declarations do not reflect all of the elements of those goods that have economic value. In short, the transport costs cannot be included in the price paid by Lifosa, as the price does not cover the transport costs, according to the authorities.

Although the customs value declared was indeed lower than the costs actually incurred by the producer for the transport, Lifosa submitted that the price of the imported goods does reflect their real value because, first, the producer is unable to process or store them and, second, recycling them gives rise to very high costs.

After considering some relevant articles of both the Community Customs Code and Union Customs Code as well as some CJ case law, the CJ considered that the costs of transporting the imported goods to the EU should not be added to the transaction value of the goods when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer, even though those costs exceed the price actually paid by the importer, provided that that price corresponds to the real value of the goods. The conditions of sale have to be taken into account, even if they do not accord with trade practice or may appear unusual for the type of contract in question.

The CJ added that a different interpretation would lead to the importer making double payment of costs of transporting the imported goods and, moreover, to the situation that where imports are subject to conditions of sale providing for such costs to be included in the sale price of those goods, the transaction value should automatically be corrected.

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