LOYENS LOEFF

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EU Tax Alert

- ECOFIN Council fails to reach political agreement on the latest draft of the EU Pillar 2 Directive
- ECOFIN Council reaches political agreement on Carbon Border Adjustment Mechanism (CBAM)
- CJ judgement on the compatibility of Bulgarian withholding tax on fictitious interest with EU law (*Viva Telecom Bulgaria - C-257/20*)
- CJ judgement on the application and compatibility of GDPR with a request of information addressed to an internet advertising company in relation to its clients (*SS SIA - Case C-175/20*)
- AG Medina's opinion on German VAT grouping scheme (*Norddeutsche Gesellschaft für Diakonie mbH - C-141/20*)
- AG Medina's opinion on benefits-in-kind between members of VAT group (*Finanzamt T - C-269/20*)

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This edition of the EUTA includes an overview of EU developments, European Court of Justice's (CJ) judgements and Advocate Generals' (AG) opinions published during the first quarter of 2022 in the field of direct and indirect taxation.

Highlights in this edition are:

- ECOFIN Council fails to reach political agreement on the latest draft of the EU Pillar 2 Directive
- ECOFIN Council reaches political agreement on Carbon Border Adjustment Mechanism (CBAM)
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ECOFIN Council fails to reach political agreement on the latest draft of the EU Pillar 2 Directive

On 12 March 2022, an amended draft compromise text of the EU directive on Pillar Two (Directive) was published. This text includes numerous amendments to the version of 22 December 2021. Although some of these amendments are essentially semantic, the updated compromise text makes certain fundamental technical shifts, which include, *inter alia*, the following:

- *Date of entry into force:* The entry into force of both the income inclusion rule (IIR) and the undertaxed profit rule (UTPR) would be delayed by a year (i.e., the IIR would apply in tax years beginning on or after 31 December 2023; the UTPR in tax years beginning on or after 31 December 2024)
- *Consistency with OECD Model Rules and guidance:* Several modifications seek to strengthen the overarching goal of following as closely as possible the OECD Model Rules, the related commentary and any further guidance that may still be released, notably as regards the scope of "covered taxes" and additional simplification measures such as safe harbours.
- *Qualified IIR and Qualified Domestic Top-up Tax:* Further guidance is provided on the 'qualified IIR' and 'qualified domestic top-up tax' to ensure that these domestic implementations are sufficiently consistent with the Directive and OECD Model Rules.
- *Temporary opt-out:* For the sake of proportionality, Member States in which no more than ten Ultimate Parent Entities (UPEs) of in-scope groups are located might elect not to apply the IIR and the UTPR for five fiscal years, the first of which starts as from 31 December 2023.

The amended draft of the EU Directive was discussed by the Economic and Financial Affairs Council (ECOFIN) on 15 March 2022 and failed to reach political agreement as four Member States (i.e. Estonia, Malta, Poland, and Sweden) did not support it. A revised compromise text of the Directive will therefore be further negotiated, with a view to reaching an agreement during the ECOFIN meeting scheduled for April 5, 2022. For more information on this, please see our Tax Flash on this matter.

ECOFIN Council reaches political agreement on Carbon Border Adjustment Mechanism (CBAM)

On 15 March 2022, the ECOFIN Council reached political agreement on a general approach for the Carbon Border Adjustment Mechanism (CBAM) regulation, which is one of the key elements of the European Union's 'Fit for 55' package. Proposed by the Commission on July 14 2021, the CBAM aims at addressing the risk of carbon leakage caused by asymmetrical climate policies of non-EU countries. For that purpose, the CBAM targets imports of carbon-intensive products (i.e. cement, aluminium, fertilisers, electric energy production, iron and steel) to prevent offsetting the EU's greenhouse gas emissions reduction efforts through imports of products manufactured in non-EU countries, where climate change policies are less ambitious than in the EU. According to the Commission's proposal, the revenue arising from the CBAM is to flow into the EU budget as own resources. The CBAM is designed to function in parallel with the EU's Emissions Trading System (ETS) to mirror and complement its functioning on imported goods.

Compared to the initial proposal, the text agreed on 15 March by the Council opted for a greater centralisation of the CBAM governance by, for example, centralizing the new registry of CBAM declarants (importers) at EU level. The text agreed by the Council also foresees a minimum threshold which exempts from the CBAM obligations consignments with a value of less than €150.

The Council still has to make sufficient progress on a number of issues which are closely related to CBAM, but are not part of the draft legal text of the CBAM regulation (e.g. phase-out of the free allowances allocated to industry sectors or appropriate solutions for limiting potential carbon leakage from exports). Further changes to the text of the regulation are therefore not excluded. Furthermore, issues that will continue to be followed include (i) the Commission's proposals for own resources, based, *inter alia*, on revenues from the sale of CBAM certificates, which are under consideration for deliberation by 1 July 2022; and (ii) an enhanced cooperation with third countries, including through the establishment, in parallel to the CBAM, of a climate club where carbon pricing policies can be discussed and encouraged.

Once sufficient progress is achieved at the Council, negotiations with the European Parliament will take place. It should be noted that differently to the ordinary EU legislative procedures in the field of taxation, when it comes to CBAM regulation the Parliament is not only consulted but it also has a right of co-decision.

CJ judgement on the compatibility of Bulgarian withholding tax on fictitious interest with EU law (*Viva Telecom Bulgaria'EOOD v Direktor na Direktsia 'Obzhalvane I danachno-osiguritelna praktika' – Sofia, C-257/20*)

On 24 February 2022, the European Court of Justice (herein after referred as "**CJ**" or the "**Court**") delivered its judgement in the case *Viva Telecom Bulgaria'EOOD v Direktor na Direktsia 'Obzhalvane I danachno-osiguritelna praktika' – Sofia* (C-257/20). Viva Telekom is a Bulgarian company that concluded an interest-free loan agreement with its sole shareholder InterV Investment S.à r.l. in Luxemburg. The loan's maturity was 60 years and it could be converted into equity at any time. The Bulgarian tax authorities considered that such arrangement entailed tax evasion pursuant to article 16(2)(3) of the Bulgarian Corporate Income Tax Act ("**CITA**") and argued that the interest that should have had to be paid for such loan would have been subjected to a 10% withholding tax. Viva Telekom appealed this decision and argued that the fictitious interest was calculated without considering the commercial interest in granting an interest-free loan. It further stated that article 16(2)(3) CITA was contrary to the case law of the CJ, as it denies taxpayers that have concluded an interest-free loan the opportunity to demonstrate that there were economic reasons to do so. In subsidiarity, Viva Telekom argued that Bulgaria had exercised the option of Article 4(1)(d) of the Interest and Royalty Directive ("**IRD**") to exclude the interest from the scope of such Directive. It, therefore, fell within the scope of the Parent- Subsidiary Directive ("**PSD**") whereby the distributed profits should be exempt from withholding tax. The company further argued that the loan constituted a contribution of capital within the meaning of the article 3(h) to (j) of the Directive concerning indirect taxes on the raising of capital ("**DITRC**") whereby the loan should not be subject to any indirect taxes.

The Bulgarian Supreme Administrative Court referred the following six questions to the CJ: (i) Does national legislation such as 16(2)(3) CITA conflict with the principle of proportionality in article 5(4) and 12(b) TEU and the right to an effective remedy and to fair trial in Article 47 of the Charter of Fundamental Rights of the European Union (the "**Charter**")? (ii) Are interest payments pursuant to article (4)(1)(d) IRD profit distributions to which article 5 PSD applies?; (iii) Does the rule laid down in article 1(1)(b) and (3) and article 5 PSD apply to payments on an interest free loan which becomes due in 60 years and which is covered by article 4(1)(d) IRD?; (iv) Does national legislation and a tax practice according to which unpaid interest on an interest-free 60-year loan by a parent company registered in a different Member State is subject to withholding tax conflict with article 49 and 63(1) and (2) TFEU, the PSD and the IRD?; (v) Does the taxation at source of fictitious interest income on an interest-free loan granted by a company in another Member State which is the sole shareholder conflict with the DITRC?; and (vi) Does the transposition of the IRD in 2011 (i.e. prior to expiry of the transposition period laid down in the Act of Assession of Bulgaria and Rumania, in which the tax rate is set at 10% instead of the 5% prescribed in the Act of Assession and the Protocol) infringe the principles of legal certainty and legitimate expectation? For the opinion of Advocate General ("**AG**") Athanasios Rantos, please see EUTA 192.

In response to the defendant's claim that the second to fourth question referred to the Court should be declared inadmissible, the CJ first rules that these questions are indeed admissible. In this regard, it notes that the CJ may only refuse to rule on a referred question if: (i) the interpretation sought bears no relation to the facts or the object of the main action, (ii) the problem is hypothetical or (iii) the CJ does not have the factual or legal material necessary to give a useful answer. According to the CJ, these exceptions are not applicable in the current case. Subsequently, the CJ recalls that where a matter has been the subject of exhaustive harmonization, the national measure must be assessed in the light of that harmonizing measure and not in that of primary EU law. The CJ therefore states that the questions referred will first be examined as far as they concern the IRD, PSD and DITRC and next, if there is no exhaustive harmonization, in so far as they concern primary EU law.

In relation to the IRD, the CJ rules that this Directive is not applicable since the concept of 'beneficial owner of the interest' included therein must be interpreted as referring to an entity that benefits in economic terms from the interest paid and that has the power to freely avail of that interest. The CJ further notes that, in case of fictitious interest, the lender receives no interest and cannot be regarded as an

'actual beneficial owner'. For the same reason, in the CJ's view, article 4(1)(d) IRD does not apply. Since the IRD is considered not applicable, the sixth question is therefore not further examined by the Court.

As regards to the PSD, according to the CJ such Directive is also not applicable. The reason for this is that, in the Court's view, fictious interest cannot be regarded as distributed profits since in such case there is no actual payment. With respect to the DITRC, the CJ notes that this Directive does not require Member States to exempt contributions of capital from all forms of direct tax. It then rules that, since the withholding tax at issue must be regarded as a direct tax, the DITRC directive is also not applicable in the present case.

Based on the aforementioned considerations, the CJ concludes that the provisions of secondary EU law in question (i.e. the IRD, PSD and DITRC) must be interpreted as not precluding national legislation which provides for the taxation in the form of a withholding tax of notional interest that a resident subsidiary, which has been granted an interest-free loan by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions.

After dealing with EU secondary law, the CJ examines whether the articles 49 and 63 TFEU and articles 5(4) and 12(b) TEU and article 47 of the Charter preclude a withholding tax that applies to the gross amount of the fictitious interest, without granting the taxpayer the possibility to deduct, at that stage, expenses related to that loan (non-resident taxpayers need to make a subsequent application for the purpose of recalculating that tax and making a possible refund).

In this respect, the CJ first rules that the withholding tax at issue falls predominantly within the scope of the free movement of capital (article 63 TFEU) and that, therefore, an independent examination in light of article 49 TFEU (freedom of establishment) is not justified. The CJ then rules that the cash-flow advantage arising from the fact that a resident company may deduct from the outset the expenses directly related to their notional interest income, whereas a non-resident company may request these expenses to be taken into account only at a later stage (by means of the submission of an application, after having paid the withholding tax calculated on the gross amount of its notional interest) constitutes a restriction on the free movement of capital.

The CJ subsequently examines whether there is a justification for this restriction. In that respect it first rules that Bulgaria chose to exercise its tax jurisdiction over interest-free loans concluded between resident borrowing companies and non-resident lending companies and that, therefore, non-resident companies must be considered in a comparable situation regarding the expenses directly related to the loans. However, the CJ rules that in the present case the restriction is justified by the objective of safeguarding a balanced allocation of taxing rights between Member States and of the effective collection of taxes. Furthermore, the CJ founds the national legislation at issue to be proportionate, considering its swift refund procedure (i.e. within 30 days and, exceptionally, up to 3 years) and the tax authorities' obligation to pay interest as from 30 days after the filing of the tax return by the taxpayer. In any case, the Courts notes that this is subject to further verification by the referring court.

Finally, in relation to the question of whether the irrebuttable presumption of tax avoidance contained in the legislation at issue is compatible with articles 5(4) and 12(b) TEU and article 47 of the Charter the CJ states that it does not have jurisdiction to reply to a question where it is evident that the provisions referred to are not applicable. The CJ then rules that article 5(4) TEU is not applicable since it relates to actions of EU institutions. The same logic is applied by the Court to article 12(b) TEU, which does not refer to national legislation but to EU draft legislative acts. Finally, the Court finds that article 47 of the Charter does not apply either, since the irrebuttable presumption of tax avoidance does not fall under the IRD, PSD and the DITRC and should not be considered a restriction of the free movement of capital (as the irrebuttable presumption applies both to residents and non-resident companies).

CJ judgement on the application and compatibility of GDPR with a request of information addressed to an internet advertising company in relation to its clients (*SS SIA - Case C-175/20*)

On 24 February 2022, the CJ decided the case *SS SIA* (Case C-175/20) which concerns the application and compatibility of Regulation (EU) 2016/679 ("**GDPR**") with a request of information issued by the tax authorities of Latvia to an internet advertising company (SS SIA) in relation to information held by the latter in relation to its clients.

SS SIA is a Latvian internet company that provides online advertising services to sellers of second-hand vehicles. In 2018, the Latvian tax authorities requested SS SIA to: (i) renew the access that such authority already had in relation to the chassis numbers of the vehicles advertised on its Internet portal, and to the telephone numbers of the sellers; and (ii) provide it with information on the advertisements published in a specific section of the aforementioned portal during a 45 days period. The tax authorities' request specified that such information (including the link and text of the advertisement, as well as the brand, model and price of the vehicle), should be provided electronically, in a format allowing the data to be filtered or selected. In addition, in the event that it was not possible to renew access to these information, SS SIA was required to indicate the reason for this and to provide, no later than the third day of each month, the relevant information relating to the notices published in the previous month. SS SIA considered that this is contrary to the principles of proportionality and data minimization laid down in the GDPR. The Latvian court referred the case to the CJ for a preliminary ruling.

In its decision, the CJ first holds that the collection of information by a tax authority involving a substantial amount of personal data from an economic operator is subject to the requirements of the GDPR, in particular those of article 5 (1) thereof. The CJ further holds the tax authority of a Member State may not derogate from Article 5 (1) GDPR where there is no clear and precise legal basis in the EU or national law, the application of which is predictable for those to whom it applies, which determines the circumstances and conditions under which the scope of the obligations and rights provided for in that Article 5 may be restricted.

Based on the above, the CJ concludes that GDPR does not preclude the tax authority of a Member State from requiring an internet advertising service provider to supply information on taxable persons who have placed advertisements in one of the sections of its internet portal, provided that: (i) the information in question is necessary for the specific purposes for which it is collected; and (ii) the period during which such data is collected does not exceed what is strictly necessary to achieve the public interest objective behind such collection.

AG Medina's opinion on German VAT grouping scheme (*Norddeutsche Gesellschaft für Diakonie mbH - C-141/20*)

On 13 January 2022, the opinion of AG Medina was published in the case Norddeutsche Gesellschaft für Diakonie mbH (C-141/20). Norddeutsche Gesellschaft für Diakonie (NGD) considered that it was part of a VAT Group with its majority shareholder. According to the tax authorities, NGD was not financially integrated with its majority shareholder because the latter did not hold a majority of the voting rights in NGD.

In her opinion, the AG analyzes if the German VAT Group regulations, in which the parent company is considered a single taxable person and the other VAT group members lose their status as separate VAT taxable persons ("Organschaft"), are compatible with the EU VAT Directive. The AG does not assess if the condition of sufficient financial integration is fulfilled in this specific case.

According to the AG, the forming of a VAT Group does not lead to the members thereof losing their taxable person status and being replaced by one single member of the VAT Group (i.e. the parent company). The VAT Group should instead be considered one single taxable person for VAT purposes if the members are bound by sufficient financial, economic and organizational links. Germany is not allowed to infringe the nature of the VAT Group concept by stipulating that the parent company, which owns a majority of the voting rights and has a majority shareholding in the controlled company in the group of taxable persons, shall be the sole taxable person (with the other members being excluded).

AG Medina's opinion on benefits-in-kind between members of VAT group (*Finanzamt T - C-269/20*)

On 27 January 2022, the opinion of AG Medina was published in the case Finanzamt T (C-269/20) about the German interpretation of the VAT Grouping Scheme. S operates university school of medicine and in that capacity provides VAT exempt patient care services for consideration. S also provides teaching services that are governed by public law for which it is not considered a taxable person for VAT purposes. S is the controlling company of U-GmbH, which provided cleaning services in respect of the premises used for the business activities of S. S and U-GmbH considered that these cleaning services were not subject to VAT due to the existence

of a VAT Group between S and U-GmbH. The German Tax Authority disagreed by arguing that the services provided by U-GmbH constituted a benefit in kind, which constituted a deemed supply over which non-recoverable VAT would have been due (given the use of the services for the non-taxable educational activities performed by S).

AG Medina argued in her conclusion that the existence of a VAT Group does not lead to the members thereof losing their taxable person status and being replaced by one single member of the VAT Group. The AG considers that the VAT Group merely results in a consolidated VAT return but that transactions between members of a VAT Group can still be taxable with VAT. This deviates from the practice currently applied in many EU countries.

AG Medina also stated that no VAT corrections should place based on the VAT correction rules for expenses used for non-business activities if the expenses are actually used for the non-economic (business) activities of S. However, based on the AG's conclusion that VAT Group members remain independent taxable persons, VAT leakage could still exist if fees are charged and the payee is not allowed to reclaim VAT on its expenses.

Direct Taxation

CJ judgement on relief from mortgage registration tax and land registry fee for real estate funds (*UBS Real Estate Kapitalanlagegesellschaft mbH v Agenzia delle Entrate (C-478/19 and C-479/19)*)

On 16 December 2021, the CJ delivered its judgement 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) is a mutual fund portfolio management company of two real estate investment funds, which are headquartered in Germany and constituted under German law. In 2005, UBS acquired two real estate properties located in Italy. When registering this acquisition, UBS paid to the Italian tax authorities a registration tax (3%) and a registry fee (1%) on behalf of both funds. At a later stage, UBS requested the Italian tax authorities to reduce the registration and land registry tax by 50% - as provided by the Italian Decree-Law No. 223/2006. The Italian tax authorities rejected such request on the grounds that the reduction only applied, to closed-ended real estate investment funds whereas USB was an open-ended fund.

The dispute was brought before the Italian Supreme Court, which subsequently asked preliminary questions to the CJ. The question referred to the CJ in the present case concerns 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 in respect to closed-ended funds but not in respect to open-ended funds. AG Hogan delivered his opinion in this case on 25 February 2021.

In its judgement, the CJ rules that this case should solely be examined from the perspective of the free movement of capital. In this regard, the CJ points out that any restrictions on the freedom of establishment resulting from legislation of an EU Member State providing for a reduction in mortgage registration tax and land registry fees relating to transfers of real estate used for commercial purposes was an inevitable consequence of the restriction of the free movement of capital. Furthermore, the Court notes that the case concerns passive investments rather than the establishment of a business or otherwise the use of the real estate in question.

Hereafter, the CJ examines whether there has been a restriction to the free movement of capital. In this regard, the Court notes that real estate investment funds could only be established in the form of closed-ended funds under Italian law. For that reason, the CJ holds that difference in treatment is liable to discourage open-ended investment funds governed by the law of Member States from acquiring real estate used for commercial purposes in Italy and it, therefore, constitutes a restriction on the free movement of capital. Based on the information provided by the Italian court, the CJ also mentions that it is yet unclear whether there is indeed an objective difference between an open-ended real estate fund and a closed-ended real estate fund. Consequently, the CJ holds that the referring courts is to ascertain the main objective pursued by the Italian legislation, taking into account all of its elements and the Italian tax system as a whole. However, the CJ also notes that, in so far as each fund pursue the activity of acquiring and subsequently reselling real estate liable to be taxed twice, the closed-ended and the open-ended funds appeared to be in a comparable situation.

Concerning potential justifications to the restriction mentioned above, the CJ considers that potential reasons related to public interest, such as combating of tax evasion and avoidance, preserving the balance and coherence of the national system or preventing property speculation are in fact insufficient to justify the restriction on the

free movement of capital existent in the present case. Finally, the CJ holds that the need to limit systematic risk on the real estate market can constitute an overriding reason in the public interest. However, it clarifies that this can only be justified if the national measure is suitable for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. According to the CJ, this latter issue of proportionality is something for the referring court to ascertain.

CJ judgement on tax authorities' powers to challenge taxpayers' bookkeeping that do not comply with certain accounting principles (*Marcas MC Szolgáltató Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-363/20*)

On 13 January 2022, the CJ delivered its judgement in the case *Marcas MC Szolgáltató Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-363/20). Marcas MC Szolgáltató Zrt. ('Marcas') owned a trademark that it licenced to affiliated entities against the payment of a license fee, which was based on the net sales made by the these entities with such trademark. The payments made to Marcas took place on the basis of quarterly accounts, which were calculated by such company on the basis of the estimated sales to be made by the affiliated entities in each quarter. The amounts of these accounts were then subsequently lowered or raised, depending on the difference between the estimated sales and the actual sales effectively realised in the previous quarter. The adjustments to the amounts referred above were made between quarters that belonged to the same fiscal year, as well as between quarters of different years (e.g. fourth quarter of 2012 and first quarter of 2013).

After a first tax audit focused specifically on the fees received by Marca during fiscal years 2021-2013 (which resulted in a favourable assessment of the company's tax position), the Hungarian tax authorities carried out a second (general) tax audit with respect to Marcas' tax returns for the fiscal year 2013. They found deficiencies in the taxable fees reported and paid by the company in fiscal year 2013 and understood that Marcas' accounting method was not in line with the accounting principles of completeness and independency of financial years. It then imposed a fine and charged interest on the company's defaulted payment. Alleging an infringement of the principles of legal certainty, fair trial and the protection of legitimate expectations, Marcas appealed the tax authorities decision before the General Court of Hungary's Capital, which referred the matter to the CJ. The essential question referred to the CJ was whether articles 2 paragraph 3 and article 31 of Directive 78/660 EEG (Fourth Council Directive on the Annual Accounts of certain types of companies or "**DAA**") preclude tax authorities to challenge the bookkeeping of a taxpayer on the ground that the accounts differ from the principles of completeness and independency of financial years, even if all other accounting principles are complied with.

In its decision, the CJ first notes that it does not have the jurisdiction to answer questions that concern practices related to tax audits and the punishment of tax offences in the field of the corporate income tax. This is because European Union Law has not harmonised the rules of the Member States in this area. Concerning the essential question referred in the case, the CJ first notices that pursuant to article 2 paragraph 3 of the DAA, annual accounts must give a true and fair picture of the equity, financial position and result of a company. It then points out that the application of this principle should be guided, as far as possible, by the general accounting principles laid down in article 31 of such Directive. The CJ then notes that, under Article 31 paragraph 2 of the DAA, derogations from these principles are possible in exceptional cases in which compliance with one or more principles would prevent a true and fair picture of the company and that such derogations should be duly disclosed in the financial statements.

Based on the above, and subject to further verifications by the referring court, the CJ considers that Marca's annual accounts of trademarks did not guarantee a true and fair picture, since, for the financial year 2013, part of the revenue received by way of royalties (fees) had been omitted. It also notes that, it is not clear from the file - although it is for the referring court to verify this - that Marcas' annual accounts sought derogations from the principles of completeness and independence of financial years. The CJ then concludes that article 2 paragraph 3 and article 31 of the DAA do not preclude tax authorities to challenge the bookkeeping of a company on the ground that only the principles of completeness and independence of financial years are not complied with when this non-compliance does not constitute an exceptional derogation that is: (i) necessary to comply with the principle of a true and fair picture and (ii) explained in the annual accounts.

CJ judgement on Spanish's reporting regime for assets located abroad in light of the free movement of capital (*Commission vs Kingdom of Spain, C-788/19*)

On 27 January 2022, the CJ delivered its judgement in the case *Commission vs Kingdom of Spain* (C-788/19). The case was initiated by an European Commission's action brought before the CJ against Spain in October 2019. According to the Commission, Spain did not comply with EU law by introducing a tax scheme back in 2012 with the aim to prevent tax evasion and avoidance related to assets located abroad. Under this tax scheme, Spanish residents must declare certain assets and rights held abroad through the so-called '720 form'. Non-compliance with this declaration could lead to: (i) the classification of those assets as unsubstantiated capital gains and their inclusion in the general tax base, irrespective of the date of acquisition of the assets concerned, without the possibility to rely on a limitation period; (ii) the imposition of a proportional fine of 150%; and (iii) the imposition of fixed fines. The Commission argued that those three penalties and the rules for their implementation constitute disproportionate restrictions infringing several of the freedoms of movement in particular the free movement of capital. For the opinion of AG H Saugmandsgaard Øe please see EUTA 191.

In its judgement, the CJ rules that the obligation to fill in the 720 form and its related penalties, for which there is no equivalent in the case of assets or rights situated in Spain, entails a difference in treatment in relation to Spanish residents based on the location of their assets. This difference in treatment constitutes a restriction of the free movement of capital. Subsequently the CJ states that the restriction could be justified based on the need to ensure an effective tax control and to combat tax avoidance and evasion. Furthermore, the CJ point out that, as provided by article 65(1)(b) TFEU, article 63 of said treaty does not preclude Member States to take all measures to prevent infringements of national tax law. The Court further notes that this element of the legislation appears to be appropriate for achieving its goals since the information available to national tax authorities about assets held abroad is generally less than that available about assets located on their territory.

With respect to the first penalty provided by this regime (i.e. the presumption of acquisition of unjustified capital gains) the CJ notices that, despite such presumption only arising if the taxpayer did not fulfil its tax compliance obligations and being rebuttable, such penalty is anyway disproportionate since it has an effect of indeterminacy and allows tax authorities to challenge a limitation period that has already expired. Concerning the second and third penalties (i.e. the proportional fine of 150% and the fixed fines) included in the Spanish regime, the CJ also founds them disproportionate as their combined application is higher than the fines applicable in domestic situations and could exceed the 100% of the value of the assets. The CJ therefore concludes that the Spanish regime is not in line with the free movement of capital (article 63 TFEU).

CJ judgement on the compatibility of certain formal requirements related to services rendered by non-residents with the freedom to provide services (*Pharmacie populaire – La Sauvegarde SCRL v État belge – Case C-52/21, C-53/21*)

On 24 February 2022, the CJ issued its decision in the joint cases *Pharmacie populaire – La Sauvegarde SCRL v État belge (Case C-52/21, C-53/21)*. The Belgian companies involved in the present case (i.e. Pharmacie populaire - La Sauvegarde SCRL and Pharma Santé - Réseau Solidaris SCRL) traded pharmaceutical products and, as part of their business operations, they engaged a Luxembourgish company named LAD Sàrl to transport medicines. Because of the use of a non-resident company, under Belgian law, Pharmacie Populaire and Pharma Santé were required to draw up individual fiches and summary declarations for the cost of the services to qualify them as deductible professional costs. As the individual fiches and summary declarations were not prepared, both companies were faced with separate tax assessments, which applied charges provided by Belgian law that increased the corporation tax by 100% of the value of the supplied services.

The aforementioned fiches and declaration would have not been required if the relevant transportation services would have been supplied by service provided established in Belgium. This resulted from the application of Belgian legislation and a practice known as "administrative tolerance", under which taxpayers are exempt from complying with the aforementioned formal requirements when two conditions are met: (i) the service provider is subject to Belgian accounting requirements; and (ii) the payments at issue are paid as remuneration for transactions not exempted from the obligation to issue invoices pursuant to VAT legislation. Under the understanding that this implied a restriction on the

freedom to provide services (Article 56 TFEU), Pharmacie Populaire and Pharma Santé challenged the tax authorities assessments. The Belgian Court of Appeal referred the matter to the CJ for a preliminary ruling.

In its judgment, the CJ rules that the freedom to provide services must be interpreted as precluding legislation of a Member State under which, any company established therein, must provide the tax authorities with statements of payments in return for services received from providers established in another Member State, while no comparable obligation is imposed when the services are supplied by providers established in its own territory. The ruling of the CJ is based on the assumption that service providers established in another Member State are subject to the rules on business accounting and to the obligation to issue invoices in accordance with the European VAT rules.

CJ judgement on whether a higher tax burden on capital gains from immovable property realized by third countries' residents is compatible with EU law (*XG v Autoridade Tributária e Aduaneira - Case C-647/20*)

On 28 February 2022, the CJ's ruling in *XG v Autoridade Tributária e Aduaneira* (Case C-647/20) was published in the Official Journal of the EU. The case was decided on 13 December 2021 and involved a Portuguese national (XG) who was resident in the United States and sold inherited real estate located in Portugal. As a consequence of such sale, the taxpayer was taxed under a specific regime, which is more onerous in relation to that applicable to Portuguese residents (who are benefited from a 50% reduction in the tax base considered for calculating personal income tax on such capital gains). Dissatisfied with such outcome, XG challenged the assessment of the Portuguese tax authorities against the referring court.

The question referred to the CJ in this matter was whether Article 63 and Article 65(1) TFEU (free movement of capital) must be interpreted as precluding a Member State's legislation which subjects capital gains realized by a non-EU resident from the sale of immovable property situated in that Member State, to a higher income tax burden than that applicable to a resident of such State for the realization of capital gains arising from the same type of transaction.

In its judgement, the CJ holds that the Portuguese legislation that provides for such differentiated treatment constitutes a restriction to the free movement of capital (Article 63, paragraph 1 TFEU). Furthermore, the Court considers that such restriction is unjustified as the difference in treatment between residents and non-residents provided by the Portuguese legislation concerns situations which are objectively comparable and are not justified by an overriding reason of public interest. Under such understanding, the CJ rules that "Articles 63 and 65(1) TFEU must be interpreted as precluding legislation of a Member State relating to personal income tax, which makes capital gains arising from the sale of immovable property situated in that Member State by a resident of a third country, subject to a higher tax liability than that which would be applied, for the same type of transaction, to capital gains made by a resident of that Member State".

AG Collins' opinion on compatibility of German withholding tax refund scheme with EU law (*ACC Solicones Ltd v. Bundeszentralamt für Steuern - C-572/20*)

On 20 January 2022, AG Collins delivered his opinion in the case *ACC Solicones Ltd v. Bundeszentralamt für Steuern* (C-572/20). ACC Silicones is a company established in the United Kingdom (UK). In the years at issue (2006 to 2008), ACC Silicones had a 5.26% equity holding in the nominal capital of Ambratec GmbH, a company established in Germany. Ambratec distributed dividends to ACC Silicones, on which withholding taxes applied. Such withholding taxes referred to the tax on income from capital at a rate of 20% and to the solidarity levy (*Solidaritätszuschlag*) at a rate of 5.5%. In 2009, ACC Silicones requested to the German tax Authorities reimbursement of the amounts paid in respect of such withholding taxes for each of the years at issue, limiting the rate of the tax to 15% in accordance with the Germany – UK Income and Capital Tax Treaty (the Treaty). Besides, ACC Silicones relied on the fundamental freedoms guaranteed by the EC Treaty and the TFEU.

The German Federal Central Tax Office rejected the application of the reduced withholding tax rate because ACC Silicones had not fulfilled the obligation laid down in Paragraph 32(5) of the German Corporate Income Tax Law (CITL), which requires the submission of a certificate from the tax authorities of its country of residence (in this case the UK) stating that the German tax on income from capital cannot be offset, deducted or carried forward and that no set-off, deduction or carry-forward has actually taken place. ACC Silicones brought an action to challenge

this position of the German tax office before the referring Court, the *Finanzgericht Köln*. The referring court observed that the obligation in question is met by submitting the aforementioned certificate in respect of both ACC Silicones and all direct and indirect shareholders. However, the referring court had certain doubts as to whether the conditions set out by Paragraph 32(5) of the CITL for the application of the reduced withholding tax are compatible with Articles 63 and 65 TFEU, as well as with the principles of proportionality and effectiveness. It therefore asked preliminary questions to the CJ.

In its opinion, AG Collins considers that dividends distributed to non-resident companies are treated less favorably than those distributed to resident companies, as the right to get a reimbursement of the withholding tax imposed on those dividends is subject to stricter conditions when the creditor of the income is a non-resident company. In the AG's view, this constitutes a restriction on the free movement of capital. Furthermore, he notes that non-resident companies receiving dividends are in a situation comparable to that of resident companies, in so far as they both face the risk of a series of charges applicable to dividends distributed (economic double taxation). Thus, both cases cannot be treated differently . Moreover, AG Collins rejects the argument of the German government which argued that – in the circumstances of the case - there were no differences in the treatment of domestic and cross-border situations (as the Treaty provided a mechanism to eliminate double taxation of dividends which neutralized the restrictive effects of the legislation at issue).

AG Collins further considers that the restriction to the free movement of capital can neither be justified based on the need to safeguard the balanced allocation of taxing powers between Member States nor by the need of preventing the tax on income from capital on free-float dividends being taken into account twice by non-resident recipients. AG Collins notes that in order for the German legislation to be compatible with Article 63 TFEU, it must reimburse the tax on income from capital to non-resident companies receiving dividends, to the extent that the withheld tax cannot be offset in the State of residence pursuant to any applicable tax treaty. The AG also clarifies that when only a partial set-off is possible in the State of residence, the source State must then reimburse the difference.

AG Pitruzzella's opinion on the compatibility of BO's public registers with data protection rights enshrined in the EU Charter and GDPR (*WM and Sovim SA v. Luxembourg Business Registers - Joined Cases C-37/20 and C-601/20*)

On January 20 2022, AG Pitruzzella published his opinion in the joined cases *WM and Sovim SA* (Cases C-37/20 and C-601/20). These cases concern the compatibility of Article 30(5) and (9) of the 5th AML Directive (which provide for a regime of public access to beneficial owners (BO) information and a system of derogations/exceptions to such regime in "exceptional circumstances") with fundamental privacy rights enshrined in Articles 7 and 8 of the Charter and several provisions of the GDPR.

In these cases, two requests for preliminary rulings containing six questions (in total) were referred by the Luxemburgish District Court to the CJ. In his opinion of over 279 paragraphs, AG Pitruzzella clusters these questions into three groups: (i) A first group of questions seek to verify the validity of the regime of public access to information on BO and its system of derogations in the light of the rights to respect for private life and the protection of personal data, enshrined in Articles 7 and 8 of the Charter; (ii) A second group of questions, seeks to verify the compatibility of the aforementioned regime with several provisions of the GDPR; and (iii) A third group of questions concerns the interpretation of Article 30(9) of 5th AMLD (i.e. system of derogations from the regime for public access to BO information).

After making some preliminary considerations on the principle of transparency in EU law, on the BO's public registers regime and on the relationship between the AMLD and the GDPR, AG Pitruzzella analyses the three groups of questions mentioned above.

In relation to the first group, AG considers that the making available and disclosure to the public of BO data by the body responsible for keeping a register undoubtedly constitutes an interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter. However, the AG considers that the non-particularly sensitive nature of the data makes the potentially harmful effects for the persons targeted by the interferences in question to be regarded as "moderate". Those interferences with data protection rights are therefore not, in the AG's view, of a particular gravity, since data of such scope and nature does not allow to obtain precise information

about the people concerned and, therefore, does not directly and strongly affect the intimacy of their private life. Nevertheless, the AG notes that the second and third subparagraphs of Article 30(5) of AML (which leave Member States flexibility to extend the amount of BO data to which the general public may have access) may potentially give rise to more interference with the fundamental rights which, in the AG's view, is capable of entailing a serious interference with a person's private life. Based on the above, the AG proposes the CJ to answer the questions under this group as follows: (i) The second subparagraph of Article 30(5) of AMLD is invalid in so far as it provides that any member of the general public is allowed to have access 'at least' to the data indicated therein, thus providing for the possibility for any member of the general public to access BO data other than those indicated in that subparagraph; and (ii) The third subparagraph of Article 30(5) of AMLD is invalid.

Concerning the second group of question, AG Pitruzzella proposes the CJ to answer the questions under this group in the following terms: (i) The provisions of Chapter V of GDPR (governing transfers of personal data to a third country or an international organisation) must be interpreted as not precluding a register that is partially accessible to the public and does not require to demonstratee a legitimate interest nor has any limitation on the location of the public; (ii) the transfer from that register may only be carried out in accordance with Article 49(1)(g) of that regulation (which governs transfers from registers which, under EU or Member State law, are intended to provide information to the public), if the conditions for consultation of the register provided for by law are fulfilled and provided that such consultation does not involve the entire register.

Regarding the third group of questions referred in the present cases, AG Pitruzzella proposes the CJ to interpret the terms "exceptional circumstances" and "disproportionate risk" contained in Article 30(9) of the AMLD as follows. According to the AG opinion, the first of this terms must be interpreted as meaning that it is for the Member States to define in their national law the situations which constitute "exceptional circumstances" under that provision (i.e. nothing prevents them from defining such term solely by reference to the situations already covered by the provision), provided, however, that the transposition of the AMLD into national law makes it possible to protect BO against disproportionate infringements of their fundamental rights. The AG further notes that to that end, the national court may itself have to determine in concrete terms the nature and scope of the exceptional circumstances which authorise derogations from public access to information concerning BO, only in so far as that is necessary to protect fully the fundamental rights of the latter. Pursuant to the AG's opinion, this determination must take into account the fact that: (i) the detailed assessment of the "exceptional" nature of the circumstances must be made on a case-by-case basis,(ii) in the case of derogations from a general rule, the provision in question must, in principle, be interpreted strictly; and (iii) the circumstances that may justify the derogation must be out of the ordinary and give rise to a disproportionate risk of infringement of fundamental rights.

As regards to the interpretation of the term "disproportionate risk", the AG's view is that such requirement is a condition applying to the specific risks mentioned in Article 30(9) (namely the risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation), as well as any violation of the fundamental rights of the BO which justifies a derogation from public access to the information concerning him. In this regard, the AG notes that the existence and disproportionate nature of such a risk may, where appropriate, be determined by taking into account the links that the BO in question has with companies or legal entities other than the one for which public access to information about him or her is requested. In this respect, the AG understands that it is for the BO or entity requesting an exemption from public access to information to prove that these links constitute a relevant factor which justifies or supports the existence of a disproportionate risk of harm to the fundamental rights of the BO in question. Moreover, the AG states that Article 30(9) excludes the possibility that an exemption from public access to information may be granted where that information is easily accessible to third parties through other information channels.

Last but not least, AG Pitruzzella considers that - for the purposes of applying the exemption under Article 30(9) of AMLD - the interested BO must demonstrate the "disproportionate risk" and "exceptional circumstances" that may justify such exemption and provide concrete, precise and substantial indications of such elements. The AG finally notes that, when assessing the existence of a disproportionate risk to the BO, what must be taken into account is on the one hand, the specific risks mentioned in Article 30(9) as well as the fundamental rights of the person concerned; and, on the other hand, the public interest in play.

Commission publishes a revised version of its work program 2022

On 26 January 2022, the Commission unveiled a revised version of its work program for 2022 originally published on 19 October 2021. The main takeaway from this revised version is that it mentions the launch of the debt equity bias reduction allowance (DEBRA) proposal and the Pillar One proposal on 11 May 2022 and 27 July 2022 respectively. However, it should be noted that this planning is indicative and not set in stone. For more information on the Pillar One proposal please see our website.

Feedback period on Pillar II and ATAD 3 proposals opened

The Commission opened a feedback period on the Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union (also referred to as Pillar 2 Directive) and on the Proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (also referred to as the Unshell Directive or ATAD 3). Feedback on both the Pillar 2 and Unshell proposed directives can be given until 6 April 2022. The feedback received will be summarized by the Commission, presented to the European Parliament and Council and published on the Commission's website.

Council's Conclusions on the revised EU list of non-cooperative jurisdictions

On 24 February 2022, the Council of the EU published its conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. Ten new jurisdictions were added to the grey list (i.e. the Bahamas, Belize, Bermuda, the British Virgin Islands, Israel, Monserrat, the Russian Federation, Tunisia, Turks and Caicos Islands and Vietnam) and no changes were made to the EU black list. As a consequence of this revision, the EU blacklist (Annex I) includes the same 9 jurisdictions indicated in the last biannual update (i.e. American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu) and the EU grey list (Annex II) has now 25 jurisdictions (i.e. Anguilla, the Bahamas, Barbados, Belize, Bermuda, Botswana, the British Virgin Islands, Costa Rica, Dominica, Hong Kong, Israel, Jamaica, Jordan, Malaysia, Montserrat, North Macedonia, Qatar, Seychelles, Thailand, Tunisia, Turkey, Uruguay, Russian Federation, Turks and Caicos Islands, Vietnam). The next biannual review to the EU lists will occur in October 2022.

VAT

CJ judgement about VAT deduction when supply is erroneously treated as VAT exempt (*Zipvit Ltd - C-156/20*)

On 13 January 2022, the CJ delivered its judgement in the case Zipvit Ltd (C-156/20). Zipvit is a supplier of vitamins and minerals. Royal Mail provided postal services to Zipvit based on individually negotiated contracts. The total invoice amount due by Zipvit was equal to the commercial price increased by VAT (if such VAT would be due by Royal Mail). Royal Mail and HMRC assumed that the postal services were exempt from VAT. Royal Mail 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 Royal Mail's postal services should instead have been taxed with VAT. However, HMRC did not reassess the VAT position of Royal Mail because most recipients of the postal services would be entitled to recover any VAT charged by Royal Mail. Zipvit then filed a VAT refund request with HMRC on the basis that all amounts paid to Royal Mail were inclusive of UK VAT. This request was rejected by HMRC because Zipvit did not possess of invoices on which VAT had been charged by Royal Mail.

The CJ ruled that VAT may only be recovered in case the recipient possesses of an invoice on which VAT is separately charged by the supplier. Zipvit was not allowed to reclaim VAT on its postal expenses since it did not possess of such invoices.

CJ judgement on application medical exemption to thermal registration fees (*Termas Sulfurosas de Alcafache SA - C-513/20*)

On 13 January 2022, the CJ delivered its judgement in the case Termas Sulfurosas de Alcafache SA (C-513/20) about the application of the medical exemption for VAT purposes. Termas Sulfurosas offers traditional thermal bathing services. These services have a therapeutic function for the users (for example as rheumatology treatment). The users first undergo a consultation with a doctor based on which an individual patient file is prepared. This file entitles the users to purchase 'traditional thermal cure' treatments within the spa establishment. In return for this service, the user must pay a 'thermal registration fee'. Termas Sulfurosas argued that the thermal registration fees

were exempt from VAT (because the thermal treatments themselves were also considered VAT exempt by Termas Sulfurosas).

For VAT purposes, the medical exemption applies to the provision of hospital and medical care as well as to services that are essential thereto. The ancillary services should also be aimed at the diagnosis, treatment and, in as far as possible, the cure of diseases or health disorders. The CJ argued in its judgement that the 'spa registration service' could potentially be exempt from VAT as an ancillary service if it is an essential part of the medical treatment. This is for the referring court to determine. The CJ also ruled that, in order for the medical exemption to apply, the medical care and activities closely related thereto must be undertaken under social conditions comparable with those applicable to public law bodies, by a centre for medical treatment or diagnosis or by another duly recognised establishment of a similar nature. From the facts and circumstances, it becomes clear that Termas Sulfurosas should be regarded a primary care unit which is not part of the Portuguese national health service and does not have the capacity to provide hospital care. The CJ therefore also ruled that the national court should verify if Termas Sulfurosas should be considered a duly recognised establishment of a similar nature to other centers for medical treatment or diagnosis. If this condition is not fulfilled, the 'spa registration service' shall always be taxed with VAT (as well as the thermal treatments themselves).

CJ judgement on the VAT treatment of 'control fees' charged by parking operator (*Apcoa Parking Denmark A/S - C-90/20*)

On 20 January 2022, the CJ delivered its judgement in the case Apcoa Parking Denmark A/S (C-90/20). This case deals with the question if so-called control fees for private parking are subject to VAT. Apcoa is the operator of parking facilities. Apcoa lays down the conditions for the use of the parking areas, such as the maximum parking time and the payment for parking. Apcoa charged a 'control fee' to users if they violated the parking terms and conditions. At the entrance of the parking facility, there is a sign that says: "violation of the regulations may result in a control fee". Apcoa argues that the control fees are not taxed with VAT, because they do not constitute consideration for a parking service provided by Apcoa but should rather be considered a penalty (which is not subject to VAT).

The CJ considered in its judgement that the obligation for the user to pay the control fee is an important element of the legal relationship between Apcoa and that user. By using the parking facility, the user has agreed to the parking terms and conditions imposed by Apcoa. The CJ therefore ruled that there exists a direct link between the control fees and the parking services provided by Apcoa. This means that the control fees are taxed with VAT.

CJ judgement about right to recover VAT in case supplier applies the cash accounting system (*Grundstücksgemeinschaft Kollaustraße 136 - C-9/20*)

On 10 February 2022, the judgement of the CJ was published in the case Grundstücksgemeinschaft Kollaustraße 136 (C-9/20). Grundstücksgemeinschaft Kollaustraße ('GK') rented a property where the option for a VAT taxed lease was exercised. The rent payments were therefore increased by German VAT. The lessor granted deferral of payment to GK. This means that in the years 2013 to 2016, GK made lease payments relating to the years 2009 to 2012. The lessor applied the cash accounting system, as a result of which VAT became due upon payment by GK (and not already when the rental service was first provided). The VAT charged by the lessor was recovered by GK in the year in which it made the payment. The German tax authority disagreed and argued that the right to recover input VAT arose at the moment when the rental services were provided, as a result of which the right to deduct input VAT was refused in the years 2013 to 2016.

In its judgement, the CJ argued that the right to recover VAT arises when the VAT becomes due by the supplier. In this specific case, the VAT became due by the lessor upon payment by GK. The CJ therefore ruled that GK was entitled to a refund of input VAT only at that moment. The German regulations are in breach of the EU VAT Directive by stipulating that the right to deduct input VAT arises at the time the transaction is performed, even if the tax claim against the supplier only arises when the remuneration is received and the remuneration has not yet been paid by the recipient of the supply.

AG Capeta's opinion on VAT correction for the provision of vouchers free of charge for the private purposes of employees (*GE Aircraft Engine Services Ltd - C 607/20*)

On 27 January 2022, the opinion of AG Capeta in the case GE Aircraft Engine Services Ltd was published (C607/20). GE Aircraft Engine Services Limited ('GE') is a company that services and maintains jet engines in the United Kingdom. GE operated a staff recognition scheme called 'Above & Beyond'. In this programme, GE provided retail vouchers to the selected employees free of charge. The employees could then redeem their vouchers with the participating retailers. In dispute is the question if GE should have declared VAT in respect of the provision of the retail vouchers to its employees.

The provision of services free of charge could lead to VAT corrections at the level of GE if these services would be provided for the private purposes of the employees. There would be no room for a VAT correction if GE would have provided the vouchers to its employees for its own business purposes. In that regard, the AG considered that it should be determined if: (i) there exists a direct link between the provision of the vouchers and the economic activities of GE; and (ii) GE has control over the use of the vouchers to ensure that these are actually used in connection to the economic activities of GE.

Based on the above, the AG established that there is no indication of a sufficient link to the economic activities of GE nor that GE maintains control over the use of the vouchers by its employees. The AG therefore concluded that the provision of the vouchers should be considered a deemed supply of services by GE.

AG Kokott's opinion on determination of the recipient of supply (*DuoDecad Kft - C-596/20*)

On 10 February 2022, the opinion of AG Kokott was published in the case DuoDecad Kft (C-596/20) about the determination of the recipient of the supply in case of potential abuse. DuoDecad performed IT support services to Lalib for a total amount of about EUR 10 million. Lalib was established in Portugal and provided entertainment services by electronic means. After an audit, the Hungarian Tax Authorities established that DuoDecad had in reality performed its services to a Hungarian company called WebMindLicenses ('WML') and not to Lalib. The Hungarian Tax Authorities subsequently issued significant VAT assessments to DuoDecad (including penalties and interest).

The AG concluded that the contracting partner (Lalib) of the supplier (DuoDecad) should normally be considered the recipient of the supply, on the basis of which the place of supply is determined. A possible abusive practice between WML and Lalib should have no bearing on this if the contract between DuoDecad and Lalib is not, in itself, an abusive practice. This is for the referring court to determine.

The AG also discussed the situation in which the Portuguese and Hungarian tax authorities would each make a different assessment of the applicable place-of-supply for VAT purposes. This could potentially lead to the double levy of VAT, especially in case both Member States do not agree on a solution. Double VAT taxation of one and the same transaction by several EU countries is among others in breach with the Charter of Fundamental Rights. According to the AG, in such a situation of double taxation the referring court is to ask the CJ to settle the difference.

Get in contact

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