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EU Tax Alert

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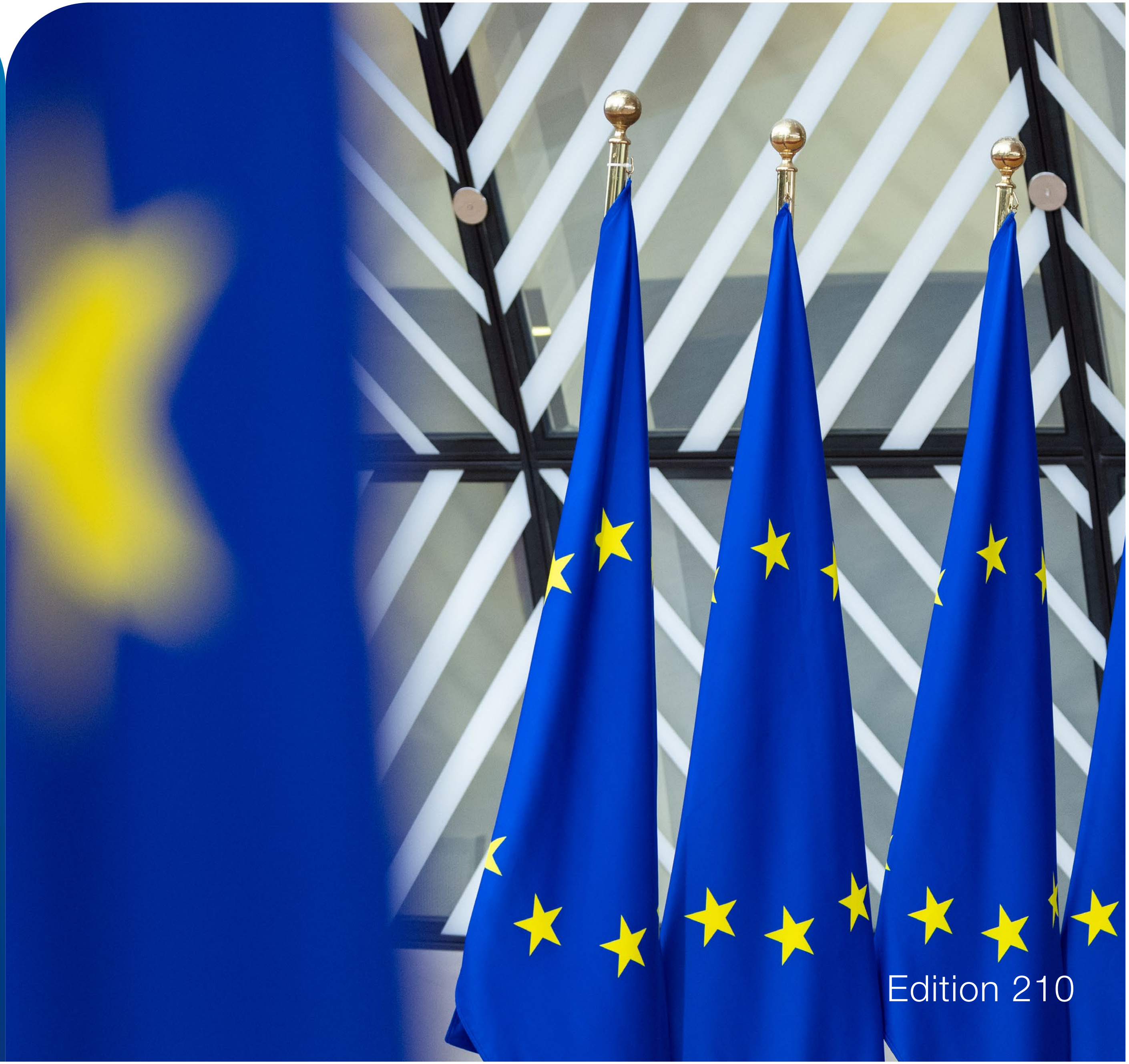

Edition 210

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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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Content

1. Highlights in this edition

EU Council adopts DAC9 to facilitate the filing and exchange of Pillar Two-related information in the EU

On 14 April 2025, the Economic and Financial Affairs Council (ECOFIN) formally adopted the proposed amendment to the Directive on Administrative Cooperation to facilitate the filing and exchange of Pillar Two-related information in the EU (DAC9).

The OECD's Pillar Two global minimum taxation model rules (GloBE Rules) have been harmonized in the EU through Council Directive (EU) 2022/2523 (Pillar Two Directive). Article 44 of the Pillar Two Directive sets out the filing requirements for constituent entities of in-scope groups. By default, each constituent entity must file a top-up tax information return (TTIR) in the EU Member State where it is located. However, there is a derogation to that filing obligation if the in-scope group's ultimate parent entity (UPE), or a designated filing entity files the TTIR on behalf of the entire group, provided certain conditions are met (i.e., first, a qualifying agreement to exchange information is in effect between the jurisdiction of the UPE or the entity designated to file the TTIR on behalf of the group, and the jurisdiction of the relevant constituent entity; and, second, the UPE or the designated filing entity has actually done the filing). DAC9 would enable meeting the first condition within the EU. For more information about DAC9 and its main elements, please see our dedicated web post on this topic.

After its entry into force through publication in the Official Journal of the EU, EU Member States will have until 31 December 2025 to implement the national laws, regulations, and administrative provisions necessary to comply with DAC9. In-scope groups are expected to file their first GIR/TTIR by 30 June 2026, as required under the Pillar Two Directive. The relevant tax authorities must exchange appropriate information from the GIR/TTIR with each other by 31 December 2026, at the latest.

CJ judgment on the application of the GAAR under the PSD to national participation exemptions (*Nordcurrent group*, C-228/24)

On 3 April 2025, the CJ delivered its judgment in the case *Nordcurrent Group* (C-228/24), which deals with the question of whether national participation exemptions can be denied under the General Anti-Avoidance Rule of Article 1(2) and (3) of the Parent- Subsidiary Directive (GAAR PSD), in the case of abuse.

The case involves a Lithuanian taxpayer (Nordcurrent), which develops and publishes video games. In 2009, Nordcurrent established a subsidiary in the United Kingdom (UK Subsidiary) for the sale and distribution of games, because of restrictions to sell video games via app stores directly from Lithuania. The UK Subsidiary realized profits in the UK which were regularly subject to UK corporate income tax. In 2017-2018, Nordcurrent relocated the functions and risks from the UK Subsidiary to the parent company in Lithuania, and the UK Subsidiary was liquidated a few years later. Nordcurrent applied the national participation exemption to dividends received from the UK Subsidiary in 2018 and 2019. Following an audit for the years 2018 and 2019, the Lithuanian tax authorities found that the UK Subsidiary had no 'substance' in these years. They deemed the UK Subsidiary to be a 'non-genuine arrangement' created to obtain a tax advantage, refusing the application of the participation exemption to dividends received from the UK Subsidiary. Nordcurrent contested this before the

Lithuanian Tax Dispute Commission, leading to a referral to the CJ. The referring court asked the CJ: (i) whether the GAAR PSD must be interpreted as precluding the denial of a national participation exemption on the basis of a non-conduit subsidiary being qualified a 'non-genuine arrangement'?; (ii) whether the qualification of an arrangement as 'non-genuine' requires taking into account all the facts and circumstances of the case, or only those that existed at the time of the dividend distribution?; and (iii) whether the qualification of an arrangement as 'non-genuine' under the GAAR PSD alone is sufficient to conclude that, by benefiting from a participation exemption, a parent company obtained a 'tax advantage' that defeats the object and purpose of the PSD?

With respect to the first question the CJ held that the GAAR PSD must be interpreted as not only being applicable to specific situations or types of arrangements (e.g., arrangements involving conduit companies). Moreover, the scheme and objective of the PSD entail that the GAAR PSD is cross-cutting in nature, which militates in favour of an interpretation that permits its application irrespective of the circumstances in which abuse occurs. Consequently, the CJ held that the GAAR PSD does not preclude a national practice pursuant to which a parent company is denied an exemption from corporate income tax in its Member State of residence in respect of dividend received from a subsidiary established in another Member State on the basis that such subsidiary is a non-genuine arrangement, while that subsidiary is not an intermediate company and the profits that were distributed by way of dividend distributions were generated in the course of activities carried out in name of the subsidiary.

With respect to the second question, the CJ held that: although the application of the GAAR PSD appears to be limited to the putting into place of an arrangement due to the wording of the provision, it is important to take into account that an arrangement may comprise more than one step or part. As a result, it cannot be ruled out that an arrangement, initially considered as genuine, has to be regarded as not genuine from a certain point onwards due to the fact that it has been maintained despite a change in circumstances. The possibility of applying the GAAR PSD to non-genuine steps of an arrangement should be understood as meaning that circumstances subsequent to the formation of the arrangement may be considered for purposes of assessing whether or not a step is genuine. Accordingly, the Court noted that when an arrangement consists of more than one step, all relevant facts and circumstances must be taken into account. Consequently, it held that the GAAR PSD must be interpreted as precluding a national practice pursuant to which merely the situation existing as per the dates the dividends were paid are to be taken into account in order to classify a subsidiary established and residing in a Member State as a non-genuine arrangement, while that subsidiary was established for valid commercial reasons and the genuine nature prior to the dividend payment dates were not questioned.

With respect to the third question, the CJ held that in light of the wording of the GAAR PSD, two conditions must be met in order for the benefits of the PSD to be denied. First, a 'non-genuine arrangement' within the meaning of Article 1 (3) of the PSD must be present. Second, the non-genuine arrangement must have been put in place with the main purpose or one of its main purposes being that of obtaining a 'tax advantage' that defeats the object and purpose of the PSD. Hence, the CJ held that the classification of a subsidiary as a 'non-genuine arrangement' in itself is not sufficient to conclude that, by enjoying an exemption from corporate income tax in respect of those dividends, the parent company obtained a 'tax advantage' that defeats the object of the PSD. In addition, the CJ noted that the existence of a 'tax advantage' must not be assessed in isolation and demands considering the overall tax position of the arrangement.

For further information about this judgment and its impact, please see our dedicated web post.

CJ judgment on whether the denial of tax refunds to non-resident investment funds is compatible with the free movement of capital (*Austria v. Franklin Mutual Series Funds – Franklin Mutual European Fund*, C-602/23)

On 30 April 2025, the CJ delivered its judgment in the case *Austria v. Franklin Mutual Series Funds – Franklin Mutual European Fund*, (C-602/23). The case deals with the question of whether the denial of tax refunds to non-resident investment funds that are comparable to EU-regulated funds is compatible with the free movement of capital.

Franklin, a US investment company, is one of seven series (independent sub-funds) of a trust established in Delaware. As a freely negotiable fund open to the public, Franklin invests mainly in European-listed shares, and is subject, in its State of residence, to financial market supervision in accordance with a set of rules comparable to EU and Austrian prudential regulations. Furthermore, Franklin's activity corresponds in all its essential aspects to an Austrian investment fund and to an Undertaking for collective investment in transferable securities (UCITS) within the meaning of Directive 2009/65. As a corporate entity, Franklin is taxable under US law.

In 2013, Franklin received dividends from two Austrian public limited companies which were subject to a 25% withholding tax. Following an application lodged by Franklin in the name and on behalf of its US unitholders, the Austrian tax authority applied the Austro-American tax treaty, reduced the withholding tax rate to 15%, and issued a refund. Later, Franklin applied for an additional refund of the remaining 10% withheld arguing that, pursuant to Article 63 TFEU, the Austrian provision allowing for such a refund should be extended to legal entities of non-Member States. Based on another national provision which would preclude such a refund, the Austrian tax authority rejected Franklin's application, reasoning that it was not resident in another Member State or in a State party to the EEA Agreement.

In disagreement, Franklin brought an action against such rejection, which ultimately led to an appeal by the tax authorities before the Austrian's Supreme Administrative Court, the referring court. In essence, the court asked the CJ whether a national legislation which has the effect of precluding a refund of tax on income from capital to a non-resident entity (which, on the one hand, has the same characteristics as a UCITS within the meaning of Directive 2009/65 but, on the other, has legal personality and is, in that regard, comparable to a resident legal person, even though, under that national legislation, a resident UCITS is considered to be transparent for tax purposes and cannot operate as a legal person), constitutes a restriction on the free movement of capital.

In its judgment, the CJ found that the national legislation in the proceedings, which has the effect of precluding a refund of tax on income from capital to a non-resident entity, does not constitute a restriction on the free movement of capital, provided that the income received by the non-resident entity is attributed to its unit-holders and is taxed, in its State of residence, not at the level of the non-resident entity but at the level of its unit-holders.

CJ judgment on the circumstances in which tax exemptions may be prohibited by EU law (*Prezydent Miasta Mielca*, C-453/23)

On 29 April 2025, the CJ delivered its judgment in the case *Prezydent Miasta Mielca* (C-453/23) where it specified the circumstances in which tax exemptions may be prohibited by State Aid rules under EU law.

The case concerns a Polish undertaking which owns an individual railway siding on its land and decided to make that siding available to a rail carrier to avail itself of a property tax exemption. To that end, it applied for an advance tax ruling confirming its right to that exemption. Although that undertaking satisfied all the conditions laid down by Polish law, it was refused the exemption on the ground that, under EU law, such exemption would constitute unlawful State aid because it had not been notified to the European Commission beforehand. The undertaking contested that refusal before the Polish courts. Having doubts as to whether that property tax exemption may be classified as State aid in the light of EU law, the Polish Supreme Administrative Court refer the case to the CJ asking whether such exemption confers a selective advantage on its beneficiaries, and whether it distorts or threatens to distort competition.

In its judgment, the Court found that the property tax exemption in question does not appear to confer a selective advantage and, thus, does not appear to constitute State aid. However, the CJ notes that it is for the national court to give a definitive ruling in that regard.

In its analysis, the Court starts from the premise that the legal property tax regime, as provided for by Polish law, represents the ‘normal’ tax regime, in the light of which the possible selectiveness of the exemption must be assessed. That regime applies to all those who own or hold immovable property and defines the constituent elements of the property tax, including the exemption in question. Pursuant to the Court, a general and abstract exemption to which a direct tax is subject, such as that established by Polish law, cannot, in principle, be regarded as State aid. In the CJ’s view, in so far as the exemption is presumed to be inherent in the ‘normal’ tax regime, it does not, as a general rule, confer a selective advantage.

However, the Court highlighted that there are two situations in which such an exemption could be selective. The first is where that exemption forms part of a tax regime configured according to manifestly discriminatory parameters. The second is where the conditions set by the relevant legislation for benefiting from that exemption relate to one or more specific characteristics of the undertakings benefiting therefrom, those characteristics being inextricably linked to the nature of those undertakings or the nature of their activities, with the result that those undertakings form a consistent category.

In this instance, the Polish exemption is granted to persons subject to property tax on the condition that they own, *inter alia*, land forming part of railway infrastructure which is made available to rail carriers. Subject to verification by the national court, the CJ found that such condition therefore does not appear to be connected, in law or in fact, with specific characteristics of the undertakings benefiting from that exemption. Nor does it appear to form part of a tax regime configured according to manifestly discriminatory parameters. Thus, in the Court’s view, that exemption appears to be capable of being obtained by a heterogeneous group of beneficiaries, including non-economic operators and undertakings of very different sizes in very different sectors. The CJ further noted that the fact that only undertakings satisfying the conditions of an exemption can benefit from that exemption is not sufficient, in itself, for the exemption to be regarded as selective.

In addition, the CJ found that the Polish exemption pursues an objective which is not only budgetary, but also environmental, encouraging the restoration of disused railway sidings and the use of rail transport. In this regard, the Court noted that - in the context of its fiscal autonomy - a Member State may legitimately pursue, through direct taxation, in addition to a purely budgetary objective, one or more other objectives which constitute, when taken together, the objective of the relevant reference framework. However, it also noted that - if the national court were to consider that the exemption in question confers a selective advantage - it would then be necessary to examine whether, in view of its general characteristics, that exemption distorts or threatens to distort competition. Regarding this matter, the CJ emphasizes that, in principle, the act of releasing an undertaking from the costs which it would normally have had to pay, in an economic sector which has been the subject of liberalization at EU level, distorts the conditions of competition.

CJ rules that Maltese investor citizenship scheme is contrary to EU law (*Commission v Malta*, C-181/23)

On 29 April 2025, the CJ delivered its judgment in the case *Commission v Malta* (C-181/23), which deals with the question of whether the Maltese investor citizenship scheme is in line with EU law. The Court found the Maltese investor citizenship scheme to constitute a breach of the principle of sincere cooperation under EU law, based on the understanding that the acquisition of Union citizenship cannot result from a commercial transaction.

Following an amendment to the Maltese Citizenship Act in July 2020, Malta adopted Regulation 1 which established detailed rules for the acquisition of ‘Maltese Citizenship by Naturalization for Exceptional Services by Direct Investment’ (‘the 2020 investor citizenship scheme’). Under that scheme, foreign investors could apply to be naturalized where they fulfilled a certain number of conditions, principally of a financial nature. The Commission asserted that that scheme, which granted naturalization in return for predetermined payments or investments to persons without a genuine link with Malta, constitutes an infringement of the rules relating to Union citizenship 3 and of the principle of sincere cooperation. It therefore brought an action against Malta before the CJ.

In its judgment, the Court held that by establishing and operating the 2020 investor citizenship scheme, which amounts to the commercialization of the grant of the nationality of a Member State and, by extension, of Union citizenship, Malta has infringed EU law. The Court recalled that each Member State is free to lay down the conditions under which it grants or withdraws its nationality. That freedom must, however, be exercised in compliance with EU law. Neither the wording of the Treaties nor their scheme can support the inference that their authors intended to lay down, as regards the grant of the nationality of a Member State, an exception to the obligation to comply with EU law. The CJ further noted that European citizenship guarantees free movement within a common area of freedom, security and justice. That common area is based on two essential principles: mutual trust between Member States and mutual recognition of national decisions. European citizenship embodies fundamental solidarity between Member States, based on a set of reciprocal commitments. Each Member State must therefore refrain from any measure that could undermine the EU common objectives, in accordance with the principle of sincere cooperation.

As a result, the Court found that a Member State cannot grant its nationality - and indeed European citizenship - in exchange for predetermined payments or investments, as this essentially amounts to rendering the acquisition of nationality a mere commercial transaction. Such a practice does not make it possible to establish the necessary bond of solidarity and good faith between a Member State and its citizens, or to ensure mutual trust between the Member States and, thus, constitutes a breach of the principle of sincere cooperation.

AG de la Tour’s Opinion regarding VAT treatment of transfer pricing adjustments for intra-group services (*Arcomet Towercranes*, C 726/23)

On 3 April 2025, the Opinion of AG de la Tour was published in the case *Arcomet Towercranes* (C726/23), which deals with the question of whether transfer pricing (TP) adjustments contractually agreed within the framework of intercompany services can be within the scope of VAT as a consideration for a supply of services.

The case concerns the VAT consequences of a TP agreement concluded between Arcomet Belgium and Arcomet Romania which arranged for a guaranteed profit margin for Arcomet Romania. Under this TP agreement based on the transactional net margin method (TNMM), Arcomet Romania was guaranteed a target profit margin. Arcomet Belgium, which bore the main economic risks associated with the group’s business and assumed the group’s central economic and strategic functions, issued annual settlement invoices to Arcomet Romania when its profits exceeded the agreed range. The dispute in the case is, among others, whether the TP adjustments as invoiced by Arcomet Belgium constitute a remuneration for the services provided by Arcomet Belgium to Arcomet Romania.

AG de la Tour takes the view that the VAT implications of TP adjustments should be analysed on a case-by-case basis. The AG is of the view that the TP adjustments in the Arcomet case should be seen as a remuneration for the services provided by Arcomet Belgium to Arcomet Romania and, consequently, be within the scope of VAT. In that regard, the AG considered that the TP adjustments were contractually agreed between parties, the modalities to determine the TP adjustments were objectively defined in the contractual arrangements, and the TP adjustments could be directly linked to the services provided by Arcomet Belgium to Arcomet Romania. The fact that the exact amount of the TP adjustments is unclear at the moment the services are rendered should not be relevant, according to the AG. The same goes for the fact that, in case of a negative profit, Arcomet Romania would have issued an invoice to Arcomet Belgium (instead of the other way around).

For more information about this Opinion and our view on the VAT implications of TP adjustments, please see our dedicated web post on this topic.

2. Direct Taxation

Case Law

CJ judgment on whether a deduction limitation foreseen under the Belgian intra-group transfer scheme is compatible with the PSD (*John Cockerill*, C-135/24)

On 13 March 2025, the CJ delivered its judgment in the case *John Cockerill* (C-135/24). The case deals with the question of whether Articles 1(4) and 4(1) of the Parent-Subsidiary Directive (PSD) must be interpreted as precluding legislation of a Member State which provides that dividends received by a parent company from its subsidiary must first be included in the tax base of the parent company, before they can subsequently be deducted, without that deduction applying to the amount of an intra-group transfer included in the tax base.

Belgium has transposed Article 4(1) of the PSD by adopting the 'inclusion/deduction' method whereby dividends received by a parent company are first included in its taxable base and subsequently, deducted as 'definitively taxed income' (DTI), in so far as the parent company retains taxable profits after deduction of losses and other exempt profits. If the DTI exceeds the taxable base, the excess can be carried forward. Additionally, Belgium offers an 'intra-group transfer' scheme, allowing profit-making group companies to transfer profits to Belgian companies in the same group with losses in the same tax period. Belgian legislation also includes a provision that imposes a restriction on the deduction of the DTI from the amount of the intra-group transfer, which is included in the tax base of the company receiving that transfer.

The case involved John Cockerill, a Belgian tax resident company that received dividends in 2019 from its subsidiaries in Belgium, other EU Member States, and third countries. A portion of these dividends met the conditions for the Belgian DTI system. Additionally, John Cockerill received an intra-group transfer, which was included in its tax base. Due to restrictions on the deduction of DTI, the company was unable to deduct all the qualifying dividends from its tax base, resulting in a corporate income tax liability. The company contended that if it had not received any qualifying dividends, its tax base would have been negative, and it would not have been subject to tax. The company argued that the restriction imposed by Belgian law on DTI's deduction, which did not apply to the intra-group transfer received, created unequal treatment compared to a company that did not receive dividends, even though both companies benefitted from the same intra-group transfer. It claimed this discrepancy was contrary to the PSD.

Entertaining doubts as to the compatibility of the Belgian legislation with the PSD, the Court of First Instance, Liège referred the case to the CJ.

In its judgement, the CJ first noted that the PSD aims to ensure tax neutrality in the distribution of profits between a subsidiary in one Member State and its parent company in another. Article 4(1)(a) of the PSD prohibits Member States from taxing the parent company on dividends received from its subsidiary, regardless of whether the tax event is the receipt of the profits or their subsequent redistribution. This prohibition also extends to national laws that 'indirectly' subject the parent company to taxation on those dividends.

The Court then noted that, for assessing whether the Belgian tax system 'indirectly' taxes dividends in a way that would violate Article 4(1)(a) of the PSD, the referring court must compare the current situation whereby a parent company had to comply with the DTI deduction prohibition, with one where a Member State applies a simple exemption system, excluding dividends from the parent company's tax base. Under the Belgian system in place during the relevant tax year, the combination of the DTI system and the intra-group transfer regime, may, in certain situations, result in the parent company being taxed more heavily than it would have been if the dividends had been excluded from its tax base. If this is the case, the receipt of dividends would not be fiscally neutral for the parent company, and such outcome would be contrary to the objectives of the PSD. In the CJ's view, the fact that the intra-group transfer scheme is voluntary or that unused DTI can be carried forward to future years is irrelevant in this context.

Regarding whether the Belgian tax system may be justified under Article 1(4) of the PSD, which permits national provisions aimed at preventing tax evasion, fraud or abuse, the Court noted that it's case law clarifies that such provisions must specifically target the prevention of 'wholly artificial arrangements' which do not reflect economic reality designed solely to unduly obtain tax advantages. The Court further noted that a general presumption of fraud or abuse is insufficient to justify tax measures that undermine the objectives of the PSD. It thus found that, in this case, the restriction on the deduction of the DTI does not appear to aim at preventing artificial arrangements. Rather, it broadly excludes DTI from the intra-group transfer without regard to whether tax abuse is involved. Therefore, the Court found that Article 1(4) of the PSD does not authorize a Member State to implement such a provision in so far as it goes beyond what is necessary to prevent tax evasion or abuse.

Based on the considerations above, the CJ concluded that Articles 1(4) and 4(1) of the PSD must be interpreted as precluding legislation of a Member State that provides that dividends received by a parent company from its subsidiary must first be included in the tax base, before they can subsequently be deducted, without that deduction applying to the amount of an intra-group transfer included in the tax base.

AG Campos Sánchez-Bordona's Opinion on whether the more favourable tax treatment of German family foundations vis-à-vis foreign foundations is compatible with the free movement of capital (*Familienstiftung v Finanzamt Köln-West*, C142/24)

On 13 March 2025, AG Campos Sánchez-Bordona issued his Opinion in the case *Familienstiftung v Finanzamt Köln-West* (C142/24), which addresses whether the free movement of capital must be interpreted as precluding the legislation of a Member State under which foreign family foundations are subject to less favourable tax treatment compared to domestic family foundations. The AG opined that Article 40 of the EEA Agreement must be interpreted as not precluding such national legislation on the basis that the difference in treatment is justified by the need to preserve the cohesion of the national tax system.

The case concerned Familienstiftung, a family foundation established in Liechtenstein by a German resident ('the Applicant'), which was subject to gift tax in Germany upon its establishment (transfer of assets to the foundation). The Applicant argued that, in relation to the application of certain allowances to reduce the tax base and rate of the gift tax, it should benefit from the same tax privileges as those granted to German domestic family foundations, which are subject to lower tax rates and higher allowances. The German tax authorities rejected this claim, stating that foreign family foundations do not qualify for the tax privileges granted to domestic foundations, because the latter are offset by German foundation's liability to pay substitute inheritance tax every 30 years.

The Applicant brought an action against this decision before the Finance Court of Cologne, Germany. Such court referred the case to the CJ, asking whether Article 40 of the EEA Agreement must be interpreted as precluding the aforementioned national legislation under which foreign family foundations are subject to less favourable tax treatment compared to domestic family foundations.

In his Opinion, AG Campos Sánchez-Bordona first assessed whether the German rules lead to a restriction on the free movement of capital. In this regard, he found that there is indeed a restriction because, under German law, family foundations established abroad are subject to higher gift tax rates and lower allowances compared to domestic family foundations. Second, the AG examined whether the restriction on the free movement of capital as described above can be justified. For such purposes, he first noted that the situations at issue are objectively comparable as the liability to gift tax arises when assets are transferred to both German foundations and foundations established abroad. Regarding the justification of the restriction by an overriding reason in the public interest, the AG considered that the difference in treatment is justified by the need to preserve the cohesion of the national tax system. In line with the views of the German Government and the Commission, the AG noted that the tax privileges granted to domestic family foundations are intended to offset the disadvantage of having to pay substitute inheritance tax, which ensures that the overall tax burden is balanced.

Finally, the AG considered that the identified restriction is proportionate since the cohesion of the tax system cannot be ensured by less restrictive provisions, which would all be affected by the fact that the German State cannot access family foundations registered abroad, which remain outside the scope of the exercise of its powers of taxation.

Based on the grounds above, AG Campos Sánchez-Bordona opined that Article 40 of the EEA Agreement must be interpreted as not precluding the national legislation under which foreign family foundations are subject to less favourable tax treatment compared to domestic family foundations, as the difference in treatment is justified by the need to preserve the cohesion of the national tax system.

AG Kokott's Opinion on the compatibility of the Italian regional tax on productive activities with the PSD (*Banca Mediolanum*, C-92/24 to C-94/24)

On 27 March 2025, AG Kokott delivered her Opinion in the case *Banca Mediolanum I, II, and III* (Joined cases C-92/24 to C-94/24). This case concerns the question of whether the Italian regional tax on productive activities (Imposta Regionale sulle Attività Produttive, hereinafter: IRAP) is compatible with Article 4 of the Parent-Subsidiary Directive (PSD). In the AG's view, Italy is in breach of EU law by levying IRAP on foreign participation dividends, as this contravenes the PSD.

The case concerns Banca Mediolanum SpA (Mediolanum), an Italian bank that receives dividends from its subsidiaries based in Ireland, Luxembourg, and Spain. The dividends are included at a rate of 5% in Mediolanum's corporate income tax base under the Italian corporate income tax known as Imposta sul Reddito delle Società. However, 50% of the dividends are also included in the IRAP base. Mediolanum submitted a request for a refund of the IRAP levied on these dividends, claiming that such taxation violates Article 4 of the PSD, which limits taxation of intra-group dividends to 5%. The Italian tax authorities rejected the request, arguing that Article 4 of the DPD does not apply to IRAP. Mediolanum appealed, with the matter eventually reaching the referring court, which asked the CJ about the compatibility of this national practice with EU law.

The AG first addressed the decisive legal question in this case, which is whether the prohibition in Article 4 of the PSD applies solely to direct double taxation via corporate income tax (or a comparable tax), or it also covers indirect double taxation through another levy, such as IRAP, which partially includes dividends in its tax base.

In her analysis, AG Kokott clarified that the aim of Article 4 of the PSD is to eliminate economic double taxation of dividends, specifically where both a subsidiary and its parent are taxed on the same distributed profits. Unlike traditional double taxation agreements, which address taxation of the same taxpayer, the PSD seeks to prevent double taxation imposed on two separate entities. As such, the relevant question becomes whether IRAP constitutes a tax that functionally replaces or supplements the corporate income tax within the meaning of Article 4 of the Directive.

The AG noted that the PSD does not contain an exhaustive list of the taxes covered. While it explicitly refers to corporate income tax and any other taxes that take the place of such a tax, it makes no mention of levies such as IRAP, VAT, or wealth taxes.

The interpretation of the residual clause - 'any other tax' - is therefore central to determining the applicability of Article 4 of this Directive. In this context, AG Kokott stressed that the nature and effect of the tax must be assessed based on its substance rather than its designation or timing of collection.

The AG then examined the case law cited by the referring court, Banca Mediolanum, and the European Commission, in particular the judgments in AFEP e.a. (C-365/16) and X (C-68/15). In those cases, the Court held that a tax which is levied exclusively on profit distributions and functions as a supplement to corporate income tax may fall within the scope of Article 4 of the PSD. However, AG Kokott distinguished the present case from those precedents on the basis that the taxes at issue in AFEP e.a. and X were designed specifically to apply to distributed profits and operated as additional layers of corporate taxation, whereas IRAP applies more broadly and independently of profit distributions. In her view, the reliance on those judgments to support the argument that IRAP must fall within the scope of Article 4 of the PSD was misplaced, as they concerned materially different levies with a closer link to corporate taxation. Therefore, it is necessary to assess whether a tax such as the IRAP can be regarded as a corporate tax or as an alternative or supplementary tax to one of the existing taxes.

Turning to the legal nature of IRAP, AG Kokott highlighted several key differences between such tax and the Imposta sul Reddito delle Società. IRAP is levied irrespective of the presence of taxable profits under the corporate income tax regime and may be due even when the taxpayer reports a fiscal loss. Its taxable base is sector-specific and generally reflects value added rather than net income. Moreover, the tax applies to a wide range of entities, including public authorities, regardless of whether they carry out economic activities. These structural features, according to the AG, indicate that IRAP is conceptually and functionally distinct from a corporate income tax.

Nevertheless, AG Kokott noted that it is ultimately for the Italian court to determine whether IRAP is sufficiently similar to the Italian corporate income tax to fall within the scope of Article 4 of the PSD. Provided some guiding considerations for conducting such assessment, the AG indicated that only if IRAP mirrors the function and base of the corporate income tax can it be treated as a comparable tax under the PSD.

On such ground, AG Kokott concluded that Italy infringes EU law by subjecting foreign-sourced participation dividends to IRAP – but only insofar as IRAP is deemed equivalent to or a substitute for the corporate income tax. The final determination of that equivalence rests with the national court.

Developments

European Commission opens targeted consultation on the integration of EU capital markets

On 15 April 2025, the European Commission opened a targeted consultation on EU capital markets. The consultation seeks to gather stakeholder's feedback on obstacles to financial market integration across the EU as currently various barriers, including those stemming from legal, regulatory, technological and operational practices hinder the full integration and efficiency of EU capital markets.

The consultation targets a wide range of stakeholders which have until 10 June 2025, to submit their feedback by way of filling in an online questionnaire that is available at the EU Commission website.

European Commission refers Spain to CJ due to discriminatory tax treatment of non-resident taxpayers

On 12 March 2025, the European Commission decided to refer Spain to the CJ for having failed to remedy an infringement with the free movement of capital that is caused by a discriminatory tax treatment of non-resident taxpayers.

Under Spanish tax law, resident taxpayers have the option to defer capital gains tax in case the payment for the transfer of assets is deferred for more than one year or paid in instalments over a period exceeding a year. In the latter case, the capital gains tax is paid proportionally as each instalment of the price is received. However, for non-resident taxpayers such an option is not available, as a result of which, capital gains are taxed on an accrual basis. According to the European Commission, this difference in treatment infringes upon the principle of free movement of capital. In this respect, the Commission sent Spain a letter of formal notice on 2 December 2021, followed by a reasoned opinion on 23 May 2024. Nevertheless, in its formal replies, Spain maintains that its tax legislation is in line with EU law. The case has now been referred to the CJ.

EU Council adopts conclusions on Tax Decluttering and Simplification Agenda

On 11 March 2025, the Council adopted conclusions on a tax decluttering and simplification agenda, aimed at improving the EU's tax regulatory framework to foster growth and innovation. The initiative forms part of the broader effort to enhance the Union's competitiveness through more efficient and targeted legislation.

The conclusions set out four guiding principles to underpin the review of both existing tax legislation and future initiatives: (i) reducing administrative and compliance burdens for taxpayers and tax authorities; (ii) eliminating outdated or duplicative rules; (iii) enhancing clarity and legal certainty; and (iv) streamlining the application of tax rules and procedures to ensure efficiency and a level playing field.

As a first step in this comprehensive review, the Council proposes an analysis of two key directives that directly impact the internal market: the Directive on Administrative Cooperation (2011/16) and the Anti-Tax Avoidance Directive (2016/1164).

European Commission issues decisions on referrals to CJ over the Minimum Taxation Directive

On 12 March 2025, the European Commission issued decisions in connection with ongoing referrals of Cyprus, Spain, Poland and Portugal to the CJ for failing to notify the national measures for implementing the EU Minimum Taxation Directive (2022/2523). The Commission described these actions as 'Referral to Court Art. 258-260(3) TFEU Deferral,' without disclosing further details.

It should be noted that the four Member States above have already transposed the Minimum Taxation Directive into national law, albeit after the 31 December 2023 transposition deadline.

European Commission adopts DAC7 implementing regulation

On 2 April 2025, the European Commission adopted the amendment to the Implementing Regulation (EU) 2015/2378, which lays down detailed rules for implementing certain provisions of the Directive on Administrative Cooperation by platforms operators (DAC7).

The Implementing Regulation establishes the standard forms and computerised formats to be used for the mandatory automatic exchange of information in relation to DAC7, and the list of statistical data to be provided by Member States for the purposes of evaluating DAC7.

The statistical data must be provided by Member States to the EU Commission on mandatory automatic exchange of information reported by platform operators. However, the existing Implementing Regulation did not specify the time prior to which this information is to be provided. Therefore, the amended Implementing Regulation now stipulates that, before 1 April each year, Member States shall communicate by electronic means to the EU Commission the statistical data on mandatory automatic exchange of information. In addition, the statistical data required for all forms of administrative cooperation, excluding the mandatory automatic exchange of information, have been updated.

3. State Aid

Case Law

CJ judgment on the application of State Aid rules to financial contributions for industrial rationalisation (*Flag Srl and Others v Ministero dello Sviluppo Economico*, C-746/23 & C-747/23)

On 13 March 2025, the CJ delivered its judgment in the case *Flag Srl and Others v Ministero dello Sviluppo Economico* (C-746/23 & C-747/23). The case concerns the application of EU State Aid rules under Article 107(1) TFEU to financial contributions granted by the Italian authorities in the context of a national rationalisation programme targeting the iron and steel foundry sector.

Flag Srl, a subsidiary of Cividale SpA, applied in 2004 for a compensation related to the dismantling of one of its production facilities due to sectoral overcapacity. The contribution was intended as a one-time payment to offset economic losses linked to the voluntary closure and demolition of obsolete production infrastructure. The facility in question had ceased operations due to structural inefficiencies, and the contribution reflected an estimated value of the dismantled assets. An initial valuation set the compensation at EUR 1.6 million. However, in 2013, only a payment of EUR 200,000 was authorised under the EU de minimis regulation. Flag Srl and its parent company disputed the classification of the contribution as State Aid, arguing that it merely constituted a reimbursement of the facility's intrinsic value and conferred no economic advantage. The referring Italian court sought clarification from the CJ as to whether such a contribution qualifies as State Aid under Article 107(1) TFEU.

In its judgment, the CJ held that such a financial contribution does constitute State Aid under Article 107(1) TFEU. The Court clarified that: (i) A State measure can be considered an economic advantage even if it is framed as compensation, provided it improves the financial position of a specific undertaking compared to others in the market; and (ii) Whether the contribution aligns with market terms must be assessed via the private market economy operator (PMEO) test (i.e., whether a private investor would have made such a payment under similar conditions).

On such basis, the Court found no sufficient indication that the Italian State had acted in the capacity of a private investor. In the Court's view, the contribution was part of a public policy-driven restructuring programme which purses public policy objectives and was not a market-based transaction with commercial objectives.

Developments

European Commission launches public consultation on draft State Aid framework accompanying the Clean Industrial Deal

On 11 March 2025, the European Commission launched a public consultation inviting stakeholders to submit comments on its draft State aid Framework accompanying the Clean Industrial Deal (CISAF). Stakeholders can submit comments until 25 April 2025.

The CISAF aims to simplify State aid rules to accelerate renewable energy deployment, industrial decarbonisation, and clean tech manufacturing capacity in Europe. The draft sets conditions under which State aid for investments, including selective tax incentives such as accelerated depreciation, would be compatible with the internal market.

The CISAF is part of the European Commission's Clean Industrial Deal roadmap, with adoption planned for the second quarter of 2025. Once adopted, CISAF will replace the Temporary Crisis and Transition Framework from 9 March 2023.

EU approves over EUR 8 billion in State Aid to accelerate industrial decarbonization and energy transition

The European Commission has approved more than EUR 8 billion in State Aid schemes across several Member States, all aimed at facilitating the EU's climate objectives and enhancing industrial competitiveness.

- **Germany**: A EUR 5 billion scheme was authorized to assist industries in decarbonizing their production processes, particularly those covered by the EU Emissions Trading System. The aid supports investments in low-carbon technologies, such as electrification and hydrogen use, aligning with the 2022 Guidelines on State aid for climate, environmental protection, and energy.
- **Finland**: A EUR 2.3 billion scheme was approved to support investments in strategic sectors and help industrial companies decarbonize their production processes. The scheme contributes to the achievement of the priorities of the European Commission for 2024-2029, based on the Political Guidelines, which call for investments in clean energy and technologies.
- **Portugal**: A EUR 612 million scheme was approved to lower electricity levy rates for energy-intensive companies. The measure aims to mitigate the risk of carbon leakage by reducing the financial burden on companies exposed to international competition, provided they commit to energy audits, renewable energy usage, or emissions reduction investments.
- **Spain**: The European Commission has approved a EUR 400 million scheme to support the production of renewable hydrogen. The aid will be administered through competitive bidding processes, ensuring cost-effective support for projects that contribute to the decarbonization of the economy.
- **Austria and Lithuania**: Austria's EUR 400 million scheme and Lithuania's EUR 36 million scheme were both approved to support the production of renewable hydrogen. These measures aim to foster the development of a hydrogen economy, contributing to the EU's energy transition goals.

These approvals underscore the EU's commitment to facilitating the green transition through targeted State Aid, ensuring that industries can adapt to climate objectives while maintaining competitiveness.

4. VAT

Case Law

CJ judgment on VAT deductibility following reclassification of a transaction (*Greentech*, C-640/23)

On 13 March 2025, the CJ delivered its judgment in the case *Greentech SA* (C-640/23).

The case concerns a dispute between the Romanian company Greentech and the national tax authorities, following the reclassification of a transaction initially treated as a taxable supply of goods. Greentech had deducted input VAT on the purchase of equipment from its affiliated company Greenfiber, which both companies had treated as a transaction subject to VAT. Although the tax authorities had confirmed the VAT treatment as correct during an earlier tax audit at Greenfiber, a subsequent audit at Greentech resulted in the requalification of the same transaction as a transfer of part of a business, falling outside the scope of VAT.

Consequently, had Greentech wrongly deducted the incorrectly invoiced VAT according to the tax authorities, resulting in VAT assessments.

Greentech argued that it could not have corrected the invoice earlier, as both parties had consistently treated the transaction as taxable. By the time the reclassification became final, the limitation period for correcting the invoice had expired, making it impossible for Greentech to recover the VAT from its supplier. Greentech, therefore, claimed a right to retain the deduction.

The Court ruled that VAT may only be deducted if it was due on a taxable transaction. Since the transaction had been reclassified as not subject to VAT, the VAT charged on the invoice was not actually due by the supplier and consequently not deductible for Greentech. However, the CJ emphasized that, in line with the principles of VAT neutrality and effectiveness, the taxable person must be allowed to apply for reimbursement of the erroneously paid VAT directly to the tax authorities, where it becomes impossible or excessively difficult to recover such VAT from the supplier.

CJ judgment on the removal from VAT register due to formal VAT infringements (Cityland EOOD, C-164/24)

On 3 April 2025, the CJ delivered its judgment in the case *Cityland EOOD* (C-164/24).

Cityland had failed to pay declared VAT for five tax filing periods and was removed from the VAT register by the Bulgarian tax authorities based on national legislation that permits deregistration following three formal infringements of the VAT rules. In Bulgaria, in particular the late submission of a tax return, the late payment of VAT or the late issue of a VAT invoice can result in the removal, without the obligation for the tax authorities to examine whether there exists a risk to tax revenue losses or fraud. Cityland contested the decision, arguing that the unpaid VAT related to invoices issued in the context of ongoing litigation, and that the amounts due had since been settled. The company claimed that the removal was disproportionate and unjustified.

The CJ ruled that EU law precludes national legislation allowing for removal of a taxable person from the VAT register solely on formal grounds, without considering the nature of the infringements or the overall conduct of the taxable person. Such a penalty may unjustifiably harm the taxpayer, infringe the principles of EU law and could discourage commercial relations or force the taxpayer to cease operations.

Opinion AG Kokott regarding the VAT taxable amount for intra-group services (*Högkullen AB*, C-808/23)

On 6 March 2025, the Opinion of AG Kokott was published in the case *Högkullen AB* (C 808/23).

Högkullen AB is a Swedish holding company that provided intra-group services for consideration to its subsidiaries, which are engaged in real estate management and partially perform VAT exempt activities. The services include company management, financing, real estate management, IT, and personnel management. The fees for the services are calculated based on the so-called 'cost-plus' transfer pricing method. The subsidiaries cannot fully deduct the VAT on the fees charged by Högkullen AB.

Under Swedish VAT law, the VAT taxable amount is based on the open market value if related parties perform supplies below the open market value and the customer cannot fully deduct the VAT. This value consists of the price of a comparable supply and, if no comparable supply exists, at least the full cost price of the services. The Swedish Tax Agency revalued the taxable amount and applied the open market value on the intra-group services performed by Högkullen AB. They considered the services provided as one indivisible supply without a comparable price on the open market and based the value on all costs incurred including expenses completely unrelated to the output transactions.

AG Kokott opined that Högkullen AB provides multiple distinct services, not a single, indivisible one. To determine the open market value, comparable market prices should be used. Only if no comparable service exists, is the full cost of providing the service used.

The full cost is limited to costs linked to the services provided and should not include costs on which no VAT is levied such as wage costs as this could not result in tax evasion or avoidance. Additionally, major capital expenditures should be spread over multiple years according to AG Kokott.

AG Rantos' Opinion about VAT on factoring services (*Kosmiro*, C-232/24)

On 3 April 2025, the Opinion of AG Rantos was published in the case *Kosmiro* (C 232/24).

A Oy applied for a tax ruling to determine whether its factoring commission, calculated as a percentage of the value of each receivable, and its arrangement fee, charged as a flat amount for setting up the factoring process, should be treated as VAT exempt financial services (such as the granting of credit) or as VAT taxable debt collection services. The Finnish Central Tax Board had classified the services partly as VAT-exempt and partly as VAT taxable. A Oy challenged this outcome, arguing that the entire service package should be subject to VAT resulting in a full deduction of VAT on its costs.

AG Rantos concluded that the factoring services should be considered one VAT taxable supply relating to 'debt collection'. The AG emphasized that the core function of factoring is the management and collection of receivables, which constitutes of a distinct economic activity. Even where financing elements are present, these are secondary to the main supply and do not qualify as VAT exempt granting of credit.

The AG also argues that the exclusion of debt collection from the VAT exemption is sufficiently clear and unconditional to have direct effect. This allows taxable persons to invoke such direct effect of the VAT Directive before national courts should that be in their interests.

AG Szpunar's Opinion on VAT liability of digital intermediaries before 2015 (*Xyrality*, C-101/24)

On 10 April 2025, the Opinion of AG Szpunar was published in the case *Xyrality GmbH* (C-101/24).

The Xyrality case concerns the applicability of the legal fiction under Article 28 of the EU VAT Directive to electronically supplied services prior to 1 January 2015. Under this provision, intermediaries who act in their own name but on behalf of another person (so-called 'undisclosed agents') in the provision of services are deemed for VAT purposes to have received and supplied the service concerned. Since 1 January 2015, Article 9a of the EU VAT Implementing Regulation has clarified that this legal fiction also applies to digital platforms or marketplaces involved in the supply of electronic services, where such platforms set the general terms of the service, authorize the charge, or deliver the services.

In the case at hand, the German developer, Xyrality GmbH, made mobile games available through an Irish app store. End users downloaded the games for free, but could make paid in-app purchases, which were processed and billed by the app store. Xyrality claimed that the Irish platform is the (deemed) supplier for VAT purposes based on the legal fiction of Article 28, and that no VAT was due in Germany by Xyrality on its deemed supply to the Irish platform. The German Tax Authorities opposed this view.

AG Szpunar concluded that Article 28 does apply to such arrangements made before 1 January 2015. Where the app store acts in its own name, it is deemed to have received and resupplied the services, even if the app developer is identified to the customer. The transaction, including both the free app and the paid upgrades, must be treated as a single service, supplied through the intermediary. The AG further stated that both the fictitious supply from developer to the app store and the subsequent supply to the end user are VAT-taxable in Ireland based on the regular VAT rules (applicable in 2015 on electronically supplied services).

Finally, the AG ruled out the liability under which VAT obligations are imposed on any party stating VAT on an invoice. The AG concluded that this provision does not apply where services are supplied to non-taxable end users, who are not entitled to deduct VAT, as there is no risk of loss of tax revenues in such cases.

5. Customs Duties, Excises and other Indirect Taxes

Case Law

CJ judgment on the taxation for excise duty purposes of gas oil used as fuel which does not comply with the fiscal marking requirement (*Alsen*, C-137/23)

On 13 March 2025, the CJ delivered its judgment in the case of *Alsen* (C-137/23) concerning the eligibility for exemption from excise duty of gas oil supplied for use as fuel for navigation for commercial purposes on EU inland waterways, where fiscal marking of the gas oil was not applied in accordance with the requirements of EU law.

In June 2016, an inspection was carried out by the Dutch Customs authorities on a tanker in the Amsterdam-Rhine Canal. During this inspection, samples were taken of the gas oil stored in the bunker tanks of the tanker. A laboratory analysis of the gas oil samples revealed the presence of Solvent Yellow 124 – which is used as a fiscal marker pursuant to Directive 95/60 – at a level of 4.4 grams per 1,000 litres, which is below the minimum level of 6 grams per 1,000 litres required for the exemption from excise duty. As a result, the Inspector refused the application of the exemption from excise duty and subsequently issued a tax assessment concerning the excise duty payable on the gas oil found in the bunker tanks. Following an appeal in cassation brought before the Supreme Court of the Netherlands, preliminary questions were referred to the CJ.

The CJ considered that the Energy Taxation Directive (Directive 2003/96/EC) requires Member States to exempt from taxation the supply of energy products for use as fuel for the purposes of navigation within EU waters (including fishing), other than private pleasure crafts. In addition, Member States are required to put in place measures to ensure the correct application of the exemption in accordance with their actual use, to enable the competent authorities to monitor effectively whether the energy products are used for the purposes prescribed for the application of the exemption from taxation.

The CJ considered that, although the requirement of fiscal marking was not met in the situation at issue, it was nevertheless established that the gas oil was used as fuel for navigation in EU waters. Furthermore, the CJ noted that the facts of the case in question did not give rise to any suspicion of tax evasion, avoidance or abuse. Moreover, the fiscal marking requirement laid down in Directive 95/60 does not allow Member States to make compliance with that requirement a precondition for the application of an exemption from taxation for energy products used for purposes which provide for an exemption from tax.

Consequently, the CJ concluded that EU Member States may not refuse the application of the exemption from excise duty for gas oil used as fuel for the purposes of navigation for commercial purposes in EU waters, provided that such gas oil is used for such purposes and that there is no evidence that could give rise to a suspicion of tax evasion, avoidance or abuse.

CJ judgment on the verification of proofs of origin in the context of EUR.1 movement certificates issued by authorities outside the customs territory of the EU (*C/C Vámügynöki Kft.*, C-351/24)

On 27 March 2025, the CJ delivered its judgment in the case *C/C Vámügynöki Kft.* (C-351/24) concerning a national practise whereby the proof of origin is rejected without recourse to the procedure laid down in Article 32 of Appendix 1 to the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (Regional Convention).

In February 2022, C/C, acting as an indirect customs representative for an importing company, requested the release for free circulation of fresh mandarins dispatched from Kosovo and originating in Turkey, the origin of which was evidenced by EUR.1 movement certificates issued by the customs authorities of Kosovo. Following the request for release for free circulation, a verification procedure was initiated by the Hungarian customs authority during which it was established that the goods in question were not eligible for preferential tariff treatment within the context of the relations between the EU, Kosovo and Türkiye and that such treatment could not be certified by the customs authorities of Kosovo. Subsequently, a decision was made for customs duties to be levied of approximately EUR 6,350 and C/C was ordered to pay this amount.

In the national proceedings, C/C argued that the EUR.1 movement certificates had been issued in the context of administrative cooperation within the meaning of Article 31 of Appendix I to the Regional Convention and that, consequently, it could not reasonably have discovered that the EUR.1 movement certificates had been issued incorrectly and that, as such, the order to pay customs duties should be remitted pursuant to Article 119 of Regulation (EU) No 952/2013 (UCC). In addition, C/C argued that the Hungarian customs authorities should have initiated the verification procedure provided for in Article 32 of Appendix I to the Regional Convention to verify the accuracy of the content of the EUR.1 movement certificates at issue.

The Hungarian authorities argued that the customs authorities of Kosovo could not have certified that the origin of the goods in question was Turkey. Therefore, it could establish with certainty that the EUR.1 movement certificates had been issued in error and that, consequently, it was not necessary to follow the verification procedure laid down in Article 32 of Appendix I to the Regional Convention. It further argued that C/C, notwithstanding any actions taken in good faith, could reasonably have discovered that the EUR.1 movement certificates had been issued in error. Since the referring court found it difficult to determine whether the customs authorities should follow the verification procedure when they discover an error in the proof of origin, a preliminary question was referred to the CJ.

First, it follows from the findings of the referring court that the EUR.1 movement certificates issued by the Kosovan customs authorities were issued in error. According to the CJ, if goods to which the EUR.1 movement certificates refer to are not eligible for preferential treatment, it follows that the customs authorities are not required to initiate a verification procedure. Furthermore, the CJ considered that in cases where EUR.1 movement certificates are issued incorrectly outside a system of administrative administration, the legal presumption laid down in Article 119(3) of the UCC would not apply.

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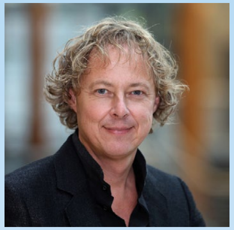

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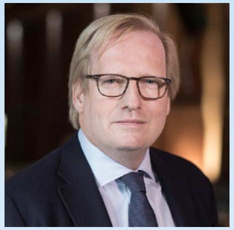

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