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EU Tax Alert

Recent developments for tax specialists

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Highlights in this edition

- AG Emiliou's Opinion on whether Dutch interest limitation rules are compatible with the freedom of establishment *(X BV v Staatssecretaris van Financiën,* C-585/22). *Read more >*

- AG Ćapeta's Opinion on whether electric vehicle charging transactions constitute a supply of goods for VAT purposes *(Digital Charging Solutions GmbH,* C 60/23). *Read more >*

EU Tax Alert

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).

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1. Highlights in this edition

AG Emiliou's Opinion on whether Dutch interest limitation rules are compatible with the freedom of establishment *(X BV v Staatssecretaris van Financiën,* C-585/22)

On 14 March 2024, AG Emiliou delivered his Opinion in the case *X BV v. Staatssecretaris van Financiën* (C-585/22). The case concerns the question of whether the Dutch interest deduction limitation rule foreseen by Article 10a of the Dutch Corporate Income Tax Act 1969 (CITA) constitutes a restriction of the freedom of establishment. In the view of the AG, Article 10a CITA is compatible with such freedom.

This case involves a Dutch company named X BV, which acquired the shares of another company named F NV from one of its shareholders. The purchase price of the latter company was financed through a loan granted by C NV, a Belgian-based group financing entity held by Company A, the sole shareholder of X BV. As a consequence of such loan, X BV deducted the interest paid in its corporate income tax return for 2007. However, the Dutch tax inspector considered that the interest payments were not deductible on the basis of Article 10a of the CITA. X BV argued that the inspector's refusal restricted its freedom of establishment.

The AG first addressed the question of which of the EU fundamental freedoms applies to the case at hand. Citing established case law of the CJ, the AG stated that national rules concerning intra-group relationships primarily affect the freedom of establishment. He then considered that such freedom applies to the Dutch provision, which only covers intra-group loans. Accordingly, he examined the Dutch law at issue solely in the light of Article 49 TFEU.

The AG then examined whether Article 10a CITA does indeed entail a restriction to the freedom of establishment, answering this first question in the affirmative. Acknowledging the absence of an express legal distinction between purely domestic and cross-border situations, the AG found that Article 10a CITA may *de facto* disadvantage cross-border situations. To arrive to such conclusion, he particularly considered that the criteria used by such provision to allow for the deduction of interest are virtually always fulfilled when the internal bank has its seat in the Netherlands and not necessarily when such bank has its seat in another Member State. Therefore, he found that such criteria is liable to affect cross-border situations more than purely internal ones.

The AG then proceeded with the question of whether the restriction on the freedom of establishment entailed by Article 10a CITA is: (i) justified by an overriding reason in the public interest, (ii) appropriate to ensuring the attainment of the legitimate objective which it pursues; and (ii) does not go beyond what is necessary in order for it to be attained. In relation to whether the restriction is justified, the AG found that the measure is indeed justified by an overriding reason in the public interest because the Dutch provision aims purely to combat abusive tax avoidance. The AG noted that the Dutch provision targets wholly artificial arrangements intended to erode the Dutch tax base.

Concerning whether the restriction is appropriate, the AG replied in the affirmative, because he considered that the case meet the two cumulative criteria required in this regard (i.e., the measure must be suitable for the achievement of the objective pursued and genuinely reflect a concern to it and be implemented in a consistent and systematic manner).

Finally, concerning whether the restriction is proportionate, the AG found that the Dutch provision does not go beyond what is necessary to achieve its legitimate objective. This is because its application is limited to 'wholly artificial arrangements' and the consequences resulting from identifying a transaction as such (i.e., the complete denial of interest deduction) are not excessive. In this regard, the AG took the view that intra-group loans, put in place without any valid commercial and/or economic justification for the sole (or main) purpose of creating a deductible debt in the seat of the borrowing company constitute 'wholly artificial arrangements', whether or not they are carried out on an arm's length basis. On such basis, the AG urged the CJ to revisit the approach it took in the judgment in Lexel (C-484/19).

AG Ćapeta's Opinion on whether electric vehicle charging transactions constitute a supply of goods for VAT purposes *(Digital Charging Solutions GmbH,* C 60/23*)*

On 25 March 2024, the Opinion of AG Ćapeta was published in the case *Digital Charging Solutions GmbH* (C 60/23). Pursuant to the AG's Opinion, the provision of a card and an authentication app with which users can charge their electric vehicles should be considered a supply of goods for VAT purposes in accordance with the commissionaire agent model.

Digital Charging Solutions (DCS) is an e-mobility provider based in Germany that provides drivers of electronic vehicles (EV-drivers) in Sweden access to a network of charging points. The charging points are operated by Charge-Point Operators (CPOs). DCS provides the drivers with a charging card and a digital application for authentication to enable them to charge their vehicles at the charging points.

When the card or application is used, the charging session is registered with a CPO. The CPO then invoices DCS for that charging session. Based on the invoices received from the CPOs, DCS bills the card/app users: (1) for the quantity of electricity supplied on a monthly basis, and (2) for access to the network and adjacent services. The price for the electricity supplied varies depending on the quantity charged. A fixed fee is charged for access and the service provided regardless of whether the user actually purchased electricity during the relevant period.

The EV-driver always initiates the buying process. The EV-driver decides from which charging point to order the electricity and what quantity of electricity to be transferred. Further, the supply of electricity occurs in the EV-driver's vehicle. According to AG Ćapeta, except for the risk of not being paid by the EV-driver, DCS does not take any own entrepreneurial risks in that supply of electricity because the electricity is all already sold and delivered when DCS invoices the user.

The Swedish tax authorities argued that DCS was liable for VAT in Sweden for the network access and for the charging sessions. DCS argued that it was only liable for VAT in Sweden in relation to the charging sessions.

The AG argued that the supply of the electricity and the supply of network access are distinct and independent transactions for VAT purposes. In our view, the treatment of the supply of network access as a separate service, implies that DCS should not be liable for VAT in Sweden for the network access.

One possible way to characterize the relationship between DCS and the card/app user is that of a supply of services governing the granting of credit. This qualification would follow from the Auto Lease Holland (C 185/01) line of case law and would imply that the service of DCS is not subject to VAT in Sweden. However, the AG does not support this line of reasoning.

The AG opined that DCS should be considered to act as a commissionaire / undisclosed agent in the electricity supplies and, consequently, deemed to purchase the electricity from the CPO and deemed to on-sell that electricity to the EV-driver. To the extent to conditions for DCS to act as a commissionaire / as undisclosed agent are not fulfilled, the AG concluded that DCS should be considered as an actual purchaser and on-seller of the electricity (i.e., not based on the deemed supplier rules for commissionaires / undisclosed agents). The approach of the AG implies, in our view, that the supply of electricity in Sweden is a supply of goods subject to Swedish VAT.

2. Direct Taxation

EU Commission launches an open public consultation on the evaluation of the DAC

On 7 May 2022, the European Commission's Directorate-General for Taxation and Customs Union (DG TAXUD) launched an open public consultation in relation to the forthcoming evaluation of the Directive on Administrative Cooperation in the Field of Direct Taxation (DAC). The evaluation will focus on the functioning of the DAC in the period 2018-2022, covering only DAC1 to DAC6 (DAC7 and DAC8 are therefore excluded as they were not yet implemented in such period).

The evaluation will assess the extent to which the DAC (as amended) is: (i) effective in fulfilling expectations and meeting its objectives; (ii) efficient in terms of cost-effectiveness and proportionality of actual costs to benefits; (iii) relevant to current and emerging needs; (iv) coherent both internally (coherence between different DAC amendments) and externally (coherence between DAC and EU and international legal framework); and (v) has EU added value i.e. produces results beyond what would have been achieved by Member States acting alone. In line with the ongoing Commission's efforts to rationalize and simplify reporting requirements for companies and administrations, a special focus will be given to this aspect to inform potential proposals to reduce the reporting burden for the stakeholders involved.

It should be noted that an evaluation of the DAC was included in Annex II to the Commission's Work Programme for 2024 and is required by Article 27(1) of the same Directive. A first evaluation of the DAC was based on a study conducted in 2018 and published in 2019 and the forthcoming evaluation will be the second one. The feedback period to provide input on this evaluation runs from 7 May to 30 July 2024.

AG Collins' Opinion on whether Swedish withholding tax on foreign pension funds restricts the free movement of capital *(Keva, Landskapet Ålands pensionsfond, Kyrkans Centralfond v Skatteverket, C-39/23)*

On 21 March 2024, AG Collins delivered his Opinion in the case *Keva, Landskapet Ålands pensionsfond, Kyrkans Centralfond v Skatteverket* (C-39/23). The case concerns the question of whether the differential tax treatment between Swedish national pension funds and non-Swedish pension funds is compatible with the free movement of capital.

This case involves Keva, Landskapet Ålands pensionsfonds and Kyrkans Centralfond (the Finnish pension funds), which received dividend payments from Swedish companies. Sweden has so-called general pension funds (GP), which manage capital to protect the income-based pension system so as to balance any surpluses and deficits between pension contributions and pension payments in a given year, and to contribute to the long-term performance of the Swedish pension system. These GP funds are part of the Swedish government and are, therefore, exempt from taxation in Sweden. However, Sweden levies a withholding tax of 15% on dividends received by analogous foreign pension funds in Finland. Since these foreign pension funds are exempted from tax in Finland, they cannot offset the tax withheld in against any tax liability in Sweden. As a consequence of this situation, the Finnish pension funds requested a refund of the tax withheld in Sweden. They claimed to be analogous to Swedish GP funds and, therefore, that they were also entitled to an exemption from taxation in Sweden.

In his Opinion, AG Collins addressed the following three questions referred to the Court: (i) Does the fact that dividends paid by domestic companies to foreign public pension institutions are subject to withholding tax, whereas the corresponding dividends are not taxed if they accrue to the [source] State through its general pension funds, constitute such negative differential treatment that it entails a restriction of the free movement of capital prohibited, in principle, by Article 63 TFEU?; (ii) If Question (i) is answered in the affirmative, what are the criteria that should be taken into account when assessing whether a foreign public pension institution is in a situation which is objectively comparable to that of the [source] State and its general pension funds?; and (iii) Is the justification advanced for a potential restriction on the free movement of capital (i.e. administrative convenience of avoiding a circular flow of resources) capable of constituting overriding reasons of public interest?

Regarding the first question, AG Collins considered that the fact that dividends paid by domestic companies to foreign public pension institutions are subject to withholding tax, whereas the corresponding dividends are not taxed if they accrue to the source State through its general pension funds, constitutes a negative differential treatment that it entails, in principle, a restriction of the free movement of capital.

When it comes to the second question, the AG first clarified that determining whether persons are in objectively comparable circumstances does not require that the circumstances are identical. On such basis, he noted that the assertion that 'non-resident public pension funds do not aim at promoting the financial stability and durability of the Swedish social security system and that they therefore cannot be compared to the GP funds' is unduly restrictive and that such an approach would make it impossible to compare even identical pension funds across frontiers. Thus, he concludes that the criteria to be taken into account when assessing whether a foreign public pension institution is in a situation that is objectively comparable to that of the source State and its general pension funds must include their respective purposes, functions and core tasks, the regulatory frameworks in which they operate and the characteristics of their organizations.

Finally, concerning the third question, the AG pointed out that Sweden has not put forward any elements or factors other than administrative convenience to support the claim that the different tax treatment is justified by overriding reasons in the public interest. He then noted that administrative convenience is not an overriding reason in the public interest and, thus, it cannot justify a failure to comply with Treaty obligations. Furthermore, the AG found that the differential treatment found in the case at hand can neither be justified by the need to ensure a balanced allocation of the power to tax between States. In light of the above considerations, he concluded that the justifications advanced in the case do not, in principle, appear to constitute overriding reasons of public interest.

EU Parliament supports the HOT and TP proposals with amendments

On 10 April 2024, the plenary of the European Parliament adopted its opinion on the legislative proposal for a Council Directive establishing a 'Head Office Tax system' for micro, small and medium-sized enterprises and amending Directive 2011/16/EU (DAC) (HOT Proposal) and for a Council Directive on transfer pricing (TP Directive).

Regarding the HOT Proposal (for more information, please see the EUTA Highlight 2023), the Parliament supported the initiative, recommended various changes (see below) and suggested better clarifying its rationale. Recommendations include, *inter alia*, providing a clearer outlining of the benefits that HOT brings for SMEs, addressing financial and administrative hurdles, expanding the proposal's coverage to include companies operating through subsidiaries, reassessing exclusions of international shipping and SMEs covered by the tonnage tax regime, establishing cooperation between tax authorities, conducting a comprehensive information campaign for SMEs, and expediting the proposal's adoption for implementation by Member States by 31 December 2024 (so that the HOT would apply from 1 January 2025, instead of 1 January 2026).

In relation to the TP Directive, the Parliament also supported the proposal and suggested several changes. These include faster implementation by 2025 instead of 2026, alignment with international guidelines such as the OECD Transfer Pricing Guidelines, the use of standardized documentation across the EU to lower the compliance burden and a reference to the BEFIT proposal.

Regarding next steps, the EU Parliament's opinions will be forwarded to the Council for review, after which Member States will decide on the adoption of the final Directives.

Consultation on EU rules for resolving cross-border tax disputes

On 12 March 2024, the European Commission launched a consultation to gather input from various stakeholders on the effectiveness of Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the EU (DRM). This Directive entered into force on 1 July 2019 and provides a framework to help resolve cross-border tax disputes for businesses and citizens in relation to double taxation.

Pursuant to Article 21 of the DRM, the Commission is now reviewing the Directive's early implementation and is compiling a report on its effectiveness. Via this consultation, stakeholders were invited to provide input on whether the DRM improved the double taxation relief procedures in the EU compared to pre-existing mechanisms, as well as on the application of Article 3 of the DRM (Complaint stage) and Article 4 (Mutual Agreement Procedure stage). The deadline for submission to this consultation was 10 May 2024.

EU Commission publishes updated Q&A on the Foreign Subsidies Regulation

On April 9 2024, the EU Commission released an updated version of its non-binding Questions and Answers document (Q&A) regarding the EU Regulation on foreign subsidies distorting the internal markets (FSR). Adopted by the Council on 28 November 2022, this Regulation gives the EU Commission powers to investigate financial contributions received in non-EU countries by groups operating in the EU internal market. The updated FAQs released in April, provide guidance on both procedural and jurisdictional issues arising from the application of the Regulation.

FASTER proposal and others to be discussed in May ECOFIN meeting

The Belgian Presidency of the EU Council has postponed the discussion on the Faster and Safer Relief of Excess Withholding Taxes (FASTER) proposal until the May Ecofin meeting which is scheduled on 14 May 2024. Outstanding issues, include Member States' self-assessments of their withholding tax relief systems, the carveouts in Article 10 and exemptions from Chapter III of the proposal for EU countries with small stock markets and comprehensive relief-at-source systems. In addition to FASTER, the VAT in the digital age (ViDA) package will also be discussed by Member States at the next Ecofin's May meeting with the aim of reaching an agreement on this ambitious proposal.

EU Parliament Adopts new EU rules to combat money-laundering

On 24 April 2024, the European Parliament adopted a package of laws strengthening the EU's toolkit to fight money-laundering and terrorist financing. The main elements of these new laws is that they will ensure that people with a legitimate interest (e.g. journalists, media professionals, civil society organizations, competent authorities, and supervisory

bodies) will have immediate, unfiltered, direct and free access to beneficial ownership (BO) information held in national registries interconnected at EU level. In addition to current information, the registries will also include data going back at least five years. The laws also give Financial Intelligence Units (FIUs) more powers to analyse and detect money laundering and terrorist financing cases as well as to suspend suspicious transactions. In concrete terms, this AML package consists of: (i) the 6th AML Directive (which would, *inter alia*, grant more powers to FIUs to analyse and detect money laundering and terrorist finance cases, suspend suspicious transactions, accounts or business relationships, etc.); (ii) the EU 'Single Rulebook' Regulation (which would, among other things, harmonize rules applicable to obliged entities that are required to verify their customers' identity, monitor transactions and report any suspicious activity to FIUs); and (iii) the Anti-Money Laundering Authority (AMLA) regulation (which creates a new authority in Frankfurt, that will directly supervise the riskiest financial entities, intervene in case of supervisory failures, act as a central hub for supervisors and mediate disputes between them. AMLA will also supervise the implementation of targeted financial sanctions).

The laws included in the AML package still need to be formally adopted by the Council before publication in the EU's Official Journal.

EESC supports BEFIT Proposal but suggests further alignment with Pillar Two Rules

On 24 April 2024, the European Economic and Social Committee (EESC) adopted its opinion on the BEFIT Proposal. The opinion, which is not binding for the Council of the European Union: (i) praises the Commission's continuous efforts to develop a common corporate tax framework to support the consolidation of the internal market; (ii) supports the Commission's decision to propose BEFIT through an EU directive, as the current variety of different national rules results in fragmentation and discrepancies, hindering cross-border activities on the internal market due to the high costs that companies incur to comply with multiple legal frameworks; (iii) notes that certain provisions of the BEFIT proposal which provide Member States flexibility (e.g., entitlement to add tax base increases, tax deductions or tax incentives to their allocated parts) could come at odds with the Commission objective of reducing the compliance costs weighing on companies; (iv) highlights that, in order to actually simplify and reduce costs, BEFIT should be aligned with the OECD's Pillar Two rules; (v) recommends that any data processing related to the BEFIT framework be carried out in accordance with the GDPR principle of 'data minimization'; and (vi) underlines the importance of carefully assessing compliance costs and administrative burdens on companies interested in the BEFIT proposal.

EU officials and stakeholders discuss simplifying and future-proofing EU tax system

On 17 April 2024, EU officials, experts, and tax advisers met in Brussels at a conference organized by the European Tax Adviser Federation (ETAF) to discuss simplifying and future-proofing the EU tax system. The event counted with the participation of several speakers and covered various topics. The president of ETAF introduced the organization's manifesto, containing 25 recommendations for the next five years. The first panel, which counted with the participation of Benjamin Angel (Director of Direct Taxation, Tax Coordination, Economic Analysis and Evaluation at the DG TAXUD of the European Commission) among others, discussed future tax policies under the next European Commission. In turn, the second panel focused on the future of tax advisers in the EU and counted with the participation of Ana Xavier (Head of Unit Economic Analysis of Taxation, Impact Assessment and Evaluation support at the DG TAXUD of the European Commission) and Pascal Saint-Amans (Former Director of the OECD Centre for Tax Policy and Administration, Non-resident fellow at Bruegel, Partner at Brunswick) among others. The topics addressed included EU tax laws' complexity, reducing reporting requirements, tax transparency, and the impact of digitalization and AI on tax advisers. The recording of the conference is available here.

EU Council supports a report proposing revaluation of the unanimity requirement for tax measures

After a special meeting on 17 and 18 April 2024, the European Council welcomed and endorsed a report titled 'Much More Than A Market', which, apart from addressing ways to boost the EU Single Market, proposes to overcome the unanimity requirement for tax measures by relying on article 116 of the TFEU. In particular the report notes that 'where severe distortions require EU intervention, the Treaties provide for the safety-valve of Article 116 TFEU on the market distortions rules. Its application does not require unanimity, but only a qualified majority, which suffices to overrule any single unwilling Member State, regardless of its size. Based on a thorough economic and legal analysis already initiated by the Commission, the political viability of a targeted and timely use of this important instrument offered by the Treaties is key over the next years'. The European Council invited the current and future Council Presidencies to take work forward on the recommendations made in the report by the end of the year.

It should be noted that, on 20 March 2024, the European Commission also raised the possibility of moving from unanimity to qualified majority voting on tax and other matters as part of a communication on pre-enlargement reforms and policy reviews. The Commission plans to conduct policy reviews by early 2025 and to suggest reforms, considering the concerns of Member States about strategic national interests, possibly integrating safeguards, such as allowing further deliberations or appealing to the European Council in exceptional cases.

Member States discuss solutions for taxation of cross-border teleworkers

According to a non-official source, the Belgian Presidency of the Council of the EU has established a task force to address the taxation of cross-border teleworkers. The task force, consisting of Member States, selected third countries, the European Commission, and the OECD, has had several meetings over the last few months. Discussions primarily focused on the challenges raised by cross-border teleworkers and, in particular, around the creation of PEs, taxation of wages, the determination of where work takes place, etc.. While the OECD will reportedly address this topic in September 2024, the EU may, in the meantime, explore a temporary solution. Based on the task force's outcomes, the Belgian Presidency may propose solutions for optional adoption by Member States.

Eurogroup identifies key priority areas and tax measures to improve functioning of EU Capital Markets

On 11 March 2024, the Eurogroup, which consists of all EU finance ministers, issued a statement regarding the future of the European Capital Markets. The statement identifies key priority areas and measures to improve the functioning of the European capital markets,. Within three broad themes (i.e., Architecture, Business and Citizens), the Eurogroup considers that the following tax-related measures be imperatively and urgently taken forward during the next European legislative term:

- Foster equity financing through well-designed national corporate tax systems to ensure EU companies have access to diversified sources of funding: Member States are invited to investigate ways to reduce the debt equity bias (for example, through their national tax systems) and share best practices and plans to address this bias. The Eurogroup invites the Commission to support this initiative by providing analysis and advice.
- Improve conditions for institutional, retail, and cross-border investment in equity, in particular in growth/scale up venture capital through regulatory means, targeted tax incentives by Member States or other measures at EU and national level.
- Create an attractive, easy-to-use and consumer-centric investment environment: Member States are invited to assess ways to make their respective personal income tax systems more supportive of investments in capital markets. Notably, the Eurogroup notes that Member States should review the tax treatment of long-term retail investment products and of capital gains and losses.

In the statement, the Eurogroup urged Member States to promptly implement the outlined measures and encourages the European Commission to initiate corresponding initiatives early in the new legislative term, aiming for completion by 2029. In addition, the Eurogroup in inclusive format commits to taking stock regularly of the performance of European capital markets and to monitoring progress on the above-listed measures at national and EU-level regularly, on the basis of input from the European Commission and starting from 2025.

French Court judgment on whether EU law requires the deduction of PE's final losses

On 26 April 2024, the French Supreme Administrative Court *(Conseil d'Etat)* delivered its judgment in the case *Financière SPIE Batignolles* (No. 466062) on whether EU law allows French resident companies to deduct the final losses they have realized through a PE located in another Member State from their profits taxable in France.

The case involved a French company that set up a PE in Luxembourg in the context of a construction project. The French company aimed to deduct the final losses realized in Luxembourg through the PE from the profits of the French tax-consolidated group to which it belonged on the basis of CJ's judgments in the *Marks and Spencer* (C-446/03) and *Bevola* (C 650/16) cases. However, the French *Conseil d'Etat* fully rejected the taxpayer's claim and annulled the lower court's judgments that had ruled in favour of *Financière SPIE Batignolles*.

In its judgment, the French Court first noted that both French domestic law and the tax treaty entered into with Luxemburg prevented French companies from deducting losses made through a PE located in the former country, whereas losses made through a French branch were deductible. The Court then emphasized that, according to the CJ's case law, such a difference in treatment does not constitute a violation of the freedom of establishment if the taxpayer's situation is not comparable to a purely domestic situation. The Court understood that companies with a PE in another Member State are not, in principle, in a comparable situation to that of companies possessing a domestic PE, except where national tax legislation itself treats those two categories of PE in the same way for considering the losses and profits made by them. In this regard, the Court observed that France does not treat domestic branches and PEs located in Luxembourg in the same way, in so far as (pursuant to French Law and the applicable tax treaty) France could not tax profits made by the Luxembourg PE of a French company. Therefore, the *Conseil d État*, found that a French company with a PE in Luxembourg is not in a situation objectively comparable to that of a French company with a domestic branch. It therefore concluded that the impossibility for the French company to offset losses realized through the Luxembourg PE did not restrict the freedom of establishment.

3. State Aid

AG Medina's Opinion on UK's CFC Group Financing Exemption *(United Kingdom v Commission and Others, Joined Cases* C 555/22 P, C-C 556/22 P *and* C 564/22 P*)*

On 11 April 2024, AG Medina issued her Opinion in the case *United Kingdom v Commission and Others* (Joined Cases C 555/22 P, C-C 556/22 P and C 564/22 P) on whether United Kingdom's Controlled Foreign Company (CFC) Group Financing Exemption (GFE) constitutes illegal State aid. In her Opinion, the AG proposed that the CJ to annul the Commission's decision that the UK's CFC GFE constituted illegal State aid and, therefore, to set aside the judgment of the General Court confirming the latter.

By decision of 2 April 2019 (2019/1352), the European Commission found that the UK had granted between 2013 and 2018 illegal State aid to certain multinational groups by means of tax advantages. In particular, it considered that the UK unduly exempted those groups from a tax scheme targeting tax avoidance. According to the Commission, the UK's CFC rules were aimed at preventing UK companies from using a subsidiary, based in a low or no tax jurisdiction, to avoid taxation in the UK. They allowed the UK tax authorities to reallocate all profits artificially diverted to an offshore subsidiary back to the UK parent company, where it could be taxed accordingly. However, between 2013 and 2018, the CFC rules included an exemption for certain financing income (i.e., interest payments received from loans) of multinational groups active in the UK. The Commission considered part of this GFE as an illegal tax advantage. It ordered the UK to recover it from its beneficiaries. The UK and the company ITV challenged the Commission decision before the General Court of the European Union. By judgment of 8 June 2022 (T-363/19 and T-456/19), the General Court dismissed their actions. The United Kingdom, ITV and two companies of the London Stock Exchange Group appealed the latter judgment taking the case to the CJ.

In her Opinion, AG Laila Medina proposes to the CJ to set aside the judgment of the General Court and to annul the Commission decision. The AG concluded that the General Court and the Commission erred in law when considering that the CFC rules constituted the correct reference framework for examining whether a selective advantage had been granted. Instead, the AG found that the correct reference framework ought to have been the general UK corporate tax system. Pursuant to the AG, the CFC rules form part of the general UK corporate tax system and cannot be severed from it. Therefore, she considered that the General Court erred by abstracting one set of rules (the CFC rules) from their broader legislative framework (the general corporate tax system). Indeed, she considered that the CFC rules can only be fully understood when considering the UK corporate tax system as a whole. According to the AG, in the context of determining the reference framework, the Commission and the General Court failed to carry out an objective examination of the content, structure and actual effects of the applicable rules under the national law concerned. Therefore, she considered that the error made in the determination of the reference framework necessarily vitiates the whole of the selectivity analysis.

Furthermore, the AG highlights that it is, in principle, for each Member State to exercise their fiscal autonomy, and the Commission must accept the characteristics and principles explicit in those domestic provisions. In this regard, she opines that the Commission failed to demonstrate that the characterization provided by the UK is manifestly incompatible with the purpose, the constitutive elements and the structure of the CFC rules and the general corporate tax system of the UK.

4. VAT

AG Kokott's Opinion on fund management exemption *(joint cases X, Y, Stichting BPL Pensioen, Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf, Fiscale Eenheid Achmea BV, Stichting Pensioenfonds voor Fysiotherapeuten)*

On 14 March 2024, the Opinion of AG Kokott was published in the joint cases *X* (C 639/22), *Y* (C 641/22), *Stichting Pensioenfonds voor Fysiotherapeuten* (C 642/22), *Stichting BPL Pensioen* (C 643/22) and *Stichting Bedrijfstakpensioensfonds voor het levensmiddelenbedrijf – BPF*L (C 644/22).

The applicants in these proceedings are Dutch pension funds that wish to apply the fund management exemption to their fund management expenses. The relevant pension schemes are based on a pension benefit agreement within the meaning of the Dutch law on pensions and provide, inter alia, for a lifelong or time limited retirement pension. The basis for assessment of the pension is the pensionable salary less an annually determined allowance. In this respect, the level of the pension entitlements and benefits depends primarily on the level of employment income and years of service.

The AG established that the following conditions are relevant in order to establish if a (pension) fund qualifies as a 'special investment fund' for which the fund management exemption can be applied: (i) Raising of capital from the public; (ii) Investment on the principle of risk-spreading; (iii) Repurchase or redemption obligation; (iv) Specific State supervision; and (v) Unit-holders bear the investment risk.

Based on these conditions, the AG argues that the Dutch pension funds are not comparable to 'special investment funds' as governed by the collective investment in transferable securities (UCITS) Directive on various grounds. In the first place, because the pension funds are not open to the public, but only to a limited circle of investors, namely employees in the sector, occupational group or undertaking in question. In the second place, because pension customers do not appear to have a repurchase or redemption right vis-à-vis the pension fund given the fact that participation is compulsory. In the third place, because the main emphasis of most of the models in the main proceedings would seem to be guaranteed pension commitments as a result of which the beneficiaries do not bear an investment risk comparable to 'special investment funds'.

AG Kokott's Opinion on VAT exemption for gambling services *(Casino de Spa SA and Chaudfontaine Loisirs SA, C 741/22 and C 73/23)*

On 25 March 2024, the opinion of AG Kokott was published in the cases *Casino de Spa SA* (C 741/22) and *Chaudfontaine Loisirs SA* (C 73/23).

As of 1 July 2016, Belgium opted to no longer exempt online gambling from VAT (except online lotteries). Other forms of gambling (including lotteries) remain VAT exempt in Belgium. Casino de Spa SA and Chaudfontaine Loisirs consider this selective scope of the VAT exemption to be an infringement of the principle of neutrality. These applicants wish to apply the VAT exemption for gambling to their activities through directly invoking the provisions of the EU VAT Directive.

AG Kokott opined that the provision of the gambling exemption in the VAT Directive do not have direct effect, as this provision is neither unconditional nor sufficiently precise. The relevant provision does not impose on Member States an obligation in unequivocal terms, as it does not clarify which forms of gambling are to be VAT exempted. Further, the gambling exemption provision is not unconditional as the wording allows Member States to lay down conditions and limitations to the exemption. The AG also considers that there is also no specific need for an extensive assumption of a direct effect of this specific gambling exemption.

However, even if Article 135(1)(i) of the VAT Directive did have direct effect, Belgium's differentiation between gambling which is provided electronically and gambling which is not provided electronically would not constitute an infringement of the principle of neutrality according to the AG. The same applies in relation to the differentiation between gambling which is provided electronically and lotteries which are carried out electronically. The AG, therefore, opined that the differentiation under Belgian VAT law between online gambling and other forms of gambling and also between online lotteries and online gambling is objectively justified and therefore, not discriminatory.

The rules on prohibited State aid also do not prohibit objectively justified differentiations in a general law. In proceedings relating solely to a business' own tax liability the question of State aid to a third party is inadmissible. In principle, those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes prohibited State aid in order to avoid payment of that tax, according to the AG.

5. Customs Duties, Excises and other Indirect Taxes

CJ judgment on national legislation establishing a tax structure and tax rate for heating tobacco differing from those applicable to ‘other smoking tobaccos’ *(f6 Cigarettenfabrik,* C-336/22)

On 14 March 2024, the CJ delivered its judgment in the case of *f6 Cigarettenfabrik* on national legislation establishing a tax structure and tax rate for heated tobacco differing from that of ‘other smoking tobaccos’.

f6 Cigarettenfabrik produces rolls of heated tobacco which are inserted into a battery-powered heating device. Until 31 December 2021, heated tobacco was only subject to excise duty at the same rate as pipe tobacco. In addition, from 1 January 2022, heated tobacco in Germany became subject to a supplementary tax consisting of 80% of the excise duty applicable to cigarettes minus the amount of excise duty applicable to pipe tobacco.

f6 Cigarettenfabrik disputed the lawfulness of the supplementary tax. Its main argument is that the supplementary tax on heated tobacco does not constitute an authorised ‘other indirect tax’, because it does not satisfy the conditions laid down in Article 1(2) of Directive 2008/118. In short, this provision stipulates that Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty. Subsequently, the CJ is asked to answer the question whether the national legislation in Germany on the levying of tobacco tax on heated tobacco complies with this provision.

The first condition requires that other indirect taxes may only be levied for specific purposes and not merely for pursuing budgetary purposes. In the present case, the CJ concluded that the specific purpose condition is met, as the supplementary tax is intended to deter customers from giving up cigarettes in favour of heated tobacco, which is also harmful to health.

As regards the second condition, the CJ considered that it is sufficient that the indirect taxes pursing specific purposes should, on those points, accord with the general scheme of the EU rules applicable either to excise duty or to VAT. In that connection, it observes that Article 14(1)(c) of Directive 2011/64 authorises the principle of a mixed excise duty which may combine an ad valorem element with a single specific element. Since the supplementary tax in Germany is simply the result of a deduction of an amount calculated on the basis of units from an amount calculated on the basis of weight, the second condition is met.

Moreover, as regards any distinction as may have been introduced by the supplementary tax at issue between the goods belonging to the group of ‘other smoking tobaccos’, the CJ considered that the category of tobacco products identified as ‘other smoking tobaccos’ is a residual category containing heterogeneous and diversified products.

Therefore, in such circumstances, to require that heated tobacco be subject to the same tax treatment as other smoking tobacco products, which do not share the same essential characteristics and mode of consumption, could lead to discrimination and distortion of competition.

In conclusion, the CJ ruled that the concept of ‘other indirect taxes on excise goods for specific purposes’ covers a supplementary tax applicable to heated tobacco, the amount of which is 80% of the excise applicable to cigarettes, minus the amount of excise duty applicable to such heated tobacco.

CJ judgment on horizontal direct effect of directives and the principle of effectiveness *(Gabel Industria Ressile SpA and others v A2A Energia SpA and others,* Case C-316/122*)*

On 11 April 2024, the CJ delivered its judgement in the case of *Gabel Industria Ressile SpA and others v A2A Energia SpA and others* (Case C-316/122) regarding the interpretation of the third paragraph of Article 288 TFEU (direct effect of EU directives) and the principle of effectiveness. The case addresses the questions of whether: (i) the third paragraph of Article 288 TFEU must be interpreted as precluding the disapplication by a national court, in a dispute between private parties, of a provision of national law establishing a tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed; and (ii) the principle of effectiveness precludes national legislation that does not allow a final consumer to seek direct reimbursement from the State in relation to taxes that are incompatible with EU law and were ‘passed on’ to the latter by their suppliers.

The case concerns two Italian companies which signed contracts with two other Italian companies for the supply of electricity to their production sites. During 2010 and 2011, the recipient companies paid the amounts under those contracts including an additional tax, which was provided for in Italian national law and passed on to them by the suppliers, in accordance with an option conferred by such national legislation. This additional tax was repealed on 1 April 2012. In 2020, the recipient companies brought proceedings against the supplying companies to the referring court, seeking reimbursement of the sums paid in respect of that tax, in two civil actions, on the grounds that the national provisions introducing that tax were incompatible with EU law (i.e., contrary to a clear, precise and unconditional provision of a directive that had not been transposed or had been incorrectly transposed)

The CJ first dealt with question (i) above regarding the direct effect of directives. In this regard, it first noted that while, under EU law, a directive cannot, of itself, impose obligations on a private party and thus be relied on, as such, against that party before a national court, a Member State may, on the other hand, confer on the national courts the power to disapply, on the basis of its domestic law, any provision of national law which is contrary to a provision of EU law that does not have direct effect. Thus, the Court understood that - notwithstanding the absence of horizontal effect of a directive - a national court may allow a private party to rely on the unlawfulness of a tax which has been wrongly passed on to it by a supplier (in accordance with an option conferred on the latter by national legislation) if such a possibility is provided for by national legislation. The CJ noted that, in the case at issue, it is for the referring court to determine the existence of such possibility. Moreover, the Court noted that provisions of a directive that are unconditional and sufficiently precise may be relied upon by private parties, not only against a Member State and all the bodies of its administration, but also against organizations or bodies which are subject to the authority or control of the State or which possess special powers (i.e., powers beyond those which result from the normal rules applicable to relations between private parties). Here again, the Court considered that it is for the referring court to determine whether the Italian suppliers concerned fall into one of those categories.

Based on the above, the CJ found that Article 288 TFEU must be interpreted as precluding the disapplication by a national court, in a dispute between private parties, of a provision of national law establishing a tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed, unless: (i) national law provides otherwise, or (ii) the entity against which that inconsistency of the aforementioned tax is relied upon is subject to the authority or control of the State or possesses special powers.

Subsequently, the CJ examined question (ii) above which concerned whether the principle of effectiveness must be interpreted as precluding national legislation that does not allow final customers to seek reimbursement of an unlawful tax directly from the State. The CJ ruled that the customer must have the possibility of obtaining reimbursement of such tax either directly from that Member State of from the supplier. In particular, if such a reimbursement proved impossible or excessively difficult to obtain from the latter, the Court noted that the principle of effectiveness would require the final customer to be able to direct the application for reimbursement to the Member State directly. Accordingly, the CJ considered that legislation which does not allow a final consumer to apply directly to the Member State for reimbursement of the additional economic burden which he or she has borne as a result of the passing on of a tax which that supplier had itself unduly paid, infringes the principle of effectiveness. It therefore, concluded that such principle must be interpreted as precluding national legislation such as that analysed under the main proceeding.

EU Council adopts regulation to transfer jurisdiction to General Courts on preliminary rulings on VAT, Excise Duties, Customs, Transport and GHG Emissions

On 19 March 2024, the EU Council adopted a Regulation amending Protocol No 3 on the Statute of the CJ (the 'Regulation'), which transfers jurisdiction for preliminary rulings from the latter to the General Court with the aim of improving the efficiency of the administration of justice by both of these tribunals.

The Regulation transfers the jurisdiction in six areas (i.e., VAT, Excise Duties, Customs, tariff classification of goods, Transports and GHG Emissions). The Court of Justice of the European Union will continue to oversee cases involving principles that require interpretation of the Treaties or the Charter of Fundamental Rights. The appeal process from the General Court will be further refined by an extended filtering mechanism, allowing only significant EU law cases to proceed to the CJ. In addition, the Regulation will enhance transparency by making written observations available on the court's website post-proceedings, unless there are specific objections against this.

The reform process was initiated in December 2022 at the request of the CJ and was finalized in December 2023, after negotiations among the European Parliament, the EU Council, the CJ and the Commission. The effective implementation of the adopted Regulation, requires an amendment of the Rules of Procedure of both the CJ and the General Court. It is expected that, once this has been achieved, both the Regulation and rules of procedures will be published and enter into force.

Get in contact

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