LOYENS & LOEFF

EDITION 190

EU Tax Alert

- Commission proposes transformation of EU economy and society to meet climate ambitions and postpones digital levy
- General Court opening decision in NIKE investigation stands
- CJ rules on VAT treatment of services provided by insurance intermediary (*Radio Popular*)

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Fit for 55 package

In EU Tax Alert 189 (July 2021) it was mentioned that the Commission had issued a communication on business taxation for the 21st century and the announcements made in this communication are expected to translate into actual legislative proposals in the next three years. With respect to the measures in this communication that seek to increase 'green taxation' the Commission has now adopted a package of proposals (the so-called 'Fit for 55 package') to make, among others, the EU's taxation policy fit for reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. The measures contain, among others, a reform of the EU Energy Taxation directive, introducing a carbon border adjustment mechanism (**CBAM**) (to prevent dumping from businesses established in countries with laxer rules against pollution) and revising the EU emission trading system (**EU ETS**) to increase the price of carbon emission rights and further incentivise businesses to upgrade their production processes in a more environment-friendly manner. The latter two measures, CBAM and EU ETS, would raise own resources for the EU.

Digital levy postponed

In the communication for the 21st century, the Commission stated that the proposal for the EU Digital Levy would be released in July 2021. The Commission confirmed that it will prioritize the completion of a global tax accord before reassessing the EU Digital Levy. The proposal is now scheduled for October 2021.

General Court opening decision in NIKE investigation stands

Nike and Converce filed an appeal with the General Court to have the Commission's decision to open a formal state aid investigations into some of their rulings annulled. On 14 July 2021 (case T-648/19), the General Court held that there was sufficient reason for the Commission to open a formal investigation to gather more information to address certain doubts it had. The Court also underlined that NIKE's claim of being treated unfairly as being singled out from a larger group of ruling recipients was not relevant, as the Commission has discretion to select the cases it pursues regardless of whether a body of 98 advance pricing agreements (APAs) issues by the tax authorities constituted an aid scheme as such, as NIKE argued.

CJ rules on VAT treatment of services provided by insurance intermediary (*Radio Popular*)

On 8 July 2021, the CJ delivered its judgment in the case *Rádio Popular – Electrodomésticos SA* (C-695/19).

Rádio Popular – Electrodomésticos SA ('Radio') is a supplier of consumer electronics. Radio also acts as an insurance intermediary for consumers wishing to extend the warranty on purchased products. The insurance contract will be concluded directly between a third-party insurer and the consumer. In return for its brokerage services, Radio charged a brokerage fee to the consumers. Radio did not take the brokerage fees into account when calculating the VAT recovery on general costs, because it argued that the brokerage services were incidental financial transactions. The Portuguese tax

authority argued that the brokerage services did not qualify as incidental financial transactions, resulting in a lower VAT recovery right for Radio with regard to general costs.

In its judgment, the CJ first assessed whether the brokerage services are VAT exempt under the insurance exemption. The insurance exemption applies to insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents. The CJ considered that the brokerage services rendered by Radio fulfilled the essential aspects of the work of an insurance agent (such as the finding of prospective clients and their introduction to the insurer, with the view of concluding insurance contracts). Because of this, the CJ ruled that Radio's brokerage services were VAT exempt. Due to the VAT exempt brokerage turnover, Radio will in principle be limited in its right to recover VAT on general costs.

When calculating the VAT recovery ratio for general costs, the turnover realized in connection with 'incidental financial transactions' does not have to be taken into account based on the EU VAT Directive. Radio argued that the brokerage services qualified as incidental financial transactions. The CJ did not follow this line of reasoning because 'insurance transactions' are not synonymous with 'financial transactions'. Because of this, the CJ ruled that the VAT exempt brokerage turnover should be taken into account by Radio for the computation of the VAT recovery ratio relating to general costs.

State Aid/WTO

The General Court of the CJ confirms that the aid granted by Austria to Austrian Airlines is comparable to the internal market (*Austrian Airlines*)

On 14 July 2021, the General Court of the CJ dismissed the action brought by Ryanair and Laudamotion and upheld the Commission decision that the State aid granted by Austria to an Austrian group company of Ryanair constituted State aid that is compatible with the internal market (Case T-677/20).

Background of the case

An Austrian company of the Lufthansa group received aid in the form of a subordinated loan convertible into a subsidy. This aid was intended to compensate the company for the damages resulting from the COVID-19 pandemic. This aid was notified by Austria in June 2020.

On 6 July 2020 the Commission decided that the aid granted constituted State aid that is compatible with the internal market based on Article 107(2)(b) TFEU. Ryanair and Laudamotion brought an action for the annulment of the decision based on the following arguments: (i) the Commission had failed to examine possible aid to or from Lufthansa, (ii) infringement of the principles of non-discrimination, free provision of services and freedom of establishment, (iii) misapplication of Article 107(2)(b) TFEU and a manifest error of assessment, (iv) that the Commission should have initiated the formal investigation procedure, and (v) infringement of the duty to state reasons.

The General Court's reasoning

The failed review of possible aid to or from Lufthansa
First, Ryanair and Laudamotion claimed that the Commission had failed to verify whether the aid at issue also benefits 'Lufthansa'. If that were the case, the measure at issue would be incompatible within the meaning of Article 107(2)(b) TFEU since it would then no longer cover the costs related to the damage suffered by the Austrian company. The aid could then be used for purposes other than its original objective. Subsequently, it is stated that the Commission had failed to take account of all the aid granted to the Lufthansa group and therefore, had failed to assess whether additional aid could overcompensate the Austrian company for the damage which the aid at issue was intended to remedy.

The General Court stated that in the *Lufthansa* decision of 25 June 2020 (SA.57153 (2020/N)), which constitutes a contextual factor in the present case, the Commission had already considered all the aid measures granted to the airlines of the Lufthansa group, including the Austrian company, and the relationship between these measures. In this decision all the additional aid granted or proposed in favour of airlines in the group had been considered to be limited to the minimum necessary and the risk of overcompensation was ruled out. Furthermore, since all the aid measures put in place a mechanism for deductions, under which the aid granted by one Member State to the entire Lufthansa group is reduced by the aid granted by other Member States to a particular company in that group, the overall amount received by that group remains the same. Finally, the General court concluded that there was no real risk that the aid at issue granted to the Austrian company could also benefit other airlines in the Lufthansa group.

Infringement of the principles of non-discrimination, free provision of services and freedom of establishment
Ryanair and Laudamotion claim that the Commission had infringed the principle of non-discrimination and the principle of free provision of services and the freedom of establishment on the ground that the aid granted only benefits the Austrian company.

The General Court, however, ruled that in so far the aid may amount to discrimination, it was justified. This because the difference in treatment is appropriate for the purpose of remedying the damage suffered because of the COVID-19 pandemic and does not go beyond what is necessary to achieve that objective. With respect to the principle of freedom to provide services the General Court noted that this freedom in the field of transport is governed by a special legal regime whereby Article 56 TFEU does not apply as such to the air transport sector. The EU legislature adopted Regulation No 1008/2008 on common rules for the operation of air services the purpose of which is to define the conditions for applying in the air transport sector the principle of free provision of services. Subsequently, the General Court stated that Ryanair and Laudamotion had not demonstrated how the exclusive nature of the measure at issue is such as to discourage them from establishing themselves in Austria or from providing services from and to that country.

Remaining arguments
With respect to the remaining arguments of Ryanair and Laudamotion, the General Court ruled that the Commission did not make a mistake in its assessment of the proportionality of the aid and in particular, in calculating the amount of damages to be compensated and the amount of aid. The argument that the Commission should have started the formal investigation procedure was not examined as the General Court ruled that this argument no longer has to be investigated because the merits of the first three arguments have already been examined. Finally, the General Court ruled that the Commission decision contained a sufficient statement of reasons whereby this argument must also be rejected.

Conclusion
The General Court rejected the arguments of Ryanair and Laudamotion and therefore, the action must be dismissed in its entirety.

Direct Taxation

CJ rules on Belgium way of tax benefit calculation (*BJ*)

On 15 June 2021, the CJ delivered its judgment in the *BJ* case (C-241/20).

BJ is a tax resident of Belgium and is employed in Luxembourg, where BJ also owns an apartment which is rented out. In addition, BJ has two properties located in Belgium. The income from employment and the apartment is taxed in Luxembourg and exempt in Belgium. Belgium takes the Luxembourg income into account when determining the Belgium tax. The tax is then taken as the starting point for the application of certain specific tax reductions. Furthermore, the tax is reduced in proportion to the share of exempt Luxembourg income in BJ's total income. BJ lodged objections to the method of calculation as it does not allow him to fully benefit from these tax benefits, i.e., BJ was losing part of the tax benefits to which he is entitled under the Belgian scheme in proportion to his exempt Luxembourg income.

The CJ ruled that Belgium is in breach of EU law as BJ loses part of the tax benefit granted by Belgium using this method of calculation used for the amount of tax due. The fact that BJ has no significant income in Belgium is not important because Belgium is in a position to grant him the tax benefits in question. Nor is it important that BJ also enjoyed tax benefits in Luxembourg.

AG Kokott opines on the 'expected interest'-criterium (*État luxembourgeois*)

The French tax authorities made a request for exchange of information to the Luxembourg tax authorities aiming at the beneficial owners of the Luxembourg-based company L. L is indirectly the parent company of F which is based in France. F owns real estate in France. Individuals who directly or indirectly own real estate located in France are required to file a property tax return in France. Consequently, the Luxembourg tax authorities ordered L to provide information and documents on the shareholders and also on the direct or indirect beneficial owners. L did not agree and eventually lodged an appeal. The Luxembourg '*Cour Administrative*' asked three preliminary questions. The third preliminary question is considered to be of minor importance and therefore, is not further explained hereafter.

The first preliminary question concerns whether the identification requirements have been met since those to whom the request relates (shareholders) have not been identified individually and by name. The second question concerns the degree of substantiation of the request, in particular the criterion of 'expected interest' and the extent to which it must be made clear that a legal obligation has not been fulfilled in the requesting State. AG Kokott published her Opinion on 3 June 2021.

First, AG Kokott does not read in the directive a limitation that the request can only relate to individual and taxpayers identified by name. Second, regarding the 'expected interest', AG Kokott concluded that requests with respect to a group of determinable but not already identified taxpayers are permissible, provided that (1) the group is described as concretely and broadly as possible, (2) it is explained what tax obligations this group of taxpayers has and what facts underlie the request, and (3) it is explained why there is reason for the assumption that the group has not complied with the law.

Refusal of cross border loss relief not contrary to EU law if business operations did not cease according to Netherlands Supreme Court

X BV belongs to the B group and holds the shares in the German A GmbH. The top holder of the companies in the B group is Norwegian A AS. In 2011-2012 E AS acquires 31.08% of the shares in A AS. Due to this acquisition, part of the losses of A GmbH in Germany can no longer be offset. X BV wants to offset the German losses to its profits. However, according to the Amsterdam Court of Appeals this would not be possible. X BV consequently lodged an appeal.

The Netherlands Supreme Court rules then that it is not contrary to EU law to refuse the cross border loss relief requested by X BV. Based on the *Marks & Spencer II case* (C-446/03), loss relief of a foreign subsidiary is possible conditionally where (i) the loss should be definitive, and (ii) there should be no possibility of the loss being offset in the future at the level of the subsidiary itself or a third party. The Supreme Court adds that there should also be no income at the subsidiary in the relevant Member State (*Marks & Spencer III*, C-172/13). As A GmbH has continued its business operations, it should be assumed that A GmbH has continued to receive income from its business, i.e., the losses, therefore, should not be definitive. Refusal of cross border loss relief, therefore, should not violate EU law.

VAT

CJ rules on taxable amount for VAT purposes in case of fraud (*Tribunal Económico*)

On 1 July 2021, the CJ delivered its judgment in the case *Tribunal Económico-Administrativo Regional de Galicia* (C-521/19).

CB is an agent in the music industry acting on behalf of the Lito Group. CB would contact festival organizers to negotiate performances for the Lito Group. The Lito Group received its remuneration from the festival committees in cash and Lito Group did not issue any invoices to the festival organizers. For its services, CB received 10% of the total income realized by the Lito Group. CB received this remuneration in cash and did not issue any invoices to the Lito Group. During an audit, the Spanish tax authority discovered that CB had not declared VAT on the remuneration received from the Lito Group. As a result, a VAT assessment was imposed on CB. The tax authority and CB disagreed on the calculation of the VAT amount due. The tax authority argued that the remuneration received by CB was a price excluding VAT, while CB claimed that the remuneration included VAT.

The taxable amount for VAT purposes is the consideration received by the taxable person from its customer. The CJ ruled that, in the case of fraudulent transactions, the amount received should be regarded as including the corresponding VAT amount. This would only be different if, despite the fraud, it would be possible, under national law, for the taxable persons to pass on and subsequently deduct the VAT amount at issue.

Opinion AG Szpunar concerning liability to pay VAT (*X-Beteiligungsgesellschaft mbH*)

On 1 July 2021, the Opinion of AG Szpunar in the case *X-Beteiligungsgesellschaft mbH* (C-324/20) was published.

X-Beteiligungsgesellschaft mbH ('X') assisted T-GmbH with the sale of an immovable property in 2012. For these services rendered, X received a fee of EUR 1,000,000 from T-GmbH. This remuneration was paid by T-GmbH in five yearly tranches of EUR 200,000.

X argued that it was only liable to pay VAT upon receiving each tranche payment. The German tax authority argued that the full VAT amount was due in 2012 because the services had been completed in that year.

In his conclusion, the AG stated that the payment in five different tranches should not be regarded as an event that may lead to a downward adjustment of the taxable amount, because such a downward adjustment may only be performed when the customer's payment becomes uncollectible. This was not present in the present case, because ultimately X received the full remuneration of EUR 1,000,000 from T-GmbH.

However, in connection to services that are performed continuously and that give rise to successive payments, the EU VAT Directive contains a special provision that stipulates that VAT becomes due at the end of the period to which these payments relate. It his Opinion, the AG stated that the intermediation services were of a singular nature and not performed continuously, even though the payments took place in five different tranches. Because of this, the AG argued that X was liable for VAT in 2012 over the full remuneration of EUR 1,000,000 (even though no payment had been received at that point).

Opinion AG Kokott concerning VAT deduction when supply is erroneously treated as VAT exempt (*Zipvit Ltd*)

On 8 July 2021, the Opinion of AG Kokott in the case *Zipvit Ltd* (C-156/20) was published.

Zipvit is a supplier of vitamins and minerals. Royal Mail supplied Zipvit with postal services under contracts which had been individually negotiated with Zipvit. The total price due by Zipvit for the postal services was the commercial price, to be increased by VAT (if VAT was due). Royal Mail and HMRC both assumed the postal services to be VAT exempt. Royal Mail therefore did not charge VAT to Zipvit and Royal Mail did not declare any VAT in relation to the postal services. Due to case law developments, it was established that the postal services should instead have been taxed with VAT. HMRC did not reassess the VAT position of Royal Mail, because most recipients of the postal services would also be entitled to recover the VAT charged in relation to the postal services. After expiration of the statute of limitation at the level of Royal Mail, Zipvit exercised its right to recover VAT. This request was rejected by HMRC because Zipvit did not possess an invoice issued by Royal Mail stating VAT.

In her conclusion, AG Kokott argued that an invoice, showing that VAT is charged by the supplier, is required in order for the recipient to exercise its right to recover input VAT. According to the AG, the recipient is not allowed to claim a refund of input VAT in absence of an invoice on which the VAT amount is specified separately. Since Zipvit did not possess of such an invoice, no input VAT can be recovered in connection with the postal services.

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