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EU **Tax Law** Highlights of 2018

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Highlights in this edition

In the course of 2018 there were several major developments in EU tax law. This annual edition of EU Tax Alert provides an overview of those developments, in which we highlight:

- State aid decisions and Commission actions concerning certain MNEs

- EU Mandatory Disclosure Rules for intermediaries applying to cross-border tax advice

- Developments concerning the CCTB and digital taxation proposals

- Relevant CJ decisions in the field of direct and indirect taxation

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Highlights of 2018

State Aid

CJ rules on taxes on large retail establishments by Spanish autonomous regions (*ANGED*)

On 26 April 2018, the CJ issued its judgment in case *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Consejería de Economía y Hacienda del Principado de Asturias and Consejo de Gobierno del Principado de Asturias* (Joined Cases C-234/16 and C-235/16).

From the 2000s onwards, regional taxes on the operation of large business establishments were introduced in some Spanish autonomous regions. If the public display or sales area of such establishment should exceed 4,000 m2, such tax would be due. Individual traders owning several such establishments would not be taxed, as long as each did not exceed 4,000 m2. Also for garden centres, vehicle sellers and suppliers of construction materials, machinery or industrial goods such tax would only be levied when exceeding 10,000 m2. The stated purpose of this tax scheme was to counteract environmental and territorial consequences of raising large retail establishments, such as rising traffic flows, and to have them contribute to financing infrastructural improvements and environmental measures needed. This tax was subsequently challenged in a national court (the case at hand), next to being investigated by the Commission. The CJ considered that the minimum threshold was not manifestly inappropriate and therefore, did not constitute State aid. As for the sectoral exemption, it is for the referring court to determine whether those establishments have no greater effect on the environment and on local planning than that of any other sectors of industry. So as far as the second exemption is concerned, there is still some work to do in order to determine whether it can be cleared from a State aid perspective. In parallel cases similar issues were raised. (see cases C-233/16, C-236/16 and C-237/16.)

CJ rules on German Loss carry forward decision (*Heitkamp*)

On 28 June 2018, the CJ issued its judgement in ase *Andres (faillite Heitkamp BauHolding) v Commission* (C-203/16P). The Court reversed the General Court judgement considering that the Commission decision on the German restructuring exemption should be annulled.

Germany restricted the carrying forward of losses in the case of a substantial change in ownership of a company, but it made an exemption for ailing companies in need of restructuring. The CJ concluded that there was a an error in the determination of the reference framework against which the selectivity of the measure should be assessed and that necessarily vitiates the whole of the analysis of the condition relating to selectivity. In this regard, the CJ followed the AG opinion according to which the selectivity of a tax measure cannot be precisely assessed on the basisi of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework, Therefore, and by excluding from the relevant framework in the present case the general rule of loss carry-forward the General Court defined it too narrowly. The CJ further added that the fact that a measure is worder in the form of an exception to the rule governing the forfeiture of losses, the legislative technique cannot be decisive for the purposes of the determination of the reference framework.

CJ overturns annulment of Spanish tax lease decision

In 2014, the Commission decided that a Spanish tax lease scheme amounted to State aid for certain economic interest groupings (EIGs) and their investors involved in the financial lease of sea-going vessels, i.e. EIGs were able to first make use of accelerated depreciation of vessels. At a later date, the EIGs applied for application of the tonnage tax. The end result was that there was no pickup of the earlier deprecation in certain situations where a call-option was exercised (which deemed the vessels to be new), as a result of which, the capital gain was left untaxed.

The General Court found that, given its transparency for tax purposes, only the members and not (also) the EIG itself should have been deemed the recipients of the aid given that the Commission did not argue the presence of an indirect benefit to the EIG. On 25 July 2018, the Court of Justice overturned its decision (C-218/16P), as it was the EIG that applied for the regimes as a legal entity even though the resulting benefit ended up with its members due to the tax transparency of the EIG. The case has been referred back to the General Court to address legal pleas not previously covered.

CJ rules that exemption from real estate transfer tax in the context of a restructuring within a group is not State aid (*A-Braunerei*)

On 19 December 2018, the CJ issued its judgment in *case Finanzamt B v A-Braueri* (C-374/17). The case deals with a request made by A-Brauerei concerning the refusal of German tax authorities to grant A-Brauerei the exemption from the real property transfer tax which may, under certain conditions, be available under German tax law to companies acquiring a right of ownership to property in the context of restructuring procedures within certain groups of companies.

A-Brauerei, a company operating a commercial business, held 100% of the shares in T-GmbH, which owned a number of properties and was in turn the sole shareholder of another company. By an agreement dated 1 August 2012, T-GmbH transferred all of its assets, including the properties, together with all related rights and obligations, to A-Brauerei. By a notice of assessment of 7 June 2013, the Finanzamt demanded payment of the real property transfer tax allegedly payable by A-Brauerei, on the ground that the transfer to A-Braueri (as acquiring company) of the property owned by T-GmbH (as the company being acquired) as a result of the merger of those two undertakings and the transfer by comprehensive legal succession of the assets of T-GmbH to A-Braueri which that merger entailed, constituted a taxable transaction. A-Braueri appealed from this decision and the Nuremburg Finance Court, Germany upheld the action brought by A-Brauerei. In the meantime, a question was raised as to whether the tax advantage at stake could be characterised as State aid for the purposes of Art. 107 (1) TFEU.

The question raised was then whether Article 107(1) TFEU must be interpreted as meaning that a tax advantage, such as that at issue in the main proceedings, which consists of exempting from real property transfer tax the transfer of ownership of a property which occurred because of a restructuring procedure involving solely companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years prior to that procedure and of five years thereafter, fulfils the condition relating to the selectivity of the advantage concerned, laid down in Article 107(1) TFEU.

According to the CJ, a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be drawn between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (judgment of 6 September 2006, *Portugal v Commission*, C88/03, EU:C:2006:511, paragraph 81).

In the present case, the objective related to the proper functioning of the general tax regime at issue in the main proceedings, seeking to avoid double and, hence, excessive taxation, may therefore give good grounds for restricting the tax exemption to the restructuring procedures carried out between companies linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years before and five years after that procedure. Furthermore, the requirement relating to the minimum period for holding such a shareholding appears justified by the intention of excluding undesirable windfall effects and, therefore, of preventing abuse, by precluding shareholdings of that level, which will come to an end once the restructuring has been concluded, from being acquired for a short period for the sole purposes of benefiting from that tax exemption. The prevention of abuse may constitute a justification linked to the nature or general scheme of the system concerned.

Therefore, the CJ concluded that even though the exemption introduces a distinction between undertakings which are, in the light of the objective pursued by the legal system at issue, in comparable factual and legal situations, that distinction is justified as it seeks to avoid double taxation and stems, to that extent, from the nature and general scheme of the system of which it forms part.

EU State aid investigation opened into IKEA's tax treatment in the Netherlands

On 18 December 2017, the Commission announced the opening of a formal State aid investigation into two tax rulings concluded by the Netherlands tax authorities with Inter IKEA Systems BV in 2006 and 2011. 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 broader efforts focusing on transfer pricing and valuation issues.
EU State aid rules disallow the granting of a selective advantage by an EU Member State that may distort competition by favouring certain undertakings.
The opening of this new investigation confirms the Commission's commitment to use State aid enforcement as a tool to further a broader tax reform agenda.

The Commission's investigation focuses on various transfer pricing elements accepted by the Netherlands tax authorities:

First of all, the Commission doubts whether the level of licence fees paid by Inter IKEA Systems BV in the period 2006-2011 was at arm's length in view of the activities carried out by Inter IKEA systems BV in the Netherlands. This is not the first time the Commission looks into the level of licence fees; amongst others, it did so in the Starbucks case and in the Amazon case.

The second doubt concerns the acquisition price for intellectual property rights purchased by Inter IKEA Systems BV in 2012 and financed with a loan from a related party. The Commission will analyse more in depth whether the price that Inter IKEA Systems BV has paid for these intellectual property rights was not too high and whether consequently, the interest on the acquisition loan would also not be too high. Recently, Commissioner Vestager indicated she was asking Apple for further details on a similar intra group transaction, following the publication of the Paradise Papers.

The Commission will now verify whether the terms of the various intragroup transactions - licence fees, acquisition price of the intellectual property rights and interest on the intragroup loan - were at arm's length. The decision to open the formal investigation does not prejudice the final outcome of the case.

The Netherlands Minister of Finance issued a press release, which remarkably did not include a statement that according to the Netherlands, no selective advantage had been granted to the beneficiary of the tax rulings.

Registering recovery claims in insolvency proceedings

Recovery of State aid should normally take place within 4 months after a recovery decision has been taken by the Commission and notified to the Member State involved. This may require registering the recovery claim as a liability as part of an insolvency process within that time frame, or requesting an extension by the Commission otherwise if starting such procedure would inevitably require more time. If authorities are unable to recover the entire amount, this procedure should end up in the winding-up of the undertaking and a definitive cessation of its activities.
From the above, it can be deduced that - as far as a recovery claim is concerned - only collecting part of that claim, but not the entire amount, is not an option. This is different from tax authorities deciding to waive part of an initial tax claim in light of potential insolvency as to be able to recover the remainder and not lose the entire claim.
In the case activities of an insolvent company are sold to another group company, the question remains whether a sale at fair market value at the time would still satisfy the criterion of definitive cessation as now defined by the CJ (C-363/16 of 17 January 2018, Commission v Greece).

Commission publishes State aid decision on Amazon

On 26 February 2018, the Commission published the non-confidential version of its October 2017 decision ordering Luxembourg to recover State aid from Amazon (the Decision). In the meantime, Luxembourg has challenged the Decision before the EU General Court. The publication of the Decision sheds further light on the Commission's reasoning, in particular as regards the key criteria of advantage and selectivity. Whereas an individual State aid decision does not have a direct impact on other taxpayers, businesses can now better assess their own State aid exposure in light of the Commission's reasoning.

Facts of the case

In the case at hand, a company fully taxable in Luxembourg (LuxOpCo) paid from May 2006 to June 2014, a royalty to a Luxembourg partnership (LuxSCS) for the use of certain intangibles (technology, marketing- related intangibles and customer data). At the time, the Luxembourg tax authorities had confirmed by means of a tax ruling that the royalty was in line with Luxembourg transfer pricing rules. The reasoning in the Decision is that this royalty exceeded the arm's length value, such that the tax base of LuxOpCo was unduly reduced.

Advantage – more uncertainty in transfer pricing? State aid is defined as a measure granted by a 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. The Decision develops two lines of reasoning on the existence of an advantage. In the primary reasoning, the Decision provides an extensive functional analysis based on numerous documents obtained during the investigation, including ones from the US Tax Court case between Amazon and the IRS (see here the US Tax Court opinion of 23 March 2017). The Commission considers that LuxSCS did not have any function, risk or asset in relation to Amazon's European business, nor as to the development of the intangibles. Whereas Amazon claims those intangibles were essentially developed in the US, the Commission allocates functions, risks and assets to LuxOpCo.

Although both the Commission and the OECD prefer the CUP method under their respective guidance, the Commission subsequently dismisses the CUP method, rejecting the comparability of agreements that Amazon considers sufficiently established by the US Tax Court to value a sub-set of the same intangibles in the US Tax Court case. Instead, the Commission asserts the transactional net margin method (TNMM) should apply, with LuxSCS as tested party making the less complex contributions as compared to LuxOpCo. It is remarkable that the Commission relies on and extensively refers to the 2017 OECD TP Guidelines, thus effectively enforcing non-binding guidance with retroactive effect. Based on its TNMM analysis, the Commission considers that the royalty paid by LuxOpCo should only cover the costs incurred by LuxSCS to develop and maintain the intangibles as well as a minor mark up on LuxSCS' related expenses.

In the alternative line of reasoning, the Commission points out what it considers methodological mistakes in the transfer pricing analysis. The Commission argues that LuxOpCo performed more than simply routine functions. It also questions the use of operating expenses rather than total costs as profit level indicator to benchmark the profitability of LuxOpCo under the TNMM, and also the introduction of a floor and a cap to LuxOpCo's remuneration.

Selectivity – comparison with all taxpayers or to group companies only?

On selectivity, the Decision applies three lines of reasoning. In its primary line, the Commission presumes selectivity, claiming that an individual measure (here, the advance tax confirmation of 2003) giving an advantage is automatically selective. This reading of the MOL case is yet to be confirmed by the EU Courts.

As an alternative line, the Decision applies the usual 3-step selectivity test: first defining the reference framework (i.e., the 'normal' application of the tax rules), second identifying if LuxOpCo is better treated than other undertakings in a similar legal and factual situation (within the same reference framework) and third, determining whether the difference in treatment (if any) is justified by the nature of the system. The Decision, as in other recent tax State aid decisions, chooses the general corporate income tax system as reference framework, even though it questions the correct application of the Luxembourg transfer pricing rules in LuxOpCo's specific case. The Luxembourg transfer pricing rules are not questioned as such. The Decision compares LuxOpCo to any other corporate taxpayer, rather than to the sole group companies party to intragroup transactions and thus subject to transfer pricing rules. Because other taxpayers could not allegedly reduce their tax liability by paying an excessive royalty, the Commission considers that LuxOpCo received a selective advantage that is not justified by the nature of the tax system.

As a third line of reasoning, the Decision takes Luxembourg transfer pricing rules as reference framework, albeit without the related administrative practice. However, it barely develops any reasoning and instead, relies on the alleged existence of an advantage to conclude that the selectivity test is also met.

Potential actions to take

The Decision does not directly apply to other taxpayers or groups, whether in Luxembourg or in another Member State. The reasoning shows, however, that the Commission continues to use State aid rules as a tool to push forward tax reforms in the EU and address what is perceived as unfair tax competition.
As the Commission appears to insist on applying the 2017 OECD TP Guidelines with retroactive effect, companies engaged in intragroup transactions should make sure they have adequate transfer pricing documentation and review whether the allocation of functions, assets and risks correctly reflects economic substance. As part of a longer term transfer pricing strategy, restructuring could be opportune. Complying with the 2017 OECD TP Guidelines should minimize the State aid risk going forward.

Next steps

Several tax State aid cases are still in the formal investigation procedure stage: McDonald's and Engie in Luxembourg, Inter Ikea in the Netherlands, the Gibraltar tax ruling regime and the UK CFC financing exemption. Appeals with the EU General Court are pending in the Apple (Ireland), Starbucks (the Netherlands), Fiat (Luxembourg), Amazon (Luxembourg) and Belgian excess profit ruling scheme cases. The Commission continues to look into the tax practices of the EU Member States and is expected to open more investigations in the coming months.

Commission approves Portuguese tonnage tax regime and seafarer scheme

In April 2018, a new Portuguese tonnage tax regime was approved for shipping companies. In this scheme, an additional 10% - 20% reduction of the tax base so calculated was made possible for more environmentally-friendly ships. The seafarer scheme covered both an exemption from personal income tax and reduced social insurance contributions.

Commission orders Luxembourg to recover State aid granted to ENGIE

On 20 June 2018, the Commission announced its finding that advance tax rulings (**ATRs**) granted by Luxembourg to ENGIE constitute unlawful State aid. Luxembourg must now recover some EUR 120 million from ENGIE. This decision should not directly impact other taxpayers, as it concerns an individual measure.

According to Article 107(1) of the Treaty on the Functioning of the European Union (**TFEU**), measures that affect trade between Member States and distort, or threaten to distort, competition by granting a selective advantage to certain undertakings, are incompatible with the EU Single Market. ATRs should not have the effect of lowering the tax liability of the beneficiaries compared to other taxpayers in a similar legal and factual situation.

In the case of ENGIE, the Commission investigated two Luxembourg domestic hybrid financing structures. The ATRs obtained by ENGIE confirmed the deductibility of accrued, but unpaid, charges connected with a convertible loan, without (corresponding) taxable income at the level of the holder of the convertible loan. Upon conversion of the loan into shares, there was no taxation. Subsequently, the domestic participation exemption seems to have applied to the income received in relation to such shares. The Commission considers that the resulting “deduction without inclusion” is not in line with Luxembourg tax rules and that a selective advantage was given to ENGIE. More on the Commission's reasoning will be known once the decision itself will be published. The announcement by the Commission, accessible here, does not make clear whether the deduction should have been denied at the level of the borrower or the income should have been taxed at the level of the other concerned companies. The press release of the Luxembourg government reacting to the announcement can be found here. It alludes to the proposed abolition of the provision allowing for a rollover relief for a lender converting loans into shares issued by the debtor as from 2019 (see our flash of 20 June 2018 here).

The Commission's decision can be challenged before the CJ under Article 263 of the TFEU, by Luxembourg, other Member States, ENGIE and other parties who are directly and individually concerned.

Appeals with the EU General Court are already pending in the Apple (Ireland), Starbucks (the Netherlands), Fiat (Luxembourg), Amazon (Luxembourg) and excess profit ruling (Belgium) cases. Several other tax State aid cases are still in the formal investigation procedure stage concerning McDonald's in Luxembourg, Inter Ikea in the Netherlands, Gibraltar's tax ruling regime and some elements of the UK CFC financing exemption. The Commission continues to look into the tax practices of Member States and can be expected to open more investigations.

Commission concludes that McDonald's did not receive State aid from Luxembourg

On 19 September 2018, the Commission concluded that a tax ruling granted by Luxembourg to McDonald's Europe Franchising did not constitute illegal State aid. The Commission acknowledged that Luxembourg had correctly applied the Luxembourg-United States tax treaty. While this decision concerns an individual case, it suggests that State aid rules are not an appropriate tool to tackle hybrid mismatches relating to permanent establishments.

McDonald's Europe Franchising, a Luxembourg resident company, had set up a branch in the United States (US) to which it allocated intellectual property rights. The related royalty income was correspondingly allocated to the branch. Luxembourg viewed the branch as a permanent establishment (PE), but the US did not. Accordingly, the activities were not taxed in the US. At the same time, the assets and income were exempt from tax in Luxembourg, as Luxembourg applied the provisions of the Luxembourg-US tax treaty to the PE's income and assets. Effectively, this resulted in a hybrid mismatch outcome (double non-taxation of the royalty income).

The Commission has now ended the formal State aid investigation that it had begun into this tax ruling in December 2015. It concluded that Luxembourg did not treat McDonald's more favourably than other companies in a similar legal and factual situation by confirming the hybrid mismatch outcome. The US branch met all criteria to qualify as a PE under the applicable Luxembourg tax provisions. Consequently, Luxembourg validly applied the relevant tax treaty provisions to exempt the PE's assets and income from Luxembourg taxes, without giving a selective advantage to McDonald's.

The Commission duly noted Luxembourg's intention to make the recognition of a foreign PE subject to stricter conditions in the future. We refer in this respect to the pending bill of law 7318 discussed in our tax flash of 20 June 2018.

The Commission's decision may be appealed by interested parties within two months of the publication in the Official Journal of the EU. Various State aid cases are still pending before the EU general court concerning the tax treatments of Apple, Starbucks, Fiat, Amazon and ENGIE, and the Belgian excess profit ruling scheme. Formal State aid investigations are still ongoing concerning the UK CFC financing exemption, Inter IKEA in the Netherlands and the Gibraltar tax ruling regime. The Commission continues to look into the tax practices of EU Member States and is expected to open more investigations in the coming months.

Commission concludes that Gibraltar gave around €100 million of illegal tax advantages to multinational companies

On 19 December 2018 the Commission has found that Gibraltar's corporate tax exemption regime for interest and royalties, as well as five tax rulings, are illegal under EU State aid rules. The beneficiaries now have to return unpaid taxes of around €100 million to Gibraltar.

According to the territorial tax system applicable in Gibraltar, companies should pay corporate taxes on income accrued in or derived from Gibraltar. However, the Commission's investigation found that companies in receipt of interests or royalties were exempted from taxation in Gibraltar without a valid justification.

According to the Commission, this measure significantly favoured a set of companies belonging to multinational groups entrusted with certain functions (such as the granting of intra-group loans or the right to use intellectual property rights). As a result, the Commission concluded that the exemption was designed to attract multinational companies to Gibraltar and that it effectively reduced the corporate income tax of a limited number of companies belonging to multinational groups. This selective tax treatment in favour of multinational companies granted these companies an advantage vis-a-vis other companies and distorted competition within the EU's Single Market, in breach of EU State aid rules. The Commission therefore concluded that the tax exemption for companies in receipt of interest and royalties, as applied in Gibraltar between 2011 and 2013, is illegal under EU State aid rules and must be recovered from the companies.

In addition and after carefully reviewing 165 tax rulings granted by Gibraltar, the Commission concluded that five of these tax rulings granted by the tax authorities of Gibraltar to large multinational companies in 2011 and 2012 involved illegal State aid. The five contested tax rulings concern the tax treatment in Gibraltar of certain income generated by Dutch limited partnerships. According to the tax legislation applicable in both Gibraltar and the Netherlands, the profits made by a limited partnership in the Netherlands should be taxed at the level of the partners. In the five cases at hand, the partners of the Dutch partnerships were resident for tax purposes in Gibraltar and should have been taxed there. However, under those five tax rulings, the companies were not taxed on the royalty and interest income generated at the level of the Dutch partnerships, contrary to other companies in receipt of other type of income. Since the exemptions in question gave their beneficiaries an undue and selective advantage, the Commission concluded that the five tax rulings concerned were illegal under EU State aid rules and that this advantage must be recovered.

Gibraltar must now recover unpaid taxes. The Commission estimates, based on currently available information, that the total unpaid tax amounts to around €100 million.

Direct taxation

EU adopts list of non-cooperative jurisdictions for tax purposes (black list)

On 5 December 2017, the Economic and Financial Affairs Council (ECOFIN) determined a list of 17 non-cooperative jurisdictions, i.e., the EU black list. This list was established based on three (screening) criteria: tax transparency, fair taxation (no harmful tax regimes) and implementation of BEPS minimum standards. The Netherlands, Belgium, Luxembourg and Switzerland are not included in this black list. Subsequently, on 23 January 2018, the list was updated with 8 jurisdictions being removed following commitments made at a high political level to remedy EU concerns. The ECOFIN recommends (but does not oblige) that the Member States impose tax sanctions on the listed jurisdictions. The EU may impose non-tax sanctions.

The listed jurisdictions

The jurisdictions which originally appeared on the EU black list were: American Samoa, Bahrain, Barbados, Grenada, Guam, (Republic of) Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad Tobago, Tunisia and the United Arab Emirates (UAE). In the meantime, Barbados, Grenada, the Republic of Korea, Macao SAR, Mongolia, Panama, Tunisia and the UAE have been removed from that list.
Furthermore, the screening process of Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, Turks and Caicos Islands, US Virgin Islands has been put on hold and is expected to be completed by the end of 2018.

Sanctions

The black listed jurisdictions may face sanctions (so-called: 'defensive measures') imposed by the Member States in the form of (administrative) tax measures and by the EU in the form of *non-tax* measures.
The *non-tax measures* are linked to EU funding in the context of the European Fund for Sustainable Development (EFSD), the European Fund for Strategic Investment (EFSI) and the External Lending Mandate (ELM). Such EU funding may not be channelled through entities in the black listed jurisdictions.
The ECOFIN *recommends* (but does not oblige) that Member States impose tax sanctions on the listed jurisdictions including: non-deductibility of costs, CFC rules, withholding taxes, limitation on participation exemption, switch-over rules and reversal of the burden of proof. If a Member State takes such measures, this might lead to having to change not only its domestic law but - depending on the measure - also bilateral tax treaties.
The ECOFIN also *recommends* that Member States take administrative tax measures against the EU black listed jurisdictions, such as increased audit risks for taxpayers benefiting from certain regimes or using structures involving those jurisdictions. The ECOFIN does not provide any guidance on when the Member States should impose the recommended sanctions.
In addition to the EU black list, there is a separate list with 47 jurisdictions, including Switzerland. These jurisdictions have undertaken to address concerns raised on one or more of the screening criteria by introducing relevant changes in their tax legislation by year-end 2018 (or by year-end 2019 in the case of developing countries). As those jurisdictions are not black listed, they would not fall within any of the recommended sanctions.

The ECOFIN intends to monitor and update the EU black list at least once a year. It remains to be seen to what extent the Member States will use the EU black list and will introduce the tax sanctions recommended by the ECOFIN. Still, this blacklist is already linked with other EU legislative proposals. For example, the public CbC reporting proposal includes stricter reporting requirements for multinationals with activities in listed jurisdictions. In the proposed Directive of mandatory disclosure rules for intermediaries, a tax scheme routed through an EU black listed jurisdiction will be automatically reportable to tax authorities Furthermore, the EU Commission is expected to support Member States' work to develop a more binding and definitive approach to sanctions for the EU black list during 2018. In any event, Member States may apply additional sanctions pursuant to their domestic laws as well maintain their own black lists of non-cooperative jurisdictions with a broader scope.

New EU Mandatory Disclosure Rules for intermediaries applying to cross-border tax advice and circumvention of reporting obligations

On 13 March 2018, the Council of the European Union reached political agreement on a Council Directive ('Directive') introducing mandatory disclosure rules for intermediaries such as lawyers, accountants and tax advisers. Intermediaries must report potentially aggressive tax planning arrangements with a cross-border dimension as well as arrangements designed to circumvent reporting requirements like CRS and UBO reporting. EU Member States' tax authorities will exchange the information automatically within the EU through a centralized database.

The reporting obligation applies to intermediaries with residency, incorporation, professional registration or a permanent establishment in an EU Member State and only related to cross-border arrangements concerning at least one EU Member State. The Directive does not include a definition of aggressive tax planning. Instead, it includes a list of features, elements and examples of arrangements that should present a strong indication of aggressive tax planning or the undermining of reporting obligations. Covered intermediaries must disclose such arrangements within 30 days after making them available to their clients.

In certain cases, for instance when no intermediary is involved, when the intermediary does not have an EU presence or in the case of client-attorney privilege, the obligation to report lies with the client.

Member States must implement the Directive in their domestic laws ultimately on 31 December 2019 and apply it as from 1 July 2020. However, it will have retroactive effect for all reportable arrangements, the first step of which is implemented in the time frame between the entry into force of the Directive (likely June/July 2018 after formal approval by the Council) and 1 July 2020. This means that starting summer 2018, intermediaries and their clients should already be monitoring all tax advice provided with a cross-border dimension and all advice concerning reporting requirements to ensure that a future obligation to report can be properly fulfilled.

Liechtenstein and Peru meet commitments, Palau removed from list of uncooperative jurisdictions

On 2 October 2018, the ECOFIN found Liechtenstein and Peru compliant with all its commitments on tax cooperation. It also agreed to remove Palau from the EU's list of non-cooperative tax jurisdictions.

Liechtenstein and Peru have completed the necessary reforms to comply with all the tax good governance principles identified at EU level and set out in the conclusions adopted by the Council in December 2017. At the same time, Palau has made commitments at a high political level to remedy EU concerns. EU experts have assessed those commitments. As a consequence, Palau was moved to the list of jurisdictions that have undertaken sufficient commitments to reform their tax policies. Implementation of its commitments will be carefully monitored by the Council working group responsible for the listing process ('code of conduct group').

Six jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Guam, Namibia, Samoa, Trinidad and Tobago and the US Virgin Islands.

CCTB developments: new compromise text released

On 5 December 2018, the Austrian Presidency released a compromise text on the CCTB proposal.

This text takes into account the work developed in the past Presidencies (notably the Maltese and Bulgarian Presidencies), and is limited to Chapters I to V.[1]

The compromise text reflects many of the proposals that have been presented by the German-French Common position paper on the CCTB.[2]

Some of the amendments in the compromise text are shown in brackets - reflecting the lack of agreement of Member States in those matters - while others are not, suggesting that Member States reached an agreement on those solutions. Some of the main aspects of the compromise text are:

1 Chapter I (scope and definitions); Chapter II (calculation of the tax base); Chapter III (timing and quantifications); Chapter IV (depreciation of fixed assets); Chapter V (losses).

2 German-French Common Position Paper on CCTB Proposal of 19 June 2018.

- One of the main aspects deals with the *scope of the proposal* with two possible approaches being considered: (i) have the compulsory scope of the CCTB extended to all corporate income taxpayers, or (ii) Member States could have the option to voluntarily also cover companies that do not exceed the EUR 750 million threshold by adjusting their national corporate income tax rules to bring them in line with the CCTB rules. The France and Germany positions were of the view that it was appropriate to extend the scope of the CCTB to make it compulsory for all companies subject to corporate income tax, irrespective of size or legal form. Identically, the Austrian Presidency favoured the extended compulsory scope. This was supported by several delegations while others opposed and some others remained undecided. In the compromise text, the limited mandatory application of the CCTB based on the EUR 750 million consolidated group revenue is shown in brackets reflecting the current status that Member States are divided as to the scope of the CCTB with both options being discussed.
- Another aspect regards the general principles for the calculation of the tax base which now includes a new provision stating that the tax base shall be determined on the basis of national accounting rule
- There is also a new explicit reference that the CCTB Directive does not prevent Member States from maintaining their national group taxation systems. While this could already be inferred in the former CCTB proposal as this was a matter not regulated by the CCTB, still the issue remained unclear. The newly inserted paragraph now clarifies this issue.
- Following the proposals of the Bulgarian Presidency, now included in brackets is the possibility to calculate the tax base following a balance sheet approach as an alternative to the calculation on the basis of a profit/ loss account;
- Another relevant aspect of the compromise proposal which is shown in brackets is the fact that granting the super-deduction for R&D expenditure is now limited to situations where a taxpayer does not yet receive any other benefits in whatever form granted by a Member State in respect of such R&D costs.
- The entire provision concerning the allowance for growth and investment (AGI) is presented in brackets and also contains some amendments (notable as regards what is defined as ‘equity’). This may reflect the fact that neither Germany or France are in favour of the AGI.
- As regards tax losses, the compromise proposal maintains an indefinite loss-carry forward but now includes the following restrictions: (i) possibility to deduct up to an amount of EUR 1 million to the extent that they are covered by profits, and (ii) limitation of up to 60 percent (and this percentage is in brackets) of the taxable profits after the deduction of the basic account of EUR 1 million.
- The provision of cross-border loss relief is also in brackets, which again may reflect the fact that both Germany and France do not agree on the introduction of cross-border loss relief but rather consider that this should be discussed in the context of the CCCTB.

Digital taxation developments: no agreement reached and Franco-Germany joint statement

On 4 December 2018, the Austrian Presidency brought the Digital Services Tax proposal to the ECOFIN Council. An agreement was not reached. According to the Presidency, while several Member States support the Commission proposal, a number of them are unable to accept it for political reasons as a matter of principle irrespective of the technical adaptations. Therefore, during this ECOFIN meeting, the text of the proposal was not discussed in detail.

As a consequence, France and Germany presented a joint declaration, which invites the Commission and Council to narrow the scope of the digital services tax proposal, with a view to targeting exclusively companies engaged in online advertising. The taxation would occur on the basis of a 3% tax on turnover. As a second step, the joint declaration invites the Commission and the Council to submit proposals in due course in line with the OECD work, expressing a commitment to immediately implement OECD outcomes into EU law.

The Franco-German joint declaration urges the EU Council to reach an agreement on a DST Directive ‘*before March 2019 at the latest*’. The proposal would enter into force on 1 January 2021 if no other international solution has been agreed in the meantime. Such DST Directive would not prevent Member States from introducing in their domestic legislation a digital tax on a broader base.

In the meantime, France has announced that it will introduce its own digital services tax as from 1 January 2019.

CJ does not allow too general anti-abuse and substance provisions for holding companies (*Deister Holding and Juhler Holding*)

On 20 December 2017, the CJ issued its judgment in joined cases *Deister Holding AG* (C-504/16) and *Juhler Holding A/S* (C-613/16) *v Bundeszentralamt für Steuern*. In this ground-breaking judgment, the CJ confirmed that the German anti-abuse provision for withholding tax relief for dividends paid by a German company to certain parent companies resident in another EU Member State is too general. Therefore, that provision is incompatible with the EU Parent-Subsidiary Directive and the EU freedom of establishment. For the CJ, neither the tax treatment of the EU parent company's shareholders nor the type or composition of economic activities of the EU parent company is relevant for assessing the existence of abuse. This has a strong impact on EU anti-abuse rules and substance requirements for holding companies.

Background

The German anti-abuse provision denies the withholding tax exemption if:

- *Subjective scope*: the shareholders of the interposed holding company would not be entitled to such relief if they earned the German dividend income directly, and
- *Three conditions test*: (1) there are no economic or other relevant reasons for interposing the holding company; or (2) the holding company does not generate more than 10% of its gross income through its own economic activities; or (3) the holding company does not have a business organisation that is adequately equipped for its business purposes.

Judgment

The CJ confirmed that the German anti-abuse provision is not in line both with the EU Parent-Subsidiary Directive and the EU freedom of establishment. According to the CJ, the legislation at stake is too general and does not have the specific objective of targeting wholly artificial arrangements which do not reflect economic reality. Furthermore, the tax treatment of the shareholders of EU parent companies is irrelevant for the purposes of benefiting from the EU Parent-Subsidiary Directive. Nor does this Directive contain any requirement as to the type of economic activity of EU parent companies or the percentage of income derived from own economic activities.
In addition, the CJ stated that the verification of any of the 'three conditions test' creates an irrebuttable presumption of abuse without the possibility of the taxpayer demonstrating valid economic reasons. According to the CJ, those three conditions (individually or as whole) do not imply by themselves the existence of a wholly artificial arrangement which does not reflect economic activity.
In any event, the analysis of such artificiality should be made based on a global assessment taking into account the organisational, economic or other substantial features of the group of companies to which the parent company in question belongs and the structures and strategies of that group.

Our observations

This judgment shows a strict approach of the CJ to domestic anti-abuse provisions. If such provisions are too general, apply automatically and therefore create a general presumption of abuse, most likely they are not in line with EU Law. Furthermore, it also provides a fresh view on the existence of substance requirements for EU holding companies, requiring a case-by-case analysis of the overall situation at stake considering economic and organisational characteristics and strategy of the whole group. We expect that this judgment will also have an impact on anti-abuse provisions in other Member States.

CJEU confirms application of the "per-element approach" and rules that Dutch tax consolidation infringes the freedom of establishment (*X NV and N BV*)

On 22 February 2018, the CJ issued its judgment in the joined Dutch cases X NV and N BV. These cases deal with the application of the "per-element approach" in the context of the Dutch tax consolidation regime (fiscal unity) in situations concerning:
The Dutch interest deduction limitation rule to prevent base erosion and;
The non-deductibility of currency losses on a participation in a non-Dutch/EU subsidiary.
Loyens & Loeff represented the taxpayers in both cases.

In general, the CJ confirmed that the so-called 'per-element approach' adopted by the CJ in the Groupe Steria judgment is also applicable for the Dutch fiscal unity. Insofar interest deduction limitations do apply to corporate tax payers with stand-alone foreign EU subsidiaries, while the same limitations do not apply in situations where the subsidiaries are included in a fiscal unity with the corporate tax payer, the freedom of establishment is infringed.
In turn, as regards, the impossibility to deduct currency

losses outside the fiscal unity, does not constitute an infringement to the freedom of establishment, according to the CJEU decision.

The decision will probably lead to many corporate tax payers with foreign EU subsidiaries claiming higher amounts of deductible interest in their tax returns. According to the Secretary of State for Finance this may have a negative impact on the Dutch budget. This is why he announced that the decision means the end of the current Dutch tax consolidation regime. Provisional legal counter measures were already announced on 25 October 2017 and will now be put into force.

Case on interest deduction limitation to prevent base erosion

The first case before the CJ concerned the Dutch interest deduction limitation rule to prevent base erosion (art. 10a of the Dutch Corporate Tax Act). This anti-abuse provision disallows deduction of interest paid by a Dutch corporate taxpayer to a related party where the relevant debt is connected with, inter alia, a capital contribution in a subsidiary. If the taxpayer had formed a prior fiscal unity (tax consolidation) with the subsidiary, the capital contribution would not have been recognized for tax purposes as a result of the tax consolidation. Therefore, the interest deduction limitation rule would not have applied. Since the fiscal unity regime is generally restricted to Dutch resident subsidiaries, the effect of the interest deduction limitation rule at issue can only be avoided in domestic situations. The CJ concluded the application of the interest deduction limitation, in light of the beneficial effect of a fiscal unity in purely domestic situations, infringes the freedom of establishment and cannot be justified either by the need to safeguard a balanced allocation of the powers to tax, the coherence of the tax system or to prevent tax avoidance.

Case on currency losses on participations in EU subsidiary

The second case dealt with a currency loss suffered on a Dutch resident corporate taxpayer's participation in a subsidiary residing in another EU member state. Such a loss is not deductible (whereas profits are exempt) at the level of a Dutch parent company under the Dutch participation exemption, which exempts all profits and losses with regard to a participation in a qualifying subsidiary. Had the taxpayer and the subsidiary been included in a fiscal unity, a currency loss related to the assets of the consolidated subsidiary would have been deductible. However, since the fiscal unity regime generally only extends to Dutch resident subsidiaries, the non-deductible currency loss in this case could not be avoided by including the subsidiary in a fiscal unity. In this specific case the CJEU ruled that there is no infringement of the freedom of establishment based on a symmetry argument: under Dutch law both currency losses and currency profits are not taken into account.

Response of the Dutch State Secretary of Finance

In response to the CJ's judgement, the Dutch State Secretary of Finance stated that the provisional measures announced on 25 October 2017 will become new legislation. Based on the announced legislation, several provisions in the Dutch corporate income tax act and the Dutch dividend withholding tax act need to be applied as if the Dutch tax consolidation regime does not exist. As a result, several benefits of the current Dutch tax consolidation regime will no longer be available in domestic situations. The legislative proposal is expected to be published in the second quarter of 2018 and will enter into force retroactively as from 25 October 2017, 11:00 am.

The Dutch State Secretary of Finance furthermore stated that the decision of the CJ means the end of the current Dutch fiscal unity regime. The announced legislation will be replaced by a new future-proof group regime within a foreseeable period. It is not yet clear how this new regime will be shape

CJ precludes provision of an international agreement between Member States allowing for arbitral tribunal (*Achmea*)

On 6 March 2018, the CJ delivered its judgment in case *Slovak Republic v Achmea* (C-284/16). The case deals with Article 8 of the Bilateral Investment Treaty (BIT) concluded between the Netherlands and Slovak Republic which enables an investor from a Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party.

As part of a reform of its health system, the Slovak Republic opened the Slovak market in 2014 to national operators and those of other Member States offering private sickness insurance services. Achmea, which is part of a Netherlands insurance group, set up a subsidiary in Slovakia through which if offered private sickness insurance services to the Slovak market. In 2006 the

Slovak Republic partly reversed the liberalisation of the private sickness insurance market. As it considered that the legislative measures of the Slovak Republic had caused it damage, Achmea brought arbitration proceedings under Article 8 of the BIT. In those proceedings, the Slovak Republic submitted that, as a result of its accession to the EU, resource to an arbitral tribunal was incompatible with EU Law, in particular Articles 18, 267 and 344 TFEU.

The CJ started by recalling that, according to its case law, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the CJ to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice of the EU and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.

The Court then went on to determine whether the disputes which the arbitral tribunal was called on to resolve referred to the interpretation of EU law. According to the CJ, Article 8 of the BIT allows that an arbitral tribunal may be called to interpret and apply EU law, in particular the provisions regarding the fundamental freedoms.

Subsequently the CJ analysed whether an arbitral tribunal such as referred to in Article 8 BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU. In this regard, it concluded that the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. It observed that it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT. Therefore, it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT the CJ considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law. Given that Article 8 of the BIT has an adverse effect on the autonomy of EU law, the CJ concluded that such provision is precluded by Articles 267 and 344 TFEU.

CJ rules on the personal scope of the Swiss-EU Agreement in the context of the French exit tax (*Picart*)

On 15 March 2018, the CJ issues its judgment in case *Christian Picart v Ministre des Finances et des Comptes publics* (C-355/16). The case deals with the exit tax charged as regards substantial holdings held by Mr Picart in French companies at the time of his transfer of residence to Switzerland as well as the additional assessments of income tax and social security contributions.

In 2002, Mr Picart transferred his residence from France to Switzerland. On the date of that transfer, he held significant shareholdings in a number of French companies. At the time of that transfer, Mr Picart declared an unrealised capital gain on the shares and, in order to benefit from suspension of payment of the tax payable on that capital gain, appointed a tax representative in France and provided a bank guarantee to ensure recovery of the debt to the French Treasury. In 2005, Mr Picart transferred the shares in question, thus bringing the suspension of the payment of that taxation to an end.
Following an examination of his personal tax position, the French tax authorities re-assessed the amount of the capital gain declared and made Mr Picart liable for additional assessments to income tax and social security contributions, with penalties. Mr Picart filed acomplaint with a view to obtaining a discharge from those assessments and penalties. In essence, he claimed that the French legislation was incompatible with the freedom

of establishment guaranteed by the Swiss-EU Agreement on the Free Movement of Persons (AFMP) which allowed him to establish in Switzerland and to pursue in that State an economic activity as a self-employed person consisting in the management of his various direct or indirect shareholdings in a number of companies which he controlled in France.

Questions were brought to the CJ by the referring Court on whether the right of establishment as a self-employed person, within the meaning of the AFMP, has the same scope as the freedom of establishment which Article 49 TFEU has and, if it does have the same scope, whether account must be taken, for the purposes of its application, of the case law deriving from the judgment of 7 September 2006, *N* (C-470/04).

The CJ started by assessing whether a situation such as that of Mr Picart comes within the scope *ratione personae* of the notion of 'self-employed persons', within the meaning of the AFMP, and, where relevant, whether that agreement contains provisions that Mr Picart may invoke in relation to his State of origin. According to the Court, the wording of Article 12(1) of Annex I to the AFMP, the right of establishment, within the meaning of that provision, is restricted to natural persons who are nationals of a Contracting Party and wish to become established in the territory of another Contracting Party in order to pursue a self-employed activity in that territory. Therefore, in order for that provision to apply, the person concerned must pursue his self-employed activity in the territory of a Contracting Party other than that of which he is a national. In the case of Mr Picart, a French national, does not intend to pursue his economic activity in the territory of the Swiss Confederation, but to maintain an activity in the territory of his State of origin. In addition, it follows from the wording of Article 13(1) of Annex I to the AFMP that the situation of a national of a Contracting Party who has his residence in the territory of another Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week, comes within the scope of that provision.

In this case, Mr Picart, unlike that self-employed couple, remains in the territory of his State of residence, namely the Swiss Confederation, from which he intends to pursue his economic activity in his State of origin, and that, contrary to what is provided for in Article 13(1) of Annex I to the AFMP, he does not undertake every day, or at least once a week, a journey from the place of his economic activity to his place of residence. Therefore, the CJ concluded that Mr Picart does not come within the scope *ratione personae* of the notion of 'self-employed person', within the meaning of the AFMP and, accordingly, he cannot rely on that agreement.

CJ rules that Danish legislation that precludes the deduction of 'final losses' incurred by foreign PE is not in line with the freedom of establishment (*Bevola*)

On 12 June 2018 the CJ issued its judgment in case *A/S Bevola, Jens W. Trock ApS v Skatteministeriet* (C-650/16). The case deals with the Danish legislation that precludes the possibility to deduct losses incurred by a foreign PE, even if those losses are final, unless the resident Danish company has opted for a scheme of joint international taxation.

Bevola is a Danish company which is a subsidiary and sub-subsidiary of Danish companies which themselves are controlled by Jens W. Trock, the group's parent company, which is also in Denmark. Bevola's Finnish establishment closed in 2009. The losses incurred by its establishment, were not and cannot be deducted in Finland following the closure. In those circumstances, Bevola applied to be able to deduct those losses from its taxable income in Denmark for the tax year 2009. The tax authorities rejected the application on the ground that Danish corporation tax did not allow the inclusion in taxable income of income and expenditure relating to a PE situated abroad, unless the company had opted for the international joint taxation scheme. Bevola appealed from such decision considering that the Danish law was in breach of the freedom of establishment. It relied mostly on the CJ reasoning in the *Marks & Spencer* case (C446/03, EU:C:2005:763), as it was of the view that it was applied to Bevola's situation.

The CJ started by observing that a provision that allows the deduction of losses incurred by a PE to be taken into account by the company to which the PE belongs to constitutes a tax advantage. Therefore, providing such advantage to domestic PEs but not the foreign PEs leads to a less favourable treatment of cross-border situations. In this regard, the CJ observed that the fact that the foreign PE has ceased its activities and can no longer make use of those losses in the Member State of establishment leads to an unfavourable difference in treatment when compared to a company possessing a domestic PE. For the CJ, the situation is no different due to the possibility of opting for the international join taxation scheme as such scheme is subject to two strict conditions: (i) the entire income of the group situated in Denmark or elsewhere must be taxed in Denmark; and (ii) the option is in principle for a minimum period of 10 years.

The CJ then went on to discuss the comparability of situations. In this regard, it considered that the proper comparison involved the situation of Danish companies possessing foreign PEs and Danish companies possessing domestic PEs. It looked to the purport of the legislation observing that the Danish legislation that excludes both profits and losses of foreign PEs aims at preventing double taxation of profits and double deduction of losses. In this regard and in in regard to losses attributable to a non-resident PE which has ceased activity and whose losses could not and no longer can be deducted from its taxable profits in the Member State in which it carried on its activity, the situation of a resident company possessing such a PE is no different from in a domestic or cross-border situation regarding the objective of preventing double deduction of losses.

Then the CJ went on to analyse possible justifications considering that the Danish legislation could be justified both by the need to maintain a balanced allocation of the powers to tax and the coherence of the tax system. It further added (although not expressly relied on by the Danish Government) that such legislation also prevents the risk of double use of losses. Subsequently and regarding proportionality, the CJ was of the view that where there is no longer any possibility of deducting the losses of the foreign PE in the Member State in which is situated, the Danish legislation would not be proportional. The CJ reaffirmed that in order for losses to be considered definitive they must satisfy the requirements in paragraph 55 of the *Marks & Spencer* judgment. Furthermore, the CJ stated that the criterion of definitive losses implies that the foreign PE has ceased to receive any income so that there is no longer any possibility of the losses being taken into account in the foreign Member State.

CJ rules that German transfer pricing legislation is in principle in line with the freedom of establishment (*Hornbach-Baumarkt AG*)

On 31 May 2018, the CJ issued its judgment in case *Hornbach-Baumarkt AG v Finanzamt Landau* (C-382/16). The case deals with the German transfer pricing legislation that provides for a correction of taxable income in case of an advantage granted gratuitously by a resident company to a non-resident company linked by a relationship of interdependence. Such correction of the taxable income would not occur in the case of an identical advantage granted do another resident company linked by such a relationship of interdependence.

Hornbach-Baumarkt AG is a company established in the Germany that held indirectly two companies established in the Netherlands. Both those companies required bank loans. The bank financing those companies made the granting of the loans contingent on the provision of comfort letters containing a guarantee statement from Hornbach-Baumarkt AG. Those comfort letters were provided gratuitously. Taking the view that unrelated third parties, under the same or similar circumstances, would agree on remuneration in exchange for granting the guarantees, the Tax Office decided that the income of Hornbach-Baumarkt AG had to be increased, by an amount corresponding to the presumed amount of the remuneration for the guarantees granted and accordingly amended the corporation tax and the basis of calculation for that company's business tax.

Hornbach-Baumarkt AG appealed from this decision considering that the German legislation at stake leads to unequal treatment in cases involving domestic and foreign transactions since, in a case involving purely domestic transactions, no corrections of income would be made in order to reflect the presumed amount of the remuneration for guarantees granted to subsidiaries. In that connection, it submitted, in particular, that it is apparent from the judgment of 21 January 2010, *SGI* (C311/08, EU:C:2010:26), that a provision must be regarded as a restriction on the freedom of establishment which is not justified due to the fact that it is disproportionate. Contrary to the requirements stemming from that judgment, the German legislation does not contain any provision concerning the opportunity to present commercial justification in order to explain a non-arm's-length transaction. According to Hornbach-Baumarkt AG, there were commercial reasons to explain why no remuneration was given for the comfort letters at issue. Those commercial reasons were related to supportive actions to replace the equity capital of the foreign group companies. The Tax Office contended that, even though the German legislation did not contain a separate provision concerning the presentation of evidence of any commercial justification for a transaction, the taxpayer, however, does have the opportunity to present evidence of the reasonableness of the transaction carried out.

The CJ started by observing that, legislation of a Member State establishing a difference in the tax treatment of resident companies, depending on whether or not the companies to which they have granted unusual and gratuitous advantages and with which they have a relationship of interdependence are established in that Member State, constitutes, in principle, a restriction on the freedom of establishment. As regards possible justifications, the CJ acknowledged that such legislation was in principle appropriate to ensure the balanced allocation of the powers to tax among Member States. As regards the proportionality of the measure, the CJ noted that national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance where, first, on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under market conditions, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction. Second, the corrective tax measure must, where required, be confined to the part which exceeds what would have been agreed between the companies in question under market conditions.

As regards, first of all, the calculation of the amount of the income correction in relation to the taxpayer concerned, it should be noted that such issue was not the subject of debate between Hornbach-Baumarkt AG and the Tax Office. The CJ further noted that the German Government argued, without being contradicted on this point, that the corrections made by the German tax authorities in situations such as those at issue in the main proceedings are confined to the part which exceeds what would have been agreed if the companies in question did not have a relationship of interdependence.

Next, as regards the taxpayer's opportunity to provide evidence of any commercial justification for an agreement on non-arm's-length terms, the referring court's question relates, in particular, to whether any commercial justification may include economic reasons resulting from the very existence of a relationship of interdependence between the parent company resident in the Member State concerned and its subsidiaries which are resident in another Member State. For the CJ, in the present case, it was clear that the foreign group companies had negative equity capital and the financing bank made the granting of the loans required for the continuation and expansion of business operations contingent on the provision of comfort letters by Hornbach-Baumarkt AG. In a situation where the expansion of the business operations of a subsidiary requires additional capital due to the fact that it lacks sufficient equity capital, there may be commercial reasons for a parent company to agree to provide capital on non-arm's-length terms. Furthermore, the CJ observed that, in the present case, no argument relating to the risk of tax avoidance had been advanced. The German Government had neither identified a wholly artificial arrangement, within the meaning of the Court's case law, nor a desire on the part of the applicant in the main proceedings to reduce its taxable profit in Germany. Accordingly, there may be a commercial justification by virtue of the fact that Hornbach-Baumarkt AG is a shareholder in the foreign group companies, which would justify the conclusion of the transaction at issue in the main proceedings under terms that deviated from arm's-length terms. Since the continuation and expansion of the business operations of those foreign companies was contingent, due to a lack of sufficient equity capital, upon a provision of capital, the gratuitous granting of comfort letters containing a guarantee statement, even though companies independent from one another would have agreed on remuneration for such guarantees, could be explained by the economic interest of Hornbach-Baumarkt AG itself in the financial success of the foreign group companies, in which it participates through the distribution of profits, as well as by a certain responsibility of the applicant in the main proceedings, as a shareholder, in the financing of those companies.

The CJ ultimately concluded that in the present case, it is for the referring court to determine whether Hornbach-Baumarkt AG was in a position, without being subject to undue administrative constraints, to put forward elements attesting to a possible commercial justification for the transactions at issue in the main proceedings, without it being precluded that economic reasons resulting from its position as a shareholder of the non-resident company might be taken into account in that regard.

CJ rules that Bulgarian legislation requiring interest arising from the expiry of the statutory time limit for payment until the date on which evidence is furnished about tax treaty application contravenes the freedom to provide services (*TTL*)

On 25 July 2018, the CJ issued its judgment in case '*TTL'EOOD v Direktor na Direktsia Óbzhlavane I danachno-osiguritelna praktika'- Sofia* (C-553/16). The case deals with the Bulgarian legislation which provides that a resident company which pays income subject to withholding tax is required to pay interest when the company established in another Member State which receives that income has not furnished evidence that the requirements have been fulfilled for the application of tax treaty concluded by Bulgaria and other Member State, including when, pursuant to that treaty, the non-resident company is not liable to pay tax in Bulgaria or the amount thereof is lower than that normally payable under the Bulgarian tax law.

The CJ started by stating that the Bulgarian legislation providing for an obligation to pay interest only occurs in the event of cross-border transactions and such interest is not recoverable. Therefore, the Bulgarian law provides for a difference in treatment between resident companies depending whether the company receiving that income is established in Bulgaria or in another Member State. Therefore, it concluded that such legislation constitutes a restriction to the freedom to provide services.
The Bulgarian government argued that such legislation was justified by the need to ensure the effective collection of tax and the need to ensure the effectiveness of fiscal supervision.

In this regard, the CJ reaffirmed that the need to ensure the effective collection of tax and the need to ensure the effectiveness of fiscal supervision may constitute overriding reasons of public interest capable of justifying a restriction to the freedom to provide services. However, it further added that national legislation providing for a penalty in the form of irrecoverable interest, calculated on the basis of the sum of tax payable at source according to national legislation and which has accrued for the period from the date on which the tax becomes payable to the date on which the documents proving that the double taxation convention is applicable are submitted to the tax authorities, is not appropriate in the event that it is established that the tax is not payable under the relevant tax treaty. In a situation such as that at issue in the main proceedings, there is no connection between the amount of interest payable, on the one hand, and the amount of tax payable, of which there is none, or the seriousness of the delay in providing those documents to the tax authorities, on the other. Furthermore, the CJ stressed that such a penalty goes beyond what is necessary to attain those objectives, given that the amount of interest accrued may prove to be excessive compared to the amount of tax payable and given that no possibility for that interest to be reimbursed is provided for. In this case, the amount of interest for late payment of the tax is the same irrespective of whether the tax is ultimately not payable or the tax withheld at source is payable but has not been paid on time. In the latter situation, which differs from that in the main proceedings, the Bulgarian tax authorities would suffer a loss of tax receipts in the period during which the tax is not paid. However, in the main proceedings, it is only the delay in providing the evidence which is penalised. Moreover, the CJ noted that there are other possibilities that would enable the same objectives to be attained. That would be the case if reimbursement to the resident company of the interest paid for late payment was provided for in the event that the tax debt was recalculated and that it was established that no tax is payable in Bulgaria in respect of income paid to the non-resident company.

CJ rules that Danish legislation that denies the exemption for withholding tax on dividends paid to foreign UCITS is not in line with the free movement of capital (*Fidelity Funds*)

On 21 June 2018, the CJ issued its judgement in case *Fidelity Funds v Skatteministeriet intervener LL (L) SIVAC* (C-480/16). The case dealt with the Danish legislation that grants UCITS established in Denmark which, either in fact or technically make a minimum distribution to their members, an exemption form tax at source on dividends distributed by Danish companies, to the exclusion of UCITS established in other Member States.

The question in this case was raised concerning several UCITS with registered offices in UK and Luxembourg, concerning claims for the repayment of tax retained at source on dividends paid to those UCITS by Danish companies between 2000 and 2009. The UCITS in question asked for the repayment of such tax on the ground that identical UCITS established in Denmark would have enjoyed such exemption. Therefore they claimed that the difference in treatment is contrary to the free movement of capital and the freedom to provide services under EU Law.

The CJ started by considering that the different tax treatment of dividends accoding to, in particular, the UCITS's place of residence may discourage non-resident UCITS from investing in companies established in Denmark and, on the other, investors resident in that Member State from acquiring shares in non-resident UCITS. Consequently it concluded that there was a prima facies restriction in principle contrary to the free movement of capital. However, such difference may be acceptable if refers to situations which are not objectively comparable or is justified by overriding reasons in public interest.

As regards the comparability the CJ started by referring that it should be examined having regard to the aim pursued by the national provision at issue as well as their purpose and content. The aims pursued by the Danish legislation at issue are: (i) to ensure equality of the tax burden on private individuals investing in companies established in Denmark thourgh a UCITS and of that on private individuals investing directly in companies established in Denmark by prevent economic double taxation charges when an investment is made through UCITS and (ii) ensure that dividends distributed by Danish companies do not elude Denmark's power to impose taxed on account of the exemption they enjoy at the level of resident UCITS and are actually taxed once, namely as regards those undertakings'members.

Regarding the aim at preventing of a series of charges to tax the CJ considered that as from the moment that Denmark - unilaterally or by way of a tax treaty - imposes a tax to charge on income, not only on residents but also non-residents become comparable.
In what refers to the aim of making the exemption enjoyed by resident UCITS conditional on taxation being deferred to the level of those undertakings's members, the question may arise as to whether, when examining the comparability of the situations, the tax situation of the members should be taken into account. According to the CJ such fact should not be devisive. Although the aim of the legislation is to move the level of taxation from the investment vehicle to the shareholder of that vehicle, it is in principle the substantive conditions of the power to tax unit-holders' income that must be considered decisive and not the method of taxation. The CJ noted that a non-resident UCITS may have members with tax residence in Denmark on whose income that Member State tax. Therefore, a non-resident UCITS is in a situation that is objectively comparable to a UCITS resident in Denmark.

As regards possible justifications, the CJ started by refusing the justification based on the need to preserve a balanced allocation of the powers to tax between Member States. According to the Court, where a Member State has chosen not to tax resident UCITS in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between Member State of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income. The CJ further added that the fact that the taxation of dividends is deferred to the level of resident UCITS' sharehodlers cannot justify the restriction at issue.

In what refers to the need to preserve the coherence of the tax system, the Court agreed in general with the argument brought forward by the Danish Government that the direct link between the tax advantage in the form of the exemption from tax at source and its offsetting by means of the immediate taxation of the profits distribution would vanish if that advantage were also granted to UCITS which do not make period distributions of their profits. However, the CJ onsidered that such justification was not proportional. For the Court since the Danish government has conceded that non-residents UCITS may voluntarily satisfy the distribution conditions laid down in Danish legislation, then they should be entitled to enjoy the exemption provided that provided that the non-resident UCITS pay a tax which is equivalent to the one that Danish funds are required to retain as a withholding on the minimum distribution requirement.

CJ rules on limitation of deduction of losses incurred by Danish PE in the context of the group taxation regime in Denmark (*NN A/S*)

On 4 July 2018, the CJ delivered its judgment in case *NN A/S v Skatteministeriet* (C-28/17). The case deals with the Danish national group taxation regimes that limits the possibility of losses incurred by Danish permanent establishment (PE) of non-resident companies to the condition that such losses cannot be deducted in the foreign State.

NN is the group parent company of a Danish group which includes, inter alia, two Swedish subsidiaries, each in turn the proprietors of a branch in Denmark, C. Those two branches merged into one single Branch A by the transfer of Branch B to one of the Swedish companies. In Sweden, the group opted for the transaction to be treated for tax purposes as a restructuring of activities, an operation which, according to the referring court, is not subject to tax in that Member State. Consequently, the transfer to Branch A of the goodwill built up by Branch B could not be written off in Sweden. In Denmark, by contrast, the merger was taxed as a transfer of assets at market value, which allowed Branch A to write off the acquisition cost of the goodwill built up by B and, consequently, to show a negative result for the tax year 2008. However, the Danish tax authority refused, for that tax year, the setting-off of Branch A's losses against the overall group taxation income, for which NN had applied. That authority based its decision on the fact that those losses could be set off against the taxable income in Sweden of the Swedish company which owned the branch. Such decision was appealed.

The CJ started by noting that that the losses of a PE, situated in Denmark, of a resident company in the group are deductible without restriction from the group's taxable profits in Denmark. If the Danish PE had been owned by one of its Danish subsidiaries, its losses could, in any event, have been set off against the group's profits. In that regard, the tax legislation at issue establishes a difference in treatment: the tax treatment of a Danish group which owns a PE in Denmark through a non-resident subsidiary is less favourable than that of a group in which all of the companies have their registered offices in Denmark. According to the CJ, such difference in treatment is liable to render less attractive the exercise of freedom of establishment through the creation of subsidiaries in other Member States. The CJ further noted that such difference in treatment is incompatible with the provisions of the Treaty only if it concerns situations which are objectively comparable.

As regards the comparability of situations, the CJ started by stating that with regard to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits, companies which have a PE in another Member State are not, in principle, in a situation comparable to that of companies which have a resident PE. By analogy, the view must therefore be taken, as regards the measures intended to prevent the double deduction of losses, that a group whose non-resident subsidiary has a resident establishment is also not in a situation comparable to that of a group whose subsidiary, and the latter's PE, are also resident. However, for the CJ, it is important to make an exception for the situation in which there is no other possibility of deducting the losses of the non-resident subsidiary attributable to the PE which is resident in the Member State in which the subsidiary is established. In that situation, the group whose subsidiary is situated in another Member State is not in a different situation to that of the purely national group, in the light of the objective of preventing the double deduction of its losses. The tax-paying capacity of the two groups is then affected in the same way by the losses of their resident PE.

As regards the justifications, the CJ highlighted the justification based on preventing double deduction of losses. In this context, the Danish legislation is specifically intended to prevent a group from exploiting the same loss twice as in the absence of such a provision, cross-border situations would confer an unjustified advantage over comparable national situations, in which a double deduction is not possible.
However, the CJ stressed that the difference in treatment must still be proportionate. A rule such as the one in the main proceedings would go beyond what is necessary to prevent the double deduction of a loss if the effect would be to deprive a group of any possibility of deducting the loss of a resident subsidiary in a cross-border situation. In this case, since the loss sustained by the PE in Denmark of NN's Swedish subsidiary is, in principle, deductible from that subsidiary's profits, which are taxable in Sweden, it cannot be deducted from the taxable group profits in Denmark, pursuant to the Danish rule.
In the main proceedings, the loss is the result of the merger of two Danish branches in the group and the choice made by the group - as permitted by Swedish law - that that merger be treated for tax purposes as a restructuring of activities, and, as such, not subject to tax in Sweden. Consequently, it would not be possible, in practice, to set those losses off against the Swedish subsidiary's profits. In a similar case, the national provisions at issue in the main proceedings - the consequence of which, according to the referring court, is to deprive the Danish group of any effective possibility of deducting the losses of the resident permanent establishment of its non-resident subsidiary - fail to have regard for the principle of proportionality. That principle would, by contrast, be respected if the setting off, against the Danish group's profits, of the loss sustained by the resident PE of its non-resident subsidiary were accepted, by derogation from the rule laid down in its legislation, as the group would have demonstrated that the setting off of the abovementioned losses against the subsidiary's profits is actually impossible in the other Member State.

CJ rules that France has misapplied Accor judgment and that French Conseil d'Etat breached the obligation to make preliminary reference (*Commission v France*)

On 4 October 2018, the CJ issued its judgment in case *Commission v France* (C-416717). The case deals with two separate questions: first, the improper interpretation and application of the CJ judgment *Accor* (C-310/09) by the French Conseil d'Etat (Supreme Court) and second, with the breach of preliminary reference by the French Supreme Court.

In the 15 September 2011 judgment in the *Accor* case, the CJ ruled that the French legislation under which a French company would receive a tax credit in respect of French source dividends redistributed to its shareholders, while no equivalent tax credit was available in respect of dividends received from subsidiaries located in other Member States amounted to a restriction to the fundamental freedoms. Following the CJ judgment in *Accor*, the French Supreme Court delivered two judgments setting the refund of the unduly levied taxes to certain conditions, notably by refusing to take into account taxation suffered by non-resident sub-subsidiaries, limiting the refunded amounts to one third of the dividends distributed whenever the distributing company in another Member State suffered taxation in excess of the French tax rate (33.33%) and setting certain proof requirements in order to obtain the refund.
The Commission considered that the conditions set forth by the Conseil d´Etat in its judgments amounted to a breach of EU law.
In this regard, the CJ concluded that by refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident parent company in respect of the distribution of dividends paid by a non-resident sub-subsidiary via a non-resident subsidiary, the tax on the profits underlying those dividends incurred by that non-resident sub-subsidiary, in the Member State in which it is established, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset, France has breached the freedom of establishment and the free movement of capital.

As regards the second question under the proceedings, the CJ observed that the obligation to submit a preliminary reference to the CJ under Art. 267 (3) TFEU aims, in particular, to avoid that national case law of a Member State is not in accordance with EU law. The breach of the obligation to make a preliminary reference is one of the elements to be taken into account when determining the responsibility of a Member State arising from a decision of a last instance Court. According to the Court, such responsibility may arise whatever the agency of a State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.

Furthermore, according to the CJ, in the present case the French Supreme Court chose to depart from the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C35/11, EU:C:2012:707), on the ground that the British scheme at issue was different from the French tax credit and advance payment scheme, while it could not be certain that its reasoning would be equally obvious to the Court. In any event, this led the French Supreme Court to adopt, in its two judgments, a solution based on an interpretation of the provisions of Articles 49 and 63 TFEU which is at variance with the CJ judgment. For the CJ, this implied indeed the existence of reasonable doubt concerning that interpretation could not be ruled out when the French Supreme Court delivered its ruling.
In accordance, the CJ concluded that France has breached the obligation that is imposed on the Conseil d'Etat concerning Article 267 (3) TFEU.

CJ rules that Belgian taxation pursuant to the tax treaty concluded with Luxembourg does not contravene the fundamental freedoms (*Sauvage and Lejeune*)

On 24 October 2018, the CJ issued its judgment in case *Benoit Sauvage, Kristel Lejeune v Etat Belge* (C-602/17). The case deals with the decision of the Belgian tax authorities to tax the portion of Mr Sauvage's remuneration from Luxembourg relating to his employment and corresponding to the days on which he actually carried out his activity as an employed person outside Luxembourg territory.

Mr Sauvage and Ms Lejeune are resident in Belgium, where they are subject to personal income tax on their worldwide income. Mr Sauvage is employed in a company established in Luxembourg. His position involved going on brief missions and attending meetings on behalf of his employer outside Luxembourg. For the tax years 2007 to 2009, Mr Sauvage declared his salary as taxable income in Belgium, but he also declared all of that income as

exempt from income tax, subject to the maintenance of progressive rates of tax. Following a check on the place of performance of Mr Sauvage's employment, the Belgian tax authorities adjusted the taxable bases relating to those three tax years. They held that, by virtue of Article 15(1) of the Belgium-Luxembourg tax treaty, the part of the remuneration relating to Mr Sauvage's employment in Luxembourg which corresponded to the days on which he was actually carrying out his activity as an employed person outside Luxembourg was taxable in Belgium.
Mr Sauvage appealed from such decision. He argued that Article 15(1) must be interpreted as meaning that a limited number of occasional business trips did not restrict the exclusive power of taxation of the State of the source of the income, as the activity concerned was pursued mostly in that State and the services provided outside that State were part of the paid employment in Luxembourg. In the alternative, he claimed that the freedom of movement of workers and the freedom to provide services was infringed.

The CJ started by clarifying that the question in this case concerns whether Article 45 TFEU must be interpreted as precluding a tax scheme of a Member State under a tax treaty, such as that at issue in the main proceedings, which makes the exemption of the income of a resident, which arises in another Member State and relates to employment in that State, subject to the condition that the activity in respect of which the income is paid is actually carried out in that Member State.
The Court observed that according to its settled case law, in the absence of unifying or harmonising measures for the elimination of double taxation at EU level, the Member States retain competence for determining the criteria for taxation on income and capital with a view to eliminating double taxation by means, inter alia, of international agreements. In that context, the Member States are free to determine, in the framework of tax treaties, the connecting factors for the purpose of allocating powers of taxation. However, the exercise of those powers must be in line with the fundamental freedoms.

The CJ concluded that the taxation by Belgium did not contravene the fundamental freedoms. According to the CJ, first of all Member States are free to determine the connecting factors for the purpose of allocating powers of taxation. Consequently, the mere fact that it has been decided to make the taxing power of the State of the source of the income dependent on the physical presence of a resident in the territory of that State does not constitute discrimination or different treatment prohibited by virtue of the free movement of workers. Secondly, the fact that income relating to employment in Luxembourg, which is paid to a Belgian resident and corresponds to those days on which the activity that gave rise to the payment of that income was actually carried out outside Luxembourg, is subject to tax in Belgium, cannot be regarded as treating that resident less favourably than a Belgian resident employed in Belgium, who, either on an occasional or regular basis, actually carries out his activity outside Belgium: the employment income of the latter is taxed by Belgium in its entirety, whereas the income of the former is taxed by that State only in so far as the activity which gave rise to the payment of such income has actually been carried out outside Luxembourg. Thirdly, it cannot be said that a Belgian resident, who is employed in Luxembourg and whose employment is, on either an occasional or a regular basis, effectively exercised outside that State is treated less favourably than a Belgian resident in employment in Luxembourg whose presence in Luxembourg is essential and who, consequently, only pursues his activity as an employed person in the territory of that State. Indeed, both of those residents benefit from the exemption laid down by the Belgium-Luxembourg Convention and the Belgian national legislation in so far as concerns their income relating to days on which their employment is actually performed in Luxembourg. As the referring court has stated, Article 15(3) of the Belgium-Luxembourg Convention provides that income of a Belgian resident from employment on board a means of transport used in international traffic by a company with its place of effective management in Luxembourg is exempt from tax in Belgium, even where the activity which gave rise to the payment of such income was not actually carried out in Luxembourg. By contrast, a resident of Belgium in a situation such as that of Mr Sauvage is taxed in Belgium if the activity which gave rise to the payment of the income concerned is not actually carried out in Luxembourg. Furthermore, the CJ noted in that regard that the fact of choosing different connecting factors depending on whether or not the employment is characterised by high mobility at international level cannot be regarded as constituting discrimination or a difference in treatment prohibited by virtue of the free movement of workers. Residents in employment entailing a high level of mobility at international level, because of the very nature of that employment, are not, in any event, in a situation that is objectively comparable to that of a resident.

CJ finds German rules on dividends received from companies in third States to be in breach of the free movement of capital (*EV*)

On 20 September 2018, the CJ issued its judgment in case *EV v Finanzamt Lippstadt* (C-685/16). The case deals with the tax treatment of dividends received by German companies resident in third (non-EU) States. In accordance with the German legislation, dividends from domestic shareholdings are exempt from German business tax, subject to a 15% participation. However, and in the case of foreign shareholdings, this exemption is subject to additional conditions such as an active business test at the level of the distributing company or the need to hold the participation for a minimum period of 12 months.

As a preliminary observation, the CJ started by determining which fundamental freedom was applicable to this case. In that regard it recalled its previous case law according to which, holding of 15% does not concern only situations in which a shareholder exercises a definite influence. Therefore, it was of the view that the free movement of capital is applicable since the relevant German rules do not apply exclusively to situations in which the parent company exercises a decisive influence on the company distributing the dividends.

Then the CJ went on to assess whether there was a restriction to the fundamental freedoms. It started by stating that the difference in treatment between dividends distributed by a resident company and dividends distributed by a company established in a third State amounts to a restriction to the free movement of capital. To the extent that it subjects the application of the exemption from dividends received by subsidiaries in third States to stricter conditions, the shares of companies established in those States are less attractive to German resident investors.

Subsequently the Court dealt with the argument raised by Germany, that the restriction could be justified based on the standstill clause in Article 64 of TFEU, under which restrictions which existed on 31 December 1993 on the free movement of capital to or from third countries are not in breach of the TFEU if such restrictions involve direct investments.

The CJ considered that the situation at stake involved a direct investment. However, and taking into account the amendments made in the German law, in particular the restriction of its personal and material scope as well as changes in the overall context of the legislation, the Court concluded that the German legislation could not benefit from the standstill clause.

Turning to possible justifications to the difference in treatment, the German government argued that the national legislation at stake was intended to combat abusive arrangements. The CJ rejected such justification considering that a general presumption of fraud and abuse cannot justify a measure which prejudices the enjoyment of a fundamental freedom guaranteed by the Treaty and the mere fact that the company distributing the dividends is located in a non-member State cannot set a general presumption of tax evasion.

CJ rules that UK may unilaterally withdraw from Brexit (*Wightman and others*)

On 10 December 2018, the CJ issued its judgment in case *Andy Wightman and others v Secretary of State for Exiting the European Union* (C-621/18). The case deals with the question of whether the UK may unilaterally revoke the notification of intention to withdraw from the EU. Concretely it discusses whether the notification referred to in Article 50 TEU (concerning the withdrawal from the EU) can unilaterally be revoked before the expiry of the two-year period laid down in that article with the effect that, if the notification made by the UK were revoked, that Member State would remain in the EU.

The petitioners and interveners in the main proceedings, while acknowledging that Article 50 TEU does not contain any express rule on the revocation of a notification of the intention to withdraw from the EU, submit that a right of revocation exists and is unilateral in nature. However, that right may only be exercised in accordance with the constitutional requirements of the Member State concerned, by analogy with the right of withdrawal itself, laid down in Article 50(1) TEU. According to those parties to the main proceedings, the withdrawal procedure, therefore, continues for as long as the Member State concerned intends to withdraw from the EU, but comes to an end if, before the end of the period laid down in Article 50(3) TEU, that Member State changes its mind and decides not to withdraw from the European Union. The Council and the Commission, while agreeing that a Member State is entitled to revoke the notification of its intention to withdraw before the Treaties have ceased to apply to that Member State, dispute the unilateral nature of that right.

According to the CJ, the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the EU, for as long as a withdrawal agreement concluded between the EU and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired. In the absence of an express provision governing revocation of the notification of the intention to withdraw, that revocation is subject to the rules laid down in Article 50(1) TEU for the withdrawal itself, with the result that it may be decided upon unilaterally, in accordance with the constitutional requirements of the Member State concerned.

For the Court, a Member State's intention to withdraw does not lead inevitably to the withdrawal of that Member State from the EU. On the contrary, a Member State that has reversed its decision to withdraw from the EU is entitled to revoke that notification for as long as a withdrawal agreement concluded between that Member State and the EU has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired.

CJ rules that French withholding tax applicable to non-resident loss making companies is not in line with the free movement of capital (*Sofina*)

On 22 November 2018, the CJ issued its judgment in case *Sofina SA and Others v Ministre de l'Action et des Comptes publics* (C-575/17). The case deals with the French legislation according to which dividends paid to non-resident companies are subject to withholding tax whereas resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability.

Sofina, Rebelco and SIdro are three Belgian companies which, during the years of 2008 to 2011, received dividends as shareholders of French companies. Those dividends were subject to 15% withholding tax pursuant to the Double Tax Treaty Agreement between Belgium and France. Because the companies were loss-making in those years, those companies submitted claims to the French tax authority seeking reimbursement for the tax withheld during those years. In essence, they argued that the French legislation amounted to a breach of the free movement of capital due to the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability.

The CJ started by observing that whereas the dividends paid to a non-resident company are subject to immediate and definitive taxation, the tax imposed on dividends paid to a resident company depends on whether the latter's financial year is net loss-making or net profit-making. Thus, where losses are made, the taxation of those dividends is not only deferred to a subsequent profit-making year, thus procuring a cash-flow advantage for the resident company, but is also thereby uncertain, since that tax will not be levied if the resident company ceases trading before becoming profitable. Accordingly, the national legislation at issue in the main proceedings is liable to procure an advantage for loss-making resident companies, as it gives rise, at the very least, to a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results. Therefore, and according to the Court, such a difference in tax treatment of dividends constitutes a restriction on the free movement of capital.

As regards possibility justifications, the French Government argued that, although the national legislation at issue in the main proceedings constitutes a restriction, (i) the positions of resident and non-resident companies are objectively different, and (ii) that legislation is justified by the necessity of ensuring that tax is collected and therefore corresponds to the allocation of powers of taxation between the Member State of residence and the Member State in which the dividends are paid.

As regards the comparability between resident and non-resident companies, the CJ drew a distinction between the case in the main proceedings and *Truck Center* judgment of 22 December 2008, C282/07, EU:C:2008:762). For the Court, although the Court held in *Truck Center*, that a difference in treatment consisting of the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable, it nevertheless made clear, in that judgment, that the income at issue in the case which gave rise to that judgment was, in any event, subject to tax irrespective of whether it was received by a resident or non-resident taxable person. In the present judgment, the national legislation at issue in the main proceedings is not limited to laying down different arrangements for the collection of tax on the basis of the place of residence of the recipient of the nationally sourced dividends, but is liable to result in a deferral of taxation of the dividends to a subsequent tax year in the event of a resident company making a loss, or even an exemption in the event of that company ceasing trading in the absence of a return to profitability. Therefore, the Court concluded that difference in treatment is not justified by an objective difference in situation.

Subsequently, the Court went on to assess the possible justification based on the need to preserve a balanced allocation of the powers to tax between Member States. The French Government argued that the withholding tax to which only those dividends received by a non-resident company are subject is the sole means by which the French State may tax that income without its tax revenue being reduced because of losses arising in another Member State. However, the Court observed that the deferral of the taxation of dividends received by a loss-making non-resident company would not mean that the French State has to waive its right to tax income generated on its territory. The dividends distributed by the resident company would, in fact, be subject to taxation once the non-resident company became profitable during a subsequent tax year, in the same way as is the case for a resident company in a similar situation. According to the Court, the French Government cannot claim that the loss of tax revenue associated with the taxation of dividends received by non-resident companies in the event of their ceasing trading is of such a nature as to justify a withholding tax on that income so far as concerns solely those companies, when the French State consents to such losses when resident companies cease trading without returning to profitability.

Finally, the Court analysed the justification on the grounds of the effective collection of tax. In this regard, the French Government also argued that submitting dividends, paid to a non-resident company, to a withholding tax is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State in which the dividends are paid. Nevertheless, the CJ considered that granting the benefit of that deferral to non-resident companies, while necessarily eliminating that restriction, would not undermine the achievement of the aim of the effective collection of the tax owed by those companies when they receive dividends from a resident company. First, because the rules on the deferral of taxation in the event of losses constitute, inherently, a derogation to the principle of taxation during the tax year in which the dividends are distributed, so that those rules are not intended to apply to the majority of companies which receive dividends. Second, it would be the duty of non-resident companies to provide the relevant evidence to allow the tax authorities of the Member State of taxation to determine that the conditions, laid down in the legislation, for benefiting from such a deferral have been met. And third, the mutual assistance mechanisms existing between the authorities of the Member States are sufficient to enable the Member State in which the dividends are paid to check the accuracy of the evidence put forward by non-resident companies wishing to claim a deferral of taxation of dividends which they have received.

Commission publishes proposals on digital economy taxation

On 21 March 2018, the Commission proposed two Council Directives addressing the taxation of the digital economy. The introduction of a digital services tax (DST) on revenues from certain digital services, as an interim solution, should affect about 100 large companies, mostly US-based. The corporate taxation of a significant digital presence (Digital PE) would be the comprehensive long-term solution and could have an impact on companies across a wider range of economic sectors, such as media & entertainment and IT services. The EU Commission hopes that the proposed rules will apply as from 1 January 2020.

Background

The EU Commission's proposals came after the OECD published an interim report on the tax challenges of the digitalising economy on 16 March 2018. The OECD is the preferred forum for those who wish to preserve a global level playing field, but reaching a consensus is difficult: interim measures (such as the DST) are contentious and some countries consider no action is needed pending the implementation of the BEPS recommendations. In particular, the US has expressed strong opposition against taxation of internet companies on a gross basis, as would be the case under the DST.

The preferred 'comprehensive' option: the Digital PE. The EU Commission's long-term option is also the focus of the OECD's ongoing work: both forums aim at adapting the permanent establishment concept to the digitalising economy. Certain digital services providers would be taxed in the countries where they have a significant digital footprint and generate value from technology, users' interactions and users' data. New rules to establish such taxable presence and new profit allocation rules would need to be introduced in domestic law and would also need to be implemented in tax treaties. The Digital PE option would not apply to companies resident in a non- EU country that has a tax treaty with the EU Member State where these companies have a significant digital presence; for that reason, the EU Commission issued a recommendation to amend these tax treaties. The Commission will also propose corresponding amendments to the CCCTB proposal. Please click here to read further details on the proposals for the Digital PE.

The 'interim' measure: the DST

The proposed DST is a 3% turnover tax that targets digital service providers with annual worldwide revenues exceeding EUR 750 million and revenues from the provision of digital services in the EU exceeding EUR 50 million. Digital services covered by the DST are (i) valorising user data by placing (online) ads targeting users of the digital interface, (ii) transmitting user data generated from their activities on digital interfaces, or (iii) making available a digital interface for users to supply amongst themselves goods and services (i.e., online marketplaces). The supply of IT solutions and digital products, as well as online retail activities and intragroup digital services would not be subject to the DST. Consequently, only a limited number of companies are likely to be affected. The EU Commission suggests (but does not propose) a binding provision to stop applying the DST to taxpayers that would be taxed under the comprehensive option, once implemented, i.e., taxpayers resident in the EU or in non-EU countries that do not have a tax treaty with the EU Member State of the Digital PE. By the same token, this means that the 'interim' DST will become a permanent tax for companies which are not subject to the Digital PE rules. Please click here for more information on what the DST would mean for your company.

Next steps

For the proposals to be accepted, EU Member States need to reach unanimity. This will be challenging for a number of reasons. For example, the proposed reforms would reallocate taxing rights from (often smaller) EU Member States that host the European headquarters of large digital economy companies to larger EU Member States with large user bases. Such headquarter countries generally seem to seek a solution that is globally supported.

The EU Commission and the EU Member States supporting the current initiatives hope for a swift approval process and a subsequent implementation in domestic law by 31 December 2019, such that the new rules would become effective as from 1 January 2020. However, the lack of global consensus observed by the OECD and the opposition expressed by the US could jeopardise this.

Commission Notice: Member States with measures equally effective to Article 4 of the ATAD

On 7 December 2018, the Commission issued a notice containing its assessment on the measures of some Member States which are considered equally effective to the interest limitation rules provided in Article 4 of the ATAD.

Article 4 of the ATAD requires the Member States to introduce interest limitation rules that shall be transposed into national law by 31 December 2018. In turn, according to Article 11(6) ATAD '(…) Member States which have national targeted rules for preventing base erosion and profit shifting (BEPS) risks at 8 August 2016, which are equally effective to the interest limitation rule set out in this Directive, may apply these targeted rules until the end of the first full fiscal year following the date of publication of the agreement between the Organisation for Economic Cooperation and Development (OECD) members on the official website on a minimum standard with regard to BEPS Action 4, but at the latest until 1 January 2024'.

The Commission services considered that the following Member States have measures which are 'equally effective' to the interest limitation rules in Article 4 ATAD: Greece, France, Slovakia, Slovenia and Spain.

Legislative proposal changing the Netherlands tax consolidation regime

On 6 June 2018, the Netherlands Ministry of Finance published a legislative proposal to change the Netherlands tax consolidation regime. Based on the proposal, several provisions included in the Netherlands corporate income tax act (CITA) and the Netherlands dividend withholding tax act (WHTA) must be applied as if the Netherlands tax consolidation regime does not apply. Most importantly, two

interest deduction limitations, rules limiting the possibility of loss compensation following a shareholder change and rules limiting the application of the participation exemption are affected. The scope of these limitations will be broadened if they need to be applied as if there is no fiscal unity. These changes were found necessary to bring the consolidation regime in line with EU law and had been announced as early as 25 October 2017.
If approved by Netherlands parliament, most proposed changes will enter into force with retroactive effect from 11.00 hours, 25 October 2010.

Background

On 25 October 2017, the AG delivered his opinion in two court cases regarding the Netherlands tax consolidation regime, in which he concluded that the so-called 'per-element approach' is applicable (see: Tax Flash). Following the opinion of the AG, so-called 'emergency repair measures' were announced by the Netherlands State Secretary of Finance. In accordance with the Opinion of the AG, the CJ ruled on 22 February 2018, that the Netherlands tax consolidation regime infringes the European freedom of establishment and that the Netherlands should apply the 'per-element approach' (see: Tax Flash). In response to the CJ's judgment, the Netherlands State Secretary of Finance confirmed that the 'emergency repair measures' as earlier announced will be implemented in Netherlands law.

Content of the legislative proposal

Based on the legislative proposal, the following provisions of the CITA and the WHTA must be applied on a stand-alone basis (deconsolidated), as if the Netherlands tax consolidation regime does not apply:

- The anti-base erosion rules (article 10a CITA);
- The Netherlands participation exemption for low-taxed portfolio investment subsidiaries (article 13, paragraphs 9 to 15 CITA);
- The anti-hybrid rule in the Netherlands participation exemption (article 13, paragraph 17 CITA);
- The revaluation provision for low-taxed portfolio investment subsidiaries (article 13a CITA);
- The interest deduction limitation rule against excessive participation interest (article 13l CITA);
- The provision regarding carry-forward losses and a change in ultimate interest in a taxpayer (article 20a CITA); and
- The redistribution facility (article 11, paragraph 4 WHTA).

As a consequence of the emergency repair measures, several benefits of the current Netherlands tax consolidation regime will no longer be available to taxpayers. This could have a severe impact on the tax position of taxpayers that currently apply the Netherlands tax consolidation regime even with retroactive effect from 11.00 hrs, 25 October 2017.

The legislative proposal covers more legal provisions than included in the emergency repair measures that were announced on 25 October 2017. The revaluation provision for low-taxed portfolio investment subsidiaries of article 13a CITA has been added. The retroactive effect will therefore not apply to that provision. This change will apply as from 1 January 2019.

Replacement of the Netherlands tax consolidation regime

In the explanatory notes to the proposal, the Ministry of Finance states that the Netherlands tax consolidation regime will be replaced by a new group regime within a foreseeable period. Consequently, the emergency repair measures included in the legislative proposal will be temporarily implemented in Netherlands law. It is expected that this new group regime will be implemented on 1 January 2023 at the earliest. At this stage, it is not yet clear what this new regime will entail.

Dutch Supreme Court confirms application of the EU law based 'per-element approach' to the Dutch tax consolidation regime

The Supreme Court rendered its judgment in two cases regarding the 'per-element approach' to the Dutch tax consolidation regime (fiscal unity). The cases concern:

- A Dutch interest deduction limitation rule, and;
- the (non-)deductibility of currency losses on certain participations.

On 8 July 2016, the Supreme Court referred preliminary questions to the CJ in these cases, which led to the judgment of the CJ of 22 February 2018, concluding that the 'per-element approach' applies to the Dutch fiscal unity. Today, the Supreme Court confirmed the judgment of the CJ, see our tax flash on this.
Based on the CJ ruling, the Supreme Court confirmed that the Dutch fiscal unity infringes EU law insofar this interest deduction applies to a Dutch taxpayer in relation to an EU subsidiary, whereas the application of this measure can be avoided in a domestic situation by including that respective subsidiary in a fiscal unity. This discriminatory treatment by

the Netherlands cannot be justified. In line with the CJ's ruling, the impossibility to deduct currency losses outside the fiscal unity does not constitute an infringement to the freedom of establishment according to the Supreme Court.

Case on interest deduction limitation to prevent base erosion

The first case before the Supreme Court concerned the Dutch interest deduction limitation rule to prevent base erosion (art. 10a of the Dutch Corporate Income Tax Act ('CITA')). This anti-abuse provision disallows deduction of interest paid by a Dutch corporate taxpayer to a related party where the relevant debt is connected with, inter alia, a capital contribution in a subsidiary. If the taxpayer had formed a prior fiscal unity (tax consolidation) with the subsidiary, the capital contribution would not have been recognized for tax purposes as a result of the tax consolidation. Therefore, the interest deduction limitation rule would not apply. Given that the fiscal unity regime is restricted to Dutch resident subsidiaries, the effect of the interest deduction limitation rule at issue can only be avoided in domestic situations. The Supreme Court concluded that the application of the interest deduction limitation, in light of the beneficial effect of a fiscal unity in purely domestic situations, infringes the freedom of establishment and cannot be justified. The Supreme Court expressly ruled that the per element approach does indeed apply per element; taxpayers can choose what elements of the consolidation regime they want to invoke, without having to accept other (negative) consequences of the regime.

Case on currency losses on participations in EU subsidiary

The second case concerned the impossibility to deduct a currency loss suffered by a Dutch parent company on a subsidiary residing in the EU under the Dutch participation exemption. If the taxpayer and the subsidiary had been included in a fiscal unity, a currency loss related to the assets of the consolidated subsidiary would have been deductible. However, because the fiscal unity regime only applies to Dutch resident subsidiaries, the non-deductible currency loss could not be avoided in this case by including the subsidiary in a fiscal unity. The Supreme Court referred to the CJ, that no infringement of the freedom of establishment is present based on a symmetry argument: under Dutch law both currency losses and currency profits are not taken into account.

Response of the Dutch State Secretary of Finance

After the CJ issued its judgment on 22 February 2018, the Dutch State Secretary of Finance stated that the announced provisional measures will become new legislation with retroactive effect as from 25 October 2017, 11:00 am. Based on these provisional measures, several provisions in the CITA and the Dutch dividend withholding tax act need to be applied as if the Dutch consolidation regime does not apply. These measures aim to mitigate the impact of the 'per-element approach' on the Dutch budget.

The draft legislative proposal regarding the implementation of the provisional measures in Dutch law was published on 6 June 2018. Given the judgment of the Supreme Court of today, we expect the additional explanatory notes to this draft legislative proposal to be published soon. In his letter of 15 October 2018, the State Secretary of Finance already confirmed he would shorten the retroactive effect of the provisional measures from 25 October 2017 to 1 January 2018, as part of a package to improve the Dutch investment climate.

VAT

CJ rules that undertaking eligible for a tax deduction scheme in its home EU Member State could not rely on a right to deduct input VAT due or paid (*EBS*)

On 15 November 2017, the CJ delivered its judgment in the case *Entertainment Bulgaria System EOOD* ('EBS', C-507/16). EBS is a company established in Bulgaria that provides internet services, such as website design, multimedia development and graphic design. EBS is registered for VAT purposes in Bulgaria. This registration is based on Article 97a (2), of the Bulgarian VAT Act, that provides for the registration of persons established in Bulgaria who supply services to taxable persons established in the territory of other EU Member States. EBS received services supplied by taxable persons established in the territory of EU Member States other than Bulgaria, which it used to provide services in other EU Member States and Switzerland. Based on the reverse charge mechanism, EBS declared the VAT on these purchased services and subsequently deducted this input VAT. During a tax inspection, the tax authorities established that EBS had reached the turnover threshold beyond which undertakings no longer benefit from the Bulgarian VAT exemption and must, under a national provision, register for VAT purposes.

The tax authorities imposed a tax assessment on the ground that national law prohibits deduction of input VAT for taxable persons that are registered based on Article 97a of the Bulgarian VAT Act. The tax authorities imposed a VAT assessment and default interest. EBS lodged a request for annulment of the VAT assessment. The case ended up before the Administrative Court of Bulgaria. The Administrative Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions the referring court wished to ascertain whether the EU VAT Directive precludes national legislation that prevents a taxable person from deducting input VAT due or paid in its home EU Member State in respect of services provided by taxable persons established in other EU Member States and used to provide services in other EU Member States, on the ground that that taxable person is registered for VAT purposes under Article 97a of the Bulgarian VAT Act.

The CJ ruled that the EU VAT Directive precludes legislation of an EU Member State that prevents a taxable person, such as in the main proceeding, deducting input VAT due or paid, on the ground that that taxable person is identified for VAT purposes pursuant to one of the two circumstances referred to in Article 214(1)(d) and (e) of the EU VAT Directive. However, since EBS was no longer eligible for the tax deduction scheme in Bulgaria, given the amount of its turnover, it could no longer be identified for VAT purposes, but had to fall within the 'mandatory' registration scheme in Bulgaria. According to the CJ, an undertaking established in the territory of an EU Member State and eligible for a tax deduction scheme in that EU Member State could not rely on a right to deduct input VAT due or paid. Furthermore, according to the CJ, the EU VAT Directive must be interpreted as meaning that it does not preclude legislation of an EU Member State that prevents a taxable person, such as the one at hand, from exercising its right to deduct input VAT due or paid in that EU Member State for services provided by taxable persons established in other EU Member States and used to provide services in EU Member States other than the EU Member State in which that taxable person is established.

CJ rules that EU VAT Directive precludes national legislation which makes right to deduct input VAT subject to indication on the invoice of the address where the issuer carries out its economic activity (*Geissel & Butin*)

On 15 November 2017, the CJ delivered its judgment in the joined cases *Rochus Geissel v Finanzamt Neuss and Finanzamt Bergisch Gladbach v Igor Butin* ('Geissel & Butin', C-374/16 and C-375/16). Geissel is the liquidator of RGEX GmbH i.I. RGEX is a limited liability company that traded in motor vehicles. That company has been in liquidation since 2015. In its VAT return for 2008, RGEX declared VAT exempt intracommunity supplies of motor vehicles and input VAT deductions relating to 122 motor vehicles obtained from EXTEL GmbH. The German tax authorities did not accept RGEX's VAT return and took the view that the intracommunity supplies of motor vehicles to Spain, which had been declared as VAT exempt, were taxable on the ground that the motor vehicles had been sold in Germany. Moreover, the input VAT deductions claimed on the basis of invoices issued by EXTEL were denied, because the latter was considered a 'ghost company', which did not have any establishment at the address mentioned on the invoice.

Mr Igor Butin, who runs a dealership in Germany, relied on invoices to deduct input VAT for a number of vehicles acquired from an undertaking 'Z', and destined for resale. The vehicles were delivered to Mr Butin or his employees, sometimes at the place where Z had its registered office - even though Z did not run a dealership from that address - and sometimes in public places. In the course of a tax audit carried out on Mr Butin, the German tax authorities concluded that the input VAT paid on the invoices issued by Z could not be deducted because the supplier address given by Z on those invoices was incorrect. It was found that the address served merely as a 'letterbox address' and that Z had no fixed establishment in Germany.

The Finance Court, before which court the cases of RGEX GmbH and Igor Butin ended up, decided to stay both proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court asks whether the EU VAT Directive precludes national legislation that subjects the right to deduction of VAT to the indication on the invoice of the address where the issuer carries out its economic activity.

The CJ ruled that it is not possible for EU Member States to lay down more stringent requirements than those under the EU VAT Directive. Consequently, it is not allowed for EU Member States to make the exercise of the right to deduct input VAT dependent on compliance with conditions relating to the content of invoices which are not expressly laid down by the provisions of the EU VAT Directive. Furthermore, in the case *PPUH Stehcemp* (C-277/14) the CJ ruled that the fact that no economic activity could be carried out at that company's seat does not mean that that activity could not be conducted in places other than the company's seat. Therefore, the CJ ruled that for the purposes of the exercise of the right to deduct input VAT by the recipient of goods or services, it is not a requirement that the economic activities of the supplier be carried out at the address indicated on the invoice issued by that supplier.

CJ rules on artificial transactions and abuse of law (*Cussens and others*)

On 22 November 2017, the CJ delivered its judgment in the case *Cussens, Jennings and Kingston* ('Cussens and others', C-251/16). The case concerns abuse of law. The appellants were co-owners of a development site in Ireland on which they constructed 15 holiday homes for sale. Before making the sales, the appellants carried out a number of transactions with a related company, Shamrock Estates Limited ('SEL'). The appellants entered into a lease for the properties with SEL for 20 years and one month ('long-term lease'). The properties were leased back to the appellants for two years ('short-term lease'). Almost a month later both leases were mutually surrendered by the parties and full ownership of the properties reverted back to the appellants. Subsequently, the appellants sold the properties to third party buyers. According to the national legislation at issue, VAT was chargeable only on the long-term lease.

The Irish tax authorities asked the appellants to pay additional VAT in respect of the property sales. The tax authorities took the view that the leases at issue, provided for the lease and leaseback of the properties, constituted a first supply artificially created in order to avoid the subsequent sales being liable to VAT and that supply should therefore be disregarded for VAT purposes. The appellants challenged the VAT assessment imposed and the case was eventually brought before the Irish Supreme Court. The Supreme Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling seeking guidance on the conditions for abuse of law. Furthermore, it asked how the relevant transactions are to be redefined if the principle of prohibition of abuse of law applies in this case.

According to the CJ, it is settled case law that a taxable person who has created conditions for obtaining a right in a fraudulent or abusive manner is not justified in relying on the principles of legal certainty and the protection of legitimate expectations pursuant to the principle that abusive practices are prohibited. If the transactions at issue should be redefined pursuant to the principle that abusive practices are prohibited, those of the transactions which do not constitute such a practice may be subject to VAT on the basis of the relevant provisions of national legislation providing for such liability. The CJ ruled that in order to determine whether the essential aim of the transactions at issue is to obtain a tax advantage, account should be taken of the objective of the leases preceding the sales of immovable property in isolation. According to the CJ, the supplies of immovable property are liable to result in the accrual of a tax advantage contrary to the purpose of the relevant provisions of the EU Sixth Directive where the properties had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant. Furthermore, the CJ ruled that the principle that abusive practices are prohibited applies in a situation such as at hand, which concerns the possible exemption of a supply of immovable property from VAT.

CJ rules that principles of equivalence and effectiveness allow a refund request of VAT levied in breach of EU law to be refused where that request was submitted after the expiry of the limitation period (*Caterpillar*)

On 20 December 2017, the CJ delivered its judgment in the case *Caterpillar Financial Services sp. z.o.o.* ('Caterpillar', C-500/16). Caterpillar operates as lessor and concludes leasing agreements. Caterpillar offers its lessees the possibility to provide them with insurance covering the leased objects. After the lessees express their wish to benefit from that possibility, the insurance contracts are taken out with an insurance company by Caterpillar, which bears the costs incurred in concluding those contracts, but charges the lessees the costs of the insurance contributions, without adding any mark-up. Caterpillar exempted those contributions from VAT in the invoices it issues to its lessees. Following a judgment of the Supreme Administrative Court of Poland, in which it was held that

the person providing the leasing service must include in the taxable amount of those services the costs of insuring the leased object, Caterpillar submitted corrected invoices stating the amounts relating to VAT arrears, plus interest and paid the VAT on the corresponding insurance contributions. After the CJ delivered the BGZ Leasing judgment (17 January 2013, C-224/11), Caterpillar requested the tax authorities for a refund of the subsequent paid VAT.
The tax authorities refused to initiate the procedure for refunding an overpayment of VAT on the ground that the five-year limitation period had expired. The case ended up before the Supreme Administrative Court of Poland. According to the Supreme Administrative Court, Polish law does not provide for any legal basis allowing a party, who has relied on national institutions for a finding that VAT was payable, to receive a refund of that VAT, levied in infringement of EU law by the tax authorities, after the expiry of the limitation period for the right to submit such a request for a refund. The Supreme Administrative Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its question, the referring court asked whether the principles of equivalence and effectiveness must be interpreted as precluding a national legislation which allows a request for a refund of overpayment of VAT to be refused under circumstances as in the case at hand.

According to the CJ, it is settled case law that the interpretation which the CJ gives in its judgments, should be regarded such to clarify and to define the meaning and scope of a rule of EU law as it should have been understood and applied from the time of its entry into force. Furthermore, it follows from settled case law that the right to a refund of charges levied in a EU Member State in breach of the rules of EU law is the consequence and complement of the right conferred on individuals by provisions of EU law as interpreted by the CJ. The EU Member State is therefore required, in principle, to repay charges levied in breach of EU law. In the absence of harmonized rules governing the reimbursement of charges imposed in breach of EU law, the EU Member States retain the right to apply procedural rules provided for under their national legal system, in particular concerning limitation periods, subject to observance of the principles of equivalence and effectiveness. The CJ ruled that as the Polish limitation rule applies in the same way both to domestic actions and to actions seeking safeguard rights which individuals derive from EU law, it cannot be considered to be contrary to the principle of equivalence.

Furthermore, according to the CJ, it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interest of legal certainty which protects both the individual and the authorities concerned, even if the expiry of those periods necessarily entails dismissal of the action. By way of example, limitation periods of two or three years have been held to be compatible with the principle of effectiveness.

CJ rules that a single supply consisting of one principal and one ancillary element must be taxed at VAT rate applicable to principal element (*Stadion Amsterdam*)

On 18 January 2018, the CJ delivered its judgment in the case *Stadion Amsterdam CV* ('Stadion Amsterdam', C-463/16). Stadion Amsterdam acts as an operator of a multi-purpose building complex, known as 'the Arena'. The Arena consists of a stadium with associated facilities and a museum of the football club AFC Ajax. Stadion Amsterdam offers a so-called 'World of Ajax tour'.
This tour consists of a guided tour of the stadium and a visit, without a guide, to the AFC Ajax museum. The World of Ajax tour was the only opportunity for visitors to visit the AFC Ajax museum. It was therefore not possible for visitors to visit the museum without participating in the guided tour of the stadium. The tour was offered for a total price of EUR 10. At the time of the proceeding, the reduced VAT rate was applicable for the admission to public museums, theme parks, playgrounds and other similar facilities that are primarily and permanently intended for entertainment and daytime recreation. Stadion Amsterdam took the view that the guided tour should be considered a service intended for entertainment and that the reduced VAT rate, therefore, was also applicable to the guided tour.

The Netherlands tax authorities however took the view that the World of Ajax tour was subject to the normal VAT rate. Stadion Amsterdam challenged that view and the case eventually ended up before the Netherlands Supreme Court. The Netherlands Supreme Courts stated that it was clear from the national proceedings that the World of Ajax tour consists of two elements, namely the guided tour of the stadium and the visit to the AFC Ajax museum. In this respect, the guided tour should be considered the principal component and the museum visit the ancillary component of one single supply. The Netherlands Supreme Court also stated that in the case the two elements of the services are separated, EUR 6.50 of the total price should be attributed to the guided tour and EUR 3.50 to the museum visit.

The Netherlands Supreme Court eventually decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its question, the referring court wished to ascertain whether a single supply that is comprised of one principal and one ancillary element, which, if they were supplied separately would be subject to different VAT rates, must be taxed to the rates of VAT applicable to those separate elements or to one single VAT rate.

The CJ considered that it follows from EU case law that every transaction must normally be regarded as being distinct and independent and that a transaction which comprises a single supply from an economic point of view should not be artificially split in order not to cause any distortion of the EU VAT system. According to the CJ, it follows from the characterization of a transaction with several elements as a single supply that that single supply will be subject to one and the same VAT rate. If EU Member States would have the option to subject various elements of one singe supply to different VAT rates, it would cause artificially splitting of that supply which leads to a risk of distortion of the function of the EU VAT system. The CJ ruled that a single supply consisting of two distinct elements, one principal and one ancillary, which, if they were supplied separately, would be subject to different VAT rates, must be taxed solely at the VAT rate applicable to the principal element of the single supply. The facts that the price of each element of the supply can be identified does not result in a different conclusion.

CJ rules that fraudulent intent of supplier should not have consequences for VAT deduction right of recipient, unless recipient was aware of fraudulent intent (*Kollroß and Wirtl*)

On 30 January 2018, the CJ delivered its judgment in the joined cases *Achim Kollroß and Erich Wirtl* ('Kollroß and Wirtl', C-660/16 and C-661/16). The first case concerned Mr Kollroß who has ordered a combined heat and power unit from company G. Company G confirmed the order of Mr Kollroß two days later and issued an advance invoice with VAT to Mr Kollroß. Mr Kollroß paid the invoice one week after receipt. However, the delivery date of the unit was not yet clear at that time. Eventually, the unit was never supplied to Mr Kollroß. The second case covers a comparable situation. Also Mr Wirtl ordered a combined heat and power unit from company G. The expected delivery date of the unit was two weeks after payment. Mr Wirtl paid the full amount including VAT, but the unit was never supplied to Mr Wirtl. In both cases, Company G became subject of insolvency proceedings. This procedure was closed on the ground of a lack of assets. The persons acting for G were convicted of different criminal offences. However, those persons were not convicted of tax evasion.

Mr Kollroß and Mr Wirtl claimed a VAT deduction for the VAT that they have paid to company G. The tax authorities refused the VAT deductions of Mr Kollroß and Mr Wirtl. Both unsuccessfully lodged objection against that decision. The cases eventually ended up before the Federal Finance Court in Germany. This court decided to stay both proceedings and refer them to the CJ for a preliminary ruling. By its questions, the referring court essentially asked whether a taxable person is entitled to deduct input VAT on purchased goods that have never been supplied to the taxable person as a result of fraud on the side of the supplier. Furthermore, the referring court wished to ascertain to what extend it is allowed to require a taxable person to adjust its input VAT deductions.

The right to deduct input VAT arises at the time the VAT becomes chargeable. The general rule is that VAT becomes chargeable when the goods or the services are supplied. However, where payments are made on account, VAT becomes chargeable upon receipt of the payment and on the amount received. According to the CJ, fraudulent intent of the supplier should not have any consequences for the VAT deduction right of the recipient, unless the recipient was or should have been aware of the fraudulent intent. Furthermore, the fact that there is no date of delivery is irrelevant in this respect. With respect to the second question, it needs to be held that the taxable person could never use the purchased goods for its taxable activities. It follows from the EU VAT Directive that in that case an adjustment of the deducted input VAT is required. However, such adjustment is optional in the case of 'theft of property'. In other words, an adjustment is not required unless an EU Member State decides otherwise. According to the CJ, fraud should be regarded 'theft of property'. Therefore, the CJ ruled that a derogation from that principle is allowed when the failed delivery of the goods purchased is due to a fraud perpetrated by the supplier. In such situation, the taxable person's expenditure relates to his economic activities. The facts that those goods were ultimately not used for the purposes of taxable transactions is purely accidental.

CJ rules on reduction of deductible amount (*T-2*)

On 22 February 2018, the CJ delivered its judgment in the case *T-2, družba za ustvarjanje, razvoj in trženje elektronskih komunikacij in opreme, d.o.o.* ('T-2', C-396/16). T-2 is a company established in Slovenia which supplies electronic communications equipment and services. T-2was the subject of a procedure for reaching an arrangement with creditors, which is a special procedure designed to alleviate the liabilities of insolvent debtors.

Pursuant to that arrangement, T-2 was required to pay its creditors an amount corresponding to 44% of its debts, without interest, within a period of nine years from the date on which the decision became final. At the request of the tax authorities, T-2 drew up a list of its suppliers' invoices which it had failed to pay which came within the terms of the arrangement with the creditors and on the basis of which it had deducted input VAT. On the basis of those invoices, the tax authorities decided that T-2 must adjust its deduction of input VAT by an amount corresponding to the reduction of its debts resulting from the arrangement with creditors, that is to say, a reduction of 56% of the VAT initially deducted.
T-2 brought a complaint against that decision before the Ministry of Finance. The Ministry dismissed the complaint. Then, T-2 brought an appeal against that decision before the Slovenian Administrative Court, which dismissed the appeal. Finally, T-2 brought an appeal on a point of law against that judgment before the Supreme Court of Slovenia. The Supreme Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court essentially wishes to ascertain whether tax authorities are entitled to demand a reduction in the deduction of VAT made by a taxable person that has benefitted from a reduction in its liabilities to its creditors in the context of a procedure for reaching an arrangement with creditors.

The CJ ruled that the EU VAT Directive requires EU Member States to reduce the taxable amount and consequently the amount of VAT payable by the taxable person whenever a part or all of the consideration has not been received by the taxable person. However, according to the CJ, it is clear from the order for reference that the decision approving the arrangement with creditors prevents creditors from seeking full payment of their claims and that, from an economic point of view, that decision leads to a reduction of the debtor's obligations towards its creditors, and not just to a default. Consequently, it does not appear that the reduction of a debtor's obligations resulting from the final approval of an arrangement with creditors constitutes a case of a transaction remaining totally or partially unpaid. However, according to the CJ, that is a matter for the referring court to determine.
If it turns out that it constitutes a case of a transaction remaining totally or partly unpaid, the deductible amount has to be adjusted.

CJ rules that the sole ground that additional formal requirements have not been met does not justify the refusal of a VAT exemption (*Piénkowski*)

On 28 February 2018, the CJ delivered its judgment in the case *Stanislaw Piénkowski* ('Piénkowski', C-307/16). Mr. Piénkowski is a trader whose supplies are subject to VAT. He is engaged in the business of selling telecommunications equipment to travellers resident outside the EU. The goods therefore leave the EU once they are in the customers' possession. Based on the VAT exemption for goods carried in the personal luggage of travellers, Mr. Piénkowski made VAT refunds to the travellers or applied the VAT zero rate on his supplies. Polish law provides for additional conditions for the application of aforementioned VAT zero rate, such as a minimum amount of turnover or the obligation to conclude an agreement with a person authorized to refund VAT to travellers.

The Polish tax authorities found that the level of Mr. Piénkowski's turnover meant that he was not permitted to make VAT refunds to travellers personally or to apply a VAT zero rate and Mr. Piénkowski's had not concluded an agreement with a person authorized to refund VAT to travallers. Mr. Piénkowski who considered that threshold to be an 'administrative barrier' to the application of the preferential VAT zero rate, appealed on a point of law to the Polish Supreme Administrative Court, submitting that certain Polish VAT provisions were incompatible with the provisions of the EU VAT Directive and with the principles of proportionality and fiscal neutrality. The Polish Supreme Administrative Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its question the referring court asked whether the EU VAT Directive precludes national legislation which provides that a VAT taxable person may apply a VAT exemption (implemented in Poland and other EU Member States as a VAT zero rate) to the export of goods by travellers only if his turnover reached a certain threshold during the preceding tax year, or if he has concluded an agreement with a person authorized to refund VAT to travellers.

According to the CJ, it is clear from the EU VAT Directive that there is no obligation imposed on VAT taxable persons to have attained a certain turnover during the preceding financial year, or to have concluded an agreement with a person authorized to refund VAT, in order for the VAT export exemption to apply. The EU VAT Directive provides for EU Member States to impose additional conditions for the purposes for ensuring the correct and straightforward application of VAT exemptions and of preventing any possible evasion, avoidance or abuse, but only as they shall deem necessary. However, the CJ ruled that in circumstances where the conditions for export exemption are satisfied, no liability to pay VAT arises in respect of such supplies. In those circumstances, there is no longer, in principle, any risk of tax evasion or loss of VAT which could justify the transaction concerned being taxed. Therefore, the Polish legislation is not necessary in order to attain the objective of preventing tax avoidance and evasion.

CJ rules on VAT deduction right after the time limit for exercising that right has been expired (*Volkswagen*)

On 21 March 2018, the CJ delivered its judgment in the case *Volkswagen AG* ('Volkswagen', C-533/16). Between 2004 and 2010, Volkswagen received goods from certain suppliers without VAT being included in the relevant invoices. The suppliers and Volkswagen had wrongly assumed that the transactions in question constituted financial compensation and, as such, were not subject to VAT. When, in 2010, they realized their mistake, the suppliers charged the VAT to Volkswagen and issued the relevant invoice stating the amount of VAT payable.

The suppliers also filed a supplementary VAT return and paid the VAT to the tax authorities. Volkswagen sought to deduct the input VAT but the tax authorities allowed the application only in respect of some of the periods claimed, rejecting it in the case of the other periods on the basis that the time limit for exercising the right (five years) had already elapsed.

The decision of the tax authorities was confirmed by Finance Directorate of the Slovak Republic. Volkswagen challenged that decision before the Regional Court, which dismissed the action. Then, Volkswagen appealed against that judgment. The case ended up before the Supreme Court of the Slovak Republic. The Supreme Court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its question, the referring court asked whether it is permissible under EU law to refuse granting a taxable person a refund of input VAT on the grounds that the time limit for exercising that right has expired, in a situation where it was thought, wrongly, that the supply of goods was not subject to VAT and the subsequent adjustment took place several years later with the taxable person paying the VAT at that time and then claiming it back as input VAT.

According to the CJ, the right to deduct input VAT arises at the same time as the VAT becomes chargeable. However, that right can only be exercised if the taxable person holds an invoice showing that the goods have been supplied. Nevertheless, the VAT Directive provides that EU Member States can authorize a taxable person to exercise the right to deduct input VAT at another moment than the moment on which the VAT has become chargeable. However, this right is then subject to conditions and procedures determined by that EU Member State. A temporal limit is such a condition. The CJ ruled that since Volkswagen was not in possession of the invoices and was not aware that the VAT was due, Volkswagen obviously could not claim the right to deduct VAT which had not been previously paid. Therefore, the right can only be exercised once the taxable person is aware that the transactions are subject to VAT and if that person has acted in good faith.

CJ rules that in case of corrected invoices right to deduct input VAT starts to run when corrected invoices have been issued (*Biosafe*)

On 12 April 2018, the CJ delivered its judgment in the case *Biosafe - Indústria de Reciclagens SA v Flexipiso - Pavimentos SA* ('Biosafe', C-8/17). Biosafe sold Flexipiso goods and applied the reduced VAT rate on these supplies. Following a tax inspection, the Portuguese tax authorities found that the standard VAT rate should have been applied and imposed VAT assessments. Biosafe paid that amount and claimed reimbursement from Flexipiso by sending debit notes to Flexipiso. Flexipiso refused to pay the additional VAT on the ground that it could not deduct that VAT because the limitation period had expired. According to Flexipiso, it was not for Flexipiso to bear the consequences of an error for which Biosafe was solely responsible.

Following that refusal, Biosafe initiated legal proceedings in order to establish that Flexipiso should reimburse the VAT that it additionally paid to the tax authorities and interest for late payment. The case eventually came before the Supreme Court of Portugal. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court wished to ascertain whether the EU VAT Directive and the principle of fiscal neutrality preclude national legislation pursuant to which the right to deduct VAT is to be refused on the ground that the period laid down by that legislation for the exercise of that right started to run from the date of issue of initial invoices and had expired, while these initial invoices had been corrected after the limitation period had expired.

According to the CJ, the right to deduct input VAT arises on the date on which the VAT becomes chargeable. However, in principle, it can be exercised only once the VAT taxable person holds an invoice. The CJ ruled that it was objectively impossible for Flexipiso to exercise its right to deduct input VAT before the VAT adjustment carried out by Biosafe, since it did not possess the documents rectifying the initial invoices and did not know that additional VAT was due. Accordingly, the CJ ruled that since Flexipiso did not show any lack of diligence before the receipt of the debit notes and there is no abuse or fraudulent collusion with Biosafe, a period which started to run from the date of issue of the initial invoices and which expired before this adjustment, could not validly be used to deny Flexipiso the exercise of the right to deduct VAT. The legal provision, therefore, is incompatible with the EU VAT Directive and the principle of fiscal neutrality.

CJ rules that EU VAT Directive requires EU Member State to recover an unduly granted VAT deduction (*SEB bankas*)

On 11 April 2018, the CJ delivered its judgment in the case *SEB bankas* (C-532/16). SEB bankas purchased plots of land from VKK Investicija UAB ('the seller') for which the latter issued an invoice for payment - inclusive of VAT. At the time of the sale, both parties considered the land at issue to be 'building land' and therefore, subject to VAT. Subsequently, SEB bankas obtained a deduction corresponding to the VAT charged. Three years later, the seller took the view that the supply of land at issue should actually have been exempted from VAT. It therefore sent SEB bankas a credit note for the original amount invoiced. It also issued a new invoice for the same amount which did not include any VAT. According to SEB bankas, at the time of the transaction the land supplied was considered, under national law, to be 'building land' and thus subject to VAT.

On the basis of a subsequent tax inspection, the Lithuanian tax authorities issued a decision that required SEB bankas to reimburse the amount corresponding to the deduction initially granted. It also required payment of a part of the accrued default interest and imposed a fine. The case eventually came before the Supreme Administrative Court of Lithuania. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court basically wished to ascertain whether the obligation to adjust VAT deductions also applies in cases where the initial deduction could not be made lawfully, because the transaction that led to the VAT deduction was exempt from VAT. Furthermore, the referring court wished to ascertain whether it is allowed to determine the date on which the obligation to adjust the undue VAT deduction arises and the period for which that adjustment must be made in cases where the initial VAT deduction could not be made lawfully.

According to the CJ, the adjustment mechanism provided for in the EU VAT Directive aims to enhance the precision of VAT deductions by monitoring the extent to which the taxable person actually uses those goods for deductible purposes. However, the question was whether that adjustment mechanism can apply to correct an initial error in the determination that a given transaction is a taxable one while it is not. The CJ ruled that it follows from the EU VAT Directive that the adjustment mechanism also applies where an initial deduction of VAT could not have been made at all because the transaction at issue was exempted from VAT. However, the CJ also explicitly ruled that the extended adjustment schemes for investment goods and services does not apply in a case like this. According to the CJ, it is for the EU Member States to determine the detailed rules for that adjustment in such cases. In this respect, the CJ ruled that the principle of legal certainty does not preclude an administrative practice consisting in revoking, within a mandatory time limit, a decision in which they acknowledged that the taxable person had a right to a VAT deduction, by demanding that he pay back that tax.

CJ rules on simplification scheme for triangular transactions (*Firma Hans Bühler*)

On 19 April 2018, the CJ delivered its judgment in the case *Firma Hans Bühler KG* ('*Firma Hans Bühler*', C-580/16). Firma Hans Bühler is a limited partnership established in Germany. Firma Hans Bühler operates a production and trading business and is registered as a VAT taxable person in Germany and Austria. Firma Hans Bühler bought products from suppliers established in Germany and sold those products to customers established in the Czech Republic. Those customers were registered as VAT taxable persons and the products were dispatched directly from the German suppliers to those customers. It is noted that Firma Hans Bühler used its Austrian VAT number exclusively for these transactions. The German suppliers included the Austrian VAT number of Firma Hans Bühler on their invoices and Firma Hans Bühler had issued invoices to the final customers under its Austrian VAT number. The invoices issued by Firma Hans Bühler also stated that the transactions concern 'intracommunity triangular transactions' and that the final customer was therefore liable to pay the VAT. However, in its filed EC Sales Listing, Firma Hans Bühler had not declared any transactions under 'triangular transactions'. Firma Hans Bühler has corrected this in a letter by stating that the reported transactions formed part of triangular transactions.

The Austrian tax authorities took the view that the transactions of Firma Hans Bühler should be regarded as 'abortive triangular transactions' because Firma Hans Bühler had not fulfilled its special obligations concerning the duty to declare and had not proved that the transactions had been subject to VAT upon final acquisition of the goods in the Czech Republic. Furthermore, the tax authorities took the view that even though the intra-Community acquisitions had occurred in the Czech Republic, they were also deemed to have been effected in Austria, since Firma Hans Bühler had used its Austrian VAT number. Firma Hans Bühler challenged that decision and the case finally ended up before the Administrative Court of Austria. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. In this respect, it is noted that it follows from the EU VAT Directive that an intra-Community acquisition in a triangular transaction will not be subject to VAT under specific cumulative conditions. One of these conditions requires that the goods must be transported directly from an EU Member State other than that in which the taxable person performing the intracommunity acquisition is identified for VAT purposes, to the person to whom he performs the subsequent supply. Therefore, the referring court wished to establish whether this condition had been met if the person performing the intra-Community acquisition is established in the EU Member State from which the goods are transported but this person uses a VAT number of another EU Member State.

According to the CJ, it follows from the objective of the legal provision in the EU VAT Directive that the aforementioned condition refers to an EU Member State other than the EU Member State in which the customer is identified for VAT purposes for the specific acquisition he is making. Therefore, where an acquirer is identified for VAT purposes in several EU Member States, only the VAT number under which he made the intra-Community acquisition must be taken into account in assessing whether the condition is met. The CJ therefore ruled that the simplification scheme for triangular transaction cannot be refused to a taxable person on the sole ground that that taxable person also is registered for VAT purposes in the EU Member State in which the intra-Community transport began.

CJ rules that application of a shorter limitation period in the event of a tax inspection is incompatible with EU VAT Directive (*Zabrus*)

On 26 April 2018, the CJ delivered its judgment in the case *Zabrus Siret SRL* ('*Zabrus*', C-81/17). Zabrus was subject to a tax inspection which covered the period 1 April 2014 to 30 November 2014. This inspection was completed in January 2015. In May 2015, Zabrus filed a VAT return for April 2015 which resulted in a VAT refund. A part of the claimed VAT refund is a result of the correction for the period that was subject to the tax inspection. The other part relates to a correction of transactions concluded in of 2014 of which Zabrus identified the relevant supporting documents in its accounts only after the tax inspection has been finalized. Subsequently, Zabrus was subject of a tax inspection covering the period from 1 December 2014 to 30 April 2015. This inspection was finalized in July 2015. The Romanian tax authorities refused to grant the VAT refund. This on the ground that the sum claimed related to transactions carried out during a period which had been subject of a tax inspection. The tax authorities stated that, national legislation precluded the reimbursement of the amounts requested by Zabrus because the respective period had already been subject to an inspection and no irregularity concerning VAT contributions had been found during that inspection. Furthermore, the inspection bodies did not adopt any measure laying down steps to be taken by Zabrus. Zabrus tried by various administrative procedures to establish its right to refund of the VAT. However, this was unsuccessful. The case finally ended up before the Romanian Court of Appeal. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its question, the referring court asked whether the EU VAT Directive and the principles of effectiveness, fiscal neutrality and proportionality must be interpreted as precluding national legislation which, by way of derogation from the five-year limitation period imposed by national law for the correction of VAT returns, prevents a taxable person from making such a correction in order to claim his right of deduction on the sole ground that that correction relates to a period that has already been the subject of a tax inspection.

According to the CJ, it follows from case law that the possibility of exercising the right of deduction without any temporal limit would be contrary to the principle of legal certainty, which requires that the tax position of the taxable person does not remain unclear, in the light of his rights and obligations towards the tax authority. Therefore, a limitation period which has the effect of punishing a taxable person who has not been sufficiently diligent and has failed to claim deduction of input VAT, by making him lose his right of deduction, cannot be regarded as incompatible with the EU VAT Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of the right of deduction (principle of effectiveness). In Romanian law, the right to deduct VAT is subject to the general limitation period of five years. Nevertheless, the exercise of the right of deduction is subject to a shorter limitation period in the event of a tax inspection. According to the CJ, it is noted that in case the tax inspection begins immediately after the filing of the VAT return or shortly thereafter, the taxable person is under that legislation deprived of the opportunity to correct his VAT return and the exercise of the right to deduct VAT by the taxable person becomes impossible in practice or, at the very least, excessively difficult. Therefore, the CJ ruled that the national provision is incompatible with the principle of effectiveness, fiscal neutrality and proportionality.

CJ rules that a company and its branch established in another Member State constitute a single taxable person for VAT (*TGE Gas*)

On 3 August 2018, the CJ delivered his judgment in case *TGE Gas Engineering GmbH — Sucursal em Portugal v Autoridade Tributária e Aduaneira* (C-16/17). The case deals with the refusal by Portuguese tax authorities to grant TGE Sucursal em Portugal VAT deduction resulting from the re-invoicing of costs from an Economic Interest Group (EIG).

TGE Gas Engineering GmbH, established in Bonn, was present in Portugal in two ways. First, TGE Gas Engineering GmbH was registered as non-resident business without a fixed establishment ('TGE Bonn'). Second, TGE Gas Engineering GmbH was registered as a non-resident with fixed establishment under the name of TGE Sucursal em Portugal ('TGE Sucursal'). Afterwards, TGE Bonn established an economic investment group ('EIG') together with the Portuguese company Somague Engenharia SA ('Somague') by the name of EIG Projesines. The EIG was VAT registered in Portugal as a separate taxable person with its own VAT registration. For the purpose of the formation of the EIG, TGE Bonn used its tax identification number and not that of TGE Sucursal. The objective of the EIG was to implement the planned extension of the liquefied natural gas terminal belonging to a Portuguese energy company. To this end, the EIG entered into a subcontracting agreement with TGE Sucursal, whereby TGE Sucursal would supply goods and services to the EIG and the EIG was obliged to on-charge costs to TGE Sucursal in line with the founding agreement between TGE Bonn and TGE Sucursal. A similar arrangement was made with Somague. For the purpose of the attribution and re-invoicing of it costs, the EIG used the fiscal number of TGE Sucursal and not that of TGE Bonn. The debit invoices including VAT were, therefore, addressed to TGE Sucursal. Consequently, TGE Sucursal deducted the VAT paid on the debit invoices issued by the EIG.

The Portuguese tax authorities ('PTA') took the view that TGE Sucursal and TGE Bonn are two different entities with their own fiscal number. Given that the fiscal number of TGE Bonn and not that of TGE Sucursal was communicated with the formation of the EIG, the EIG could not allocate costs to TGE Sucursal and the VAT on the invoices issued to TGE Sucursal could not be recovered by TGE Sucursal.

The case came before the Portuguese Tax Arbitration Tribunal (Centre for Administrative Arbitration). The tribunal decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its question, the referring tribunal asked whether the tax authority of a Member State should be precluded from regarding a company which has its headquarters in another Member State and the branch that it holds in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and from refusing, for that reason, the branch the right to deduct the VAT charged on the debit notes issued by an EIG of which that company, and not its branch, is a member. The CJ ruled that it is apparent from the case law of the Court that a company in one Member State and its branch located in another Member State constitute a single taxable person subject to VAT, unless it is established that the branch carries out an independent economic activity and it bears the economic risk arising from its business.

The CJ recalled that TGE Bonn obtained the initial fiscal number for the purpose of the formation of the EIG and subsequently, TGE Bonn obtained the second fiscal number for the registration of TGE Sucursal, which was used in all of the activities carried out by TGE Bonn and TGE Sucursal. Therefore, the two fiscal numbers of TGE Bonn and TGE Sucursal are attributable to one single entity, namely TGE Bonn. Consequently, the Portuguese tax authorities cannot, according to the CJ, refuse the deduction of input VAT to TGE Sucursal on the sole ground that the fiscal number of TGE Bonn was used when forming the EIG and the fiscal number of TGE Sucursal was used for the re-invoicing of the costs of the EIG.

CJ rules that VAT on costs for aborted activity is fully deductible (*Ryanair*)

On 17 October 2018, the CJ delivered its judgment in the case *Ryanair Ltd* ('Ryanair') (C-249/17). In the course of 2006, Ryanair attempted to acquire all the shares of another airline company (Air Lingus). In this respect, Ryanair incurred various costs relating to the planned acquisition. Eventually, for Ryanair, it was only possible to acquire a part of the shares. Although the takeover was unsuccessful, Ryanair sought to recover the entire input VAT on the costs incurred. In this respect, Ryanair argued that it had had the intention to provide management services against remuneration to Air Lingus, had the takeover been successful.

The Irish tax authorities refused the input VAT deduction. Ryanair challenged that decision and the case eventually ended up before the Supreme Court of Ireland. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court wished to ascertain whether a company that intends to acquire all the shares of another company in order to pursue an economic activity consisting of the provision of management services subject to VAT to that company, is entitled to deduct input VAT on the costs relating to that planned takeover, even if ultimately that economic activity was not carried out.

According to the CJ, the reason for the expenditure must be established in order to determine whether VAT on costs is deductible or not. Ryanair intended to pursue an economic activity with the acquisition of Aer Lingus, namely the supply of VAT taxed management services. Therefore, the costs were incurred for this purpose. Hence, these costs are directly and immediately linked to an economic activity (i.e. the provision of management services). The CJ, therefore, ruled that Ryanair is entitled to deduct VAT on these costs, even though ultimately no management services were provided.

CJ rules on deduction of input VAT on general costs (*Volkswagen Financial Services*)

On 18 October 2018, the CJ delivered its judgment in the case *Volkswagen Financial Services (UK) Ltd* ('Volkswagen Financial Services'), (C-153/17). Volkswagen Financial Services is a financial company which is part of the Volkswagen AG Group. The finance offered by Volkswagen Financial Services is intended solely for the purchase of vehicles of brands of the Volkswagen AG Group. The business activities of Volkswagen Financial Services are, amongst others, the hire and purchase of motor vehicles. With respect to the hire and purchase agreement, Volkswagen Financial Services purchases the vehicle from the dealer and supplies it to the customer. According to the legislation applicable in the United Kingdom, Volkswagen Financial Services is regarded as the supplier of the vehicle concerned by that agreement and the agreement must contain a contractual condition that the vehicle is of satisfactory quality. Thus, the service provided by Volkswagen Financial Services is not limited to the provision of credit, but extends to the provision of support in terms of the vehicle itself. Volkswagen Financial Services therefore performs both VAT taxable and VAT exempted activities.

It is agreed between the parties that whilst it is a single commercial transaction, a hire purchase agreement, as a matter of United Kingdom VAT law, comprises a number of separate supplies, including, on the one hand, a taxable supply of a vehicle, and, on the other, exempt supplies of credit. The dispute between parties relates to the extent to which VAT on general costs is deductible. In this respect, it is relevant that the general costs were only included in the price of finance part of the transaction. The case eventually ended before the Supreme Court of the United Kingdom. This court decided to stay the proceedings and to refer to the CJ for a preliminary ruling. By its questions, the referring court wished to ascertain whether a company is entitled to (partly) deduct input VAT on general costs if the general costs are only included in the price of the VAT exempted part of the transaction.

The referring court took the view that each car hire and purchase agreement consist of several separate supplies. According to the CJ, there are no indications that this categorization is not in line with EU law. Furthermore, the costs should be regarded as general costs and the fact that Volkswagen Financial Services decided to include those costs in the price of the VAT taxable transactions, but solely in the price of the exempt transactions, can have no effect in this respect. As those general costs have a direct and immediate link with the activities as a whole, including the taxed transactions, those costs are, as such, components of the price of those taxed transactions. The CJ ruled that it is up to the national court to determine whether the input VAT deduction method applied by the UK tax authorities takes into account the actual and non-negligible allocation of a part of the general costs which are made for the purposes of the transaction that gives rise to a right to deduct input VAT.

CJ rules on VAT deduction of consultancy services borne by holding company (*VAC&D Foods Acquisition*)

On 8 November 2018, the CJ delivered its judgment in the case *C&D Foods Acquisition* (C-502/17). C&D Foods Acquisition (‘C&D’) is part of the international Arovit group. C&D is the parent company of Arovit Holding A/S which in turn wholly owns Arovit Petfood (‘Petfood’). Until 1 March 2007, C&D Foods was primarily active as the parent company of Arovit Holding A/S. As of that date, C&D concluded a management agreement with its sub-subsidiary Petfood regarding the rendering of management and IT services for remuneration. On 13 August 2008, Kaupthing Bank (‘Kaupthing’) became the owner of the Arovit group for a one-euro payment because the then owner of the group had not fulfilled its payment obligations towards Kaupthing. In light of its intention to sell all shares in Petfood, Kaupthing concluded consultancy contracts in the period between December 2008 and March 2009 on account of C&D. C&D Foods deducted the VAT on the costs charged to it by the consultants. Ultimately, no potential buyer could be found and the sale process ended in the autumn of 2009.

The Danish tax authorities denied deduction of the VAT because, amongst other reasons, they took the view that the consultancy costs were not sufficiently linked to VAT taxable activities of C&D. The case eventually came before the court in second instance, which decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its question, the referring courts asks whether a holding company like C&D should be able to deduct the VAT on services acquired in relation to an intended but not completed sale of shares in a subsidiary for which it performed VAT taxable services (in the form of management and IT).

The CJ considered that there are two ways in which the transfer of shares can fall within the scope of the VAT Directive. Firstly, when the transfer of shares has its exclusive and direct cause in an economic activity for VAT purposes of the parent company. Secondly, when the share transfer is the direct, durable and necessary extension of the taxable economic activity of the parent company. With respect to C&D, the CJ recalled that the purpose of the intended transfer of shares was to use the proceeds of that sale for the repayment to Kaupthing. With that said, the CJ ruled that the transfer of shares cannot be regarded as being directly and exclusively caused by C&D’s VAT taxable economic activities. Furthermore, it cannot be regarded as a direct, durable and necessary extension of C&D’s VAT taxable economic activities. As a result, the transfer of shares cannot be regarded as an action that exceeds the normal shareholding activities and therefore, does not fall within the scope of VAT. Consequently, the VAT on the consultancy costs cannot be deducted by C&D.

CJ rules on burden of proof for VAT deduction in the absence of invoices (*Vădan*)

On 21 November 2018, the CJ delivered its judgment in the case *Vădan* (C-664/16). Vădan is a Romanian real estate developer who built a housing complex consisting of 16 buildings, with single-family homes and 90 apartments. These housing projects were completed between 6 June 2006 and 8 September 2008. During the year 2006, Vădan performed 29 real estate transactions; in the years 2007 up to and including 2009, there were 70 transactions. Moreover, Vădan sold building plots in 2008 and 2009. During these years, Vădan was not registered for VAT purposes and did not file any VAT returns.

The Romanian tax authorities stated that as of June 2006, Vădan's revenue had surpassed the threshold of the VAT exemption for small businesses. Therefore, the Romanian tax authorities considered that Vădan had qualified as a taxable person as of August 2006. Consequently, the tax authorities registered him for VAT purposes and imposed an additional VAT assessment for the output VAT on the real estate transactions. Vădan, however, was refused the deduction of the input VAT related to the acquisitions of goods and services performed in connection with the economic activity performed, as he had not kept any accounting evidence of the purchases made or the related invoices, in order to be able to assess the amount of deductible VAT. In light of these circumstances, the referring Romanian court turned to the CJ for a preliminary ruling on the question if a taxable person who satisfies the substantive requirements for the deduction of VAT can exercise his right to deduct input VAT in the situation where he is unable to provide evidence, by way of invoices, of input VAT for the supply of goods and provision of services? If so, is an estimation by a court ordered expert a suitable method of determining the extent of the right to deduct input VAT?

The CJ considered that the fundamental principle of neutrality requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with (all) formal conditions. Nevertheless, it is up to the taxable person that claims the right to deduct input VAT to provide objective evidence of the fact that goods or services were supplied to him on which VAT was paid. In this case, due to the absence of invoices, Vădan had provided other documentation in regard of the received goods and services to support his claim. With respect to these documents, the CJ ruled that, based on the referring court's consideration that these were completely illegible they are, as such, insufficient to determine the (extent of the) right to deduct input VAT. As to the estimation by a court ordered expert, the CJ ruled that this could only form an addition to a taxable person's objective evidence of the acquisition of goods and services on which VAT was paid, but could not replace it as the estimation does not provide the opportunity to determine if the taxable person has actually paid the VAT that was due on the received goods and services.

Commission proposes new rules on VAT rates and small enterprises

On 18 January 2018 the Commission has published two proposals for new VAT rules, one regarding the VAT rates, the other regarding small enterprises (SMEs). These proposals are part of its 2016 VAT Action Plan which aims to modernize the VAT system in order to make it simpler, more fraud-proof and business friendly. The proposal on rates concerns new rules to give Member States more flexibility to set up VAT rates. The proposal on SMEs aims at reducing VAT compliance costs for SMEs. Businesses with an annual turnover of less than EUR 2 million could benefit from simplified VAT obligations. If adopted, the proposals could have a significant impact. Both proposals will now be submitted to the European Parliament for consultation and to the Council for adoption. It is intended that the SME rules would enter into force on 1 July 2022. No specific starting date has yet been mentioned for the new rate rules.

VAT rates

The current situation is a patchwork of rates which vary from one country to another The proposed rules will introduce a harmonized and less restrictive system. All EU Member States would be allowed to introduce - in addition to a standard VAT rate of minimum 15% - a super reduced VAT rate below 5%. Furthermore, they would be able to introduce two separate reduced rates as well as an exemption/zero rate. There will be a list of products for which the standard rate is mandatory, such as smartphones, fuel and alcoholic beverages.

Small enterprises

Under current rules, the exemption for SMEs is limited to sales in the SME's own Member State. The proposal would enable SMEs to benefit from the exemption also for sales in other Member States. The annual turnover threshold for the exemption is still decided by the Member States, but should not be higher than EUR 100,000. Simplified VAT obligations would be introduced for SMEs with a turnover between EUR 100.000 and EUR 2 million across the EU. The simplification concerns rules regarding registration, bookkeeping and longer tax periods that should lead to less frequent filing of VAT returns.

Customs Duties, Excises and other Indirect Taxes

CJ rules on repayment of customs duties in case of price adjustments between related companies on the basis of Advance transfer price arrangement (Agreed transfer price composed of an amount initially invoiced and a flat-rate adjustment made after the end of the accounting period) (*Hamamatsu Photonics Deutschland GmbH)*

On 20 December 2017, the CJ delivered its judgment in the *Hamamatsu Photonics Deutschland GmbH* case (C-529/16). The case concerns the conditions for repayment of import duties in case of ex-post price adjustments to transfer prices used at importation (actual transaction value) and the situations in which Article 78 of the Community Customs Code (CCC 2913/92 EC) is applicable.

Hamamatsu, a company established in Germany, which belongs to a group of companies active globally whose parent company, Hamamatsu Photonics, is established in Japan. Hamamatsu distributes, inter alia, optoelectronic devices, systems and accessories.

Hamamatsu purchased imported goods from its parent company which charged it for those goods intrAGroup prices in accordance with the advance pricing agreement concluded between that group of companies and the German tax authorities. The total of the amounts charged to the applicant in the main proceedings by the parent company were regularly checked and, if necessary, adjusted, in order to ensure the conformity of the sale price with the 'arms-length' principle laid down in the guidelines of the Organisation for Economic Co-operation and Development (OECD) applicable to transfer pricing for multinational undertakings and the tax authorities (the 'OECD Guidelines').

The referring court, the Finanzgericht München (Finance Court, Munich, Germany) explained that those checks are carried out in a number of stages, based on the method called the 'Residual Profit Split Method', which is consistent with the OECD Guidelines. In the first stage, each participant is allocated a sufficient profit to produce a minimum rate of return. The residual profit is allocated proportionally in accordance with specific factors. In the second stage, Hamamatsu's operating margin range is established. If the profit actually generated falls outside that margin, the result is adjusted to the upper or lower limit of the margin and credits or subsequent debit charges are made.

Between 7 October 2009 and 30 September 2010, the applicant in the main proceedings released for free circulation various goods from more than 1,000 consignments from the parent company, declaring a customs value corresponding to the price charged. A rate of between 1.4% and 6.7% was levied on the taxable goods.

Because, during that period, the operating margin of the applicant in the main proceedings fell below the range for the operating margin, the transfer prices were adjusted as a result. The applicant in the main proceedings thus received a credit of EUR 3,858,345.46.

Having regard to the adjustment of the transfer pricings subsequently made, by letter of 10 December 2012, the applicant in the main proceedings applied for the repayment of the customs duties for the imported goods of EUR 42,942.14. There was no allocation of the adjustment amount to the individual imported goods.

The Principal Customs Office, Munich rejected that application on the ground that the method adopted by the applicant in the main proceedings was incompatible with Article 29(1) of the Customs Code which refers to the transaction value of individual goods, not that of mixed consignments.

The applicant in the main proceedings lodged an appeal against that decision with the referring court.

The referring court considered that the final annual amount constitutes the final transfer pricing, established in accordance with the arms-length principle provided for by the OECD Guidelines. There was thus no point in basing the transfer pricing exclusively on the provisional pricing in the context of an advance transfer pricing agreement concluded with the tax authorities which does not reflect the real value of the goods. Thus, the price declared to the customs authority was only a fictitious pricing and not the price payable for the imported goods pursuant to Article 29 of the Customs Code.

In those circumstances, the Finanzgericht München (Finance Court, Munich) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Article 28 et seq. of [the Customs Code] permit an agreed transfer price, which is composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, using an allocation key, regardless of whether a subsequent debit charge or credit is made to the declarant at the end of the accounting period?
(2) If so: May the customs value be reviewed and/or determined using simplified approaches where the effects of subsequent transfer pricing adjustments (both upward and downward) can be recognised?'

The CJ made the following observations:
By virtue of Article 29 of the Customs Code, the customs value of imported goods is the transaction value, that is to say, the price actually paid or payable for the goods when they are sold for export to the customs territory of the European Union, adjusted, where necessary, in accordance with Articles 32 and 33 thereof (see, to that effect, judgments of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 38, and of 16 June 2016, *EURO 2004*. *Hungary*, C-291/15, EU:C:2016:455, paragraph 24).

Furthermore, the Court has already stated that the customs value had to be determined primarily according to the 'transaction value' method under Article 29 of the Customs Code. It is only if the price actually paid or payable for the goods when they are sold for export cannot be determined that it is appropriate to use the alternative methods laid down in Articles 30 and 31 thereof (see, in particular, judgments of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraphs 38, 41, 42 and 44, and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraphs 24 and 27 to 30).

The Court has also stated that, if as a general rule the price actually paid or payable for the goods forms the basis for calculating the customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value (see, to that effect, judgments of 12 June 1986, *Repenning*, case 183/85, EU:C:1986:247, paragraph 16; of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 24; of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 39; and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 25).

Article 27 of the Customs code permits the customs authorities, on their own initiative or at the request of the declarant, to amend the declaration.

However, it must be recalled that the cases in which the Court has allowed a subsequent adjustment of the transaction value is limited to specific situations relating, inter alia, to quality defects or faulty workmanship in the goods discovered after their release for free circulation.

The Court has, in particular, already held that it had to be accepted that, where the goods to be valued were bought free of defects but were damaged before their release for free circulation, the price actually paid or payable was to be reduced in proportion to the damage suffered, since it was an unforeseeable reduction in the commercial value of the goods (judgment of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 25 and the case law cited).
Similarly, the Court acknowledged that the price actually paid or payable could be reduced in proportion to the reduction in the commercial value of the goods owing to a hidden defect which it was shown to be present before their release into free circulation and gave rise to subsequent repayments under a warranty obligation which, as a result, might result in a subsequent reduction in the customs value of those goods (judgment of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 26 and the case law cited).

Finally, it must be stated that, in the version in force, the Customs Code does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is subsequently adjusted upwards and it does not contain any provision enabling the customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments. In those circumstances, it must be held that the Customs Code, in the version in force, does not allow account to be taken of a subsequent adjustment of the transaction value, such as that at issue in the main proceedings.

The CJ ruled as follows:
Articles 28 to 31 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, must be interpreted as meaning that they do not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate

adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

The second questions did not need to be considered, given the ruling on question 1.

CJ rules on the classification of spinal fixation systems (subheadings 9021 1010, 9021 10 90 and 9021 90 90 (Regulation (EEC) No 2658/87)

On 12 April 2018, the CJ delivered its judgment in the *Medtronic GmbH* case (C-227/17). The case concerns the Tariff classification of spinal fixation systems (Implementing Regulation (EU) No 1214/2014).

This request for a preliminary ruling concerns, in essence, the interpretation of tariff subheadings 9021 10 10, 9021 10 90 and 9021 90 90 of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 (OJ 2015 L 285, p. 1) ('the CN').

The request was made in proceedings between Medtronic GmbH and Finanzamt Neuss (Tax Office, Neuss, Germany) ('the Tax Office') concerning the applicable turnover tax rate for the supply of spinal fixation systems.

Medtronic supplies, inter alia, spinal fixation systems under the trade mark CD Horizon SOLERA to hospitals and licensed doctors, which consist of, inter alia:

- fixed-angle screws made of titanium and multiaxial screws made of titanium or cobalt chrome/titanium each in a variety of diameters and lengths, colour-coded, with self-cutting threads, each with titanium set screw accessories,
- fixed-angle screws made of titanium and multiaxial screws made of titanium or cobalt chrome/titanium each in a variety of diameters and lengths, colour-coded, with self-cutting threads, each with titanium set screw accessories,
- rods in different materials (titanium alloy or cobalt chrome), pre-bent or straight, with a diameter of 4.75 mm, in a variety of lengths (between 30 mm and 500 mm),
- CD Horizon X10 Crosslink plates made of titanium in different lengths (fixed or multi-span) including a set screw,
- colour-coded hooks of four different shapes and sizes made of titanium alloy, and
- lateral connectors made from a titanium alloy with a diameter of 4.75 mm.

According to the information provided by the referring court, the spinal fixation systems are permanently implanted in the patient's body and assembled according to the needs of each patient. The order for reference also indicates that the spinal fixation systems are to treat degenerative disc diseases, spinal stenosis and spinal dislocations or failures in earlier spinal fusions, tumours, scoliosis or bone fractures.

On the basis of non-binding tariff information given to Medtronic on 19 June 2013, which indicated that the spinal fixation systems that it supplies are covered by CN subheading 9021 90 90, Medtronic applied the reduced turnover tax rate laid down in Paragraph 12(2)(1) of the UStG for its supplies.

Following two on-the-spot audits, the Tax Office took the view that the systems should be classified under CN subheading 9021 10 90. Medtronic complied with that assessment and, in its preliminary tax return for May 2016, applied to its supplies the tax rate provided for in Paragraph 12(1) of the UStG.

Medtronic nevertheless brought an action before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) against the preliminary tax return, in which it claimed that the systems in question should be classified under CN subheading 9021 90 90 and that the supply thereof must therefore be taxed at the reduced tax rate, pursuant to Paragraph 12(2)(1) of the UStG. According to Medtronic, the systems are designed to remain permanently in the patient's body, whereas the fracture appliances referred to in CN subheading 9021 10 90 are inserted only temporarily inside the patient's body. Medtronic argues, moreover, that since the spinal fixation systems are not used solely to treat fractures, a classification under CN subheading 9021 90 90 would be more accurate.

Implementing Regulation (EU) No 1214/2014

Commission Implementing Regulation (EU) No 1214/2014 of 11 November 2014 concerning the classification of certain goods in the Combined Nomenclature (OJ 2014 L 329, p. 8), contains, in the annex thereto, a table with three columns, the first containing a description of the goods concerned, the second containing the classification in the CN attributed to the goods and the third concerning the reasons for that classification.

It is apparent from that annex that the goods corresponding to the following description are covered by CN code 9021 10 90:

'A solid, cylindrical, threaded product (so-called 'pangea dual core screw') made of extra hard titanium alloy, of a length of between 20 and 45 mm.

The shank is wholly threaded with a dual core thread containing a transition zone for the core diameter change. It is of a constant outer diameter of 4,0 mm, with a self-tapping profile and a blunt, threaded tip.

The product has a polyaxial (movable) U-shaped, internally threaded head that offers 25° of angulation around its axis allowing its adjustment.

The product has a specialised saddle in locking cap for fixing a rod (presented separately) in its head.
The product corresponds to the ISO/TC 150 standards for implant screws and is presented for use in trauma surgery as a part of a system for posterior stabilisation of the spine. It is installed using specific tools.
At importation, it is not presented in a sterilised packing. The product is marked with a number and therefore traceable throughout production and distribution.'

In the column relating to the reasons for the classification given it is stated, inter alia, that the latter 'is determined by general rules 1 and 6 for the interpretation of the [CN], note 2(b) to Chapter 90 and the wording of CN codes 9021, 9021 10 and 9021 10 90'.

The Tax Office contended, on the contrary, that the supply of spinal fixation systems is subject to the (higher) turnover tax rate set out in Paragraph 12(1) of the UStG. In its view, it is apparent from Implementing Regulation No 1214/2014 that the systems are covered by CN subheading 9021 10 90 because the multiaxial screws that constitute them are similar to the 'pangea dual core screw' which that regulation classifies under that subheading in accordance with note 2(b) to Chapter 90 of the CN.

As the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) expressed its doubts as to the classification of the spinal fixation systems at issue in the main proceedings under the appropriate CN subheading, it decided to stay the proceedings and referred the following question to the Court for a preliminary ruling:

'Is the [CN] to be interpreted as meaning that spinal fixation systems as described in more detail in the order fall under subheading 9021 90 90?'

The CJ made the following considerations

Under the general rules for the interpretation of the CN, for legal purposes, the classification of goods in the subheadings of a heading is to be determined according to the terms of those subheadings and any related subheading, section or chapter notes, with the wording of section, chapter and subchapter titles being considered to be provided for ease of reference only.

According to the Court's settled case law also, the intended use of a product may constitute an objective criterion for classification, provided that it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (judgment of 26 May 2016, *Invamed Group and Others*, C198/15, EU:C:2016:362, paragraph 22 and the case law cited).

Moreover, it must be borne in mind that even though the Explanatory Notes to the HS lack binding force, they are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation. The same is true of the Explanatory Notes to the CN (judgment of 12 June 2016, *Lukoyl Neftohim Burgas*, C330/13, EU:C:2014:1757, paragraph 35 and the case law cited).

According to the wording of CN heading 9021, that heading includes 'orthopaedic appliances ...; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability'.
As is clear from the wording of that heading, the function to be performed by the appliance concerned is decisive for the purpose of determining the subheading under which the appliance is to be classified.

In that regard, the referring court notes that the spinal fixation systems at issue in the main proceedings, as described in paragraph 24 of this judgment, have several functions. They are used for the treatment of bone fractures as well as degenerative disc diseases, spinal stenosis and spinal dislocations or failures in earlier spinal fusions, tumours or scoliosis.

The referring court concludes that, in the light of the various functions they perform, the spinal fixation systems could, a priori, be classified under (i) CN 9021 90 90 as other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, (ii) CN subheading 9021 10 90 as fracture appliances, or (iii) CN subheading 9021 10 10 as orthopaedic appliances.

With regard, in the first place, to CN subheading 9021 10 10, the referring court considers that it is not necessary to examine whether the spinal fixations systems at issue in the main proceedings may be characterised as orthopaedic appliances within the meaning thereof, since, in all likelihood, they correspond to the type of appliances described in CN subheading 9021 90 90.

In that regard, it should however be borne in mind that, as follows from the structure of CN heading 9021 and the wording of CN subheading 9021 90 90, the latter has a residual character compared with the other subheadings at the same level, inasmuch as it covers appliances which do not come within any of the other subheadings of heading 9021.

Therefore, classification under that heading may be envisaged only if the systems at issue in the main proceedings do not come within any of the other subheadings of CN heading 9021 (see, to that effect, judgment of 13 July 2006, *Uroplasty*, C514/04, EU:C:2006:464, paragraph 56).

According to the case law referred to in this judgment, it will therefore be for the referring court to assess, first, whether the systems at issue in the main proceedings may be characterised, inter alia, as orthopaedic appliances within the meaning of CN subheading 9021 10 10. To that end, the referring court will have to take into account note 6 to Chapter 90 of the CN, according to which orthopaedic appliances are appliances for either preventing or correcting bodily deformities or supporting or holding parts of the body following an illness, operation or injury.

In that regard, appliances for the treatment of degenerative disc diseases, spinal stenosis and spinal dislocations or failures in earlier spinal fusions, tumours or scoliosis could come within CN subheading 9021 10 10, subject, however, to verification by the referring court.

In that context, the point should be made that it does not follow from the CN, the Explanatory Notes to the CN or the Explanatory Notes to the HS that the EU legislature intended to exclude from that subheading appliances to be implanted in the human body.

With regard, in the second place, to CN subheading 9021 10 90, it should be recalled that the Explanatory Notes to the HS relating to heading 9021 state that ‘fracture appliances are used either to immobilise injured parts of the body (for extension or protection), or for setting fractures’ and specify that ‘[those appliances] are also used in the treatment of dislocations and other joint injuries.’

In that regard, Medtronic’s argument that the spinal fixation systems at issue in the main proceedings cannot be covered by that subheading since, unlike the fracture appliances mentioned therein, they are designed to remain permanently in the patient’s body, must be rejected from the outset.
Indeed, it does not follow either from the wording of subheading 9021 10 90 or from the Explanatory Notes to the CN relating to heading 9021 that that subheading covers only fracture appliances designed to be inserted temporarily inside the patient’s body.

It follows that fracture appliances cannot be excluded from CN subheading 9021 10 90 merely because they are designed to remain permanently in the human body.

Moreover, the referring court notes that the treatment of fractures is only one of the numerous uses of the spinal fixation systems at issue in the main proceedings and that that use thus cannot be regarded as their principal function, with the result that the systems cannot be classified under CN subheading 9021 10 90 on the basis of an application, by analogy, of note 3 to Section XVI of the CN.

According to that note, which applies to Chapter 90 of the CN by virtue of note 3 to that Chapter, in so far as those systems are capable of falling within several CN subheadings because they perform a number of functions, they are to be classified on the basis of ‘the principal function’ they perform.

It follows, as rightly held by the referring court, that the spinal fixation systems at issue in the main proceedings cannot be classified under CN subheading 9021 10 90 if it is established that they are not intended principally for the treatment of fractures.

In addition, if classification under CN subheading 9021 10 10 were adopted following verification by the referring court in accordance with paragraph 46 of this judgment, it would have to be determined whether those systems are intended principally for orthopaedic use.

The referring court nevertheless asks whether the spinal fixation systems at issue in the main proceedings should in fact be classified under CN subheading 9021 10 90 on the ground that the systems consist partly of multiaxial screws that, according to the Tax Office, are similar to the pangea dual core screws referred to in the annex to Implementing Regulation No 1214/2014, which the Tax Office classifies under that subheading.

It is important to note in that respect that, admittedly, note 2(b) to Chapter 90 of the CN provides that ‘other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind’.

However, even if certain components of the spinal fixation systems at issue in the main proceedings were to correspond to the description of the appliance referred to in the annex to Implementing Regulation No 1214/2014, the systems would still have to be intended principally for use in trauma surgery, which is a matter for verification by the referring court.

Moreover, it should be noted that, while the application by analogy of a classification regulation to products similar to those covered by that regulation facilitates consistent interpretation of the CN and the equal treatment of traders, such an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading (judgment of 26 April 2017, *Stryker EMEA Supply Chain Services*, C51/16, EU:C:2017:298, paragraphs 61 and 62).
It follows that if the referring court were to conclude that the spinal fixation systems at issue in the main proceedings, having regard to their objective characteristics and properties as well as their intended and actual use (see, to that effect, judgments of 4 March 2015, *Oliver Medical*, C547/13, EU:C:2015:139, paragraphs 51 and 52, and of 25 February 2016, *G. E. Security*, C143/15, EU:C:2016:115, paragraph 55), were not intended principally for the treatment of fractures, then Implementing Regulation No 1214/2014 should not be taken into account for the purpose of their classification under the appropriate CN subheading.

In the third place, it is important to note that, if the referring court were to conclude that the spinal fixation systems at issue in the main proceedings do not come within either subheading 9021 10 10 or subheading 9021 10 90, a classification of the systems under residual CN subheading 9021 90 90 would presuppose that the systems are intended not only to be implanted in the body but also to compensate for a defect or disability, which would be a matter for verification by the referring court in the light of the Explanatory Notes to the CN and to the HS relating to heading 9021.

According to the Explanatory Notes to the CN relating to heading 9021, only appliances which actually take over or substitute for the function of the defective or disabled part of the body may be considered to compensate for a defect or disability, whereas appliances which simply alleviate the effects of the defect or disability are not covered by that heading.

Furthermore, it must be noted that, by way of example of appliances intended to compensate for a defect or a disability, the Explanatory Notes to the HS relating to heading 9021 mention speech aids for persons having lost the use of their vocal cords, pacemaker-type appliances, such as pacemakers for stimulating defective heart muscles, electronic aids for the blind and appliances used to support or replace the chemical function of certain organs, such as secretion of insulin.

With regard to spinal fixation systems such as that at issue in the main proceedings, it will be for the referring court, where appropriate, to identify the defective or disabled part of the body as well as the function that those systems are intended to replace.

The CS ruled as follows:

The Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015, must be interpreted as meaning that spinal fixation systems such as those at issue in the main proceedings may not be classified under subheading 9021 90 90 of the Combined Nomenclature if they are covered by another subheading of heading 9021 of the Combined Nomenclature. Whether those systems may be classified under subheading 9021 10 10 or subheading 9021 10 90 of the Combined Nomenclature will depend on the principal function they perform, which is a matter for the referring court to determine by having regard to the objective characteristics and properties of such systems as well as to their intended and actual use.

CJ rules on appeal concerning remission of import duties (*Combaro*)

On 25 July 2018, the CJ issued its judgment in case *Commission v Combaro SA* (C-574/17P). The case deals with an appeal by the Commission where it asks the Court to set aside the judgment of the General Court of 19 July 2017, *Combaro* v *Commission* (T752/14) by which that court annulled Commission Decision C(2014) 4908 final of 16 July 2014, finding that the remission of import duties is not justified in a particular case (REM 05/2013).

The judgment at stake concerns import duties on linen fabrics which were imported into the EU via Germany, between 10 December 1999 and 10 June 2002, by Combaro SA, and whose Latvian preferential origin was not proved.

As a preliminary matter, the CJ noted that Article 239 of the Customs Code (CC) constitutes, in conjunction with Article 905 of the implementing regulation, a general fairness clause intended to cover the exceptional situation in which a declarant might find himself in comparison with other operators engaged in the same business. Such clause entails the remission of import duties where two conditions are met, namely the existence of a special situation and the absence of obvious negligence or deception on the part of the liable person. In the judgment under appeal, the General Court concluded, following the examination of the first part of the single plea in law raised by Combaro, that the Commission had wrongly considered, in the contested decision, that that company was not in a special situation, for the purposes of Article 239 of the CC. Such conclusion was based on the finding that, first, the Commission erroneously considered that it had sufficient information allowing it to assess the situation and, second, that institution had failed to take concrete measures required of it in accordance with its mission of supervision and control of the correct application of the Association Agreement. The General Court considered that the Commission should have further explained the facts of the case and that, if that institution had made full use of its rights and powers, the authenticity or inauthenticity of the certificates at issue could have been established with more certainty. The General Court held that the Commission should have taken concrete measures to verify the authenticity of the movement certificates and that a failure in that regard could constitute a special situation.

However, for the CJ, there is nothing in the judgment under appeal to indicate that the General Court concluded that the replies supplied by the Latvian customs authorities were ambiguous or inconsistent. Therefore, the CJ considered that the findings put forward by the General Court cannot, justify the conclusion reached by that court and, therefore, justify the rejection of the Commission's argument that it had necessarily to adhere to the results of the post-clearance check of the certificates at issue carried out by the Latvian customs authorities.

Therefore, the CJ was of the view that the General Court had erred in its legal characterisation of the facts concerning the existence of a special situation for the purposes of Article 239 of the Customs Code, by concluding that, for the reasons mentioned in paragraph 62 of the present judgment, the Commission could not rely on the clear replies provided by the Latvian customs authorities so as to assess the authenticity of the certificates at issue and that that institution should, on the contrary, have used its rights and powers for that purpose, in spite of those replies. For the CJ, the General Court could not validly conclude, in paragraphs 90 and 91 of the judgment under appeal, that the Commission had wrongly considered that it had sufficient information to allow it to assess the situation and that that institution had failed to take the concrete measures required of it in accordance with its obligation to supervise and monitor the correct application of the Association Agreement. It follows that the conclusions made by the General Court with regard to the well-founded character of the first part of the single plea submitted at first instance by Combaro, which constitute the necessary basis for the operative part of the judgment under appeal, must be rejected.

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