RECENT DEVELOPMENTS FOR TAX SPECIALISTS

LOYENS LOEFF

EDITION 203

EU Tax Alert

- CJ confirms Amazon and Luxembourg win in EU State aid case
- Five Member States' elect to delay the application of Pillar Two's IIR and UTPR
- CJ sides with Engie and Luxembourg in tax State aid case
- AG Pitruzzella's Opinion on Irish transfer pricing rulings

LOYENS & LOEFF

In this publication, we look back on recent tax law developments within the European Union (EU). We discuss, amongst other things, relevant case law of the Court of Justice of the European Union (CJ), Opinions of its Advocate Generals (AG), as well as relevant case law of the national courts of the Member States. Furthermore, we set out important tax plans and developments of the European Commission (EC), the Council of the European Union (Council) and the European Parliament (EP).

Highlights in this edition are:

- CJ confirms Amazon and Luxembourg win in EU State Aid case (*Commission v Amazon.com and Others*, Case C-457/21 P)
- Five Member States' elect to delay the application of Pillar Two's IIR and UTPR
- CJ sides with Engie and Luxembourg in tax State Aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P)
- AG Pitruzzella's Opinion on Irish transfer pricing rulings (*Commission v Ireland and Others*, C-465/20 P)

Contents

Highlights in this edition **4**
- CJ confirms Amazon and Luxembourg win in EU State Aid case (*Commission v Amazon.com and Others*, Case C-457/21 P) 4
- Five Member States' elect to delay the application of Pillar Two's IIR and UTPR 4
- CJ sides with Engie and Luxembourg in tax State Aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P) 4
- AG Pitruzzella's Opinion on Irish transfer pricing rulings (*Commission v Ireland and Others*, C-465/20 P) 5

Direct Taxation **6**
- Belgian presidency releases program on taxation and customs 6
- ECOFIN approves report with update on files related to direct taxation 6
- CJ judgment on the interpretation of income tax exemption in contracts financed by the EU under IPA framework agreements with third countries (*LM v Ministarstvo financija Republike Hrvatske*, C-682/22) 6
- CJ judgment on the application of the Merger Directive in purely internal situations (*GE Infrastructure v Hungary*, C-318/22) 7
- CJ judgment on the compatibility of Portuguese tax rules for transfer of shares in foreign micro- and small enterprises with the free movement of capital (*NO v Portugal*, C-472/22) 8
- AG Sánchez-Bordona's Opinion on whether full income tax assessment for German employees resident in Switzerland is in line with EU law (*AB v Finanzamt Köln-Süd*, C-627/22) 9
- AG Kokott's Opinion on whether personal income tax exemption for local workers in the construction industry is compatible with EU law (*Nord Vest Pro Sani Pro SRL*, C-387/22) 10
- ECOFIN endorses progress made by the OECD's IF in respect of Pillar One and Two 11
- DAC8 adopted and published in Official Journal of the EU 11
- CJ judgment on whether a different valuation method applicable to property located in a third country is precluded by the free movement of capital (*BA v Finanzamt X*, C-670/21) 11
- CJ judgment on the compatibility of Portuguese taxation of interest from bonds and debt instruments with the free movement of capital (*FL v Portugal*, C-312/22) 12

VAT **13**
- CJ judgment on ability to uphold national VAT legislation that is contrary to EU law (*Osteopathie Van Hauwermeiren*, C-355/22) 13
- CJ judgment on the VAT aspects of a welcome gift (*Deco Proteste – Editores Lda*, C-505/22) 13
- CJ judgment on whether director fees are subject to VAT (*TP*, Case C-288/22) 14

Customs Duties, Excises and other Indirect Taxes **14**
- CJ judgment on national legislation providing for an administrative fine corresponding to 50% of the shortfall in customs duties (*J.P. Mali*, C-653/22) 14

Get in contact **16**

Highlights in this edition

CJ confirms Amazon and Luxembourg win in EU State Aid case (*Commission v Amazon.com and Others*, Case C-457/21 P)

On 14 December 2023, the CJ sided with Amazon and Luxembourg and dismissed the European Commission's appeal against a May 2021 judgment of the General Court that had found Amazon did not receive unlawful State aid from Luxembourg. The CJ judgment is final. We assisted Amazon on Luxembourg tax and transfer pricing aspects.

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 a 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 European Commission disagreed and considered that LuxOpCo's tax base had been unduly reduced. The General Court in turn found errors of facts and law in the European Commission's analysis and annulled the European Commission's decision. For further background, we refer to our tax flash of 12 May 2021.

The CJ upheld the General Court's conclusions albeit on different grounds. In line with its landmark *Fiat* judgment of November 2022, the CJ considered that the OECD transfer pricing guidelines could not form part of the 'reference framework', i.e., normal taxation in Luxembourg against which a selective advantage is tested, because Luxembourg law did not explicitly refer to and implement these guidelines. Thus, the decision of the European Commission was vitiated by a fundamental error. The CJ decided that, although the General Court also relied on a wrong reference framework, it had reached the correct outcome. The CJ thus decided to directly rule in final instance and confirm the annulment of the European Commission's decision.

For more information, please see our recent web post on this case.

Five Member States' elect to delay the application of Pillar Two's IIR and UTPR

On 12 December 2023, the Official Journal of the EU included a notice of the European Commission regarding the election made by five Member States' to delay the application of the Income Inclusion Rule (IIR) and the Undertaxed Profits Rule (UTPR) under Article 50 of the Pillar Two Directive. Article 50(1) of the Pillar Two Directive provides for an election to delay the application of the IIR and the UTPR that can be made by Member States, 'in which no more than twelve ultimate parent entities of groups within the scope of this Directive are located' for six consecutive fiscal years beginning from 31 December 2023. Member States that make such election must notify the Commission by 31 December 2023.

As at 12 December 2023, the following Member States have notified the Commission of their intention to elect for a delayed application of the IIR and UTPR in accordance with the aforementioned provision: (i) Estonia, (ii) Latvia, (iii) Lithuania, (iv) Malta and (v) Slovakia.

CJ sides with Engie and Luxembourg in tax State Aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P)

On 5 December 2023, the CJ annulled the General Court's judgment in the ENGIE State aid case (*Luxembourg v Commission*, joined cases C-451/21 P and C-454/21 P). The CJ set aside the European Commission's 2018 findings that companies of the French energy group ENGIE had received unlawful State aid from Luxembourg through various tax rulings.

This landmark judgment on the European Commission's investigations of tax rulings, confirms the limits to the European Commission's use of State aid rules to challenge such rulings already outlined in the *Fiat* judgment (November 2022).

The European Commission investigated two Luxembourg financing structures set up by ENGIE. The tax rulings confirmed the deductibility of accrued, but unpaid, charges connected with a convertible loan, without (corresponding) taxable income at the level of the holder of the convertible loan. Upon conversion of the loan into shares, there was no taxation at the level of the holder of the conversion shares.

The European Commission considered that the resulting 'deduction without inclusion' outcome was not in line with Luxembourg tax rules and that ENGIE had received a selective advantage. In a first line of reasoning, the European Commission claimed that Luxembourg law did not permit deducting expenses to the extent they give rise to a corresponding exempt income at the level of the recipient (or, conversely, to exempt income that gave rise to a corresponding deduction at the level of the payer). As a result, the parent entities that were not taxed upon their disposal of the conversion shares had received an unlawful selective advantage. In a second line of reasoning, which resembles to a large extent the first one, the European Commission sought to demonstrate a selective advantage at group level. In a third line of reasoning, the European Commission argued that Luxembourg should have applied its general anti-abuse rule to reject the ruling requests and prevent the selective advantage. The General Court upheld the European Commission's decision.

The CJ set aside the General Court's judgment and annulled the European Commission's decision, rejecting all lines of reasoning. It found the decision wrongly defined the reference framework, which is the first step in assessing the existence of a selective advantage. The first line of reasoning was set aside by the CJ on the ground that the European Commission had misinterpreted Luxembourg law and adopted a wrong reference framework by referring to the general purpose of taxing all resident companies without properly assessing the wording of Luxembourg law.

As regards abuse of law, the CJ found that the General Court and the European Commission were wrong to dismiss the administrative practice of the Luxembourg tax authorities in applying this provision. It is against that benchmark that the existence of abuse should have been assessed, and not by adopting an abstract reading of the general anti-abuse rule.

For more information, please see our recent web post on this case.

AG Pitruzzella's Opinion on Irish transfer pricing rulings (*Commission v Ireland and Others*, C-465/20 P)

On 29 November 2023, AG Pitruzzella issued his Opinion in the Commission v Ireland case (C-465/20 P). The case concerns two transfer pricing rulings issued by the Irish tax authorities in favour of two group companies of Apple incorporated in Ireland, but tax resident in a different jurisdiction.

Ireland had issued two tax rulings benefiting two Irish-incorporated but non-Irish tax-resident branches of the Apple group in 1991 and 2007. Through the rulings, Ireland had approved the method proposed by the two companies to determine the profits relating to the activities of their Irish branches taxable in Ireland.

In 2016, the European Commission (EC) considered that by excluding from the tax base the profits generated by the use of intellectual property licenses held by the two branches, Ireland had granted illegal State aid to the two Apple entities. Moreover, these rulings were regarded as benefiting the entire Apple Group. The EC considered that the Irish authorities had misapplied national law by failing to use the methodologies that would have ensured an outcome at arm's length. The European Commission, therefore, ordered Ireland to recover the amount of illegal aid.

In a decision issued in 2020, the General Court annulled the European Commission's decision on the grounds that the existence of an advantage deriving from the adoption of tax rulings had not been demonstrated. In particular, the General Court considered that the European Commission had misapplied Irish law and performed an inaccurate functional analysis by presuming that the branches were performing key functions also in relation to the IP assets (given the alleged lack of capacity of the foreign head offices to perform such functions, absent employees and references to business decisions in board minutes of the head offices).

AG Pitruzzella suggested annulling the General Court's judgment and referring the case back to it for further analysis. In his view, the General Court had made several errors of law with regard to the appreciation of the European Commission's functional analysis and the interpretation of certain statements in the initial European Commission's decision. Furthermore, according to him, in the context of APAs, Irish law mandated the use of methodologies that do not result in the departure from a reliable approximation of a market-based outcome, and the Commission's approach would thus be justified. In his Opinion, AG Pitruzzella also takes a broad view of what constitutes matters of law (as opposed to matters of facts, which are not appealable before the CJ).

The decision of the Advocate General is not binding on the CJ, whose judgment is to be issued at a later date. It is worth noting that this Opinion appears to diverge from the CJ's position in the *Fiat*, *Amazon* and *Engie* cases as regards the proper definition of the reference framework of 'normal taxation'. In particular, AG Pitruzzella refers on several instances to the OECD transfer pricing guidelines of 2010 (which are post-dating the rulings), whereas the CJ ruled that OECD transfer pricing guidelines are irrelevant if not expressly referred to in the domestic law.

Direct Taxation

Belgian presidency releases program on taxation and customs

On 8 December 2023, the program setting out the priorities and main directions of the Belgian Presidency of the Council of the EU was released. The Belgian presidency takes place from 1 January 30 June 2024.

Regarding direct taxation, the program highlights that the EU and its Member States have committed to implementing the OECD Pillar Two by 1 January 2024, and Pillar One by 1 January 2025. Furthermore, it notes that the Presidency: (i) will give priority to measures aiming to curb tax evasion, tax avoidance, aggressive tax planning and harmful tax competition. This will involve updating the EU's list of non-cooperative jurisdictions, propelling both legislative and non-legislative initiatives to decrease compliance costs and the burden for cross-border investors, and tackling tax abuse related to withholding taxes; (ii) welcomes the Business in Europe Framework for Income Taxation (BEFIT) package, and will explore the usefulness of more unified tax rules in other fields over the longer term, such as in relation to mobile workers; (iii) will support the implementation of the Unshell Directive and back the Securing the Activity Framework of Enablers (SAFE) initiative; and (iv) will also work to ensure greater tax transparency and reinforce the exchange of relevant information within the EU, specifically regarding the good functioning of the Pillar Two Directive.

With respect to indirect taxation and customs, the program states that the Belgian Presidency will: (i) further emphasise action aiming to close the VAT gap, benefiting both national and EU budgets. In this context, priority will also be given to the 'VAT in the Digital Age' proposal; (ii) contribute to the revision of the Union's Customs Code to better adapt it to current and future needs, and to make it more beneficial to EU Member States, to the EU as a whole and to society at large; and (iii) will continue the review of the Energy Taxation Directive.

ECOFIN approves report with update on files related to direct taxation

On 8 December 2023, the Economic and Financial Affairs Council (ECOFIN) approved the report to the European Council on tax issues and the conclusions on the progress achieved by the Code of Conduct Group (Business Taxation) (COCG conclusions) during the Spanish Presidency of the Council.

The report to the European Council on tax issues provides an overview of the progress achieved in the Council during the term of the Spanish Presidency, as well as an overview of the state of play of the most important dossiers under negotiations in the area of taxation.

The report highlights the work pursued during the Spanish Presidency on different matters (e.g., OECD's Two-Pillar Solution and tax cooperation at the United Nations level) as well as on pending files, including the amendment of the Directive on administrative cooperation for tax purposes (DAC8), the proposals comprised by the 'VAT in the Digital Age' package, the proposal on faster and safer relief of excess withholding taxes (FASTER), the proposal to prevent the misuse of shell entities for tax purposes (Unshell), proposals for a Council Directive establishing a Head Office Tax system for micro, small and medium sized enterprises (HOT), a Council Directive on transfer pricing (TP Directive) and a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), the update to the EU list of non-cooperative jurisdictions for tax purposes, as well as the revision of the Energy Taxation Directive.

More detailed information on individual dossiers can be found in the report.

CJ judgment on the interpretation of income tax exemption in contracts financed by the EU under IPA framework agreements with third countries (*LM v Ministarstvo financija Republike Hrvatske*, C-682/22)

On 23 November 2023, the CJ delivered its judgment in the case *LM v Ministarstvo financija Republike Hrvatske, Samostalni sector za drugostupanjski upravni postupak* (Case C-682/22). The case addresses the question of whether Article 26(2)(c) of an assistance agreement

entered into between Albania and the Commission of the European Communities under the instrument for pre-accession assistance (IPA) ('the framework agreement') precludes legislation of a Member State that provides for the taxation of income received by a tax resident of that Member State who is not an official or a member of staff of the EU for tasks carried out in Albania under the framework agreement. The CJ concluded that this is not the case.

Albania benefits from the IPA which helps (potential) candidate countries progress towards fully meeting the Copenhagen political and economic criteria and reaching the EU *acquis*. As part of the IPA, the EU organizes and finances projects in Albania. These projects may require the deployment of experts from other Member States inside Albania. Article 26(2)(c) of the framework agreement requires Albania to apply a tax exemption to the income that those experts receive as remuneration for working on those projects.

The applicant in this case is a Croatian national who was appointed as an expert in a project which was financed by the EU in the framework of the 'IPA 2013' national program. The project required the applicant to live in Albania whilst carrying out the requested tasks. Under Croatian law, the remuneration the applicant received for the activities in Albania was subject to Croatian income tax. The applicant argued that Article 26(2)(c) of the framework agreement did not allow Croatia to levy this income tax.

In its judgment, the CJ stated that based on the wording of Article 26(2)(c) of the framework agreement, it is clear that the income tax exemption only relates to income tax payable in Albania. This means that income tax payable in a Member State does not fall within the scope of this provision. The Court further noted that this is also in line with the purpose behind the provision, which aims to prevent double taxation and ensure the independence of tax residents of Member States who are appointed under the IPA. Highlighting that the framework agreement does not aim to limit Member States' powers of direct taxation, the CJ concluded that the relevant provision does not preclude Croatia from levying the tax on the expert's income.

CJ judgment on the application of the Merger Directive in purely internal situations (*GE Infrastructure v Hungary*, C-318/22)

On 16 November 2023, the CJ delivered its judgment in the case *GE Infrastructure v Hungary* (Case 318/22). The case addresses the question of whether Article 8(2) of Directive 2009/133 must be interpreted as meaning that it allows the application of the system of fiscal neutrality in the case of a partial division to be made subject to conditions relating the reduction in shareholding or share capital of the transferring company.

On 30 September 2009, GE Infrastructure acquired a 100% stake in GE Hungary. On 7 July 2016, GE Hungary created the company GE Aviation, in which it owned a 100% holding. As part of a reorganization, GE Hungary's renewable energies and aviation businesses were spun off and merged into GE Aviation. As part of the transaction, GE Infrastructure acquired a stake in GE Aviation corresponding to the value of the business lines spun off. The tax authorities took the view that the transaction had given rise to taxable income for GE Infrastructure in that it could not benefit from a tax deferral from the national tax law on the grounds that the partial division had not given rise to a reduction in share capital of GE Hungary and that GE Infrastructure continued to hold 100% of that company. The referring court decided to stay the proceedings and refer questions for a preliminary ruling from the CJ.

Considering the case concerns a purely domestic situation, the CJ first determined whether it had jurisdiction to interpret a Directive in a case where it did not directly govern the situation at issue. The Court first noted that it is open to the national legislature to follow the solutions adopted by EU law when dealing with purely domestic situations. It then stated that it is apparent from the reference for a preliminary ruling that the Hungarian legislature did not distinguish between the tax treatment of partial divisions in a purely domestic context and the tax treatment of such transactions where they involve companies from different Member States. From this, the CJ considered that when the national legislature chooses to apply the same treatment to situations governed by the Merger Directive and to purely domestic situations, the Court has jurisdiction to interpret the provisions of that Directive in cases of a purely domestic nature.

Secondly the CJ decided on whether Article 8(2) of the Merger Directive must be interpreted as meaning that it

allows the application of fiscal neutrality in the case of partial division to be made subject to conditions relating to the reduction of shareholding or share capital of the transferring company. The CJ stated that in order to benefit from the benefit of fiscal neutrality laid down in Article 8(2) of the Directive it was required not to attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value of the securities held in the capital of the transferring company. Moreover, the CJ emphasized that linking the fiscal neutrality system to a reduction in the shareholder's percentage holding could undermine its application in cases of single-shareholder ownership, which is not excluded by the Directive.

Based on the foregoing, the CJ decided that the benefit of fiscal neutrality cannot be made subject to a condition not provided for by that Directive. It therefore ruled that Article 8(2) of Directive 2009/133 must be interpreted as precluding national legislation which makes the benefit of that provision subject to conditions relating to a reduction in the shareholding of the shareholder of the transferring company in that company or to a reduction in the share capital of that company, which are not provided for by that Directive.

CJ judgment on the compatibility of Portuguese tax rules for transfer of shares in foreign micro- and small enterprises with the free movement of capital (*NO v Portugal*, C-472/22)

On 16 November 2023, the CJ delivered its judgment in the case *NO v Portugal* (Case C-472-22). The case deals with the issue of whether an administrative practice under which taxpayers with shareholdings in foreign companies are refused the tax advantage provided for in national law is in line with the free movement of capital.

The case involves a French national, NO, who established tax residence in Portugal in 2019. In the same year, he sold 29,222 shares (47.5% of CLB's capital) to Prince Vert SAS. NO also held 86% of Prince Vert's capital. In his 2019 IRS return, NO declared the share transfer and resulting capital gain. The tax authority issued an assessment to NO without applying the 50% reduction foreseen in Article 43(3) of the Portuguese personal income tax code (IRS Code) for shares in non-listed micro- and small enterprises (MSMEs). Against that assessment, NO brought an action to the referring court. The referring court questioned the compatibility of an administrative practice denying taxpayers with shareholdings in foreign companies the tax advantage with EU law. It highlighted potential unjustified restrictions on the freedom of establishment (Article 49 TFEU) and free movement of capital (Article 63 TFEU). Furthermore, the referring court observed that the transfer could constitute an artificial transaction and questioned whether a taxpayer may rely on EU law to obtain a tax advantage.

In its judgment, the CJ first evaluated which freedom was applicable based on the purpose of the legislation concerned. Since the legislation in question provides a tax advantage for transferring shares in Portuguese MSMEs universally, regardless of holding size or influence, the CJ considered that the case involved the free movement of capital rather than the freedom of establishment.

The CJ continued to evaluate whether the distinction in treatment made by the Portuguese law is linked to situations that are objectively comparable. The CJ found that the difference in treatment resulting from such legislation is not based on an objective difference in situation.

Next the CJ examined whether that restriction on free movement may be justified by an overriding reason in the public interest. Considering that pursuant to the referring court - the tax practice at issue is intended to support national undertakings and to stimulate economic activity in Portugal - the CJ noted that an objective of a purely economic nature cannot constitute an overriding reason in the public interest justifying a restriction of a fundamental freedom guaranteed by the TFEU Treaty. Even if such an objective were deemed acceptable, the Court considered that there was no evidence to suggest that applying the tax advantage to capital gains from shares in MSMEs operating outside Portugal would hinder achieving it.

Consequently, the CJ concluded that Article 63 TFEU must be interpreted as precluding a tax practice of a Member State in the field of personal income tax under which a tax advantage is confined solely to transfers of shares in companies established in that Member State, to the exclusion of transfers of shares in companies established in other Member States.

Regarding the observation of the referring court regarding potential abuse, the CJ held that the questions of the referring court were inadmissible because of insufficient substantiation thereof.

AG Sánchez-Bordona's Opinion on whether full income tax assessment for German employees resident in Switzerland is in line with EU law (*AB v Finanzamt Köln-Süd*, C-627/22)

On 16 November 2023, AG Campos Sánchez-Bordona delivered his Opinion in the case *AB v Finanzamt Köln-Süd* (Case C-627/22). The case addresses the question of whether the Agreement on the Free Movement of Persons (AFMP) between Switzerland and the EU precludes legislation of a Member State under which employees resident in Germany may avail themselves of the voluntary income tax assessment mechanism (which provides the opportunity to receive a tax refund, deduct expenses and credit German wage tax withheld) whereas that right is denied to German employees resident in Switzerland. The AG opined that the AFMP precludes this legislation.

Under German law, natural persons who are not a resident in Germany are partially liable to income tax. If such person has earnings from an activity inside Germany as an employed person, then income tax is withheld at the source at the moment wages are paid. Once the wage tax has been withheld, the income tax on those earnings is considered paid. This is not the case if the taxpayer requests a voluntary assessment, in which case, by filing an income tax return it is possible to claim a deduction of business expenses necessarily incurred in obtaining the income earned from employment. However, under German law, only employees who are EU/EEA nationals and reside in Germany or an EU/EEA State can request this voluntary assessment.

AB is a German national who resides in Switzerland and works in Germany. AB was partially liable to income tax in Germany because of his employment in Germany and rental income from his two properties situated in Germany. AB requested a voluntary assessment to include tax-deductible business expenses connected with his activity as an employed person in Germany. The German Tax Office issued notices of assessment to tax AB's rental income, but not his income from employment. This latter item of income was not included, because AB was not a resident of an EU/EEA State. As a consequence of these assessments, AB lodged a complaint based on the AFMP.

The AFMP is a treaty entered into between Switzerland and the EU which lifts restrictions on EU and Swiss citizens to work and live in the territories of the contracting parties. Amongst other things, the AFMP forbids discrimination on grounds of nationality. It is important to note that the CJ ruled that as Switzerland has not joined the internal market, the interpretation of EU law concerning the internal market cannot automatically be applied to the interpretation of the AFMP.

In his Opinion, AG Campos Sánchez-Bordona first considers the personal scope of the AFMP to determine whether a German employee who resides in Switzerland may rely on it against Germany. Even though the factor warranting application of the AFMP is residence in another State party to the agreement and not nationality, the AG sees no reason not to apply the AFMP in this situation. The AG opines that the principle of equal treatment goes beyond discrimination on grounds of nationality and extends to differences in treatment arising from place of residence of employed persons. The case law regarding the AFMP should evolve this way, the AG argues. The AG believes the situation in which EU/EEA or German residents receive wages in Germany is comparable to AB's situation. The AG also refers to the *Schumacker* case.

The AG considers the key point in this case to be the fact that employed persons resident in Switzerland who receive earnings from employment in Germany in respect of which they are partially liable, cannot avail themselves of the voluntary assessment mechanism. Not being able to request a voluntary assessment results in the taxpayer not being able to file an income tax return in which a deduction can be claimed for business expenses necessarily incurred in obtaining the income earned from employment. This is a discriminatory and disadvantageous tax treatment under the AFMD, according to the AG.

Furthermore, he considers that this discrimination cannot be justified on the need to ensure the imposition, payment, and effective recovery of income tax in Germany, nor on the need to forestall tax evasion.

Despite the fact that German law also offers an alternative procedure for taxpayers such as AB to have their business expenses factored into the calculation of the tax withheld at source, the AG concluded that there is still no justification for the found discrimination. This is because, in the AG's view, the possibility of opting for another tax regime does not exclude the discriminatory effects of a tax regime that violates EU law and the alternative procedure is subject to time limits and conditions and, therefore, is not a less restrictive alternative.

Finally, the AG gave his Opinion on the AFMP's standstill provision which stipulates that 'the Contracting parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by this Agreement' (Article 13 AFMP). Based on such provision, the German Government alleged that the rules in questions could remain in force as they entailed restrictive measures that were already existent at the time when the AFMP was concluded. Differently, the AG opines that although the standstill provision only refers to new restrictions, it does not protect already existing restrictions which are required to be eliminated. Therefore, he concludes that the standstill provision does not protect the German legislation.

Based on the above, the AG concludes that the AFMP precludes the German legislation in question.

AG Kokott's Opinion on whether personal income tax exemption for local workers in the construction industry is compatible with EU law (*Nord Vest Pro Sani Pro SRL*, C-387/22)

On 9 November 2023, AG Kokott delivered her Opinion in the case *Nord Vest Pro Sani Pro SRL v Administrația Județeană a Finanțelor Publice Satu Mare, Direcția Generală Regională a Finanțelor Publice Cluj-Napoca* (Case C-387/22). The case addresses the question of whether the free movement of workers precludes national legislation which, in order to reduce outward migration of workers from the domestic construction industry, grants construction workers who are taxable in the national territory and have not been posted abroad, a special exemption from income tax. In her Opinion, the AG believes that such legislation is compatible with EU law.

Romania has a lower wage level than the EU average which results in workers migrating to other Member States. This has led to a shortage of workers in the construction industry. Because an increase in the minimum wage did not remedy this shortage, a special tax exemption was introduced. Under Romanian law, an income and wage tax exemption applies to natural persons whose employers achieve at least 80% of their total turnover from activities specific to the construction sector. This exemption only applies to employees who work inside Romania, but not to workers who are on secondment in Romania.

The applicant in this case is a company who is active in the construction industry and employs workers outside of Romania. Therefore, this company cannot apply the wage tax exemption. The company argues that this is discriminatory.

The AG began her Opinion by establishing that the tax exemption can only be measured against the fundamental freedoms. The Services Directive does not apply to the field of taxation and there is no State aid, because the exemption does not benefit the companies and only indirectly increases the minimum wage specific to the construction sector. Therefore, there is no selective advantage. There is also no disadvantage to the company and, at most, such potential disadvantage could exist for its workers posted to other Member States. Therefore, pursuant to the AG's Opinion, the only freedom that could be restricted is the free movement of workers (Article 45 TFEU).

The AG started her test by establishing that *prima facie* the difference in treatment of the cross-border situation can render less attractive the exercise of the free movement of workers through work carried out abroad. However, she notes that such a difference in treatment is only incompatible with the fundamental freedoms if it relates to objectively comparable situations. This objective comparability is measured with regard to the objective pursued by the national measure which, in this case, is increase the level of wages for the national construction sector. The AG considers that, on the one hand, workers posted to other Member States are not comparable to workers pursuing their activity within Romania. On the other hand, she considers that comparability can be established because workers carry out the same activity but are subject to different taxation. Acknowledging the vagueness of the comparability criterion, the AG assumed comparability and looked at possible justifications for the difference in treatment.

The AG opines that the maintenance of employment in the construction sector and the need of combating risks such as the loss of this sector due to a lack of workers are grounds of justification for the measure. The AG also argues that it is legitimate to regard the mere guarantee of sufficient workers on national territory by means of an indirect minimum wage as an overriding reason in the public interest. Furthermore, the AG considers that the measure is also appropriate to achieve the objective it pursues and does not go beyond what is necessary. In her view, the activity abroad does not become less attractive to an employee who is liable to tax in Romania but, differently, it is the activity carried out on national territory which is the one which actually becomes more attractive.

Finally, the AG finds the measure proportionate because it is limited in amount and time.

Based on the above, the AG has concluded that the free movement of workers does not preclude the Romanian tax exemption in question.

ECOFIN endorses progress made by the OECD's IF in respect of Pillar One and Two

On 9 November 2023, during the ECOFIN meeting, EU Member States endorsed a Council declaration (with a proposed statement from the EU Commission) regarding Pillar One and Pillar Two. This endorsement serves to reaffirm the EU political backing to the OECD's Two Pillar initiative. Furthermore, the statements provided confirm that Pillar Two's safe harbour rules and administrative guidance are in line with the EU Minimum Tax Directive.

Regarding Pillar One, the introductory notes from the Presidency provide a brief overview of the progress achieved so far in relation to the OECD Two Pillar solution and stress the critical importance of its implementation. In particular, the Council statement expresses appreciation for the progress made by the Inclusive Framework (IF) in finalizing the Amount A Multilateral Convention (MLC) and acknowledges advancements in Amount B.

With respect to Pillar Two, both the Council declaration asserts compatibility between IF-endorsed administrative guidance and the EU Directive. Furthermore, it urges swift transposition of the EU Minimum Tax Directive by Member States, pledging ongoing support. Finally, the Council statement highlights Member States' intent to align national laws with the OECD guidance to prevent divergences and inconsistencies in interpretation.

In addition to the Council statement, a similar draft statement by the EU Commission is included as Annex II of the document.

DAC8 adopted and published in Official Journal of the EU

On 17 October 2023, the Council of the European Union adopted by unanimity the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 8). This Directive, introduced an EU standardized tax information reporting and exchange framework for crypto-assets and e-money, as well as other rules to expand administrative cooperation between Member States' tax administrations (e.g., extends the scope of AEoI to include information from non-custodial dividends and advance cross-border tax rulings for high-net-worth individuals, expands the information to be reported under CRS/DAC2 and includes other adjustments, incorporates the exemption for lawyers bound by the legal professional privilege from notifying other intermediaries of their DAC6 reporting obligations, etc.).

The formal adoption by the Council is the final step in DAC8's legislative process. The Directive was published in the Official Journal on 24 October 2023 and became effective on 13 November 2023. EU Member States are required to transpose the main rules of DAC8 into national law by 31 December 2025, and the new provisions will apply as of 1 January 2026. However, DAC8 provisions related to identification services should be transposed into national law by 1 January 2024 and apply as of 1 January 2025, whereas the provisions related to TIN validation should be transposed into national law by 31 December 2027 and apply as of 1 January 2028.

CJ judgment on whether a different valuation method applicable to property located in a third country is precluded by the free movement of capital (*BA v Finanzamt X*, C-670/21)

On 12 October 2023, the CJ delivered its judgment in the case *BA v Finanzamt X* (Case C-670/21). The case addresses the question of whether the free movement of capital precludes legislation of a Member State which, for the purpose of calculating inheritance tax, values immovable property which is let for residential purposes and is located in another non-EEA state at its full market value, whereas if the immovable property were located in an EU/EEA Member State it would be valued at 90% of its market value. The CJ concluded that this is the case.

Germany levies inheritance tax if the deceased is a resident of Germany at the date of their death. The taxable acquisition includes the enrichment of the acquirer. To calculate the enrichment, a valuation must be carried out. In general, the full market value of the property is taken as a basis. However, pursuant to German legislation, real estate property located in Germany or in an EU/EEA Member State must be valued at 90% of its value when it is leased for residential use and is not part of business

assets. Such reduced market valuation does not apply to properties located in third countries.

The applicant in this case is a German resident whose father passed away. His father was also a German resident. The applicant inherited a 50% share in an immovable property located in Canada. This immovable property was leased for residential use and was not part of business assets. However, because this asset is located outside of the EU/EEA, 100% of the value is considered for inheritance tax purposes. The applicant argued that this is a violation of the freedom of capital.

The CJ started its analysis by reiterating that the tax treatment of successions falls within the TFEU provisions on the movement of capital, except if the constituent elements are confined within a single Member State. Since the immovable property is located in Canada, this case cannot be regarded as a purely domestic situation. Pursuant to the Court, the difference in valuation results in a heavier tax burden on immovable property situated in a non-EU/EEA state, which reduces the value of the inheritance. This could discourage natural persons in Germany from investing in an immovable property let for residential purposes in a non-EU/EEA state or from keeping that property. Therefore, in the Court's view, the difference in valuation is a restriction on the movement of capital. The CJ considers the grandfather clause (Article 64 TFEU) not applicable in this case, because the tax advantage was introduced for the first time into the German legal system in 2008.

The CJ saw no objective difference to justify the unequal tax treatment based on the purpose of the legislation (i.e., to reduce the tax burden on immovable property let for residential purposes which may compel heirs to sell such immovable property because of the inheritance tax). The CJ also distinguished the present case (in which the tax advantage applies to immovable property let for residential purposes in general) from that decided in *Q* (C-133/13), in which the tax advantage was intended to preserve the integrity of certain rural estates forming part of the national cultural and historical heritage which was very specific. Therefore, the CJ did not consider such precedent relevant.

The CJ accepted that an objective relating to social policy such as the promotion of affordable housing may be a justification for the discrimination. However, the CJ noted that the tax benefit (i.e. reducedof tax base) applies in general and does not take into account where the immovable property is located (e.g., rural or urban area) or whether the property is basic or luxurious. Furthermore, it considers that as the benefit does not require the heir to retain the property after having received it, the heir could also sell the property or use it as a second home. Therefore, the Court found that the German measure is not suitable for securing its objective and cannot be justified on this basis. Regarding the potential justification of the measure on the need to guarantee the effectiveness of fiscal supervision, the Court rejected such possibility based on the exchange of information provision included under the tax treaty concluded between Canada and Germany, which allows the latter to request the information necessary to verify the conditions for the tax benefit. Therefore, the CJ concluded that the free movement of capital precludes the German legislation in question.

CJ judgment on the compatibility of Portuguese taxation of interest from bonds and debt instruments with the free movement of capital (*FL v Portugal*, C-312/22)

On 12 October 2023, the CJ delivered its judgment in the case *FL v Portugal* (Case C-312/22). The case deals with the issue of whether the more burdensome taxation of interest income received from third states' entities vis-à-vis interest received from national entities is in line with the free movement of capital.

The case involves *FL* who received interest income from bonds and debt instruments from a Swiss bank in 2005. The interest income was aggregated with FL's other income and taxed at a progressive rate of 40%, whereas interest income from a Portuguese entity would have been taxed at a definitive rate of 20%. Arguing that such a differential treatment was precluded under the freedom of capital, the freedom to provide services and the Agreement between the European Community and the Swiss confederation, FL lodged a complaint, which ultimately led to a referral to the CJ for a preliminary ruling.

The referring court essentially asked whether legislation of a Member State, which imposes a progressive tax rate of up to 40% on interest income from bonds and debt instruments issued by entities outside the Member State, is in violation of Article 56 EC and Article 2(4) of the aforementioned.

The Court first decided to assess the case at hand under the free movement of capital, as the freedom to provide

services is deemed to be only secondarily affected. In such context, the CJ found a difference in treatment to exist since the national legislation at issue subjects interest income from bonds and debt instruments issued in Portugal to a definitive tax rate of 20%, whereas interest from bonds and debt instruments issued in another Member State or in a third State is aggregated and subject to a progressive rate of tax of up to 40%. In the Court's view, it is therefore apparent that the interest income from a State other than Portugal is placed at disadvantage by comparison with interest income from Portugal itself. The Court thus found that the Portuguese legislation constituted a restriction on the free movement of capital.

Following its conclusion that the differential treatment found in the case concerns objectively comparable situations, the CJ then assessed whether that difference in treatment could be justified by an overriding reason in the public interest. Noting that neither the referring court nor the Portuguese government had relied on the existence of such justification, the CJ concluded that the Portuguese legislation at issue is incompatible with Article 56 EC.

Furthermore, the CJ ruled on Article 2(4) of the Agreement, which stipulates that if the beneficial owner voluntarily discloses or declares interest income from a Swiss paying agent to their Member State of residence, such income will be taxed in that State at the same rate as similar domestic income. In this regard, the CJ concluded that since the information set out in the request for preliminary ruling does not confirm the fulfilment of all conditions for applying Article 2(4), the referring court must conduct the necessary verifications. In light of this, the CJ ruled that Article 2(4) of the Agreement, along with Article 1(2), prohibits a Member State's legislation from imposing a progressive tax rate of up to 40% on interest income received from a Swiss paying agent by taxpayers who have opted for voluntary disclosure, compared to a lower fixed rate of 20% for income paid by a resident paying agent.

VAT

CJ judgment on ability to uphold national VAT legislation that is contrary to EU law (*Osteopathie Van Hauwermeiren*, C-355/22)

On 5 October 2023, the CJ delivered its judgment in the case *Osteopathie Van Hauwermeiren* (C-355/22) which concerns the question of whether national courts can use a national provision to maintain effects of a law that conflicts with Council Directive 2006/112/EC on value added tax. In the case *Belgisch Syndicaat van Chiropraxie e.a.* (C-597/17), the CJ ruled that Belgium was acting contrary to EU law by reserving the VAT exemption for medical services to services provided by practitioners of a regulated medical or paramedical profession. As a consequence of this ruling, the Belgian Constitutional Court overturned the Belgian provision that non-regulated practitioners that provide medical care of a similar quality as regulated practitioners could not use this exemption. However, the Belgian Constitutional Court used its powers to uphold the effects of the provision in question, whereby the VAT exemption was denied for taxable events that occurred before 1 October 2019. According to the Belgian Constitutional Court, it was practically impossible to fix the consequences of the CJ's judgment in the case *Belgisch Syndicaat van Chiropraxie e.a.* case for transactions that took place before this date. The reason for this was that a large number of people are involved and that many claimants would not be availed of an accurate accounting system to identify the services and their value.

In the case at hand, Osteopathie Van Hauwermeiren disagreed with this approach of the Belgian Constitutional Court and asked for a refund of the VAT that was incorrectly levied on its sales of medical services. The CJ considered that it may only, and merely exceptionally and for compelling reasons of legal certainty, grant a provisional suspension of the effect of EU law on the conflicting national law. National courts are bound by a judgment rendered by the CJ under the procedure of Article 267 TFEU. The CJ also clarified again that an ordinary national court may not apply the considerations of a national constitutional court that refuses to give effect to a preliminary ruling of the CJ.

The CJ considered further that the administrative and practical difficulties in identifying those eligible for refunds cannot in themselves prove the existence of a risk of serious distortions and compelling considerations of legal certainty. The CJ therefore ruled that a national court may not give effect to the national provision that was declared incompatible by the CJ.

CJ judgment on the VAT aspects of a welcome gift (*Deco Proteste – Editores Lda*, C-505/22)

On 5 October 2023, the CJ delivered its judgment in the case *Deco Proteste – Editores Lda* (C-505/22). The case concerns the question of whether an introductory gift for

taking out a magazine subscription falls within the concept of ‘supply of goods for consideration’ for VAT purposes.

Deco Proteste publishes magazines and other information material on consumer protection. When a consumer takes out a subscription, they receive a welcome gift with a unit value of less than EUR 50 (e.g. a tablet or smartphone). During an audit, the Portuguese tax authorities found that the invoices issued in relation to new subscriptions did not contain any reference to the welcome gifts. According to the Portuguese tax authorities, the supply of these welcome gifts for free were to subject to VAT. The purchase price formed the taxable amount subject to 23% Portuguese VAT. The Portuguese tax authorities therefore imposed a VAT assessment on Deco for around EUR 3.5 million.

The CJ ruled in its judgment that the welcome gift, offered when subscribing (again) to the magazines, is an ancillary service to the magazine subscription. According to CJ, both activities form one whole, with the subscription being the main performance and the gift being the ancillary performance whose sole purpose is to encourage the conclusion of a subscription. The CJ further ruled that the provision of such welcome gifts falls within the concept of ‘supply of goods for consideration’, consisting of the supply of the magazines, and does not constitute a supply of goods free of charge. This ruling of the CJ would imply that the VAT assessment should be annulled.

CJ judgment on whether director fees are subject to VAT (*TP*, Case C-288/22)

On 21 December 2023 the Court of Justice of the European Union (CJEU) delivered its final judgment in the TP Case (C-288/22) on the question whether a member of the board of a Luxembourg SA (Director) should have invoiced his director fees with VAT.

The CJEU considers that even though in the case at hand the Director is performing an economic activity, the independency as required by the VAT Directive is missing as the Director does not bear the personal economic risk associated with his decisions and activity. As a consequence, the Director fees are not subject to VAT.

More details will follow in our next edition.

Customs Duties, Excises and other Indirect Taxes

CJ judgment on national legislation providing for an administrative fine corresponding to 50% of the shortfall in customs duties (*J.P. Mali*, C-653/22)

On 23 November 2023, the CJ delivered its judgment in the case of *J.P. Mali* on the validity of national legislation providing for an administrative fine of 50% of the shortfall in customs duties resulting from the failure to comply with customs legislation.

In 2017 and 2018, J.P. Mali Kft., a company established in Hungary, released bicycles and bicycle parts for free circulation (‘importation’) in the customs territory of the EU. The products were purchased from companies established in Taiwan and the customs representative of J.P. Mali submitted import declarations stating that these products also originated in Taiwan. However, the customs authorities found that the products actually originated in China, resulting in the post-release levy of anti-dumping duties for an amount of approximately EUR 70,000. In addition, in accordance with national legislation, an administrative fine of 50% of the shortfall in customs duties (approximately EUR 35,000) was imposed on J.P. Mali.

J.P. Mali disputed this and argued that an administrative fine of 50% of the shortfall in customs duties was disproportionate to the seriousness of the offence, taking into consideration the fact that importers only have limited information on the production and origin of the products and therefore have to rely on the information provided by the exporters. J.P. Mail was of the view that the Hungarian legislation does not take this into account as it should.

Article 42(1) of Regulation 952/2013 (‘UCC’) requires EU Member States to provide for effective, proportionate and dissuasive penalties in cases where importers fail to comply with customs legislation, irrespective of whether the non-compliance was intentional, negligent or absent of any wrongful conduct on the part of the economic operator concerned. EU Member States are empowered to choose the penalties which they consider to be appropriate, provided that they are proportionate and do not go beyond what is necessary in order to attain the objectives legitimately pursued by the customs legislation.

The CJ considered that an administrative fine of 50% of the shortfall in customs duties is likely to encourage economic operators to take all necessary measures to ensure that the information they provide in customs declarations is correct and complete, thus ensuring that the penalties are effective and dissuasive.

In addition, the CJ considered that the national legislation resulted in administrative fines which are directly proportionate to the amount of the shortfall in customs duties caused by the infringement. When the shortfall is low, the amount of the administrative fine is reduced. Furthermore, the CJ does not consider the rate of 50% to appear excessive in light of the importance of the objectives of EU customs legislation.

Lastly, the national legislation allows for the conduct of the economic operator to be taken into account. For example, if the shortfall in customs duties is due to fraudulent activities, the rate of the administrative fine is increased to 200%. If the economic operator acts in good faith and requests an amendment of the customs declaration by supplying the correct information, the rate of the administrative fine is reduced to 25%. The national legislation thus distinguishes between cases where the economic operator has acted in good faith and cases where he has not.

In conclusion, the CJ ruled that Article 42(1) UCC does not preclude national legislation which provides for administrative fines equal to 50% of the shortfall in customs duties caused by the supply of incorrect information in a customs declaration, and which are imposed notwithstanding the good faith and precautions taken by the economic operator concerned.

Get in contact

For more information, please reach out to Dennis Weber or Harmen Zeven via the contact details below. The contributors to this edition of the EU Tax Alert were Juan Manuel Vázquez, Liselot Bakker, Daan Both, Mart van Genuchten, Gino Sparidis, Bram Middelburg, Pierre-Antoine Klethi, Chloe Prebet, Bruce van Schaik, Emma van Doornik and Karin Finné.

Dennis Weber
Of counsel
T +31 20 578 57 50
E dennis.weber@loyensloeff.com

Harmen Zeven
Partner / Tax adviser
T +31 10 224 66 55
E harmen.zeven@loyensloeff.com

The EU Tax Alert is an e-mail newsletter to inform you of recent developments in the EU that are of interest for tax professionals. It includes recent case law of the European Court of Justice, (proposed) direct tax and VAT legislation, customs, state aid, developments in the Netherlands, Belgium and Luxembourg and more.

To subscribe (free of charge) see: **eutaxalert.com**

Although this publication has been compiled with great care, Loyens & Loeff N.V. and all other entities, partnerships, persons and practices trading under the name 'Loyens & Loeff', cannot accept any liability for the consequences of making use of the information contained herein. The information provided is intended as general information and cannot be regarded as advice. Please contact us if you wish to receive advice on this specific topic that is tailored to your situation.

LOYENS LOEFF

LOYENSLOEFF.COM

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, London, Luxembourg, New York, Paris, Rotterdam, Tokyo, Zurich