LOYENS & LOEFF

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# EU Tax Alert

- General Court judgment on the Commission's State aid decision on the UK CFC rules (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19)
- EFTA court rules on whether a denial of an interest deduction under Norwegian legislation is contrary to the freedom of establishment (*PRA Group Europe AS v the Norwegian Government*, E-3/21)
- CJ judgment on joint and several liability of indirect customs representative for VAT purposes (*U.I. Srl*, C 714/20)
- EU Commission proposes a debt-equity bias reduction allowance (DEBRA)
- No agreement on the proposed EU Pillar Two Directive during the French presidency

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

Highlights in this edition are:

- General Court judgment on the Commission's State aid decision on the UK CFC rules (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19)
- EFTA court rules on whether a denial of an interest deduction under Norwegian legislation is contrary to the freedom of establishment (*PRA Group Europe AS v the Norwegian Government*, E-3/21)
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## Contents


**Highlights in this edition** **4**

- General Court judgment on the Commission's State aid decision on the UK CFC rules (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19) 4
- EFTA court rules on whether a denial of an interest deduction under Norwegian legislation is contrary to the freedom of establishment (*PRA Group Europe AS v the Norwegian Government*, E-3/21) 4
- CJ judgment on joint and several liability of indirect customs representative for VAT purposes (*U.I. Srl*, C714/20) 5
- EU Commission proposes a debt-equity bias reduction allowance (DEBRA) 6
- No agreement on the proposed EU Pillar Two Directive during the French presidency 6

**Direct Taxation** **6**

- CJ rules on the compatibility of the French system of taxation of participation dividends before 2005 with the Parent-Subsidiary Directive (*Schneider Electric and Others*, C-556/20) 6
- CJ rules on whether German requirements for the reimbursement of withholding taxes paid by non-resident entities on dividends from 'free-float' shares is compatible with the free movement of capital (*ACC Silicones Ltd v Bundeszentralamt für Steuern*, C-572/20) 7

**VAT** **8**

- CJ rules on the qualification of 'city cards' as multi-purpose vouchers (*DSAB Destination Stockholm AB*, C637/20) 8
- CJ judgment on the determination of the recipient of supply (*DuoDecad Kft*, C-596/20) 8
- Opinion of AG Medina regarding VAT consequences of synthetic securitization transactions (*O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A.*, C250/21) 9

**Customs Duties, Excises and other Indirect Taxes** **9**

- CJ rules on payment of interest in case of refunds of amounts levied in breach of EU law (*Gräfendorfer, Reyher and Flexi Montagetechnik*, joined cases C-415/20, C-419/20 and C-427/20) 9
- CJ rules on the determination of the customs value by using the transaction value of identical or similar goods (*FAWKES Kft.*, C-187/21) 10
- CJ rules on the use of national databases for determining the customs value in the context of related parties (*Baltic Master*, C-599/290) 11

**Get in contact** **13**

## Highlights in this edition

### General Court judgment on the Commission's State aid decision on the UK CFC rules (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19)

On 8 June 2022, the General Court delivered its judgment in the case United Kingdom and ITV plc v Commission (T-363/19 and T-456/19). In the case, the Court ruled that an exemption in the controlled foreign company (CFC) rules applicable in the United Kingdom (UK) until 31 December 2018 constitutes State aid.

The UK CFC rules essentially determine the conditions under which profits of a CFC are considered to be artificially diverted from the United Kingdom. These profits are then taxed in the UK. The judgment of the General Court concerned the so-called non-trading finance profits. These non-trading finance profits from a CFC are taxed in the UK (among others) insofar as they arise from activities where the significant people functions are carried out in the UK (UK activities). There are three specific exemptions that fully or partially exempt the taxpayer from a CFC charge on non-trading finance profits, provided (among others) that the relevant loans from which the profits are derived constitute qualifying loans. Hence, non-trading finance profits from qualifying loans may be (partially) exempt from the CFC charge, whereas that exemption cannot be applied to non-trading finance profits from non-qualifying loans.

The General Court followed the European Commission in its conclusion that the group financing exemption scheme constituted State aid, insofar as it applied to non-trading finance profits from qualifying loans. Here, it followed its (standard) approach, which entails the identification of the reference system. After the reference system has been established, it must be assessed whether the measure constitutes a derogation from the reference system and whether such derogation can be justified.

The General Court held that the CFC rules should be qualified as a separate body of tax rules within the general UK corporation tax system. The Court based itself on the objective criteria of the CFC charge, among others the definition for taxable persons, taxable events, tax rates and interaction with other taxes. Therefore, the body of CFC rules in itself constitutes the reference system. The exemption for non-trading finance profits from qualifying loans then constitutes a derogation from the general rule and is considered a benefit. The exemptions are granted irrespective of whether significant people functions have been carried out in the UK. It could not be ruled out that the exemptions also applied if significant people functions were carried out in the UK. Therefore, the exemption could apply to artificially diverted profits. From that perspective, exempting only CFCs non-trading finance profits arising on qualifying loans could lead to a difference in treatment as opposed to CFCs non-trading finance profits from non-qualifying loans. The two situations were also found to be comparable in the light of the purpose of the CFC rules, which is to protect the tax base of the corporation tax in the UK through the taxation of artificially diverted profits.

As regards the justification, the General Court did not agree with the UK that the derogation was justified for reasons of administrative practicability. It was for the UK to show that such reason justified the measure, but it had not shown (sufficient) evidence to substantiate that position. Second and more interesting, the UK argued that it adopted a reasonable approach to comply with the freedom of establishment. More specifically, it referred to the case of *Cadbury Schweppes* (C-196/04), in which case, the CJ considered the UK CFC rules to be (partially) contrary to the freedom of establishment. The General Court held that where the profits are attributable to an entity resident of the UK which was responsible for the significant people functions carried out in connection with the profits, then they are regarded as having been artificially diverted and, therefore, as being taxable in the UK through a CFC charge. For that reason, the General Court considered that this system cannot be regarded as constituting an obstacle to the freedom of establishment. As the imposition of such a charge cannot be regarded as constituting an obstacle to the freedom of establishment, the exemption from that tax cannot be justified to ensure compatibility with the freedom of establishment. Other (more subsidiary) arguments were also dismissed by the General Court.

### EFTA court rules on whether a denial of an interest deduction under Norwegian legislation is contrary to the freedom of establishment (*PRA Group Europe AS v the Norwegian Government*, E-3/21)

On 1 June 2022, the EFTA Court published its decision in the case *PRA Groupe Europe AS* (E-3/21). The case concerns the issue of whether a denial of an interest deduction resulting from the combined application

of the Norwegian limited interest deduction rules and group contribution rules is contrary to the freedom of establishment as provided in the Agreement on the European Economic Area (EEA).

The case at hand involved PRA Group Europe Holding S.à.r.l. (PRA Holding), a company established in Luxembourg which holds all the shares of PRA Group Europe Subholding AS (PRA Subholding), a subsidiary established in Norway. PRA Subholding was partly financed with a loan granted by PRA Holding and a deduction of the interest paid in connection with such loan was claimed by the former subsidiary entity in Norway. As a consequence of this interest deduction being disallowed by the Norwegian tax administration, the PRA group contested this decision, claiming that the interest deduction limitation was in breach of the freedom of establishment of Article 31 of the EEA. This because, if PRA Holding were established in Norway, it would have maximized the maximum tax deduction for the interest at the level of PRA Subholding by benefiting from the Norwegian group contribution rules (which would lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies). The Oslo District Court referred the case to the EFTA Court asking whether such Norwegian scheme is a restriction to the freedom of establishment within the meaning of Article 31 EEA, read in conjunction with Article 34 EEA.

The EFTA court first stated that the maximum deduction (which corresponds to 30% of EBITDA) rule applies to all companies and that the Norwegian group contribution rules may be used to lessen or remove the impact of this deduction limitation. The court then noted that a Norwegian tax resident company belonging to a group of companies established in another EEA State will not be able to avoid or lessen the impact of the interest deduction limitation in the same way that Norwegian resident companies belonging to a Norwegian group would. According to the EFTA court, this restricts companies' exercise of the freedom of establishment. Subsequently, and in line with the *Lexel* case C-484/19 (please see EUTA 187), the EFTA court ruled that a company established in one EEA State paying interest to another group company in another EEA State is no different from a situation where the recipient is established in the same EEA State. The fact that no actual group contribution was made in this case does not alter this conclusion. Therefore, the Court found that the Norwegian legislation at issue constitutes a restriction on the freedom of establishment.

With respect to potential justifications for this restriction, the EFTA Court first ruled that the difference in treatment existent in the case, does not appear justified by the need to safeguard the allocation of the power to impose taxes between EEA States. The Court held this based on the understanding that, if an EEA State grants a deduction in a domestic situation (and renounces part of its taxation rights), that EEA State cannot argue that the same taxing right is important in the cross-border situation in an attempt to limit equal treatment. Finally, in relation to whether the restriction can be justified by the prevention of tax avoidance, the EFTA Court clarified that a restriction may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, the Court noted that, if the Norwegian legislation (which is for the referring court to determine) does not provide the taxpayer with the opportunity to demonstrate that the transaction was arm's length, it goes beyond what is necessary to pursue that objective.

## CJ judgment on joint and several liability of indirect customs representative for VAT purposes (*U.I. Srl*, C714/20)

On 12 May 2022, the CJ delivered its judgment in the case *U.I. Srl* (C-714/20) about the possibility for EU Member States to hold indirect customs representative jointly and severally liable for import VAT.

U.I. acted as an indirect customs representative that submitted customs declarations in its own name, but on behalf of trading companies. U.I. was held jointly and severally liable by the Italian Tax Authorities for customs duties and import VAT in its capacity as indirect customs representative for a trading company that had been declared bankrupt.

The CJ ruled first that, based on the provisions of the Union Customs Code, the indirect customs representative is liable only for the customs duties payable on the goods which he has declared to customs, and not also for the VAT on imports of those same goods. Second, the CJ ruled that the indirect customs representative also cannot be held jointly and severally liable for import VAT if the national provisions do not expressly and unequivocally designate or recognize him as the person liable for payment of VAT.

## EU Commission proposes a debt-equity bias reduction allowance (DEBRA)

On 11 May, the EU Commission published a Directive proposal on the debt-equity bias reduction allowance (DEBRA). The proposed Directive entails both a notional deduction on growth in equity and an additional interest deduction limitation for corporate income tax (CIT) purposes. The DEBRA proposal applies to all taxpayers, which are subject to CIT in one or more Member States, except for certain financial undertakings. The proposed date of entry into effect of the DEBRA Directive is 1 January 2024. For a more detailed explanation of the proposal, please see our news article.

## No agreement on the proposed EU Pillar Two Directive during the French presidency

Due to Hungary's reservation, the ECOFIN failed to reach a unanimous agreement on the proposed EU Directive implementing Pillar Two during the six months French presidency of the Council of the EU, which lasted from 1 January to 30 June 2022.

It should be recalled that, both the original and the amended version of the proposed Pillar Two Directive were first opposed by several Member States (e.g., Estonia, Malta, Poland and Sweden). Following the March ECOFIN meeting, on April 2022 all but one of the aforementioned Member States agreed on a revised compromise text of such Directive. The sole remaining opposition to the initiative came from Poland, which asked for a legally binding link on the implementation of both Pillar One and Two. After failing to reach a political agreement during the April and May ECOFIN meetings, Poland finally lifted its reservation and accepted the Pillar Two Directive (which now includes a closer link with Pillar One) at the final ECOFIN meeting on 17 June 2022.

However, in that same ECOFIN meeting, Hungary changed its position and decided not to support the adoption of the Directive. To sustain its opposition, it expressed concerns on: (i) implementing minimum taxation at a time where the EU economy faces serious challenges due to the war in Ukraine, (ii) the negotiations on Pillar One; and (iii) the text of the proposed directive itself (i.e., domestic concerns, the significant work required before practical application of the rules, etc.). Because of these issues, Hungary asked for further efforts to find a generally approved solution.

Following the Hungarian veto, ECOFIN President Bruno Le Maire announced that the French presidency was still determined to reach an agreement in the end of June and called on Hungary to drop their reservations. Among other things, Le Maire brought into the discussion a call for ending unanimity voting in the Council of the European Union.

The task of convincing Hungary and, in this way, achieving unanimous support to Pillar Two Directive in the EU is now in the hands of the Czech Republic, which holds the Presidency of the Council of the EU until December 2022. Since Pillar Two is not on the agenda of the ECOFIN meeting of 12 July and the September meeting is only an informal gathering of EU finance ministers (which means no decisions will be made), the next meeting in which a decision could be made about this proposal is the one to be held in October. However, an EU agreement at the ambassadors' level could also be reached before such date.

# Direct Taxation

## CJ rules on the compatibility of the French system of taxation of participation dividends before 2005 with the Parent-Subsidiary Directive (*Schneider Electric and Others*, C-556/20)

On 12 May 2022, the CJ published its judgment in the case *Schneider Electric and Others* (C-566/20) which concerns the compatibility of the French system of taxation of participation dividends before 2005 with the Parent-Subsidiary Directive (90/435) (PSD). Up to and including 2004, France provided for a system of tax credits and advance payments for the taxation of dividends. Under this system, which aimed to address economic double taxation, recipients of dividends paid by French companies were entitled to a tax credit equal to 50% of the amounts actually paid by such companies. In cases when the underlying profits that led to the dividend distribution were not subjected to corporate tax at the general rate, the distributing companies were required to make an 'advance payment' of the corporate income tax in an amount equal to the tax credit granted to the shareholders and linked to the dividend distribution.

In the present case, Schneider Electric and others brought an action before the French Council of State seeking the annulment of an administrative decision which applied the aforementioned system to a re-distribution

of dividends made by the former (parent) companies to their shareholders. The amount of dividends re-distributed included dividends received by Schneider Electric and others from their non-EU resident subsidiaries. The question referred to the CJ in the present case concerns whether the aforementioned French system is precluded by Article 4(1) of the PSD and whether such system falls within the provisions referred to in Article 7(2) of that directive. AG Kokott published her Opinion on 14 October 2021.

Making an express reference to the *Accor* case (C-310/09), the CJ ruled that Article 4(1) PSD must be interpreted as precluding such national legislation as the French system described above, as long as the sums due as 'advance payment' exceed the ceiling of 5% laid down in Article 4(2) of such directive. The main arguments that led to this conclusion are based on the aforementioned precedent and refer to Court understanding that: (i) the 'advance payments' had the effect of subjecting the profits received by a parent company from its non-resident EU subsidiaries to a charge which exceeded the ceiling of 5% laid down in Article 4, paragraph 2 of PSD; (ii) The conclusion is not affected by the fact that, the parent companies re-distributing the dividends are entitled - under Articles 49 TFEU and 63 TFEU as interpreted by the Court in *Accor* - to a tax credit conferring on them the same tax treatment as that of a company receiving dividends from a French subsidiary; (iii) No legislative/regulatory measure has been taken to specify the conditions for the granting of such a tax credit nor does the referring court establish the regime applied for the calculation of that tax claim by the national courts; (iv) Judicial actions aimed at remedying the incompatibility of the French legislation with the PSD cannot mitigate the effects of that legislation which are incompatible with the Directive, as this would imply creating an additional national requirement (not included in the PSD) to benefit from the tax credit; (v) the consideration of the tax credit leads, in essence, to the application of a method of imputation to dividends received from non-resident EU subsidiaries, which differs from the exemption method chosen by the French legislature under the first paragraph of Article 4(1) of the PSD.

Finally, the Court ruled that the French legislation does not fall within the provisions referred to in Article 7(2) of the PSD, as it cannot be regarded as compatible with the objective of the directive, even when the 'economic double taxation' effect it creates may possibly be mitigated.

## CJ rules on whether German requirements for the reimbursement of withholding taxes paid by non-resident entities on dividends from 'free-float' shares is compatible with the free movement of capital (*ACC Silicones Ltd v Bundeszentralamt für Steuern*, C-572/20)

On 16 June 2022, the CJ delivered its judgment in the case *ACC Silicones Ltd v Bundeszentralamt für Steuern* (C-572/20). The case addresses the issue of whether German legislation imposing more severe conditions to non-resident entities for the purposes of obtaining a reimbursement on tax paid on dividends from 'free-float' shares is against the free movement of capital (Art. 63 TFEU)

Under German legislation, the withholding tax levied on dividends distributions made to entities resident in Germany can be set-off in full against the corporate income tax payable by that German entity and, where appropriate, the remainder can be reimbursed. By contrast, in the case of non-German shareholders, the reimbursement of the withholding tax on income from capital is subject to the condition that such tax cannot be: (i) set off or its set-off be carried forward in favour of that company or in favour of its direct or indirect shareholders, nor (ii) deducted as an operating cost or work-related outgoings in favour of that company. In this later case, no-German entity must provide proof of compliance with these conditions by way of a certificate from the tax authorities of their country of residence.

The case at hand involved AAC Silicones Ltd that was established in the United Kingdom which held 5.26% of the share capital in Ambratec established in Germany. Ambratec was fully owned by another company in the United Kingdom that was listed on the stock exchange. Ambratec distributed dividends to ACC Silicones Ltd from which tax at source on income from capital was levied in Germany. Among other things, ACC Silicones requested reimbursement of this tax based on the free movement of capital, which was refused by the German tax authorities because not all conditions for reimbursement were satisfied. The referring court took the view that ACC Silicones Ltd did not prove, by way of a certificate issued by the tax authorities, that the tax may not be set-off or deducted by ACC Silicones Ltd or by its direct or indirect shareholders. According to the referring court, it is however impossible for Ambratec to meet this condition since it is not verifiable how the tax withheld by Germany was treated at the level of its shareholder quoted on the

stock exchange. The referring court, therefore, asked the CJ whether the German legislation is precluded by the free movement of capital.

The CJ first ruled that national legislation that subjects the reimbursement of withholding tax on dividends paid to non-resident companies to additional conditions as those laid down for resident companies has the effect of making it more difficult to exercise the right of reimbursement for non-resident companies whereby dividends paid to them are subject to less favourable tax treatment. Subsequently, the CJ noted that such a difference is only permissible if it relates to objectively non- comparable situations or if it is justified by overriding reasons in the public interest.

The CJ then stated that, in order to assess the comparability of a cross-border situation with an internal situation, attention should be paid to the aim pursued by the national provision at issue which is the prevention of double taxation. Given that both resident and non-resident companies are in a comparable situation as regards the risks of economic double taxation or of a series of charges to tax on the dividends they received, they should be subject to equal treatment, according to the CJ. Pursuant to the Court, the existent difference in treatment cannot be neutralized because, for non-resident companies, the possibility to set-off the tax withheld is always uncertain, whereas resident companies benefit from the immediate set-off and, where appropriate, reimbursement of the excess withholding tax. Therefore, the Court found that the German legislation constitutes a restriction on the free movement of capital.

When assessing potential justifications, the CJ first rules that the balanced allocation of power to tax cannot justify the restrictions because, despite the fact that Germany chose to exercise its powers of taxation in respect of all dividends from ‘free-float’ shares, it also chose to neutralize in full the burden of the withholding tax on dividends paid (only) to resident companies. The Court further found that the restriction is neither justified by the need to avoid withholding tax being taken into account twice. This because, in the case of dividends paid to resident companies, the possibility of withholding tax taken into account twice cannot be ruled out and, thus, the measure cannot be considered appropriate for securing the attainment of the objective pursued.

# VAT

## CJ rules on the qualification of ‘city cards’ as multi-purpose vouchers (*DSAB Destination Stockholm AB*, C637/20)

On 28 April 2022, the CJ delivered its judgment in the case *DSAB Destination Stockholm AB* (C 637/20), which concerns the issue of whether ‘city cards’ qualify as multi-purpose vouchers for VAT purposes.

DSAB issues city cards to visitors and to tourists visiting Stockholm. That card gives cardholders the right to be admitted to around 60 attractions, such as sights and museums, for a limited period of time and up to a certain value. DSAB argued that the city card should be considered a multi-purpose voucher, as various service providers are obliged to accept the card as a means of payment for a wide range of services with different VAT treatments, as a result of which, no VAT was due upon issuance thereof to the tourists. The Swedish tax authorities disagreed that the city card should be considered a voucher, as the value limit is very high in relation to the very short validity period, and argued that VAT was due by DSAB upon issuance of the city cards. For VAT purposes, a voucher is an instrument that entails an obligation for a supplier to accept it as consideration or part consideration for a supply of goods or services and which contains information about the goods or services for which the voucher can be used as consideration, or alternatively, information about the potential suppliers.

In its judgment, the CJ ruled that the city cards should be considered ‘vouchers’ for EU VAT purposes. As the nature of the supplied services is unclear at the time of purchase of the cards they should, more specifically, be classified as multi-purpose vouchers (and not as single-purpose vouchers). That is also the case if all services covered by such a card cannot be used within a given time by the average buyer of the city cards. The CJ therefore ruled that the transfer of the vouchers is not subject to VAT but rather that VAT is levied upon redemption thereof by the tourists.

## CJ judgment on the determination of the recipient of supply (*DuoDecad Kft*, C-596/20)

On 16 June 2022, the judgment of the CJ was published in the case *DuoDecad Kft* (C-596/20) about the determination of the recipient of the supply in case of potential abuse.

DuoDecad performed IT support services to Lalib for a total amount of about EUR 10 million. Lalib was established in Portugal and provided entertainment services by electronic means. After an audit, the Hungarian Tax Authorities established that DuoDecad had in reality performed its services to a Hungarian company called WebMindLicenses ('WML') and not to Lalib. The Hungarian Tax Authorities subsequently issued significant VAT assessments to DuoDecad (including penalties and interest). The Hungarian referring court raised a wide range of questions to the CJ in relation to determining the true supplies of the services concerned.

The CJ ultimately ruled that it had no jurisdiction to answer the questions referred by the national court. According to the CJ, the national court had failed to describe why previous CJ case law is insufficient to determine whether it is WML or Lalib that must be regarded as the actual supplier of the entertainment services at issue in the main proceedings. According to the CJ, it appeared as if the national court was in fact asking the CJ itself to determine which party should be considered the true supplier.

### Opinion of AG Medina regarding VAT consequences of synthetic securitization transactions (*O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A.*, C250/21)

On 12 May 2022, AG Medina of the CJ delivered her Opinion in the case *O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A.* (C 250/21). This case concerns the VAT consequences of the procurement of loan receivables by an investment fund from various bank institutions under so-called 'sub-participation contracts'.

The investment fund paid to bank institutions an upfront (discounted) amount in return for obtaining the net proceeds of the receivables of the loans granted to debtors. These securitization transactions have a two-fold economic purpose, which is the funding of the original loans by the investment fund and the transfer of credit risk in respect thereof from the bank to the investment fund.

The procurement of the receivables by the investment fund constitutes a service for VAT purposes. The remuneration for this service is typically equal to the face value of the loan receivables and the discounted payment made by the investment fund to the bank. This case concerns the question whether the service rendered by the investment fund is VAT exempt under the exemption for the granting of credit. The investment fund argued that this is indeed the case because the services provided under the sub-participation agreement ensure liquidity to the bank institutions.

The AG stated that the nature of the transaction concerns the provision of liquidity and protection against credit risk associated with exposure to the underlying loans and that these elements together constitute one single indivisible service for VAT purposes. The VAT exemption for credit granting services applied if capital is made available against payment of (interest) remuneration. The AG considered that the loan funding may be considered as granting of credit, but that this is not the case for assuming the risk in the event of a default by the debtor. Because both aspects constitute one single invisible service for VAT purposes, the AG argued that the VAT exemption for granting and negotiating credit of Article 135(1)(b) VAT Directive should not be applicable in connection with the procurement of the loan receivables by the investment fund.

The AG did remark that the exemption for transaction in shares and other securities might be applicable to (part of) the activities, but that this aspect was not part of the questions raised by the national court and therefore, was not subject to discussion in the proceedings.

## Customs Duties, Excises and other Indirect Taxes

### CJ rules on payment of interest in case of refunds of amounts levied in breach of EU law (*Gräfendorfer, Reyher and Flexi Montagetechnik*, joined cases C-415/20, C-419/20 and C-427/20)

On 28 April 2022, the CJ delivered its judgment in joined cases *Gräfendorfer, Reyher and Flexi Montagetechnik* (C-415/20, C-419/20 and C-427/20), which concern the interpretation of the principles of EU law relating to the repayment of duties levied by Member States in breach of EU law and to the payment of the corresponding interest.

This case concerns three German companies that are active in Europe in the export or import of products. Although the facts differ per case, in all three cases the companies did not agree with the levy of a certain duty and requested repayment, including the payment of interest.

In the *Gräfendorfer* case, the German authorities incorrectly applied EU law, based on a misinterpretation of EU law, when they refused to grant export refunds and imposed a financial penalty. In the *Reyher* and *Flexi Montagetechnik* cases, the German authorities incorrectly applied EU law, based on an error of law or an error in the assessment of the facts, when they imposed, respectively, anti-dumping and import duties.

The companies were repaid the duties which were incorrectly levied by the German authorities in breach of EU law but were denied the payment of interest on those amounts. This is the main dispute of the cases in question.

Based on settled EU case law, a person has the right to obtain not only the repayment of the sum of money levied although not due, but also the payment of interest intended to compensate for the unavailability of that money. However, this case law concerned situations where a national authority imposed the payment of duties based on an EU act which proved to be invalid.

The referring courts, therefore, wondered whether the right to obtain the payment of interest also applies when the payment of duties has been refused or imposed by a national authority on the basis either of an incorrect interpretation of EU law or of an incorrect application of that law, as had occurred in the present cases.

The CJ stated that the rights to repayment and to the payment of interest which rights persons derive from EU law are the expression of a general principle, the application of which is not limited to certain breaches of EU law or excluded where there are other breaches. Thus, they may also be relied on, where payment of duties is made based on national legislation contrary to EU law provisions or it is found that a national authority has misapplied, in the light of EU law, an EU act or national legislation implementing or transposing such an act when it imposed the payment of a tax on that person.

Noteworthy is that the CJ stated that legislation which provides interest to be only due if proceedings seeking repayment have been brought, is in principle allowed, provided that this does not have the effect of making the exercise of the rights which persons derive from EU law excessively difficult.

## CJ rules on the determination of the customs value by using the transaction value of identical or similar goods (*FAWKES Kft.*, C-187/21)

On June 9, 2022, the CJ delivered its judgment in the case *FAWKES Kft.* (C-187/21), which concerned the use of Articles 30(2) (a) and (b) of the Community Customs Code ('CCC') in the determination of the customs value, based on the transaction value of identical or similar goods.

After having rejected the transaction value as customs value used by FAWKES upon importation into the European Union (EU) of textile products originating in China, the Hungarian customs authorities determined the customs value based on Article 30(2) (a) and (b) CCC by using information from a national database covering a period of 90 days, 45 days before and 45 days after customs clearance.

According to FAWKES, the authorities should have established the customs value determined based on Article 30(2) (a) and (b) CCC by consulting the databases managed by the EU, taken account of the transaction values relating to other imports by them and taken account of a relevant period of more than 90 days.

In this respect, the CJ considered that in view of the obligation imposed on them to exercise due care when implementing Article 30(2) (a) and (b) CCC, customs authorities are required to consult all the information, sources and databases available to them to establish the customs value in the manner that is most accurate and closest to the actual value (see to that effect, judgments of 9 November 2017, C-46/16 *LS Customs Services*, EU:C:2017:839, paragraph 56, and of 20 June 2019, C-1/18 *Oribalt Rīga*, EU:C:2019:519, paragraph 27). Taking this into consideration, according to the CJ, the customs authority of a Member State may confine itself to using information contained in the national database which it compiles and manages, without that customs authority being required, where the information is sufficient for that purpose, to access information held by the customs authorities of other Member States or by the EU services and institutions, without prejudice, if that is not the case, to the possibility for that customs authority to make a request to those authorities or to those services and institutions in order to obtain additional data for the purposes of that determination.

Also, the concept of goods exported 'at or about the same time' as the goods being valued, must be interpreted as meaning that, when determining the customs value, the customs authority of a Member State may confine itself to using data relating to transaction values covering a period of 90 days, including 45 days before and 45 days after the customs clearance of the goods being valued, provided that the transactions relating to exports, into the European Union, of goods which are identical or similar to the goods being valued over that period enable it to determine the customs value of those goods in accordance with that provision.

Finally, the customs authority of a Member State may exclude transaction values relating to other transactions performed by the applicant for customs clearance, when determining the customs value, even if those values have not been challenged either by that customs authority or by the customs authorities of other Member States, provided that these transaction values are first called into question in accordance with applicable customs legislation and for the transaction values relating to imports into other Member States, the customs authority substantiates its grounds for exclusion.

## CJ rules on the use of national databases for determining the customs value in the context of related parties (*Baltic Master*, C-599/290)

On 9 June 2022, the CJ delivered its judgment in the *Baltic Master* case (C-599/20), which concerns the use of the reasonable means method for customs valuation purposes when parties may – de facto – be related.

Between 2009 and 2012, Baltic Master imported into Lithuania various quantities of goods originating from Malaysia, which it had purchased from Gus Group ('the seller'). In the customs declarations, those goods were presented as 'parts of air-conditioning machines'. Those declarations referred to only one TARIC code, together with the total weight of those goods in kilograms. In those declarations, Baltic Master indicated as the customs value the transaction value of those goods, that is to say, the price indicated on their purchase invoices.

Lithuanian Customs, however, were of the view that the circumstances surrounding the conclusion of transactions were, on the basis of objective evidence, characteristic and not of the performance of economic activities under normal conditions. For example, cases were identified in which Baltic Master's employees acted on behalf of the seller under an authorisation and used its corporate stamp.

Subsequently, the transaction should be considered as one taking place between related persons and the transaction value should not be applied, as this would not reflect the real economic value. The customs value should be determined with the data available in the national authorities' customs information system because the customs value could not be determined by the other valuation methods, as, among others, too limited information was available.

In appeal, the referring court brought two questions before the CJ. The first question concerned interpreting when parties are related, and the second question was whether the customs value can be determined based on the information provided in a national database with regard to the customs value of goods with just the same origin and which are ascribed to the same TARIC code.

The CJ considered that, in principle, the transaction value is used to determine the customs value of imported goods. According to the Community Customs Code (CCC), the transaction value of the goods cannot, however, be used for determining the customs value where the buyer and seller are related and the transaction value is not acceptable for the purposes of determining the customs value.

Parties may be regarded as being related if they are legally recognized partners in business or when one of them directly or indirectly controls the other or both are directly or indirectly controlled by a third person.

In this respect, the CJ ruled that the buyer and the seller may not be deemed to be related in a situation in which no documents exist to prove such a relationship, but the buyer and seller may be deemed to be related if, substantiated by objective elements, it can be demonstrated that one of the parties is de facto in control of the other, or both are controlled by a third party. This is for the referring court to decide.

With regard to the determination of the customs value, the general rule should be followed. First, the customs value needs to be determined with the transaction value, as mentioned above. If the transaction value method cannot be applied, alternative methods, such as the customs value of identical goods, should be applied. In the case, however, the customs value still cannot be determined

according to these methods, the means that are chosen should be based on the available data, need to be reasonable and need to be in accordance with the relevant legal framework.

The CJ confirmed that the CCC must be interpreted as not prohibiting the authorities from using the national databases containing the customs value of goods which have the same origin and which are ascribed under the same TARIC code to determine the customs value (i.e., based on reasonable means), in the case sufficiently accurate or reliable information is not provided.

## Get in contact

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