LOYENS & LOEFF

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EU Tax Alert

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Communication on business taxation for the 21st Century

On 18 May, the Commission issued a communication on business taxation for the 21st century. The announcements made in this communication are expected to translate into actual legislative proposals in the next three years. For a clear overview of all the announcements we refer to our tax flash and our timeline on this topic.

General Court of the CJ annuls State aid decision in *Amazon* case

Factual background

The case concerned the arm's length nature of a royalty paid by a Luxembourg operating company (**LuxOpCo**) to a Luxembourg partnership (**LuxSCS**) – a tax transparent entity in Luxembourg – for the use of certain intangibles (technology, marketing-related intangibles and customer data).

In the 2003 tax ruling, the Luxembourg tax authorities had confirmed the arm's length nature of the deductible royalty payments. The supporting transfer pricing analysis applied the transactional net margin method (**TNMM**), a one-sided transfer pricing method, with LuxOpCo as tested party. Hence, it determined an arm's length remuneration for LuxOpCo and any business income in excess of that remuneration served to pay the royalty.

The Commission disagreed and considered that LuxOpCo's tax base was unduly reduced. It relied on two lines of reasoning:

- Primary line: LuxSCS does not (and is not able to) perform any significant people function and bear any risk in relation to the intangibles. By contrast, LuxOpCo has numerous employees and operates Amazon's EU business. Accordingly, LuxOpCo must be the entity entitled to the IP income and LuxSCS should just be entitled to recover its limited operating costs, as well as the intangibles development costs it incurred on a pass-through basis; and
- Secondary line: even if LuxSCS were found to perform some significant people functions and bear some risks related to the intangibles, a profit split would be more appropriate than using the TNMM transfer pricing method with LuxOpCo as tested party. Moreover, even if the TNMM with LuxOpCo as tested party were appropriate, LuxOpCo should earn a mark-up on the royalty expense. Finally, even if that were not required under transfer pricing rules, the fact that the 2003 ruling applied a 'cap and a floor' to LuxOpCo's income (without such cap-and-floor mechanism being backed up by the transfer pricing analysis) also resulted in a selective advantage.

Motives for the annulment by the General Court

The General Court, after confirming that group companies may be taxed in accordance with the arm's length principle, rejected all of these different lines of reasoning on the basis that the existence of a selective advantage was not demonstrated to the requisite standard:

- The functional analysis of the Commission wrongly depicted LuxSCS as merely a passive holder of intangibles, thereby ignoring the functions and risks borne by LuxSCS in exploiting them;
- The choice of LuxOpCo as tested party was also not wrong, given it was not easier to find comparables for LuxSCS than for LuxOpCo;
- Furthermore, LuxSCS should not earn a mere reimbursement of the intangibles development costs, as such an approach ignores the posterior increase in value of the intangibles. Also, LuxSCS's services were not low value-adding services; and

- The subsidiary lines relied on the same erroneous functional analysis (for the first part) and did not show the requisite standard of evidence that the choice of the profit level indicator or the application of the cap-and-floor mechanism reduced LuxOpCo's tax base.

Next steps

The Commission may appeal the judgment on matters of law before the Court of Justice. The Commission essentially lost on factual matters, which may complicate the appeal – it is likely that, just as in the *Apple* case, the debate around the burden of proof to demonstrate a selective advantage would be the main argument. For a further discussion of the impact of the Amazon case we refer to our news article.

The General Court of the CJ rules that tax rulings granted by Luxembourg to group companies of ENGIE entail State aid *(ENGIE)*

On 12 May 2021, the General Court of the CJ upheld the Commission decision of June 2018 finding that Luxembourg had granted unlawful State aid to ENGIE by means of various tax rulings.

ENGIE set up two financing structures that consisted of three successive stages: (i) a Luxembourg holding company transfers assets to one of its Luxembourg subsidiaries; (ii) this subsidiary takes out an interest-free mandatorily convertible loan (ZORA) with another Luxembourg subsidiary of the holding company to finance the acquisition; and (iii) the ZORA granting subsidiary enters into a prepaid forward sale contract with the holding company whereby the holding company acquires the rights to the shares that the subsidiary will issue at conversion of the ZORA. The ZORA will be repaid, upon its conversion, by issuing shares plus a premium representing, in essence, all the profits made by the subsidiary during the ZORA (the ZORA accretions). Due to the prepaid forward contract, the holding company will be entitled to the converted shares and the ZORA accretions.

The tax rulings that were issued by the Luxembourg tax authorities agreed that the ZORA accretions were deductible at the level of the ZORA taking subsidiary whereas these ZORA accretions were not taxed at the level of the ZORA granting subsidiary due to the corresponding loss of the same amount resulting from the prepaid forward contract nor at the level of the holding company due to the application of the Luxembourg participation exemption.

The Commission considered that the 'deduction without inclusion' outcome was not in line with Luxembourg tax rules and that ENGIE had received a selective advantage. The Commission claimed that Luxembourg law did not permit deducting expenses leading to exempt income whereby the parent entities of ENGIE (and ENGIE as a group) received an unlawful selective advantage.

The General Court of the CJ, after confirming again that the Commission was entitled to review tax rulings under State aid rules and that such review does not entail hidden tax harmonization, validated the Commission's lines of reasoning. It agreed with taking an economic approach to assess the arrangement as a whole rather than as separate transactions. It also validated the point that Luxembourg normally does not allow exempting income if the corresponding charge was deductible at the level of the payer. Therefore, ENGIE had received a selective advantage comparable to other taxpayers in Luxembourg. Finally, it ruled that the arrangement was abusive under the Luxembourg general anti-abuse rule (GAAR) whereby the Luxembourg tax authorities should have rejected the tax treatment approved in the various rulings.

The case reveals that the non-application of a GAAR and or special anti-abuse rule (SAAR) is a new line of attack of the Commission to combat State aid. The confirmation of the economic approach to 'pierce the veil' of separate related transactions is also a relevant element. ENGIE and Luxembourg may file an appeal with the CJ before the end of July 2021. For a further discussion of the impact of the *ENGIE* case we refer to our news article.

CJ rules on the concept of a VAT permanent establishment *(Titanium Ltd)*

On 3 June 2021, the CJ delivered its judgment in the *Titanium Ltd.* Case (C-931/19).

Titanium is a real estate investor that is established in Jersey. Titanium owned a real property in Austria, which it leased to Austrian companies. Other than the real property, Titanium did not possess any assets in Austria, nor did it employ any local staff of its own there. Titanium outsourced the day-to-day property management to an Austrian real estate agent. On the other hand, Titanium retained the main decision-making power with regard to the Austrian real property, such as the power to enter into or to terminate tenancy agreements as well as decisions relating to capital expenditures and repairs.

Titanium did not pay any Austrian VAT in relation to the leasing of the Austrian real property. The Austrian tax authority disagreed and argued that the Titanium was liable to pay Austrian VAT on the ground that Titanium had a fixed establishment for VAT purposes in Austria.

In its judgment, the CJ held that Titanium did not possess of a fixed establishment by merely owning and leasing real property. For VAT purposes, the concept of a 'fixed establishment' requires a sufficient degree of permanence and a suitable structure, in terms of human and technical resources, to supply services on an independent basis. Since Titanium did not have any own staff in Austria and the real estate agent it appointed to perform certain administrative tasks was not allowed to make key decisions regarding the lease, the CJ ruled that the local presence of Titanium in Austria was not sufficient enough to act independently and to perform the leasing activities.

CJ rules on the VAT exemption for fund management services *(K and DBKAG)*

On 17 June 2021, the CJ delivered its judgment in the joint cases *K* (C-58/20) and *DBKAG* (C-59/20) about the VAT exemption for the management of ICBE and AIF funds.

In the first case, K was engaged by fund managers to perform administrative services relating to the calculation of yields for income tax purposes (such as fund settlements). K passed on the relevant information to the fund managers, who submitted the information to the tax authority. K argued that the tax calculation services are exempt from VAT as they fulfil the essential characteristics of fund management, whereas the Austrian tax authority argued that these services are specific tasks performed by accountants and tax advisers (as a result of which the fund management exemption should not apply).

The second case concerns the acquisition of IT software used for risk management and performance measurement. The software is specifically tailored to the investment fund sector and takes into account the complex requirements imposed by the legislature. The risk and performance indicators calculated with the IT software are used by DBKAG for the preparation of reports in order to meet its legal information requirements towards the authorities and investors with regard to risk management and performance measurement.

According to DBKAG, these services are exempt from VAT under the fund management exemption. The Austrian tax authority argued that the VAT exemption does not apply because DBKAG only rendered a service of technical nature, which is not essential for the management of collective investment funds.

In its judgment, the CJ emphasized that in order for the fund management exemption to apply, the services must form a distinct whole that fulfils the specific, essential functions of the management of collective investment funds.

With regard to the notion of 'distinct whole', the CJ considers that it is not necessary for a task to be completely outsourced for it to be a distinct whole (as long as the essential characteristics of fund management are fulfilled).

As for the requirement that services be 'specific and essential', the CJ referred to an intrinsic link between the services and the management of special investment funds. The fund management exemption relates specifically to portfolio management and the administration of the investment vehicle itself. From the annexes of the ICBE Directive, it follows that this also includes the legally required activities of reporting, valuation and pricing (including tax returns). On the other hand, activities that are inherent to any type of investment do not fall within the scope of 'fund management'. This means that the tax calculation services provided by K fall within the scope of the VAT exemption as long as these services are intrinsically linked to the management of collective investment funds. The same applies to the IT software acquired by DBKAG, as long as this software is granted exclusively to collective investment funds and not to any other types of funds.

These aspects are to be ascertained by the referring court. In particular, the referring court should determine if the tax calculation services carried out by K correspond to the obligations imposed by Austrian law which are specific to special investment funds and therefore, differ from the obligations imposed on other types of investment funds. With regard to the IT services, it is apparent from the reference that the risk management and performance measurement services are specific to the management of collective investment funds.

State Aid/WTO

Regional deviation from a national levy of beverage bottle deposits and not imposing fines leads to serious difficulties

On 9 June 2021, the General Court annulled a 2018 Commission decision declaring a German exemption of a beverage bottle deposit not to be State aid (Case T-47/19).

Some beverage border shops in Germany were allowed by local (State) authorities not to levy a deposit on bottles sold to Danish clients on the condition that they would sign an export declaration stating that bottles would be consumed outside of Germany. The General Court held that the non-levying of the deposit did amount to State aid, as this was a federal levy and the exemption that was locally created did not seem to apply throughout the whole of Germany. The Commission could only confirm that it applied in two German border States and left whether others tolerated it as well in the middle.

More importantly the General Court held that not imposing a fine may potentially lead to State aid as well. The Court held that the decision not to impose a fine did not rely on the existence of uncertainty with regard to the applicable federal law, but it was based on an interpretation by local (State) authorities not to apply the levy. So, while the General Court leaves room not to impose a fine in the case of real uncertainty, it does not leave room not to impose a levy because of deviating regional administrative policy where the domestic federal law was clear and unambiguous and had a very wide scope. (The German federal law did follow the lead of the European Packaging Directive, which also did not provide for a border shop exemption, but this does not seem to have played a role as such.) In general, this case might play a future role where local (tax) authorities apply an in itself consistent policy which deviates from national law that is not followed by other local authorities responsible for carrying out such law.

The General Court did stress that the exemption seemed to be based on protecting employment and economic activity in border shops and had nothing to do with reasons inherent to the environmental protection objective of the legislation. The Commission, therefore, should have opened a formal investigation as serious difficulties existed.

Direct Taxation

Commission proposes new Regulation to address distortion caused by foreign subsidies in the Single Market

On 5 May 2021, the Commission proposed a new Regulation to address potential distortive effects of foreign subsidies in the European Single Market. EU competition, trade defence instruments and public procurement are important in ensuring fair conditions for companies in the European Single Market and the Commission noted that the existing tools cannot be applied to foreign subsidies. This provides their recipients with an unfair advantage when acquiring companies in the EU which creates a ‘regulatory gap’. The aim of the proposed Regulation is to address this regulatory gap and to ensure a level playing field in the European Single Market.

Based on the Regulation, the Commission will have the power to investigate financial contributions granted by public authorities of non-EU countries that benefit companies with an economic activity in the EU and to redress their distortive effects. To do so, the Commission introduces three tools:

(a) A notification-based tool to investigate concentrations involving a financial contribution by a non-EU government;

(b) A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government;

(c) A general market investigation tool to investigate all other market situations and smaller concentrations and public procurement procedures.

With respect to (a) the acquirer or bidder has to notify ex-ante any financial contribution received from a non-EU government in relation to concentrations if the EU turnover of the company to be acquired is EUR 500 million or more and the amount of the financial contribution is at least EUR 50 million. With respect to (b) the acquirer or bidder has to notify ex-ante if the estimated value of the procurement is EUR 250 million or more. If companies are non-compliant with the notification obligations, fines may be imposed and the transaction may be reviewed as if it had been notified.

With respect to (c) the Commission can investigate on its own initiative (ex-officio) and may request ad-hoc notifications. With respect to the potential redressive measures and commitments, the Regulation includes a range of remedies such as the divestment of certain assets or the prohibition of certain market behaviour.

The Regulation will now be discussed in the European Parliament and the Member States based on the ordinary legislative procedure. The proposal is also open for a public consultation until 22 July 2021.

The Commission releases planned initiative on a new EU system to avoid double taxation / withholding tax on dividend or interest payments

The Commission has released a planned initiative to introduce a common EU-wide system for withholding tax on dividend or interest payments. The initiative will also include a system for tax authorities to cooperate and to exchange information with each other.

The roadmap is not yet available but will be open for public consultation that is planned for the third quarter of 2021. The adoption by the Commission is scheduled for the fourth quarter of 2022.

2021 Annual Report highlights the contribution of taxation towards a more innovative, business friendly and healthier EU

On 18 May, the Commission published the 2021 Annual Report on Taxation, a yearly review of Member States' tax policies and their contribution to the priorities of the EU, such as the twin digital and green transitions, social fairness and prosperity, or combatting tax fraud. Annual tax revenue in the EU was stable in 2019 across Member States, with slight reductions in the average tax burden on labour and average corporate income tax from 21.9% in 2019 to 21.5% in 2020. Member States have continued to introduce new tax measures to support innovation and productivity, address the corporate debt bias and reduce the time it takes to comply with taxes. The report found that while environmental taxation can be a useful policy tool to help achieve climate and environmental policy goals and contribute to the economic recovery, the report shows that it is still underused in many Member States. Several EU Member States have raised taxes on tobacco, alcohol, and soft drinks to improve public health. The report also highlights that most Member States have introduced some measures to tackle aggressive tax planning but much remains to be done, notably in view of the current crisis. The report also pointed out that the COVID-19 pandemic has forced Member States and the EU to react with an unprecedented range of measures, including tax measures and direct support for households, businesses and the health sector. These helped cushion the impact of the crisis, providing liquidity to the hardest hit businesses and households and mitigating the adverse economic impact of the public health confinement measures introduced by Member States. Finally, the report discusses the possible role of tax policies in shaping our future economies and societies.

CJ rules that Finland acts in breach of Articles 63 and 65 TFEU by treating income received from a Luxembourg UCITS differently to income received from a Finnish UCITS on the ground that the two UCITS do not have the same legal form *(E)*

On 29 April 2021, the CJ delivered its judgment in the case *E* (C-480/19). For the Opinion delivered in this case by AG Hogan of 19 November 2020, we refer to EUTA 186. The case deals with a natural person E residing in Finland who invested in a compartment of a SICAV in Luxembourg which is a UCITS within the meaning of the Directive 2009/65/EC (UCITS Directive). E submitted a request for a preliminary decision to the Central Tax Committee concerning the taxation of the earnings from the SICAV. In this request, E stated that the SICAV should be equated with a Finnish UCTIS within the meaning of the UCITS Directive whereby the earnings from the SICAV should be taxed the same way as earnings from a Finnish investment fund. The Central Tax Committee took the view that the SICAV was objectively comparable, in particular by virtue of its legal form, to a Finnish public limited company. Therefore, the earnings had to be considered dividends and taxed as income from employment. E brought an action before the Supreme Administrative Court in Finland stating that the taxation of the earnings distributed by the SICAV as income from employment is more stringent than the taxation of earnings distributed by a Finnish investment fund which is in breach of the free movement of capital pursuant to Article 63 TFEU. The Supreme Administrative Court decided to refer the question to the CJ, whether Articles 63 and 65 TFEU preclude that income received by a Finnish natural person from a Luxembourg UCITS within the meaning of the UCITS Directive is not, for the purposes of income tax, treated in the same way as

income received from a Finnish investment fund within the meaning of the UCITS Directive because the legal form of the Luxembourg UCITS does not correspond to the legal structure of the Finnish investment fund.

The CJ started by observing that Article 63(1) generally prohibits restrictions on movements of capital between Member States and that Article 65(1)(a) TFEU states that Article 63 TFEU is without prejudice to the rights of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation. It is therefore appropriate to examine whether (i) there is a difference in treatment, (ii) whether the situations are potentially comparable and (iii) whether the difference may be justified. The CJ ruled that there is a difference in treatment since the income received from the SICAV by a Finnish natural person is subject to a less favourable tax treatment than income received by a Finnish natural person from a Finnish public limited company or from a Finnish UCITS. With respect to the question whether the situations are objectively comparable, the CJ noted that the SICAV and a Finnish UCITS are both types of UCITS within the meaning of the UCITS Directive but that this is not decisive for establishing whether the situations are comparable. As also mentioned in case *Fidelity Funds and Others* (C-480/16), the comparability of a cross-border situation with an internal one must be examined having regard to the objective pursued by the national provisions as well as their purpose and content. In that respect, the CJ ruled that a SICAV is objectively comparable to a Finnish UCITS since both entities are exempt from income tax and the earnings received from both are subject to taxation at the level of the participants. The CJ observed that a Luxembourg SICAV, unlike a Finnish UCITS, is equated to a public limited company but that the Finnish legislature does not make the distinction between income from capital and income from employment contingent on the legal form of the distributing body but, on the contrary, has taken the view that both earnings constitute income from capital. Therefore, it follows that, subject to verification by the referring court, the difference in treatment between the respective income received from a Luxembourg SICAV and a Finnish UCITS concerns objectively comparable situations. Finally, the CJ noted that the Finnish Government had not relied on reasons in the public interest to justify the restriction of movement of capital and that it had also not identified such reasons.

On the whole, the CJ came to the conclusion that Articles 63 and 65 TFEU must be interpreted as precluding a tax practice of a Member State according to which, for the purpose of the taxation of income of a natural person residing in that Member State, the income received from a UCITS established in another Member State cannot be equated with income received from a UCITS established in the first Member State on the ground that the latter does not have the same legal form.

Interest payments on optional reductions are not covered by EU tax law

The German company XY buys electricity and, after a conversion, delivers it to its customers. In separate proceedings for the 2006 tax year, the Bundesfinanzhof ruled that XY was entitled to apply the reduced rate of electricity tax. On that basis, the tax authorities amended the decision concerning the 2010 tax year and refunded the overpaid tax, in view of the 2006 proceedings. In 2014, XY requested a refund of interest, which was denied by the German tax authorities. XY's appeal before the court at first instance was dismissed. That court held that the reduced rate of electricity tax is optional from the point of view of European Union law, so that the levying of the tax at the standard rate, even if contrary to national law, does not constitute an infringement of European Union law. Consequently, the obligation arising from the case law of the Court to repay the excess tax with interest is not applicable. XY brought an action in revision against that judgment. The Bundesfinanzhof referred questions to the CJ. AG Szpunar published his Opinion on 12 May 2021.

AG Szpunar concludes that German tax authorities do not have to pay interest in respect of the wrongly paid electricity tax. European tax law does not require that tax unduly paid to be repaid with interest where the erroneous assessment of that tax results from the non-application by the German tax authorities of a reduced rate of tax to which the taxpayer was entitled and which was provided for in national law on the basis of an optional authorization. However, the aforementioned situation would be different if the failure to reimburse would result in a breach of the principle of equal treatment. AG Szpunar concludes that a national court should ascertain this in the light of the circumstances of the particular case.

Portuguese treatment of UCITS is not contrary to EU law, according to AG Kokott

Allianzgi-Fonds Aevn is a collective investment undertaking (UCITS) which has its seat in Germany and receives investment income in the form of dividends paid by undertakings resident in Portugal. In principle, Portugal treats dividends distributed to a UCITS formed under Portuguese law as exempt from CIT. It therefore makes no difference to the private investor whether he or she acquires shares directly or invests indirectly in another undertaking via a UCITS. In that respect, dividends distributed by undertakings to a resident UCITS which the latter in turn distributes to its investors are not taxed by Portugal at the level of the UCITS. Instead, a UCITS formed under Portuguese law is subject to stamp duty, which is charged quarterly as a tax under tax law on both the retained dividend income and the remaining total net book value.
However, the exemption from corporation tax in respect of capital income of the UCITS does not apply to the applicant, as it is not an undertaking formed and operating under Portuguese law. The applicant, therefore, is subject to the general provisions of the Corporation Tax Code.
Accordingly, dividends distributed by Portuguese undertakings to the applicant in 2015 and 2016 were subject to Portuguese corporation tax at a rate of 25%, which the distributing undertakings withheld at source and paid over to the Portuguese treasury. Allianzgi-Fonds Aevn lodged an appeal against the Portuguese tax assessments on the basis of which corporation tax had been deducted at source for the tax years 2015 and 2016. The competent tax authority did not grant those requests, and the case was eventually brought before the court, which referred preliminary questions to the CJ. The referring court raises five questions concerning the compatibility of a Portuguese provision of tax law with the fundamental freedoms.
AG Kokott published her Opinion on 6 May 2021.

AG Kokott concludes that the difference in treatment between resident and non-resident UCITS does not evidently result in unfavourable treatment whatsoever from the outset, and, consequently, to a restriction of the free movement of capital. However, if the different treatment would lead to a restriction of the free movement of capital, it should be ascertained whether, in the light of the objective, and the purpose and content of the legislation at issue in the main proceedings as well, resident and non-resident UCITS are in a comparable situation (these criteria are derived from *Pensioenfonds Metaal en Techniek* (C-252/14)). AG Kokott concludes, in the light of the aim pursued by the national legislation, as well as of its purpose and content, a non-resident UCITS is not in a situation comparable to that of a resident UCITS. If the CJ, however, were to proceed on the assumption that the situations are comparable, AG Kokott lists four justifying circumstances that enter into consideration in the present case: (i) the preservation of the balanced allocation of the power to impose taxes between the Member States, (ii) the avoidance of non-taxation, (iii) the preservation of the coherence of the Portuguese tax system, and (iv) safeguarding the principle of proportionality.

Based on the above, AG Kokott concludes that EU law does not preclude national legislation under which withholding tax is levied on dividends distributed by a resident company where those dividends are distributed to a non-resident UCITS which is not subject to corporation tax in the State of residence. This also applies if no corporation tax is levied on those dividends when they are distributed to a resident UCITS, but another taxation technique is applied which is intended to ensure that no corresponding income tax is levied until they are redistributed to the investor, and, until that point, a quarterly taxation of the total net assets of the resident UCITS is levied instead.

VAT

CJ rules on payment of deferment interest in VAT cases *(CS and technoRent International)*

On 12 May 2021, the CJ delivered its judgment in the joint cases *CS and technoRent International* (C-844/19).

The request for a preliminary ruling is based on two different appeals. The first applicant is CS, who claimed a VAT refund in 2007, which at first, was partly granted. 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 (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 in these specific cases of late payment of excess VAT or a VAT refund.

The CJ reasoned that, in both cases, a taxable person is charged too much VAT, which was paid either indirectly through his suppliers or directly to the State. Based on settled case law, the CJ 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 are compensated through payment of default interest. The CJ, therefore, ruled 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. According to the CJ, there is however no rule of Council Directive 2008/9/EC with direct effect which may be invoked by either one of the applicants. The CJ, therefore, ruled that the referring court should do all that which is within its power to uphold 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.

CJ rules on obligation to revise input VAT when initially planned activity is ceased *(Skellefteå Industrihus AB)*

On 18 May 2021, the CJ delivered its judgment in the *Skellefteå Industrihus* case (C-248/20).

Skellefteå planned to develop an office building. In principle, the rental of real estate is exempt from VAT, but under certain conditions the landlord and the tenant may choose to opt for a VAT taxed lease. This option for VAT taxed lease results in the landlord being entitled to reclaim input VAT. During the construction phase, Skellefteå applied for this option for VAT taxation (optional tax liability scheme). Later on, one of the future tenants announced that it was no longer interested in renting office space, ultimately resulting in the cancellation of the project. This subsequently ended the optional tax liability scheme. Based on Swedish VAT law, the cancellation of the project effectively resulted in the retroactive reversal of Skellefteå's right to recover input VAT granted in the course of the optional tax liability scheme. Skellefteå argued that this obligation to immediately repay the input VAT previously deducted (including interest) was not compatible with the EU VAT Directive.

Based on settled case law, the CJ stated that the right to deduct VAT is in principle retained once it has arisen if the intended economic activity is not carried out. The reasoning behind this is to safeguard a neutral VAT treatment between the same investment activities though mitigating differences between businesses already carrying out taxable transactions and other businesses seeking to invest. However, when the taxable person ultimately starts to use the acquired goods or services to perform activities that are exempt or outside the scope of VAT, this will trigger an obligation to revise the input VAT earlier deducted. This obligation is interpreted broadly within the EU VAT Directive: the initial deduction is adjusted if the ultimate use entitles a higher or lower input VAT deduction.

In the past, the CJ had already held that a taxable person is not required to revise the input VAT deducted when that taxable person did not make use of the acquired goods or services because of circumstances beyond the taxable person's own control, provided the taxable person still intends to use these goods or services for a VAT taxed activity. Because of the above, the CJ ruled that the Swedish obligation to immediately repay the total amount of input VAT deducted is in breach of the EU VAT Directive. However, if the taxable person no longer plans to use the goods and services to carry out output transactions or uses them to carry out exempt transactions, this may lead to an obligation to repay (part of) the input VAT deducted. In such situations, national legislation imposing an obligation on a taxable person to adjust the initial input VAT amount does not breach the EU VAT Directive.

CJ on joint and several liability for default interest *(ALTI)*

On 20 May 2020, the CJ delivered its judgment in the case *ALTI* (C-4/20).

ALTI purchased a harvester, a tractor and other agricultural equipment from FOTOMAG. ALTI paid the invoices issued by FOTOMAG and deducted the input VAT charged on these invoices. FOTOMAG had previously acquired the equipment from a UK supplier, thus declaring an intra-community acquisition in Bulgaria. FOTOMAG did not pay the corresponding VAT liability. In a tax audit, it was found that:

- ALTI and FOTOMAG had entrusted one and the same person with their accounting, the management of their bank accounts and the submission of their VAT returns;
- The intra-Community acquisition of the agricultural equipment by FOTOMAG had been financed through a third-party company whose members were the managers of ALTI and FOTOMAG; and
- the transport of the combine harvester from the United Kingdom had been organised by a manager and representative of ALTI through another company.

These findings led the tax authorities to conclude that ALTI itself had organised the acquisition of the agricultural equipment by FOTOMAG through an intra-Community acquisition in order for VAT to be charged improperly and that ALTI knew that FOTOMAG would not pay the VAT amounts due. As a result, ALTI was held jointly and severally liable for the VAT amounts due by FOTOMAG, including the default interest.

The VAT Directive empowers Member States to provide that a person other than the person liable for the payment of VAT is to be held jointly and severally liable for the payment of VAT. Those provisions seek to ensure the efficient collection of VAT from the most appropriate person in the light of the specific situation. It follows from previous case law that Member States may hold a person jointly and severally liable for payment of VAT where, at the time of the supply to it, that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid. However, it should not be systematically difficult or impossible for a person held jointly and severally liable to prove that he acted in good faith. In the present case, it follows that this is not the case because the presumption of 'knew or ought to have known' in rebuttable in Bulgaria.

The CJ ruled that it falls within the procedural autonomy of the Member States to extend the joint and several liability to default interest. According to the wording of the VAT Directive, the joint and several liability only relates to the payment of VAT, but this does not preclude Member States from being able to impose a joint and several liability in connection to other elements as well. This is particularly the case because a broader interpretation of the joint and several liability clause serves to combat VAT abuse and it contributes to achieving the objective of ensuring the efficient collection of VAT.

CJ rules on national practice stipulating revision of input VAT in the case of insolvency proceedings *(Administrația Județeană a Finanțelor Publice Suceava and Others)*

On 3 June 2021, the CJ delivered its judgment in case C-182/20, about the obligation to revise input VAT when a taxable person ceases to perform activities subject to VAT.

BE ran a business that was ultimately declared bankrupt. In Romania, the transfer of (former) business assets in connection with an insolvency proceeding is automatically deemed to be a non-economic activity for VAT purposes. As a result, the Romanian Tax Authority issued a VAT assessment to BE relating to the input VAT previously deducted by BE for its economic activities. BE argued that it still qualified as a VAT taxable person during the course of the liquidation procedure and that the transfer of the assets was therefore subject to VAT (as a result of which the input VAT should not have to be adjusted).

In its judgment, the CJ ruled that BE did not cease its economic activities due to the insolvency proceedings. According to the CJ, the mere fact that the initiation of insolvency proceedings changes the purpose of a taxable person's transactions (in the sense that those purposes no longer include the long-term operation of its business) cannot affect the economic nature of the transactions carried out by a taxable person.

Opinion AG Tanchev on allocation of mixed-use assets *(Finanzamt N and Finanzamt G)*

On 20 May 2021, AG Tanchev delivered his Opinion in the joint cases *Finanzamt N* C-45/20 and *Finanzamt G* C-46/20.

The request for a preliminary ruling is based on two different appeals. The applicant in the first case acquired a newly built residential property, which also included an office. The applicant in the second case acquired solar panels and used some of the generated electricity himself and supplied the rest to a power supplier's transmission system. Both assets are used for private or non-business purposes as well as for economic activities at the same time, as a result of which the taxable person should choose to (partially) allocate the respective asset to its business or private assets.

German VAT law stipulates that if no identifiable decision is made by the taxable person upon the deadline for the submission of the annual VAT return, it will automatically be assumed that the asset will be labelled a private asset. On the other hand, the applicants argued that they were entitled to a partial refund of the input VAT paid in connection to the acquisition of the mixed-use assets.

The AG stated that the allocation decision is essential in establishing the right to deduct VAT. The right of deduction forms an integral part of the EU VAT system and in principle may not be limited. The time limit imposed in Germany essentially results in the loss of the right to deduct VAT, even though both applicants both use the assets partially to perform economic activities subject to VAT. Since these time restrictions undermine the right to deduct VAT, they are not in line with EU VAT according to the AG.

Opinion AG De La Tour about VAT treatment controlling fees charged by parking operator *(Apcoa Parking Denmark A/S)*

On 3 June 2021, AG De La Tour of the CJ delivered his Opinion in the *Apcoa Parking Denmark A/S* case (C-90/20) regarding the question whether fees for controlling a private parking are subject to VAT.

Apcoa is the operator of various parking facilities. Apcoa lays down the conditions for the use of the parking areas, such as the banning of parking without a permit, the maximum parking time and the payment for parking. If the terms imposed by Apcoa are violated, Apcoa charges a special 'control fee' to the parking space user. At the driveway to the parking areas in question, a sign is put up with this text: 'Violation of the regulations may result in a control fee'.

Apcoa argued that the control fees for infringement of parking regulations are not subject to VAT, because those fees do not constitute consideration for a service supplied by Apcoa. The AG argued that the control fees are subject to VAT, as the users are able to make use of the car park operated by Apcoa by paying the control fee.

Customs Duties, Excises and other Indirect Taxes

Clarification on the temporal application of EU customs law *(Jumbocarry Trading GmbH)*

Jumbocarry Trading GmbH ('Jumbocarry') (C-39/20) is a company established in Germany. Jumbocarry filed a customs declaration in the Netherlands on 4 July 2013 for the release for free circulation of a consignment of porcelain goods.

In the declaration, Bangladesh was indicated as the country of origin, on the basis of which a preferential rate of customs duty of 0% was applied. After discovering that the certificate of origin was false, the Inspector of the Dutch customs authorities ('Inspector'), informed Jumbocarry in writing that he intended to impose a retroactive customs assessment of customs duties at the standard rate of 12%. The inspector gave Jumbocarry the opportunity to express its point of view within 30 days after notifying its intention in accordance with article 22(6) of the Union Customs Code ('UCC'). On 18 July 2016, the Inspector issued a retroactive customs assessment for the customs debt that had incurred on 4 July 2013.

According to Article 103(1) UCC a customs debt shall not be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred, in this case 4 July 2013. According to Article 124(1)(a) UCC, a customs debt shall be extinguished where the debtor can no longer be notified of the customs debt. Following Article 103(3)(b) UCC, the statute of limitation of three (3) years is suspended for the period that the debtor is given to express its point of view. In this case, for 30 days.

On 1 May 2016, the UCC replaced the Community Customs Code ('CCC') which code did not include the rule that the statute of limitation is suspended for the time the debtor is given the opportunity to express its point of view. Therefore, according to the CCC the customs debt could not have been notified after 4 July 2016.

The Dutch Supreme Court has doubts about the temporal effect of the provisions of the UCC and referred to the Court of Justice of the European Union ('CJ') two preliminary questions:

- Are articles 103(3)(b) and 124(1)(a) of the UCC applicable to a customs debt that was incurred before 1 May 2016 and whose period of limitation had not yet expired as of that date?
- If the answer to the first question is in the affirmative, does the principle of legal certainty or the principle of legitimate expectations preclude that applicability?

The CJ replied to the questions that Article 103(3)(b) and Article 124(1)(a) UCC, read in the light of the principles of legal certainty and the principle of legitimate expectations, must be interpreted as applying to a customs debt incurred prior to 1 May 2016 and which had not yet become time-barred on that date. As such, Jumbocarry had been notified in time and the customs debt had not been extinguished.

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