LOYENS & LOEFF

EU **Tax Law** Highlights of 2019

In the course of 2019 there were several developments in EU tax law. This annual edition of EU Tax Alert provides an overview of those developments.

Highlights in this edition

In the course of 2019 there were several developments in EU tax law. This annual edition of EU Tax Alert provides an overview of those developments, in which we highlight:

- New Commission investigations on State Aid

- General Court decisions on State Aid cases concerning certain MNEs

- CJ decisions in the field of direct taxation (notably on the interpretation of beneficial ownership and the meaning of final losses)

- VAT rules for e-commerce

Contents

VAT

- EU Council adopts VAT Implementing Regulation on new VAT rules for e-commerce
- CJ rules on VAT on commission payments (*Baumgarten Sports & more*)
- CJ rules on VAT refund requirements (*Tratave*)
- CJ rules on qualification of VAT transactions (*A Oy*)
- CJ rules on VAT deduction of expenditures (*Morgan Stanley*)
- CJ rules on VAT exemption on imports in the case of subsequent tax evasion (*Vetsch Int. Transporte GmbH*)
- CJ rules on conditions for VAT refund (*Nestrade SA*)
- CJ rules on initial VAT deduction followed by sale and lease back transactions (*Mydibel*)
- CJ rules on deduction of VAT incorrectly charged (*PORR Építési Kft.*)
- CJ rules whether fuel cards qualify as financial services (*Vega International Car Transport and Logistic*)
- CJ rules on VAT deduction (*Związek Gmin Zagłębia Miedziowego w Polkowicach*)
- CJ rules on whether or not a member of the Supervisory Board of a foundation qualifies as a taxable person for VAT purposes (*IO*)
- CJ rules on assessment of abusive practices and refusal to grant VAT deduction (*Kuršu zeme*)
- CJ rules on meaning of ‘building land’ for VAT purposes (*KPC Herning*)
- CJ rules on the application of the financial VAT exemption in regard of transfer of debt (*Paulo Nascimento Consulting*)
- CJ rules on application of the VAT exemption for transactions concerning payments (*Cardpoint*)
- CJ rules on requirements for zero VAT rate for export (*Unitel*)
- CJ rules on the application of reduced VAT rate for camping or caravan sites (*Segler-Vereinigung*)
- CJ rules on the VAT treatment of land registry costs which concern a statutory obligation of the seller (*Amărăşti Land Investment*)

State Aid / WTO

EU General Court annuls State aid decision on Belgian excess profit rulings

On 14 February 2019, the EU General Court annulled the Commission's State aid decision of 11 January 2016 on Belgian excess profit rulings on the formal ground that the Belgian rules did not constitute an aid scheme (as opposed to individual measures). The General Court did not address the pleas addressing the findings of selectivity and of an advantage. The Commission had ordered recovery of the alleged aid from dozens of multinationals simultaneously (see our earlier tax flash here) through deciding that the Belgian excess profit ruling measures formed an aid scheme.

State aid is defined as a measure granted by the State or through State resources, which distorts or threatens to distort competition and affects intra-EU trade by favouring certain undertakings or the production of certain goods. Measures meeting these criteria may constitute an aid scheme in particular in the case they do not need further implementing measures and define beneficiaries in a general and abstract manner.

The General Court first dismissed the plea that the Commission had encroached on Belgium's tax sovereignty, including the competence to adopt measures to prevent double taxation, as the measure did not appear to pursue that objective. It thereby confirmed the right of the Commission to examine the compatibility of tax rulings under State aid rules.

The General Court then turned to assessing whether the Belgian rules and the related rulings effectively constituted a scheme and found that the criteria were not met:

- Implementing measures were needed and the tax authorities had a genuine margin of discretion in deciding whether it was appropriate to grant the downward adjustment to the Belgian company's taxable profits.
- The beneficiaries could not be identified on the sole basis of the tax provision in the law without further implementing measures.
- The Commission's analysis of a limited sample of rulings did not meet the requisite standard of proof to establish a systematic approach. Deficiencies in the contested decision could not be remedied by additional information provided during the proceedings.

The General Court's judgment can be found here.

As a result of the judgment of the General Court, beneficiaries of the excess profit rulings no longer have to repay the alleged aid. Those who had already done so may claim back the amount paid to Belgium. The Commission may appeal the judgment to the Court of Justice, on points of law only, within two months and 10 days of its notification. The General Court had decided earlier to stay all the proceedings relating to the excess profit rulings that were started by 29 multinationals affected by the European Commission's decision, until a final decision was given in the case of the Belgian State (and Magnetrol International) versus the Commission. These proceedings will not resume before the above appeal period has run and might never resume if the General Court's decision is final or confirmed.

As the General Court does not address the selectivity and advantage criteria, no lesson may be drawn for the other pending cases concerning aid allegedly granted by the Netherlands to Starbucks, Ireland to Apple, and Luxembourg to Fiat, Amazon and ENGIE by means of various tax rulings. Apart from the cases pending before the General Court, formal investigations continue into the tax treatment of Inter Ikea and Nike in the Netherlands (see below) and into the UK CFC financing exemption rules (which the Commission also examines as a scheme).

General Court annuls Commission decision on Spanish Football Clubs

On 26 February 2019, the General Court decided, in a case brought by FC Barcelona (T-865/16), to annul a 2016 Commission decision on the taxation of four major Spanish football clubs. Unlike other professional football clubs who had to become 'sport public limited companies', they were allowed to remain being treated as non-profit sport clubs. The Commission ruled this treatment to be State aid, inter alia, in light of the lower tax rate applicable to non-profit entities. The General Court found that the Commission did not meet its burden of proof with regard to the presence of an actual advantage. It was mentioned, for instance, that the regularly taxed companies were entitled to much higher investment deductions (also applicable to the transfer of players), so the non-profit status was not beneficial per se.

Also, the Commission only investigated four years out of the period 1990 to 2015 to substantiate its findings.

CJEU clarifies the consequences of non-compliance with the GBER

On 5 March 2019, the CJ issued its judgment in case C-349/17. This case clarified the consequences of violating the general block exemption regulation (GBER). The GBER specifies under which conditions state aid does not need to be notified to the European Commission in advance. In the case at hand the question was whether the aid received indeed had the necessary incentive effect, as activities already started prior to the aid being applied for. The CJEU held that, if authorities discover that not all conditions of the GBER were fulfilled in a particular case, they have the duty to recover unlawfully granted aid (plus interest) on their own initiative. Those authorities, of course, also had the duty to check whether any aid applied for met the GBER requirements on a case-by-case basis. If aid is granted while misapplying GBER requirements, it infringes upon the stand still obligation of Article 108(3) TFEU.
The CJEU immediately and unequivocally ruled out that any such action by national authorities could have given rise to legitimate expectations at the side of the beneficiary. So, even though the above referred to an investment subsidy, to the extent a tax scheme would be introduced with reference to the GBER and hence without prior notification to the Commission, any non-compliance with GBER requirements may lead to a similar situation as well.

General Court sets framework for the Commission to enforce arm's length transfer pricing under State aid rules (*Fiat and Starbucks*)

On 24 September 2019, the General Court upheld the Commission's decision that Fiat had received unlawful State aid from Luxembourg, and at the same time annulled the decision which had found the same with respect to Starbucks in the Netherlands.

Even though leading to different outcomes, these judgments support the Commission in its scrutiny of advance tax rulings on transfer pricing, explicitly confirming the possibility for the Commission to verify the arm's length nature of transactions between related parties. At the same time, it acknowledges taxpayers and Member States have a margin of appreciation.

Background

State aid is defined as a measure granted by the State or through State resources, which distorts or threatens to distort competition and affects intra-EU trade by favouring certain undertakings or the production of certain goods. Measures meeting those criteria may constitute an aid scheme, in particular, in the case they do not require further implementing measures and define beneficiaries in a general and abstract manner.
On 21 October 2015, the Commission concluded that the Netherlands and Luxembourg had granted unlawful aid to Starbucks and Fiat respectively (see our earlier flash). In both cases, the Commission challenged the transfer pricing (TP) analysis underpinning the price of certain intragroup transactions, e.g., with respect to the choice of the TP method, the choice of the profitability indicator, and the selection of comparable companies. The taxpayers and the Member States involved had appealed to the General Court, arguing in particular that the Commission (i) had exceeded its powers and sought to harmonise taxes through the backdoor, (ii) had made mistakes in its detailed TP assessment, and (iii) did not establish that the beneficiaries of the rulings were treated more favourably than other taxpayers.

Key findings

The General Court confirmed that the Commission can interpret State aid rules as imposing an obligation to comply with an arm's length principle, as integrated and standalone companies are in a similar situation. Hence, the Commission was right to compare the tax position of the relevant Fiat and Starbucks entities with the tax burden imposed by normal national taxation rules on an undertaking operating in a comparable factual situation and under market conditions. The General Court appears to accept this would be the case even if there is no arm's length principle clearly laid down in domestic law. At the same time, the General Court acknowledges that TP inherently entails a degree of inaccuracy, so that an advantage only arises when the variation between two comparables exceeds the inaccuracy inherent to the chosen TP method.
Moreover, in both the *Fiat* and *Starbucks* cases, the General Court found that the Commission did not exceed its powers when assessing compliance of the tax rulings with the arm's length principle.
The judgments also provide guidance on how to apply such principle concretely and came out with opposite conclusions as regards the actual evidence of an advantage provided by the Commission:

- In the *Fiat* case, the General Court found it was inappropriate to remunerate only a hypothetical amount of capital at risk, rather than the full amount of capital. Luxembourg had thus not complied with the arm's length principle, which resulted in an unlawfully reduced tax base for the taxpayer.
- In the *Starbucks* case, the General Court rejected the Commission's challenges to the Netherlands TP analysis. It found that choosing the TNMM rather than another, more direct TP method (the CUP) was not sufficient to prove the existence of an advantage. The General Court also reviewed the functional analysis of the parties to the transactions covered by the advance pricing agreement and the comparability analysis to determine an arm's length remuneration.

Finally, in the *Fiat* case, the General Court also confirmed the presumption of selectivity raised by the Commission (once an advantage resulting from the tax ruling is established). The General Court, however, also went through the standard 3-step selectivity analysis to set aside Luxembourg's and Fiat's arguments.

Next steps

Taxpayers engaged in intragroup transactions in the EU should review the General Court's positions on the different stages of a TP analysis, as the reasoning may affect how national tax authorities perform TP assessments going forward. It may be worthwhile to verify the strength of the taxpayer's TP position in view of these new developments.

The Commission (in the *Starbucks* case), Fiat and Luxembourg (in the *Fiat* case) respectively, may file an appeal with the Court of Justice, which is the court of final instance, to assess matters of law rather than fact.

An appeal of the Commission in the Belgian Excess profit ruling case is already pending with the Court of Justice. The *Apple*, *Amazon* and *ENGIE* cases are still pending before the General Court; the hearing in the *Apple* case took place on 17 and 18 September 2019. The Commission still also has formal investigations pending into the tax treatment of Nike and IKEA in the Netherlands, Huhtamäki in Luxembourg and 39 Belgian companies which benefited from an Excess profit ruling.

CJ rules that limitations to the Belgian notional interest deduction regarding exempt foreign permanent establishments are in line with the freedom of establishment (*Argenta Spaarbank*)

On 17 October 2019, the CJ issued its judgment in case *Argenta Spaarbank* (C-459/18). The case deals with the calculation of the notional interest deduction (deduction for capital risk) in the case of a Belgian company that has a Netherlands permanent establishment the income of which is exempt under the double tax treaty signed between those countries. The CJ concluded that there is no actual difference between how the deduction applies to domestic and foreign permanent establishments.

The Belgian notional interest deduction is calculated based on the amount of the company's equity capital. For such a calculation, the net value of the assets of a permanent establishment (deemed as its equity capital) situated in another Member State was not taken into account if the profits of that permanent establishment were not taxable in Belgium by virtue of a double tax treaty. However, such a limitation was found in breach of the freedom of establishment by the CJ in the *Argenta Spaarbank* judgment (4 July 2013, C-350/11). Then, the Belgian legislation was amended so that the net value of the assets of such a permanent establishment is taken into account in the calculation of the deduction, but, subsequently, this amount is reduced by the lesser of the following amounts: the part of the deduction that relates to the permanent establishment's equity capital or the positive result of the permanent establishment.

Given that such a reduction is not applied in the case of a permanent establishment situated in Belgium, the CJ was asked whether the freedom of establishment precludes this treatment. The CJ identified and analysed three situations, and concluded that under none of those situations is a company, with a foreign permanent establishment the income of which is exempt in Belgium under a double tax treaty, treated less favourably than a company with a domestic permanent establishment.

First, if the permanent establishment suffers losses, the notional interest deduction is not reduced, so there is no difference in treatment. Second, if the permanent establishment generates a positive result which is lower than the part of the deduction for risk capital which relates to that permanent establishment, the exceeding part of the deduction is taken into account to reduce the taxable base of the company, as it were the overall outcome for a domestic permanent establishment the income of which is not exempt. And third, if the permanent establishment generates a positive result which exceeds the related part of the deduction for risk capital there is no disadvantage, given that the taxable base of a company with a domestic permanent establishment would be higher.

CJ rules on restriction of eligibiltiy of energy tax rebate scheme

On 14 November 2019 the CJ issued a preliminary ruling in the (second) *Dilly's Wellnesshotel* case (C-585/17). Austria decided to limit an existing energy tax rebate scheme to the manufacturing industry as of 2011.
The applicant, a provider of hotel services, was therefore refused the rebate in 2011. On appeal and after a first decision by the CJ, it was ruled that the restriction as such had to be notified in light of the restriction of an existing aid scheme as the implementing law failed to include the obligatory reference to the 2008 Block Exemption Regulation. Absent mandatory notification, the Austrian Federal Finance Court held that the restriction had not come into force and awarded the rebate.

On further appeal to the Austrian Supreme Administrative Court the case was again referred to the CJ. The CJ reitterated that (later) restricting those eligible for an aid scheme is subject to the notification requirement of Article 108(3) TFEU. However, as the revised aid scheme as such complied with the renewed 2014 Block Exemption regulation – the rebate followed from a specific formula leaving no discretion to tax authorites and ensuring a minimum energy tax to be paid – it would qualify for an exemption of notification nowadays.

EU State aid investigation opened into Huhtamäki's tax treatment in Luxembourg

On 7 March 2019, the Commission announced the opening of a formal State aid investigation into three tax rulings granted by the Luxembourg tax authorities to a Luxembourg entity of the Finnish Huhtamäki group.
The tax rulings allowed a Luxembourg borrower to impute an arm's length interest expense on an interest-free debt.

Under EU State aid rules, Member States are not allowed to grant a selective advantage that may distort competition by favouring certain undertakings. This new investigation focuses on transfer pricing: it questions the imputation of a deemed interest expense on an interest-free debt at the level of the Luxembourg borrower, whereas there is no corresponding upward adjustment of the tax base at the level of the Irish lender.

The Huhtamäki group had a Luxembourg-based group financing company. This company had received an interest free loan from an Irish group company, but claimed a downward adjustment of its tax base through deduction of deemed interest expense. Luxembourg considered that this unilateral adjustment reflected the arm's length interest that would have been charged by the lender under market-based conditions. Based on its press release, accessible here, the Commission is concerned that Luxembourg's acceptance of the unilateral downward adjustment may grant the company a selective advantage.

The opening of a formal investigation does not prejudge the final outcome of the case. The Commission will now examine whether the unilateral downward adjustment of the Luxembourg borrower's tax base is justified under EU State aid rules. The Commission's interpretation of the arm's length principle under EU State aid rules in other recent State aid decisions, including Apple, Starbucks, Fiat and Amazon, is at the same time subject to appeal before the Court of Justice of the EU. Luxembourg.
The Luxembourg company that obtained the investigated tax rulings and interested third parties will have the opportunity to submit comments on the Commission's decision.

More formal investigations into tax rulings in several EU Member States are still expected to be opened. There are also pending formal investigations concerning IKEA (in the Netherlands), Nike (the Netherlands) and the CFC financing exception scheme in the United Kingdom.

Commission opens investigation into Nike's tax treatment in the Netherlands

On 10 January 2019, the Commission announced the opening of a formal State aid investigation into five tax rulings granted by the Netherlands tax authorities to two Netherlands entities of the Nike group between 2006 and 2015. This investigation concerns individual tax rulings and, as such, should not directly impact other taxpayers. Nonetheless, the investigation forms part of the Commission's continuing efforts, focusing on transfer pricing and valuation issues.
Under EU State aid rules, Member States are not allowed to grant a selective advantage that may distort competition by favouring certain undertakings. This new investigation

focuses on transfer pricing: it questions the arm's length nature of the royalty payments made by the two Netherlands operating entities (OpCos) to two Netherlands tax-transparent partnerships owning certain IP rights relating to products sold by the OpCos. As the royalty payments are tax deductible, the OpCos' taxable amount is only marginal, which the Netherlands tax authorities considered at arm's length. The partnerships are not taxed in the Netherlands.

Based on its press release the Commission's doubts arise from the potential non-alignment between the profit allocation and the substance of the respective entities. The partnerships 'have no employees and do not carry out any economic activity' whereas the OpCos have more than 1,000 employees, perform IP-related functions, and carry out and bear the costs of marketing and sales activities. The Commission's reasoning, not yet published, may in this respect follow a similar path as in the *Amazon* (see our flash of 26 February 2018) and *IKEA* cases (see our flash of 18 December 2017).

The opening of a formal investigation does not prejudge the final outcome of the case. The Commission will now look in depth at whether the transfer pricing method accepted by the Netherlands tax authorities to determine the royalty payments are at arm's length. The Commission's interpretation of the arm's length principle under EU State aid rules in other recent State aid decisions, including Apple, Starbucks, Fiat and Amazon is, at the same time, subject to appeal before the Court of Justice of the EU. The Netherlands, the OpCos and interested third parties will have the opportunity to submit comments on the Commission's decision.

More cases investigating individual tax rulings in several EU Member States are still expected to be opened. There are also pending formal investigations concerning IKEA (in the Netherlands) and the CFC financing exception scheme in the United Kingdom.

Commission finds UK CFC exemption to benefit certain multinationals

Up to 2019 The UK provided a group financing exemption to its CFC rules. The European Commission found that it benefitted certain multinational groups and was therefore selective. I.e. financing income received by an offshore subsidiary from another foreign group company would be exempt, even if that income had been derived from UK-related activities or capital. A multinational active in the UK could therefore use its offshore subsidiary to finance a foreign group company without paying a substantial amount of tax.

The Commission found the exemption justifiable if the financing income was unrelated to UK activities, even if UK connected capital had been involved, as to avoid rather burdensome intra-group allocations. On the other hand, to the extent it was derived from UK activities the exemption constituted state aid and is to be recovered. UK authorities have been called upon to do a case-by-case examination for this purpose.

General Court annuls decision to recover arbitral award that compensated for withdrawn tax incentives

On 18 June 2019 the General Court ruled that the Commission overstepped its competences in deeming an arbitral award to amount to state aid (Joined cases T-624/15, T-694/15 and T-704/15, the 'Micula' cases.)

In 2005 Romania withdraw a number of investment incentives to comply with state aid rules prior to its accession to the EU in 2007. Based on a bilateral investment treaty between Romania and Sweden five applications asked for the establishment of an arbitral tribunal under the rules established by the International Centre for Settlement of Investment Disputes (ICSID). The European Commission intervened in the arbitration procedure, poiting out that any award might compensate compensation for operating aid and would be considered new aid. In 2013 the tribunal awarded compensation of about € 178 million in total to five applicants as Romania failed to ensure fair and equitable treatment of the investments at hand. In 2014 Romania filed an application for annulment and a stay of enforcement. That stay was lifted as Romania refused to unconditional commit to the arbitral award upon review regardless of EU law and any Commission decision in this matter. In 2014 a local Romanian court then recognised the award and allowed for forced execution against the Minstry of Finance.
On appeal that decision was suspended in 2015. One of the applicants then loged applications for recognition in 6 other jurisdictions; the one filed in the USA was joined by the other applicants as well. In the meantime an executor already seized and transfered around € 8 Mln. The remainder was then booked into a blocked account. In 2014 the Commission issued a suspension order under state aid rules and opened a formal investigation and in

2015 the Commission ordered the recovery of the arbitral award.

The General Court found that the award compensated retroactively for events in 2005 at which time the Commission was not yet competent to review Romanian actions under state aid rules. The 2014(/2015) payments were therefore related to enforcement of a right that arose in 2005. To the extent compensation was given for the periode of 1 January 2007 to April 2009 - subsequent to Romania's accession to the EU - the Commission exceeded its powers by not drawing a distinction between those payments and the payments related to the pre-accession period. The General Court did not confirm that the latter compensation would amount to unlawful aid if so defined, which leaves open the possibility that also that amount could be seen as related to an award related to a continued violation of the fair and equitable treatment obligation by Romania.

The General Court confirms that compensation for damages suffered cannot be regarded as state aid *unless* it has the effect of compensating for the withdrawal of unlawful or incompatible aid. The latter is an important and logical clarification of previous CJEU case law (the Asteris-cases of 1988). As the award could not relate to unlawful aid for the period up to 2007, the award cannot be seen as compensation for the withdrawal of such aid either. As the Commission did not make a distinction between the award related to the period before and after accession, its decision to recover is unlawful in its entirety and is therefore to be annulled. By choosing this path, the General Court avoided dealing with the question of awards granted under bilateral investment treatied that predate Romania's accession to the EU as far as they serve to protect investor rights that are infringed by that same accession. These issues are still to be addressed, should the Commission decide to take a new decision and split the award in a pre- and post-2017 part.

Direct taxation

EU Council updates EU list of non-cooperative jurisdictions for tax purposes.

On 10 October 2019, the EU Council removed the United Arab Emirates (UAE) and the Marshall Islands from the EU's list of non-cooperative jurisdictions for tax purposes. It also agreed that Albania, Costa Rica, Mauritius, Serbia and Switzerland are compliant with all commitments on tax cooperation.

Nine jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Belize, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

Ground-breaking decisions of the CJ on tax avoidance and beneficial ownership (Danish cases)

On 26 February 2019, CJ delivered its judgments in six cases which deal with the interpretation of the Parent-Subsidiary Directive (PSD) and the Interest & Royalties Directive (IRD) (together: the Directives).

The CJ stated that the term beneficial owner in the IRD, required to be able to benefit from the exemption from tax under the IRD, should be interpreted as the entity which benefits economically from the interest received and accordingly, has the power to freely determine the use to be given to that income. The CJ also broadened the EU definition of tax avoidance, in which case, no protection from the IRD or the PSD can be invoked, and provided indicia as to the elements that may constitute abuse when using intermediate holding companies. It also added the important statement that even in the absence of anti-abuse provisions in national law or tax treaties, Member States should apply a general EU law anti-abuse principle in order to refuse the benefits of the Directives.

In these six cases (the Danish cases *N T Danmark* (C-116/16) and *Y Denmark* (C-117/16) and cases *Luxembourg 1* (C-115/16), *X Denmark* (C-118/16), *C Danmark* (C-119/16) and *Z Denmark* (C-29916)), the CJ was asked multiple questions concerning the conditions under which a company paying dividends or interests to a related company can be denied an exemption from withholding tax pursuant to the PSD or the IRD. The questions were raised in connection with tax disputes in Denmark where the tax administration took the view that there was avoidance of Danish withholding tax through the use of intermediary holding companies controlled by entities that otherwise would not have access to the Directives' benefits.

i. Meaning of beneficial ownership

In some of these cases, the CJ was confronted with the interpretation of the beneficial owner requirement in Article 1(1) and Article 1(4) of the IRD. The CJ considered that the concept of beneficial owner of interest must be interpreted as designating an entity which actually benefits from the interest that is paid to it and has the power to freely determine the use to be given to that income received. The CJ further added that the concept of beneficial owner that appears in tax treaties based on the OECD Model Tax Convention and related commentaries is relevant when interpreting the IRD.

ii. Broader definition of tax avoidance and constituent elements of abuse

In previous case law, an abusive practice would occur in case the arrangement was 'wholly artificial'. In the Danish cases of today, the CJ referred to artificial arrangements in which the principal objective or one of the principal objectives is to obtain a tax advantage, suggesting that the CJ has broadened the EU definition of tax avoidance. The CJ also provided some useful indicia in order to assess the existence of abuse in case of intermediary holding companies, stating that an arrangement may be considered artificial in the case the company receiving the interest or dividends passes all or almost all of such income very soon after its receipt to entities that do not fulfil the conditions for the application of the Directives. For the CJ, the assessment of actual economic activity must be inferred from an analysis of all relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to the expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has. Indications of an artificial arrangement may also be founded by the various contracts existing between the companies involved in the financial transactions at issue giving rise to intragroup flows of funds, by the way in which transactions are financed, by the valuation of the intermediary company's equity and by the inability to have the economic use of the dividends or interest received.

iii. General EU law anti-abuse principle

Finally, the CJ added the important statement that in the light of the general principle of EU law that abusive practices are prohibited, national authorities should refuse the entitlement to the Directives' benefits even in the absence of anti-abuse provisions in national law or tax treaties.

CJ rules that the EU law precludes a tax regime that, following the emigration to Switzerland, taxes the unrealised capital gains in shares without deferral (*Wächtler*)

On 26 February 2019, the CJ delivered its judgment in the case *Martin Wächtler v Finanzamt Konstanz* (C-581/17). The case deals with a request made by Martin Wächtler concerning the decision made by the Finanzamt Konstanz (the tax authority of Konstanz, Germany) to tax, on his transferring his domicile from Germany to Switzerland, the unrealised capital gains with respect to shares held by him in a company established in Switzerland of which he is also the managing director.

The EU and its Members States, of the one part, and the Swiss Confederation, of the other part, signed seven agreements, one of which was the AFMP on 21 June 1999. Mr Wächtler, a German national, has been the managing director of a company incorporated under Swiss law since 1 February 2008, the nature of his business being in the field of IT consultancy, and he owns 50% of the company's share capital. On 1 March 2011, Mr Wächtler transferred his domicile from Germany to Switzerland, following which the Finanzamt Konstanz levied income tax on the unrealized capital gain with respect to his shareholding in that company. Mr Wächtler considered that that taxation, liability for which arises solely because he has transferred his domicile to Switzerland, is contrary to the AFMP, and more specifically the right of establishment provided for by the AFMP. The referring court had doubts as to the compatibility of the German law with the AFMP. That was, in particular, due to the fact that German law prescribes the taxation of unrealised capital gains with respect to company shares while permitting no deferral of payment of the tax payable in the event of a transfer, by a national of the Member State concerned, of his domicile to Switzerland, whereas, in the event of a transfer, by such a national, of his domicile to a Member State other than the Federal Republic of Germany or to a third State that is a party to the EEA Agreement, that tax regime does permit deferral, without interest and without provision of any guarantee, of payment of such a tax until the actual disposal of the shareholdings concerned.

The CJ started by observing that it is clear that the objective of the AFMP is to secure, for natural persons who are EU nationals or nationals of the Swiss Confederation, the free movement of persons in the territory of those parties based on the rules applying within the EU and the terms must be interpreted in accordance with the relevant case law of the Court prior to the date of signature of the AFMP.

The Court then considered that, having regard to the objective of the tax legislation, which is to tax the capital gains on shares which have accrued within the scope of the tax powers of Germany, the CJ ruled that the situation of a national of a Member State who transfers his domicile from Germany to Switzerland is comparable to that of a national of a Member State who maintains his or her domicile in Germany. Therefore, it concluded that the German legislation gave rise to a breach to the free movement of persons. The difference in treatment, which constitutes a tax-flow disadvantage for a German national is capable of deterring from making actual use of the right of establishment provided in the AFMP.

The CJ then discussed the justifications for the difference in treatment, being the preservation of the allocation powers of taxation, the effectiveness of fiscal supervision and the need to guarantee the effective collection of the tax in order to prevent the loss of tax revenue. The CJ concluded that these cannot justify the restriction on the right of establishment provided for by the AFMP. The fact that the tax regime provides for the possibility of payment of that tax in instalments does not change the fact that the tax regime constitutes an unjustified restriction on the right of establishment provided for by the AFMP. According to the CJ, such instalment-payment measure is incapable of eliminating the cash-flow disadvantage inherent in the obligation on the taxpayer to pay, at the time of the transfer of his domicile to Switzerland, a proportion of the tax payable on the unrealized capital gains with respect to the shares concerned. Moreover, that measure remains more onerous for the taxpayer than a measure that permits the deferral, until the disposal of those shares, of payment of the tax payable.

CJ rules on compatibility of German CFC rules with the free movement of capital (*X GmbH*)

On 26 February 2019, the CJ delivered its judgment in the case *X GmbH v Finanzamt Stuttgart – Körperschaften* (C-135/17). The case deals with the German CFC legislation and the proceedings between X GmbH, a company incorporated under German law, and the Finanzamt Stuttgart – Körperschaften regarding the incorporation of the income obtained by Y, a company incorporated under Swiss law which is 30% owned by X, into the tax base of X.

According to German CFC legislation, the taxable base of a taxable person resident in Germany, which holds at least 1% of the shares in a company established in another State (in the present case, Switzerland) includes, pro rata to the percentage of the shareholding, positive income obtained by that company from invested capital, where such income is taxed at a rate lower than 25%.

The Court ruled that the German legislation does not fall within the scope of the standstill clause in Article 64 (1) TFEU. The CJ then examined whether Article 63 (1() must be interpreted as precluding the German CFC legislation.

First of all, the CJ observed that the German CFC legislation is to discourage investors with unlimited tax liability in Germany from investing in companies established in certain third countries and therefore, constitutes a restriction on the free movement of capital. Second, the CJ stated that as soon as a Member State unilaterally taxes a resident company on the income obtained by a company established in a third country, in which that resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company.

The CJ then reminded that a national measure restricting the free movement of capital may be justified by the need to prevent tax evasion and avoidance where it is specifically targets wholly artificial arrangements which do not reflect economic reality and the purpose of which is to avoid the tax normally payable on the profits generated by activities carried out in the territory of the Member State concerned. The CJ ruled that, in the context of free movement of capital, the concept of 'wholly artificial' cannot necessarily be limited to the indications set out in the *Cadbury Schweppes* cases. The concept also covers, in the context of the free movement of capital, any scheme which has its primary objective or one of its primary objectives as the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.

As the German legislation presumes that conduct is artificial on the sole ground that the conditions laid down by that legislation are met, while affording the taxable person concerned no opportunity whatsoever to rebut that presumption, goes, in principle, beyond what is necessary in order to attain its objective. However, it is also apparent from the Court's settled case law that where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, for example, because that third country has no treaty obligation to provide information, it proves impossible to obtain that information from that third country.

Concluding, the CJ ruled that Article 63(1) TFEU must be interpreted as not precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled-company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person's shareholding in that company is not the result of an artificial scheme.

AG Kokott opines that EU law does not require to allow cross-border settlement if there is no legal possibility to use those losses in the subsidiary State (*Memira Holding*)

On 10 January 2019, AG Kokott delivered her Opinion in the case *Memira Holding* (C-607/17). The case deals with the question of whether a Swedish parent company has the right to deduct the losses in a wholly-owned subsidiary established in Germany from its profits if that subsidiary is wound up by way of a merger with the parent company and it was not able to fully 'use' its losses made in Germany. AG Kokott concluded that a cross-border loss settlement is only possible if the losses in the State of establishment of the subsidiary are eligible. In the concrete cases, given that the losses are not taken into account in a merger in Germany, according to the AG it is not disproportionate that Sweden does not allow that cross-border loss relief.

The German subsidiary of the Swedish parent company Memira Holding had substantial losses. They intended to merge the German subsidiary into the Swedish parent company through a cross-border merger. Under German law, losses can be offset without limitation, but cannot be transferred through a merger (domestic or cross-border). The outstanding losses at the level of the German subsidiary would therefore be lost as a result of the intended merger. The question is whether Sweden should allow Memira Holding AB, in the light of the final losses doctrine, to utilize – via the Swedish group deduction - the outstanding amount of losses at the level of the German subsidiary which have been lost due to the German tax legislation as a result of the merger.

AG Kokott derived from CJ case law that the definitive nature of losses cannot arise from the fact that there is no legal right to settle losses in the subsidiary State. Therefore, Kokott concluded, there is no definitive loss if the transfer of a loss is excluded (as in this case in the context of a merger) in the subsidiary's State.

Furthermore, according to the AG, there cannot be a definitive loss if there is a legal possibility for the realization of loss deduction, which the taxpayer has not opted for. According to the AG, the principle of territoriality establishes a precedence of loss utilisation in the State of establishment (in this case Germany). Even though German tax law does not permit losses to be transferred by way of a merger, it does allow losses to be preserved and therefore, used by the new shareholders, where shares are transferred for the purposes of restructuring an ailing company. As Memira Holding AB could have opted for the sale of the subsidiary to a third party instead of a merger, the AG considered that also for this reason Memira could not elect to have its losses taken into account in Sweden.

CJ rules that the concept of final losses of a non-resident subsidiary does not apply to a sub-subsidiary unless all the intermediate companies between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State (*Holmen*)

On 19 June 2019, the CJ issued its judgment in the case *Holmen* (C-608/17). This case deals with the question whether a Swedish parent company has the right, on the basis of Article 49 in conjunction with Article 54 TFEU, to deduct from its profit losses in an Spanish sub-subsidiary if the sub-subsidiary has been liquidated and was not able to use all its losses in Spain. The Swedish parent company based its argument on the final losses exception from the Marks & Spencer Judgment (C-446/03).

The CJ ruled that the concept of final losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in Marks & Spencer, does not apply to a sub-subsidiary unless all the intermediate companies between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State. In other words, for the CJ it is not disproportionate to make cross-border tax relief conditional on a direct link, even if the other impossibilities referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met. Such direct link is only not required if both the intermediate subsidiary and the sub-subsidiaries that sustained the losses are all resident in the same Member State.

Additionally, the CJ ruled that, for the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in Marks & Spencer, the fact that the subsidiary's Member State of establishment does not allow the losses of one company to be transferred to another company in the year of liquidation is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are taken into account by a third party for future periods.

CJ rules that losses should only be considered final if the parent company demonstrates that it is impossible for it to deduct those losses by ensuring that they are fiscally taken into account by a third party for future tax periods (*Memira Holding*)

On 19 June 2019, the CJ issued its judgment in the case *Memira Holding* (C-607/17). The case deals with the question whether a Swedish parent company has the right, on the basis of Article 49 TFEU in conjunction with Article 54 TFEU, to deduct from its profit the losses in a subsidiary established in Germany if that subsidiary is wound up by way of a merger with the parent company and it was not able to fully 'use' its losses made in Germany. The Swedish parent company based its argument on the final losses exception from the Marks & Spencer Judgment (C-446/03).

The CJ ruled that the mere fact that the subsidiary's State of establishment does not allow the transfer of losses in the event of a merger cannot, in itself, be sufficient to regard the losses of the subsidiary as being final. The taxpayer has to demonstrate that it is precluded that a third party may take into account for tax purposes the losses of the subsidiary in that subsidiary's State of establishment, for example following a sale of that subsidiary for a price including the tax advantage represented by the deductibility of losses of the future. If the such evidence is adduced and the other conditions referred to in par. 55 of the Marks & Spencer judgment have been met, the tax authorities are required to find that the losses of a non-resident subsidiary are final and that it is therefore disproportionate to not allow the parent company to take those cross-border losses into account at its level for tax purposes.

The CJ further ruled that, in the assessment of the finality of losses, it is irrelevant whether or not there were other entities in the State of establishment of the loss-making subsidiary which could have had the losses of that subsidiary transferred to them via a merger if such a possibility had been afforded.

CJ rules on the applicable social security legislation in case of a person, whilst working as a seaman for an employer established in a Member State on board a vessel flying the flag of a third State and travelling outside of the territory of the European Union, maintained his residence in his Member State of origin (*SF*)

On 8 May 2019, the CJ issued its judgment in the case *SF* (C-631/17). This case deals with the question which social security legislation applies to a person who works as a seaman for an employer that is established in a Member State, on board of a vessel flying the flag of a third state which travels outside the territory of the EU, but maintained its his residence in his Member State of origin.

SF, a Latvian national residing in Latvia, worked as a steward for Oceanwide Offshore Services B. V., an undertaking established in the Netherlands, from 13 August to 31 December 2013. SF carried on that activity on board a vessel flying the flag of the Bahamas which, during that period, sailed over the German part of the continental shelf of the North Sea. The Netherlands tax authorities issued SF with a notice of assessment for 2013 in respect of income tax and social insurance contributions. Following a complaint made by SF against that assessment, the Inspector upheld the notice only in so far as it declares SF to be liable for the social contributions to the Netherlands social insurance scheme for the period from 13 August to 31 December 2013. SF went to court

arguing that he does not come under that scheme.
The referring court considers that doubts remain over the interpretation of the provisions of Regulation No 883/2004, more in particular Article 11 (3) (e), for the purposes of determining the applicable legislation in a situation such as the one at issue in the main proceedings and decided to refer the following question to the CJ for a preliminary ruling:
'Which legislation applies under Regulation No 883/2004 in a situation where the interested party (a) resides in Latvia, (b) has Latvian nationality, (c) is employed by an employer established in the Netherlands, (d) works as a seafarer, (e) works on board a vessel flying the flag of the Bahamas, and (f) performs those activities outside the territory of the European Union?'

The CJ considers that SF has maintained his residence in Latvia and that he works as a seafarer for a Dutch employer on a ship that sails outside the territory of the EU and under the flag of the Bahamas. According to the CJ, SF then falls within the scope of Article 11 (1) (e) of Regulation No 883/2004. The CJ ruled that the social security legislation of the Member State of residence (Latvia) is applicable. SF is then not insured and liable to pay social security contributions in the Netherlands.

CJ rules that EU law precludes a national court from assessing whether a residence condition complies with the free movement of capital where the scheme concerned constitutes an aid scheme (*A-Fonds*)

On 2 May 2019, the CJ issued its judgment in the case *A-Fonds* (C-598/17). The case deals with a request for the refund of Dutch dividend tax, based on a national scheme which constitutes an aid scheme, by A-Fonds which was refused by the Dutch Tax Authorities on the ground that it was not established in the Netherlands.

A-Fonds is a special collective investment fund, with no legal personality, established in Germany. Such a fund is exempt from corporation and business tax in Germany. All shares of A-Fonds have been held by BBB, a body governed by German public law, which has legal personality and is made up of a group German municipalities, which are legal persons governed by public law. BBB held, through A-Fonds, shares in Dutch companies. Dutch dividend tax was withheld on the dividends that those shares generated for it. BBB sought the refund of that tax from the Dutch Tax Authorities, pursuant to Article 10(1) Dividend Withholding Tax Act ("DWTA"), but was rejected on the ground that BBB was not established in the Netherlands.

The referring court concluded that the fact that BBB could not claim the refund of the dividend tax under Article 10(1) DWTA, even though it conducted activities comparable to those of Dutch legal persons governed by public law and not subject to corporation tax in the Netherlands, constituted a restriction on the free movement of capital. However, since the refund based on Article 10(1) DWTA is inextricably linked to an exemption from corporation tax which the European Commission found to be an existing state aid that was incompatible with the internal market, the referring court concluded that the refund therefore also constitutes an existing state aid scheme. The referring court therefore asked the CJ whether EU law precludes a court from granting, in order to ensure compliance with Article 63(1) TFEU, the benefit of a State aid scheme to an undertaking established in another Member State.

The referring court also asked in particular whether, where such an aid scheme is regarded as existing, the decision to grant the benefit of that scheme constitutes a new aid, which that court would have to notify to the Commission in accordance with Article 108(3) TFEU.

The CJ considered that it does not appear to be possible to separate the residence condition, which is necessary for the attainment of the objective and functioning of the aid scheme, without adversely affecting the division of competences between the European Commission and the national court in the matter of State aid. The CJ ruled that EU law precludes a national court from assessing whether a residence condition, such as that at issue in the main proceedings, complies with the free movement of capital ,where the refund of dividend tax concerned constitutes an aid scheme. It follows that a court cannot draw the consequences of a possible infringement by that residence condition of the free movement of capital in granting the refund of that tax.

CJ rules that limitations to the Belgian notional interest deduction regarding exempt foreign permanent establishments are in line with the freedom of establishment (*Argenta Spaarbank*)

On 17 October 2019, the CJ issued its judgment in case *Argenta Spaarbank* (C-459/18). The case deals with the calculation of the notional interest deduction (deduction for capital risk) in the case of a Belgian company that has a

Netherlands permanent establishment the income of which is exempt under the double tax treaty signed between those countries. The CJ concluded that there is no actual difference between how the deduction applies to domestic and foreign permanent establishments.

The Belgian notional interest deduction is calculated based on the amount of the company's equity capital. For such a calculation, the net value of the assets of a permanent establishment (deemed as its equity capital) situated in another Member State was not taken into account if the profits of that permanent establishment were not taxable in Belgium by virtue of a double tax treaty. However, such a limitation was found in breach of the freedom of establishment by the CJ in the *Argenta Spaarbank* judgment (4 July 2013, C-350/11). Then, the Belgian legislation was amended so that the net value of the assets of such a permanent establishment is taken into account in the calculation of the deduction, but, subsequently, this amount is reduced by the lesser of the following amounts: the part of the deduction that relates to the permanent establishment's equity capital or the positive result of the permanent establishment.

Given that such a reduction is not applied in the case of a permanent establishment situated in Belgium, the CJ was asked whether the freedom of establishment precludes this treatment. The CJ identified and analysed three situations, and concluded that under none of those situations is a company, with a foreign permanent establishment the income of which is exempt in Belgium under a double tax treaty, treated less favourably than a company with a domestic permanent establishment.

First, if the permanent establishment suffers losses, the notional interest deduction is not reduced, so there is no difference in treatment. Second, if the permanent establishment generates a positive result which is lower than the part of the deduction for risk capital which relates to that permanent establishment, the exceeding part of the deduction is taken into account to reduce the taxable base of the company, as it were the overall outcome for a domestic permanent establishment the income of which is not exempt. And third, if the permanent establishment generates a positive result which exceeds the related part of the deduction for risk capital there is no disadvantage, given that the taxable base of a company with a domestic permanent establishment would be higher.

CJ rules that non-EU pension funds can obtain the refund of dividend withholding tax if they are comparable to domestic pension funds (*College Pension Plan of British Columbia*)

On 13 November 2019, the CJ issued its judgment in case *College Pension Plan of British Columbia* (C-641/17). The case deals with the tax treatment of dividends paid by German companies to a Canadian pension fund and the possibility to claim a refund of the 15% withholding tax paid on those dividends on the basis that dividends received by resident pension funds do not increase their taxable amount, or increase it only very slightly. The CJ concludes that there is a restriction on the free movement of capital if the comparability test is fulfilled; i.e., if the non-resident pension fund allocates dividends received to make provisions for pensions that it will have to pay in the future so they are comparable to domestic funds.

When a German pension fund receives dividends, they are fully credited to the various pension fund agreements if the profits correspond to the technical interest rate used to calculate the contributions (accounting investments). Returns exceeding the technical interest rate (non-accounting investments) must be also credited at a rate of at least 90%. Thus, it is only to the extent that returns on non-accounting investments do not have to be credited to the various pension fund agreements that they result in a pension fund profit that must also be taken into account for tax purposes. On the contrary, non-resident pension funds are always subject to definitive dividend withholding tax, usually at a rate of 15%. Thus, the CJ identifies a restriction to the free movement of capital given that dividends paid to non-resident pension funds are the subject of less favourable treatment than that applied to dividends paid to resident pension funds, since the former are subject to definitive taxation of 15%, whereas the latter are exempt from tax in whole or in part.

As to the comparability test, the CJ concludes that a non-resident pension fund, which allocates the dividends received to provisions for pensions that it will have to pay in the future, intentionally or pursuant to the law in force in its State of residence, is in that regard in a situation comparable to that of a resident pension fund. That is a matter for the referring court to ascertain, but the CJ clarifies that the fact that allocations to the mathematical and other technical provisions do not constitute expenses incurred in order to generate income in respect of dividends cannot call into question that comparability of the situations.

None of the justification grounds raised in the proceeding (balanced allocation of taxing rights, coherence of the tax system and guaranteeing effectiveness of fiscal supervision) are accepted by the CJ.

Finally, the CJ addresses if this restriction may be covered by the standstill clause laid down by Article 64(1) TFEU to the extent it was a restriction existing on 31 December 1993 for the purposes of that provision. On the one hand, as to the temporal criterion, the CJ does not conclude on whether the introduction of special legislation relating to pension funds after 31 December 1993 is the circumstance that makes the tax situation of non-resident pension funds less advantageous compared to domestic funds. However, the CJ considers that the acquisitions of shareholdings and the receipt of dividends constitute a means by which a pension fund can honour its pension commitments and not a service that it provides to those insured persons. Based on that, unlike the case of investment funds in the *Wagner-Raith* decision (C-560/13), the CJ does not find the necessary causal link between the capital movement and the provision of financial services. Therefore, the restriction does not meet the substantive criterion and cannot be covered by the standstill clause.

Dutch legislative proposal to implement ATAD2 published

On 2 July 2019, the Dutch government published a legislative proposal implementing rules to counter hybrid mismatches, as required by the amended EU Anti-Tax Avoidance Directive (ATAD2). The proposal follows the consultation draft of 29 October 2018 (see our previous Tax Flash). The purpose of the proposal is to neutralize the tax effects of hybrid mismatches, such as that of payments to or by a hybrid entity and on hybrid financial instruments, by disallowing the deduction of such payments or by including the payments in the taxable income of the recipient. Other hybrid mismatches are also covered. Implementation must be completed by 31 December 2019, with an exception for the 'reverse hybrid rule', which is meant to be implemented by 31 December 2021.

Notable differences with the consultation draft of 29 October 2018

The proposal is largely similar to the consultation draft of 29 October 2018. The most notable changes are the following:

- **Documentation requirement:** the proposal provides for a new requirement for corporate taxpayers to include in their administration information that is relevant for determining if and to what extent a payment is affected by the new anti-hybrid mismatch rules. Such information may, *inter alia*, comprise a (global) structure chart of the group and an analysis of the treatment of financial instruments, hybrid entities and PEs under the relevant Dutch and foreign (tax) laws.
- **Exception for collective investment vehicles:** the proposal provides for an exception to the 'reverse hybrid rule' for certain defined collective investment vehicles, in line with ATAD2. Such exception was not included previously.
- **Tax treaty overrules disregarded PE rule:** the proposal clarifies that the implementation of ATAD2's 'disregarded PE' rule should not affect the allocation of taxing rights under the tax treaties entered into by the Netherlands. If a tax treaty provides for an exemption of business profits of a disregarded PE, such exemption should continue to apply. The proposal notes that the Netherlands will aim to amend its tax treaties for these situations through treaty (re)negotiations.

Rules

The proposal in essence contains three types of rules to neutralize the tax effects of hybrid mismatches:

- **Denial of deduction:** payments made by a Dutch corporate taxpayer may no longer be tax deductible if and to the extent such payments, as a result of a hybrid arrangement, are not regarded taxable income in the state of the recipient (*deduction without inclusion;* **D/NI**) or these payments (or expenses or losses) can be deducted twice (*double deduction;* **DD**). This rule is referred to as the 'primary rule'. As an exception to this primary rule, deduction may in certain hybrid mismatch situations be allowed if and to the extent the deduction is set-off against so-called 'dual inclusion income'.
- **Inclusion of income:** income of a Dutch corporate taxpayer that would normally be exempt from Dutch corporate income tax or not be recognized, as a result of a hybrid arrangement, is included in the taxable income if the underlying payment was deductible in

the state of the payer. This rule is referred to as the 'secondary rule'.

- **Taxation of reverse hybrid entities:** reverse hybrid entities (transparent for Dutch tax purposes and non-transparent for tax purposes in the residence state(s) of the participants in the entity) will be subject to Dutch corporate tax if incorporated, established or registered in the Netherlands. This rule is referred to as the 'reverse hybrid rule'. It is announced that distributions by such reverse hybrid entities will also become subject to Dutch dividend withholding tax.

The primary and secondary rules should apply to financial years commencing on or after 1 January 2020 and the reverse hybrid rule should apply to financial years commencing on or after 1 January 2022.

Hybrid mismatches

The hybrid mismatches covered by the primary and secondary rules include:

- **Hybrid financial instruments:** payments on financial instruments that result in a D/NI outcome as a result of differences in the characterization of the instrument. The transfer of financial instruments may under certain circumstances also qualify as such.
- **Hybrid entities:** payments made by or to a hybrid entity that result in a D/NI or DD outcome.
- **Hybrid PEs:** payments made to a hybrid or disregarded PE, as well as deemed payments between a PE and its head office, that result in a D/NI outcome. DD outcomes caused by hybrid PE arrangements are also covered.
- **Dual resident entities:** payments made by an entity that is a tax resident in two states, that result in a DD outcome.
- **Imported mismatches:** payments made on a non-hybrid instrument that (directly or indirectly) fund deductible payments in a hybrid mismatch arrangement as referred to above, unless one of the other states involved has made an equivalent adjustment in respect of the hybrid mismatch, similar to the adjustment that would be made under the Dutch rules.

In principle, only hybrid mismatches between related parties are covered (generally at least 25% voting rights, profit entitlement or capital ownership, as well as certain other situations of control), unless there is a 'structured arrangement'.

The impact of the legislative changes will need to be assessed in all structures where a Dutch corporate taxpayer is (directly or indirectly) involved in a hybrid mismatch arrangement. It is irrelevant whether a taxpayer actually intended to create a hybrid mismatch outcome, as the ATAD2 measures are applied objectively.

CV/BV Decree relating to the Netherlands-US tax treaty

In parallel to the implementation of the anti-hybrid rules, the Dutch government will withdraw the so-called 'CV/BV Decree (*Decree of 6 July 2005 no. IFZ 2005/546M*), that deals with the application of the anti-hybrid provision in the tax treaty between the Netherlands and the United States. As of 1 January 2020, the tax treaty between the Netherlands and the United States will therefore no longer reduce the Dutch dividend withholding tax rate on distributions to certain reverse hybrid entities (such as certain Dutch CVs).

Minor amendments to Dutch DWT anti-abuse rule announced following CJ Danish cases

On 14 June 2019, the Dutch State Secretary of Finance (State Secretary) announced he will propose legislation amending the rules for foreign intermediate holding companies with 'relevant substance' that qualify for the Dutch dividend withholding tax (DWT) exemption (see our tax flash of 19 September 2017). The proposal entails the possibility of counterproof for the Dutch Tax Authorities (DTA) that, even if the relevant substance criteria are met, a structure is abusive and the DWT exemption does not apply. It should enter into force on 1 January 2020 and would similarly apply to the Dutch non-resident corporate tax rules. Existing rulings will continue to be valid until explicitly notified differently by the DTA.

Foreign intermediate holding companies that rely on meeting the relevant substance criteria to qualify for the Dutch DWT exemption, or to disqualify as non-resident corporate taxpayer, should assess whether they are at risk for scrutiny and challenge by the DTA based on the proposed changes.

On 26 February 2019, the CJ rendered a ground-breaking decision on tax avoidance and beneficial ownership in the so-called 'Danish Cases' (see our tax flash of 26 February 2019). In reaction hereto, Members of Parliament raised detailed questions regarding the consequences for the Dutch DWT exemption and the Dutch participation exemption.

The State Secretary considers the Dutch DWT exemption's anti-abuse rule generally compatible with the Danish Cases, but slight amendments in the application thereof are in his view required. He does not anticipate that these would lead to material differences compared to the existing situation. Currently, satisfying the ‘relevant substance’ criteria functions as safe harbour for foreign intermediate holding companies in business structures. Under the expected proposals, the DTA would have the possibility to demonstrate that a structure is abusive, even if the relevant substance criteria are satisfied.

The State Secretary is still assessing whether changes to the Dutch participation exemption regime are required based on the Danish cases.

The State Secretary stated that the announced legislative proposal will be published on 17 September 2019 (Budget Day).

L&L Quoted: Implementation of the Anti-Tax Avoidance Directive in the Netherlands, Belgium and Luxembourg

The Anti-Tax Avoidance Directive (ATAD) as adopted by the European Council on 20 June 2016 and further amended on 25 October 2016 contains five anti-abuse measures which Member States of the European Union (Member States) have to implement in their domestic laws. These measures include an earnings stripping rule (ESR), a general anti-avoidance rule (GAAR), a controlled foreign company rule (CFC), to be implemented before 1 January 2019, and an exit tax and rules on hybrid mismatches, to be implemented before 1 January 2020.

The ATAD sets minimum standards. Member States are free to impose more strict rules.

The Netherlands, Belgium and Luxembourg have timely implemented the ESR, exit tax, GAAR and the CFC. In this Quoted we set out the main rule and options of each measure as provided in the ATAD and subsequently set out the choice of implementation made by the Netherlands, Belgium and Luxembourg. We will show the differences in implementation by these three Member States. The annex to this Quoted includes an overview of the various choices made by the Netherlands, Belgium and Luxembourg.

Click here to read the Quoted.

Dutch Parliament approves bill to change the Dutch tax consolidation regime

On 23 April 2019, the Upper House (Eerste Kamer) of the Dutch Parliament approved the pending legislative proposal to change the Dutch corporate income tax consolidation regime (fiscal unity), the so-called repair measures. Due to this approval, the legislative process is finalised and the repair measures will be implemented in Dutch law with retroactive effect to 1 January 2018 after the bill has been published in the Government Gazette. Based on these measures, several provisions in the Dutch corporate income tax act (CITA) and the Dutch dividend withholding tax act (WHTA) must be applied as if the Dutch fiscal unity regime does not exist. The measures can have a severe impact on the tax position of taxpayers that currently apply the Dutch fiscal unity regime.

Background

Through the introduction of the repair measures, the Netherlands aim to bring the Dutch fiscal unity regime in line with EU law following the judgement of the CJ of 22 February 2018. In that case, the CJ ruled that the so-called “per-element” approach, as introduced in the CJEU Groupe Steria case, also applies to the Dutch fiscal unity regime (see our Tax Flash of 22 February 2018). On 19 October 2018, the Dutch Supreme Court confirmed the judgement of the CJ (see our Tax Flash of 19 October 2018).

Content and impact

Based on the repair measures, the following provisions must be applied on a stand-alone basis (deconsolidated), as if the Dutch fiscal unity regime does not exist:

1. The anti-base erosion rules (article 10a CITA), possibly leading to non-deductible interest expenses for taxpayers with related party debt;
2. The Dutch participation exemption rules for low-taxed portfolio investment subsidiaries (article 13, paragraph 9 to 15 CITA) and the anti-hybrid rule in the Dutch participation exemption (article 13, paragraph 17 CITA), possibly disallowing the participation exemption to taxpayers;
3. The revaluation provision for low-taxed portfolio investment subsidiaries (article 13a CITA), possibly leading to an annual (taxable) revaluation of low-taxed portfolio investment subsidiaries held by taxpayers;
4. The interest deduction limitation against excessive participation interest (article 13l CITA), possibly leading to nondeductible interest expenses for taxpayers with participations;

5. The provision regarding carry-forward losses and a change in ultimate interest in a taxpayer (article 20a CITA), possibly leading to the expiration of tax losses for taxpayers with carry forwards; and
6. The redistribution facility for the dividend withholding tax (article 11, paragraph 4 WHTA), possibly leading to a higher Dutch dividend withholding tax burden for taxpayers applying this facility.

As a consequence of the repair measures, several benefits of the current Dutch fiscal unity regime are no longer available for taxpayers. This can have a severe impact on the tax position of taxpayers that currently apply the Dutch fiscal unity regime. The repair measures will enter into force with retroactive effect as of 1 January 2018, except for article 13a CITA (entry into effect on 1 January 2019).

Some observations

- The retroactive effect of the repair measures until 1 January 2018 is maintained, although the Committee of Finance of the Upper House argued to limit the retroactive effect until 1 January 2019.
- Article 13l CITA remains part of the emergency measures, although the Committee of Finance of the Upper House argued otherwise. Article 13l CITA was abolished on 1 January 2019, meaning that the impact on this provision will be limited to one year.
- Because of the retroactive effect of the repair measures until 1 January 2018, the 2018 tax return form will be amended accordingly. Since the impact of the repair measures must be taken into account in the 2018 tax return, it is recommended to use this amended form (not applicable yet) to avoid questionnaires from the Dutch tax authorities.

Previous flashes in connection with the legislative process

- On 25 October 2017, the emergency repair measures were announced by the Dutch Ministry of Finance, after the Advocate-General of the CJEU ruled that the “per-element” approach should apply to the Dutch fiscal unity regime (see our Tax Flash of 25 October 2017).
- On 6 June 2018, the Dutch Ministry of Finance published the legislative proposal to amend the Dutch fiscal unity regime by implementing the emergency repair measures (see our Tax Flash of 6 June 2018).
- On 2 November 2018, the Dutch government published additional explanatory notes regarding the emergency repair measures, giving new insights on the legislative proposal (see our Tax Flash of 5 November 2018).

Future of the Dutch fiscal unity regime

Earlier, the Dutch State Secretary of Finance announced that he is exploring the alternatives to replace the Dutch fiscal unity regime by a new future-proof group regime. As this may take some time, such group regime is not expected to enter into force before 2023.

VAT

EU Council adopts VAT Implementing Regulation on new VAT rules for e-commerce

On 21 November 2019, the EU Council has adopted the VAT Implementing Regulation (2019/2026) which is an amendment of the VAT Implementing Regulation (282/2011). The amendment relates to the new VAT rules for e-commerce.

These new VAT rules are part of the VAT e-commerce package that was adopted on 5 December 2017 by the EU Member States.

The amended VAT Implementing Regulation provides detailed rules on the application of specific e-commerce provisions of the VAT Directive. Particularly, further technical clarifications are laid down regarding supplies of goods or services facilitated by online platforms to EU non-taxable customers and the records they would have to keep on sales made via their online platform.
In addition, this VAT Implementing Regulation also contains provisions with respect to the extension of the One-Stop-Shop regime to distance sales of goods in cross-border situations (both intra-Community and from third countries) and certain domestic supplies of goods.

The aim is to ensure a smooth transition to the new VAT rules for e-commerce that will enter into force on 1 January 2021.

CJ rules on VAT on commission payments (*Baumgarten Sports & more*)

On 29 November 2018, the CJ delivered its judgment in the case *Baumgarten sports & more* (C-548/17). Baumgarten sports & more (hereafter: ‘Baumgarten’) performs agency business services in the professional football sector. When Baumgarten successfully places a player in a football club, it receives a commission from the club under the condition that the player subsequently signs an employment contract and is licensed to play by the German Football Association. This commission is paid to the company every six months as long as the player remains under contract with that club and holds a licence from the German Football Association. Baumgarten had paid VAT on its 2012 turnover on the basis of the remuneration received in 2012. However, the German tax authorities took the view that Baumgarten should account for VAT on all payments due under the contract once the player was placed and the contract was agreed upon. This would require the taxpayer to 'pre-finance' the VAT on the commissions.

The case eventually came before the Federal Financial Court in Germany, which decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its first question, the referring court asked whether VAT can only become due insofar as the amount receivable in respect of the supply of goods or services is due or at least unconditionally owed. If the answer to the first question is in the negative: is the taxable person obliged to pre-finance the VAT owed in respect of the supply of goods or services for a period of two years if he is not able to receive (part of) the remuneration for the goods or services supplied by him until two years after the taxable event has occurred? If the answer to the second question is in the affirmative: are the Member States entitled to assume, for the purposes of the tax period in which VAT first becomes chargeable, that there has been an adjustment due to (partial) non-payment in the case where the taxable person is not able to obtain the amount receivable, because it is not due, until two years after the taxable event has occurred?

The CJ considered that a chargeable event occurs and VAT becomes chargeable when the services are supplied. Moreover, where the supply of services gives rise to successive payments, it is to be regarded as being completed on expiry of the periods to which such payments relate. Therefore, the CJ ruled that services giving rise to successive payments must be deemed to have been made at the end of the period to which those payments relate. The chargeable event and the chargeability of VAT, therefore, do not occur at the time of placing the player in the club, but at the end of the periods to which the payments by the club relate.

CJ rules on VAT refund requirements (*Tratave*)

On 6 December 2018, the CJ delivered its judgment in the case *Tratave* (C-672/17). Tratave is a Portuguese company subject to VAT which operates and manages public services with respect to waste water as part of an integrated waste disposal system. After several recipients of Tratave's services were judicially declared insolvent, Tratave proceeded to lower its VAT taxable amount for the VAT period of July 2010 and similarly corrected the amount of VAT due over that period. After Tratave filed its VAT return, the Portuguese tax authorities rejected Tratave's request for a refund of the VAT previously paid on the grounds that (i) the certificates relating to the insolvency judgments had not been provided to the tax authorities; and (ii) Tratave had not fulfilled the requirement to give prior notice to its insolvent debtors of its intention to cancel the VAT charged, in order for them to correct the VAT that they had possibly deducted in their VAT returns.

The case was brought before the Tax Arbitration Tribunal which ruled that the requirement of the possession of certificates of the insolvency judgments has no legal basis, but that Tratave should have complied with the requirement to give prior notice to the insolvent debtors of its intention to cancel the VAT relating to outstanding claims. However, the Portuguese Court was not certain if these procedures were in line with EU VAT law and decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its questions, the referring court asks first if, in the event of non-payment, a VAT taxable base can be adjusted before the purchaser of the goods or service has been notified of the cancellation of the VAT for the purposes of rectifying the deduction initially made. Second, the court asked whether the adjustment can be denied when the purchaser of the good or service was not notified of the cancellation of the tax within the time-limit for deducting input VAT.

The CJ considered that Member States are allowed to implement additional requirements which they deem necessary to secure the correct collection of VAT as well as to prevent fraud. Furthermore, formal requirements for the adjustment of the taxable base in the case of non-payment have to be restricted to those which offer the opportunity to show that (a part of) the remuneration for a supply or service will definitively not be received. In this respect, the notification of the debtor is not only likely to contribute to ensuring the correct collection of VAT and the avoidance of tax evasion but also to eliminating the risk of tax revenue loss. Also, given that compliance with the requirement in question enables the taxable person to recover all excess VAT paid to the tax authorities in respect of unpaid debts, that requirement does not, in principle, undermine the neutrality of VAT. Finally, given that the notice is not subject to any particular formal requirements and may therefore be satisfied by any appropriate means it is not an excessive requirement for the reduction of the VAT taxable amount. Therefore, the CJ ruled that a taxable person can indeed be denied the right to lower its VAT taxable base until it has given prior notice of its intention to cancel all or part of the VAT to the purchaser of the goods or services, if that purchaser is a taxable person, for the purposes of correcting the VAT deducted by the latter.

CJ rules on qualification of VAT transactions (*A Oy*)

On 10 January 2019, the CJ delivered its judgment in the case *A Oy* (C-410/17). A Oy ('A') is a company specializing in environmental services in the industrial and construction sector. In the course of its activities, A performs demolition services for its clients whereby, pursuant to the demolition contract that is standard in the construction sector, A's responsibilities also include the proper disposal and processing of materials and waste. These materials are composed of scrap metal and waste materials the sale of which, according to the national legislation at hand, is liable to VAT at the level of the buyer (reverse charge). That waste consists partly of materials that A can resell. In this respect, A makes an estimate of the price expected to be obtained on the resale, which price is taken into account when determining the price for the demolition services. This factor, however, is not individually discussed or fixed with the client. Also, A engages in contracts where A purchases old constructions, machines and/or equipment and other movable goods with respect to which, A undertakes to remove and dismantle the goods that it has purchased. Again, A will make an estimate of the costs that it will incur, factoring it into the price it quotes with the purpose of reducing the purchase price.

The Finnish tax authorities take the view that in both described scenario's, A is due VAT on (i) demolition services that it renders to its clients; and (ii) purchases of scrap metal of which the VAT liability is reverse charged to A.

A challenged the aforementioned classification of the contracts and the case was eventually brought before the Finnish Supreme Administrative Court, which decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its questions, the referring court asks whether the performance of demolition services in combination with the disposal and possible resale of scrap metal should be regarded as a single VAT transaction or as comprising of two individual VAT transactions.

According to the CJ, the supply of scrap metal should be considered 'against remuneration' when the recipient (the demolition company) assigns a value to the material which it takes into account when determining the price of its demolition services. It is, however, irrelevant whether the factoring in of this value is also included in the demolition contract. It is, however, important that the supply of the scrap metal is performed by a taxable person. Thereafter, the CJ considered that in the case of a purchase contract for dismantling, it is certain that a supply of goods take place. Insofar as the recipient of the goods is also required to dismantle the goods and dispose of the waste and thereby the recipient meets the specific needs of the seller, it also performs a service. Furthermore, this service should be considered 'against remuneration' insofar as the recipient considers this service to be a price-reducing factor in the purchase price offered by him for the goods to be dismantled.

CJ rules on VAT deduction of expenditures (*Morgan Stanley*)

On 24 January 2019, the CJ delivered its judgment in the case *Morgan Stanley* (C-165/17). Morgan Stanley & Co International Plc ('Morgan Stanley') is a UK based company in the field of banking and finance. However, the case revolves around Morgan Stanley's Paris branch. This branch was regarded as a fixed establishment for VAT purposes and performs two types of activities. On the one hand, the branch carried out banking and financial transactions for its local clients, in respect of which it had opted to be liable to VAT, and, on the other, the branch supplied services to the principal establishment located in the United Kingdom, in return for which it received transfers from the principal establishment. The branch deducted the VAT on all expenditures attributable to either one or both of those two categories of services.

The tax authorities considered that the VAT on expenditures used solely for internal transactions with the principal establishment located in the United Kingdom was not deductible, as those transactions fell outside the scope of VAT. Nonetheless, by way of mitigation, the branch was allowed to deduct a fraction of the VAT by deducting the proportion applicable to the principal establishment. With regard to the mixed expenditures attributable to both categories of services, the tax authorities considered that they were only partially deductible and applied the deductible proportion applicable to the principal establishment, adjusted according to the Paris branch's turnover giving rise to the right to deduct. Morgan Stanley did not agree with this and the case was ultimately brought before the Council of State which decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its first question, the CJ asked whether the right to deduct input VAT for a branch established in one Member State that exclusively makes expenditures used for the transactions of its principal establishment established in another Member State should be determined on the basis of the transactions carried out in the Member State in which it is registered or should the proportion applicable to the principal establishment apply? Or should it be a specific proportion combining the rules applicable in the Member States in which the branch and the principal establishment are registered, with regard in particular to a possible option mechanism for imposing VAT on transactions? By its second question, the referring court asked what rules should be applied in the specific case where expenditures borne by the branch are used both for transactions in the Member State where it is registered and for transactions of the principal establishment, particularly as regards the concept of general costs and the proportion of tax deductible?'

The CJ ruled that in the circumstance that a branch exclusively carries out activities for the principal establishment and these activities are both subject to VAT as well as VAT exempt, it is necessary to apply a deductible proportion resulting from a fraction the denominator of which is formed by the turnover exclusive of VAT and the numerator of which is formed by the VAT taxed transactions in respect of which VAT would have been deductible if they had been carried out in the Member State in which that branch is registered. In the circumstance where a branch carries out transactions both in the Member State in which it is registered and in the Member State in which its principal establishment is established, it is necessary that, in the numerator of the fraction making up that deductible proportion, besides the VAT taxed transactions carried out by that branch, only the VAT taxed transactions carried out by that principal establishment must appear, in respect of which VAT would also be deductible if they had been carried out in the State in which that branch is registered.

CJ rules on VAT exemption on imports in the case of subsequent tax evasion (*Vetsch Int. Transporte GmbH*)

On 14 February 2019, the CJ delivered its judgment in the case *Vetsch Int. Transporte GmbH* (C-531/17). Vetsch Int. Transporte GmbH ('Vetsch') is an Austrian limited liability company which operates a forwarding business. In the period between 10 December 2010 and 5 July 2011, Vetsch submitted to the Austrian Customs Office, as the indirect representative of two companies established in Bulgaria, declarations for release for free circulation in relation to goods imported from Switzerland. In each of those declarations, Vetsch applied for the exemption from import VAT for goods which, after import, are directly transferred from Austria to another Member State. As such, the goods concerned were released for free circulation with exemption from import VAT. However, shortly thereafter, the Customs Office decided that the conditions for the exemption claimed in the declarations were not met because the Bulgarian recipients of the goods had committed fraudulent actions with the goods after the acquisition of those goods from Vetsch. As a result, Vetsch became liable for payment of the Austrian VAT on import. Vetsch objected to this decision and the case eventually ended up at the 'Verwaltungsgerichtshof' (highest court of Austria), which decided to stay the proceedings and refer to the CJ for a preliminary ruling.

In essence, the referring court asked whether the exemption from import VAT should be denied to an importer designated or recognised as liable for payment, where the recipient of the intra-Community transfer of goods effected after that import commits tax evasion in connection with a transaction which is subsequent to that transfer and is not linked to that transfer.

The CJ considered that the import followed by an intra-community transfer and, secondly, the intra-community supply to which the tax evasion relates, must be regarded as independent transactions. Furthermore, the exemption for import followed by an intra-community transfer is actually a two-part exemption. Namely, an exemption from the VAT due on import and an exemption from the VAT due on the following intra-community supply or transfer.

Given the fact that the tax evasion was committed in Bulgaria in connection with an intra-community supply from that Member State, it is up to the Bulgarian authorities to refuse the application of the VAT exemption relating to that supply. Once it has been established that the tax evasion did not relate to the transfer on which the right to the exemption from import VAT was granted, that exemption cannot be denied to the importer designated or recognized as liable for payment of that tax insofar as there is no evidence to support the conclusion that the importer knew or ought to have known that the supply subsequent to the import entailed tax evasion on the part of the Bulgarian recipients.

CJ rules on conditions for VAT refund (*Nestrade SA*)

On 14 February 2019, the CJ delivered its judgment in the case *Nestrade SA* (C-562/17). Nestrade SA ('Nestrade'), a tax resident in Switzerland, carried out transactions subject to VAT in Spain. On 21 September 2010, Nestrade requested the Spanish tax authorities ('STA') for a refund of Spanish input VAT charged in respect of the supply of goods by its supplier Hero España, S.A. ('Hero') during the third and fourth quarters of 2009. Nestrade also applied for the refund of all the other amounts of VAT paid in the years 2008 to 2010 on the supply of goods by Hero. The STA requested Nestrade to provide the correct invoices corresponding to the supplies of goods by Hero in the third and fourth quarters of 2009, because the invoices originally produced showed Nestrade's Netherlands VAT number, whereas it was the Swiss VAT number which should have been indicated on those invoices. The deadline for providing the copies was not met by Nestrade and Hero provided the copies only after expiration of the deadline. Based thereon, the STA refused Nestrade's refund request, which was not formally contested by Nestrade.

A few months after the abovementioned decision, having corrected the incorrect invoices, Nestrade filed a new request for refund of the input VAT incurred in 2008-2010 as well as for the input VAT incurred in the first quarter of 2011. These refunds were granted by the STA, except for the input VAT relating to the third and fourth quarter of 2009 as, according to the STA, the refund had already been denied and this decision had become final. Nestrade contested this decision and the case ultimately ended up at the Audencia National (the National Judicial Court of Spain). The court considered that the CJ had ruled in its judgment *Petroma Transports a.o.* (C-271/12) that the refund of input VAT can be denied in the situation where correcting invoices are provided to the tax authorities after they have already finalized their decision to deny the request for a refund. By its questions, the referring court asked whether the rule following from *Petroma Transports* can be interpreted so as to allow a VAT refund sought by a company not established in the European Union, even though the national tax authorities have already issued a decision refusing the refund on the grounds that the company had failed to respond to a request for information concerning its tax identification number, in view of the fact that the authority was in possession of that information at the relevant time since it had been provided by the company in response to other requests?

The CJ started by considering that the VAT directive does not preclude Member States from inserting conditions for obtaining a refund of VAT, provided that these conditions do not make it impossible or abundantly difficult to obtain the refund. Also, a VAT refund procedure with an indefinite reporting period would not correspond with the legal certainty principle. Although a Member State is required not to stall the refund procedure when all necessary information is available to them, based on the situation as presented, the STA did not have (all of) the information necessary to determine Nestrade's right to a VAT refund. Given that Nestrade did not respond to the STA within the provided time limit, and, on top of that, did not appeal to STA's decision to deny the VAT refund, even after it had obtained the corrected invoices, the CJ ruled that the STA was not unreasonable in denying the VAT refund request for these invoices when they were submitted the second time.

CJ rules on initial VAT deduction followed by sale and lease back transactions (*Mydibel*)

On 27 March 2019, the CJ delivered its judgment in the case *Mydibel* (C-201/18). Mydibel is a Belgian company whose economic activities consist of the production of potato-based products and is thus regarded an entrepreneur for VAT purposes. Furthermore, Mydibel is the owner of several buildings which it uses for its VAT taxable transactions. Mydibel has fully deducted the VAT charged on construction, alteration and renovation invoices in regard of these buildings. On 1 October 2009 Mydibel entered into two sale and lease back transaction with two financial institutions for the sole purpose of increasing its liquidity. These sale and lease back transactions were executed by establishing emphyteutic rights over the buildings in favor of the financial institutions followed by real property leasing agreements back to Mydibel. These sale and lease back transactions were not subject to VAT. The Belgian tax authorities take the view that the initially applied deduction of input VAT with respect to the buildings concerned should be undone following the review mechanism given that the sale and lease back transactions were out of scope for VAT purposes.

The case was eventually brought in front of the high court 'Cour d'appel de Mons', which decided to stay the proceedings and refer to the CJ for a preliminary ruling. The referring court asks the high court whether the review mechanism should apply on capital goods in the situation that VAT is initially correctly deducted, but these capital goods are thereafter the subjects of a sale and lease back transaction with a purely financial motive and out of scope for VAT purposes.

The CJ's opinion on this matter is as follows.
The adjustment mechanism provided in Articles 184 to 186 of the VAT Directive has the aim to enhance the precision of deductions so as to ensure the neutrality of the VAT. The mechanism aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxable output transactions. In the present case, it is apparent that the buildings were used by Mydibel in an uninterrupted and permanent manner for its economic activities. The mere creation of a ground lease and a real property leasing agreement not subjected to VAT cannot be regarded as a change in the factors used to determine the amount of the deductions made after the VAT return was made. Such creation of a right does not in itself have the effect of breaking the close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxable output transactions. Consequently, Mydibel correctly deducted the input VAT in question.

CJ rules on deduction of VAT incorrectly charged (*PORR Építési Kft.*)

On 11 April 2019, the CJ delivered its judgement in the case *PORR Építési Kft.* (C-691/17). PORR Építési Kft ("PORR") built a motorway in Hungary and deducted input VAT on the invoices it received from local contractors. During a retrospective examination of PORR's tax returns, the Hungarian tax authorities found that the transactions included on the invoices related to construction activities and that (in accordance with the applicable national rules) those transactions should have been subject to the VAT reverse charge mechanism. The issuers of the invoices should therefore have drawn up the invoices without including VAT on them or should have included statement on the invoices that they were subject to the reverse charge mechanism. Because of the invoicing error, the tax authorities refused to accept PORR's claim for input VAT deduction. The issue for the CJ to decide was whether PORR – in absence of any suspicion of tax evasion – is entitled to recovery of input VAT that was incorrectly charged to PORR on account of the reverse charge mechanism being applicable.
The CJ notes that the right of deduction forms an integral part of the EU VAT system and in principle may not be limited. The deduction rules are intended to free the taxable person completely of the burden of the VAT accruing or paid in all its economic activities. The CJ also considers that the VAT paid by PORR was not due, whereas the right to deduct can be exercised only in respect of taxes actually due. Hence, the CJ ruled that PORR is not entitled to recover the VAT charged on the invoices. This is in spite of the fact that there was no suspicion of fraud and the suppliers had remitted the VAT to the tax authorities. In order to recover the VAT charged by PORR's suppliers, PORR would have to request a refund from them. The suppliers would then have to reclaim the overpaid VAT from the tax authorities and subsequently adjust their invoices. The tax authorities are not required, before rejecting the claim for deduction of VAT, to ascertain whether those issuers can correct those invoices on the basis of the national legislation. Next to that, the CJ did clarify that in exceptional cases where the reimbursement of the VAT by the supplier would be impossible (e.g. in the case of insolvency), the recipient may apply for the refund directly to the tax authorities.

CJ rules whether fuel cards qualify as financial services (*Vega International Car Transport and Logistic*)

On 15 May 2019, the CJ delivered its judgement in the case *Vega International Car Transport and Logistic* (C-235/18). Vega International Car Transport and Logistic GmbH ("Vega International") is an Austrian company active as a carrier of commercial vehicles from the factory to the customers. In this regard, Vega International holds several subsidiaries in different Member States. One of these is the Polish company Vega Poland sp. z o.o. ("Vega Poland"). The vehicles transported by Vega Poland are refuelled with fuel cards that are issued in the name of the drivers. The invoices issued by the fuel suppliers are sent directly to Vega International. Vega International then issues invoices to Vega Poland for the provision of the fuel with a mark-up of 2%. Vega International requested a refund from the Polish tax authorities for VAT incurred on their fuel supplying activities. However, the Polish Tax Authorities took the stance that Vega International did not supply fuel, in respect of which VAT may be reclaimed, but it supplied financial services exempted from VAT as Vega International was only an intermediary who never had the disposal over the fuel (the drivers did).

The dispute ended up before the high court of Poland, which decided to stay the proceedings and refer to the CJ for a preliminary ruling on the following question. Should

the provision of fuel cards and the negotiation, financing and settlement of the fuel purchases by means of such cards qualify as financial services or can such complex transactions be regarded as chain transactions whose main purpose is the supply of fuel?
The CJ considers that Vega International at no point in time disposes of the fuel as an owner in connection with which it applies for a refund of VAT. The fuel is purchased by drivers directly from the suppliers and the decisions in regard of the purchases (e.g. the time, quality or quantity) of those goods are completely to Vega Poland's discretion. Thus, the provision of fuel cards by Vega International to Vega Poland and its other subsidiaries should be considered financial services exempted from VAT and the VAT reclaimed by Vega International in this respect is not eligible for a refund.

CJ rules on VAT deduction (*Związek Gmin Zagłębia Miedziowego w Polkowicach*)

On 8 May 2019 the CJ delivered its judgment in case *Związek Gmin Zagłębia Miedziowego w Polkowicach* (C-566/17). Związek Gmin Zagłębia Miedziowego ("Zwiazek") is a partnership of Polish municipalities which carries out waste management activities on the account of the municipalities. These activities are financed by means of municipal taxes and do not qualify as economic activities. As of 2013, Zwiazek started providing additional services to private individuals as well. The provision of these services did constitute an economic activity for VAT purposes. During the financial years of 2013, 2014 and 2015, the partnership gained revenue from these economic activities. Additionally, during that time, Zwiazek incurred expenditures that could not be directly allocated to either the non-economic municipal services or the commercial economic activities performed and were thus mixed expenditures for VAT purposes.

The Polish authorities took the view that Zwiazek was entitled to deduct input VAT on the expenditures only insofar as these are allocable to the economic activities of Zwiazek. Zwiazek claimed that, based on a Polish judgment in 2011, in the absence of any criteria under national law, a taxable person must be entitled to deduct in full the VAT, including that part of the input tax relating to non-economic activities, on the basis of the principle of fiscal legality. This dispute came before the national court who had doubts as to whether that interpretation of national law is compatible with the VAT Directive. Thus, the court referred to the CJ for a preliminary ruling.

The CJ considered that, insofar as the national legislation enables the taxable person to determine the precise scope of the right to deduct, despite that the method is not explicitly prescribed by national legislation, it cannot be held that the fact that he is obliged to determine the proportion of his mixed expenditure relating to economic transactions is contrary to the principle of legality for tax purposes. In addition thereto, the CJ ruled that granting a taxable person a full right to deduct input VAT on goods and services acquired by him for the purposes of both economic activities and non-economic activities would provide a benefit for the taxable person that is contrary to the principle of legality as the 'doctrine' of the right to deduct input VAT would be extended beyond its intended purpose. Zwiazek was therefore denied the full right to deduct input VAT.

CJ rules on whether or not a member of the Supervisory Board of a foundation qualifies as a taxable person for VAT purposes (*IO*)

On 13 June 2019, the CJ delivered its judgment in the case IO (C-42/18). IO works as a municipal officer and is also a member of the Supervisory Board of a foundation. IO receives a remuneration for his work as a supervisory director, subject to wage tax and national insurance contributions. IO has no other additional positions besides this supervisory board. The question in concern is whether IO should be regarded as a taxable person for VAT purposes with respect to his activities as a member of the Supervisory Board. IO, as an individual member of the Supervisory Board, argues that he does not act as a taxable person for VAT purposes, given that the activities are not performed independently. Otherwise, the Inspector argues that the relationship between the foundation and a member of the Supervisory Board is characterized by equality; there is a contract of assignment and no employment contract. In this light, the following question was laid before the CJ. Is a member of the Supervisory Board of a foundation, who is in a subordinate position with regard to this Board for his employment and remuneration conditions, but who is otherwise not in a subordinate position with respect to the Supervisory Board or the Foundation, performing economic activities independently?

In the first place, the CJ considers that the work of a supervisory director, even if only for one board, constitutes an economic activity provided the activity is carried out on a regular basis against remuneration. It should also be noted that the supervisory director cannot be regarded an employee, as meant in art. 10 of the EU VAT Directive. Although it is true that IO's remuneration is subject to wage tax, this is merely based on a legal fiction. Thus, no legal or contractual relation of subordinance exists.

The next question that needs to be answered is whether or not this economic activity is being carried out independently, as defined in art. 9 of the EU VAT Directive. This is the case if there is no subordination in the exercise of the activity performed, which implies that IO will need to carry out the activities in his own name, for his own account and IO needs to bear the economic risks of the performed activity. IO is not in any way hierarchically subordinate to the supervisory board, but IO is also not acting in his own name, for his own account, but rather under the responsibility of the Supervisory Board. Also, IO doesn't bear the economic business risk, since IO receives a fixed remuneration that does not depend on his participation in meetings or on his actually worked hours. Based on the foregoing, IO does not perform an economic activity independently and hence, does not qualify as a taxable person for VAT purposes.

CJ rules on assessment of abusive practices and refusal to grant VAT deduction (*Kuršu zeme*)

On 10 July 2019, the CJ delivered its judgment in the case *Kuršu zeme* (C-273/18). The Latvian company SIA Kuršu zeme deducted input VAT charged to it by another Latvian company, KF Prema, with regard to a local supply of goods. The goods concerned had first been sold by the Lithuanian UAB 'Baltfisher' to two Latvian companies. These two companies sold the goods to another Latvian company which resold them to KF Prema. Kuršu zeme acquired the factual possession of the goods from Baltfisher's warehouse in Lithuania. Kuršu zeme itself transported those goods from Lithuania to its factory in Latvia.

Further to a tax inspection, the Latvian tax authorities VID (the 'VID') found that the intermediary Latvian companies did not actually have any connection with the execution of the acquisitions of goods at issue. The VID could not find a logical explanation for the transaction chain and thus concluded that Kuršu zeme could not have been unaware of the artificial nature of that chain. The VID refused Kuršu zeme the right to deduct the input VAT on the local supply charged by KF Prema and stated that they should have reported an intra-Community acquisition instead. However, by doing so, the VID refused Kuršu zeme the right of deduction without establishing whether an undue tax advantage was obtained by the Kuršu zeme or any other persons in the transaction chain concerned. The dispute ended up before the Supreme Court of Latvia, which decided to refer questions to the CJ for a preliminary ruling.

The CJ considered that the fact that Kuršu zeme had acquired the physical disposal of the goods from a different supplier than the one stated on the invoice in connection with those goods does not in itself suffice to ascertain the existence of an abusive practice by any party in the transaction chain. The competent tax authorities, therefore, are required to ascertain the existence of an undue tax advantage obtained by Kuršu zeme or any other persons in the transaction chain concerned, in order to refuse the right to deduct input VAT incurred on the acquisition of the goods.

CJ rules on meaning of 'building land' for VAT purposes (*KPC Herning*)

On 4 September 2019, the CJ delivered its judgment in the case *KPC Herning* (C-71/18). KPC Herning ('KPC') is a Danish project development and construction company which develops property projects and carries out construction work under turnkey contracts in Denmark.

In the fall of 2013, KPC purchased a plot of land, with an existing (still operational) warehouse on it, from the Port of Odense in Denmark. The purchase contract was subject to a number of conditions, including the condition that KPC was to conclude a contract with a low-rent housing body for the purpose of a social housing project for young persons. Thereafter, KPC sold the land to a company called 'Boligforeningen Kristiansdal' ('BK'). From the contracts concluded with respect to the sale of this land, it was apparent that the sale was subject to the condition that KPC undertakes to build and provide (turnkey) social housing units. Particularly, KPC was required to 'supply a fully completed building for residential use'. However, BK was required to carry out the (partial) demolition of the existing warehouse at its own expense and risk.

These facts and circumstances led to a dispute that eventually came before the 'Vestre Landsret' (the High Court of Western Denmark). Before this court, the Danish Ministry of Taxation argued that under Danish law, the land classifies as 'building land' given that the intention of the parties involved for the land to support a new building is decisive for VAT purposes. KPC, on the other hand, argued that land which has a building on it cannot be classified as building land except for specific conditions such as in the case of *Don Bosco* (C-461/08). In that case, the vendor was still responsible for the demolition of an existing building in order to supply bare land as part of a composite service.

The High Court stayed the proceedings and referred a question to the CJ for a preliminary ruling. By its question, the referring court asked whether a supply of land that includes a building should be considered the supply of 'building land' provided that it is the parties' intention that the building is wholly or partly demolished to make room for a new building.

The CJ ruled that the first sale of the land, from the Port of Odense to KPC, is distinct and independent from the second sale of the land, from KPC to BK, including in particular the demolition of the warehouse. Thus, the first transaction classified as a supply exempt from VAT which is separate from the VAT taxed construction services of KPC for the social housing corporation. As to the second sale of the land, the CJ considered that the warehouse was still operational and that, after the supply of the land, KPC was in no way involved in the partial demolition of the warehouse. Taking into account the aforementioned facts and circumstances, the CJ concluded that, subject to review by the referring Danish court, the demolition of the warehouse is an act independent of the sale of the warehouse and does not constitute, together with that sale, a single economic supply, despite the economic link between each of the acts in question and the common objective pursued by the parties. Consequently, the second sale by KPC to BK is also exempt from VAT.

CJ rules on the application of the financial VAT exemption in regard of transfer of debt (*Paulo Nascimento Consulting*)

On 17 October 2019, the CJ delivered its judgment in the case *Paulo Nascimento Consulting* (C-692/17). Paulo Nascimento Consulting ("PNC") is a property agency and, in this capacity, PNC was mandated by a landowner to sell its agricultural land. PNC found a buyer, but the landowner refused the purchase offer. Furthermore, the landowner then refused to pay the fees charged by PNC for its services. PNC submitted a civil claim with the Court for payment of the fees for PNC's services plus VAT and interest. In the course of these proceedings, a property belonging to the debtor was seized. As the debtor failed to pay, the property was allocated to PNC under the obligation for PNC to repay the difference between the value of the property and the value of its claim to the competent enforcement authority.

After the allocation, but prior to the finalization of the enforcement proceedings, PNC transferred all its rights and obligations with respect to the civil claim to a third party, for an amount superseding the payment due by the landowner. Next, PNC paid the VAT that corresponded with the amount that was due by the landowner for PNC's services. The remaining amount was recorded as 'other unspecified income' in PNC's accounts, on which no VAT was paid. The tax authorities however took the view that the assignment of a right for consideration by a taxable person acting as such qualifies as a supply of services for which, in this case, no VAT exemption was applicable.

This dispute was eventually brought before the Supreme Court, which referred to the CJ for a preliminary ruling. Essentially, the referring court asked whether the transfer of PNC's position in the enforcement proceedings fall under the VAT exemption for granting, mediation or management of credit.

In this regard, the CJ considered that the transfer of the position by PNC was an extension of its economic activity. Also, it was carried out against remuneration. The transfer is thus in principle taxable. The CJ proceeds to consider that PNC transfers various rights and obligations which cannot be artificially split, but the most important part of this supply is the transfer of the immovable property. It was however unclear from the proceedings whether PNC already had the power to dispose of the property as the owner at the time of transfer. Taking this into account, the CJ ruled that if PNC did have the power to dispose at the time of transfer, the transfer consisted a supply of immovable property. If not, the transfer was considered the provision of a service. Lastly, the CJ ruled that no services in regard of credit were performed as the transaction at issue did not entail an obligation for the third party to pay interest intended to remunerate any credit granted to it. Consequently, no VAT exemption was applicable.

CJ rules on application of the VAT exemption for transactions concerning payments (*Cardpoint*)

On 3 October 2019, the CJ delivers its judgement in the case *Cardpoint* (C-42/18). Cardpoint is a German company that engages in services regarding the exploitation of cash machines. Cardpoint supplied these services to a client. On 7 February 2007 Cardpoint submitted an adjusted VAT return for the year 2005. Herein Cardpoint stated that the services they supply are exempted from VAT based on the VAT exemption for transactions concerning payments. These services contain: preparing and maintaining cash machines, supplying them, installing hardware and software to read bank card data, sending a request for approval of cash withdrawals to the bank that issued the bank card used for those withdrawals, providing the requested cash and recording the withdrawals. The German tax authorities rejected the adjusted VAT return.

These facts and circumstances led to a dispute that eventually came before the Bundesfinanzhof (the High Court of Germany). The High Court noticed that the services supplied by Cardpoint are similar to the services that were in dispute in another case named *Bookit* (C-607/14). In this case the CJ ruled that services regarding the purchase and sale of cinema tickets were only technical and administrative services and thus did not qualify for the VAT exemption for transactions concerning payments. According to the High Court, the difference in for what purpose a service is used does not justify a different VAT treatment. In both cases the supplied services consist of the exchange of information and technical and administrative assistance.

The High Court questions whether it should be taken into account that in this case, unlike in the Bookit case, there is no question of a separate contract of sale other than providing the requested cash and recording the withdrawals. Subsequently, the High Court is uncertain about whether the services supplied by Cardpoint must be qualified as technical and administrative services which do not fall under the meaning of transactions concerning payments. The High Court therefore stayed the proceedings and referred this question to the CJ for a preliminary ruling.

The CJ ruled that it follows from settled case law that services can only be qualified as transactions concerning payments if the services in itself are distinctive and essential for payment. Thus, the services must lead to a transfer of money and involve legal and financial changes. To determine if this is the case the functional characteristics of services are decisive. Since Cardpoint does not have any decision-making power regarding the payments, its services do not lead to a transfer of money or legal and financial changes. Even the fact that Cardpoint's services were indispensable to provide payments, does not alter that the characteristics of Cardpoint's services are not distinctive and essential for a transaction concerning payments. Thus, the CJ ruled that the services supplied by Cardpoint cannot be qualified as transactions concerning payments and therefore Cardpoint could not apply the VAT exemption.

CJ rules on requirements for zero VAT rate for export (*Unitel*)

On 17 October 2019, the CJ delivered its judgement in the case *Unitel* (C-653/18). Unitel is a Polish telecom company. From January until May 2007, Unitel sold mobile phones to two Ukrainian company's. Following an audit at Unitel, the tax authorities found out that the mobile phones had been exported to a location outside the European Union, but had not been obtained by the Ukrainian companies listed on the invoices. The Polish tax authorities therefore argued that the supplies of goods by Unitel to Ukraine were not exported and thus the zero VAT rate for export was not applicable.

These facts and circumstances led to a dispute that eventually came before the Naczelny Sad Administracyjny (the High Court of Poland). Unitel argued that the tax authorities used a wrong meaning of supply of goods for the zero VAT rate for export. They state that the material condition that goods must be exported to a destination outside of the European Union is fulfilled. A formal condition that is not fulfilled, is no reason to state that there is no supply of goods for the zero VAT rate for export. The authorities argued that a supply of goods must be seen in the context of a transition of the right to dispose by an owner. Since the Ukrainian companies are not identified as the buyers of the mobile phones, the tax authorities argue that there is no supply of goods and thus no zero VAT rate for export.

According to the High Court, the outcome of the dispute requires the meaning of supply of goods in the context of the zero VAT rate for export. It is not disputed that a supply of goods to a destination outside the European Union took place. Thus, there was the export itself of the goods. However, the High Court is uncertain about whether it is necessary that the entity designated on the supplier's invoice as the person acquiring those goods must be the same as the actual recipient of those goods in order to apply the zero VAT rate for export. The High Court therefore stayed the proceedings and referred this question to the CJ for a preliminary ruling.

The CJ ruled that when it is proved that goods were exported to a destination outside the European Union, it would be disproportionate to refuse the zero VAT rate for export based on the inability to identify the purchaser. The meaning of supply of goods for the zero VAT rate for export is therefore not dependent on the identification of the purchaser of the goods. There are two exceptions to this rule. If the failure to identify the person actually acquiring the goods prevents it from being proved that the transaction at issue constitutes a supply of goods to a destination outside the European Union, refusal of the zero VAT rate for export is required. Also, when it is established that a taxable person knew or should have known that a transaction was part of fraud committed against the common system of VAT, refusal of the zero VAT rate for export is required.

CJ rules on the application of reduced VAT rate for camping or caravan sites (*Segler-Vereinigung*)

On 19 December 2019, the CJ gave its judgment in the case *Segler-Vereinigung Cuxhaven eV* (C-715/18). Segler-Vereinigung Cuxhaven eV ('Segler') is a German VAT registered non-profit association aiming to promote the sport of sailing and motorised water sports. Amongst the activities of Segler is the provision of boat moorings to guests of their harbor. During the years at issue (2010 through 2012), Segler applied the reduced VAT rate for the letting of places on camping or caravan sites on the payments received for the provision of the moorings. Following an audit, the local Tax Office denied the application of the reduced VAT rate, instead applying the standard VAT rate.

This dispute was brought before the 'Niedersächsisches Finanzgericht' (Finance Court of Lower Saxony), which dismissed Segler's action and ruled that the short-term provision of boat moorings cannot be classified under the 'short-term letting of camping areas' within the meaning of the German VAT provisions. Moreover, it considers the provision of boat moorings to fall under the concept of the 'letting of premises and sites for the parking of vehicles', which is excluded from the VAT exemption for the letting of immovable property. Thus, the standard VAT rate should apply. Segler proceeded to appeal to the 'Bundesfinanzhof' (Federal Finance Court of Germany), arguing that the taxation on the letting of boat moorings at the standard VAT rate infringes upon the general principle of equality since the provision of places on camping or caravan sites is subject to the reduced VAT rate. In this context, the Bundesfinanzhof decided to refer to the CJ for a preliminary ruling on the question whether the reduced VAT rate for the letting of places on camping or caravan sites of Article 98(2) VAT Directive, read in conjunction with point 2 of Annex III, should also cover the letting of boat moorings.

The CJ begins by considering that the aforementioned Annex III to the Directive sets out an exhaustive list of supplies and services to which reduced rates may be applied. Also, the CJ points out that provisions which are in nature exceptions to a principle (reduced rate instead of the standard rate) must be interpreted strictly. Based on the case *Baštová* (C 432/15), a concept such as 'accommodation' should be interpreted strictly and the scope of that provision should not be extended to services which are neither included in its wording nor intrinsically linked to that concept. Along these lines, the CJ rules that the letting of boat moorings is (i) not included in the wording and (ii) not intrinsically linked to the concept of 'accommodation' as its primary purpose is to enable boats to be immobile and secured. Thus, the letting of boat moorings is not covered under the reduced VAT rate for the letting of places on camping or caravan sites. Lastly, the CJ rules that this interpretation of the provision at issue does not undermine the principle of fiscal neutrality as the services for the letting of places on camping or caravan sites, on the one hand, and services for the letting of boat moorings, on the other, perform different functions and are thus not in competition with each other.

CJ rules on the VAT treatment of land registry costs which concern a statutory obligation of the seller (*Amărăşti Land Investment*)

On 19 December 2019, the CJ gave its judgment in the case *Amărăşti Land Investment* (C-707/18). The Romanian entity Amărăşti Land Investment (hereafter "ALI") aims to carry out agricultural activities and purchased land to that end.

The land was not registered in the Land Register and purchased by means of a two-stage process. First a provisional purchase agreement has been signed between the seller and ALI. Under this agreement ALI as buyer was obliged to register the plots in the land register, while this registration is a legal obligation for the seller. This registration is required to transfer the land legally valid. After the required registration the seller and ALI concluded the second stage and had signed a final purchase agreement in order to transfer the land.

The registry costs are not charged by ALI to the seller. Furthermore, in the provisional purchase agreement parties

agreed that the purchase price does not include the consideration for registration in the Land Register.
In the view of the Romanian tax authorities ALI has provided a VAT taxed service to the seller by taking on the registration in the Land register. Hence, after the purchase of the land the tax authorities have issued an additional VAT assessment to ALI.
In the procedure that followed, the Romanian court eventually turned to the CJ for a preliminary ruling. The CJ considers that a buyer who has carried out the necessary steps for the first registration of the land in order to comply with a statutory obligation of the seller, those steps must be deemed to have been carried out on behalf of the seller. According to the judgment of the CJ follows from this consideration that ALI has provided a service to the seller. That the registry costs are not included in the purchase price of the land does not change this judgment.

About Loyens & Loeff

Loyens & Loeff N.V. is the first firm where attorneys at law, tax advisers and civil-law notaries collaborate on a large scale to offer integrated professional legal services in the Netherlands, Belgium, Luxembourg and Switzerland.

Loyens & Loeff is an independent provider of corporate legal services. Our close cooperation with prominent international law and tax law firms makes Loyens & Loeff the logical choice for large and medium-size companies operating domestically or internationally.

loyensloeff.com

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

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

LOYENS LOEFF

LOYENSLOEFF.COM

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

Amsterdam, Brussels, Hong Kong, London, Luxembourg, New York, Paris, Rotterdam, Singapore, Tokyo, Zurich