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LAW & TAX

EU **Tax Law** Highlights of 2021

In the course of 2021 there were several developments in EU tax law. This annual edition of EU Tax Alert provides an overview of those developments.

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State Aid/WTO

Brexit & State Aid: The EU-UK Trade and Cooperation Agreement

The degree to which the UK would be subject to any kind of State aid-like control was one of the stumbling blocks in the negotiations that led to the EU-UK Trade and Cooperation Agreement in December 2020.

Even though some limitations remain as to the provision of State aid-like subsidies that affect trade between the EU and the UK, tax measures based on UK Acts of Parliament seem to be protected against any claims of recovery under the new Agreement. It will most likely be up to competitors to challenge UK tax incentives received by others in UK courts. While the new rules on subsidies may be used to get rid of certain tax schemes in the future, in the tax domain retroactive effect will be restricted to those benefits that did not arise directly from UK Acts of Parliament.

The latter might happen in the case of incorrect implementation or application in an individual case. Possibilities for the EU to invoke an arbitration panel exclude the panel from interfering with national decisions on individual subsidies or to check upon full and effective recovery, where called for under the new agreement.

The regime thus created will most likely mean that as far as tax subsidies are concerned that find their basis in Acts of Parliament, traditional trade countermeasures will be the only sanctions that might remain for the EU itself.

Although the Agreement is already provisionally in force, it is still being scrutinized by the European Parliament which needs to grant its consent before it can be ratified on behalf of the EU.

General Court dismisses case against aviation tax deferrals in France (*Ryanair*)

In 2020, Ryanair challenged various decisions from the European Commission approving various types of State aid to competing airline companies. On 17 February 2021, the General Court gave one of its first decisions, which concerned a deferral of aviation taxes in France,

Ryanair's principal argument was that it was being discriminated against as COVID-19 induced deferrals of aviation taxes required a principal place of business in France. Its main plea was that this resulted in discrimination on ground of nationality in violation of Article 18 TFEU and an infringement of the freedom of services.

Under EU aviation regulations liberalizing the market, each EU-based airline can only have one principal place of business. The General Court had to consider whether a difference in treatment would be permitted by Article 107(2)(b) TFEU, which requires the Commission to approve of aid aimed at addressing exceptional circumstances. The Court found that the condition allowed French authorities to monitor the financial situation of the recipients and established a link between the damage caused by travel restrictions imposed by French authorities and the lockdown. The Court also held that, in light of limited resources, aiding those airlines most severely affected by those French measures was a proportional restriction. Ryanair only generated about 8% of its business in, to and from France compared to, for instance, 99% by Air France.

The Court also found that there were sufficient safeguards against overcompensation, should the benefit from deferring aviation taxes exceed the actual damage caused by COVID-19. Hence, the aid scheme at issue satisfied the requirements of the derogation included in Article 107(2)(b) TFEU and the conditions were deemed necessary for that purpose. This finding is now being contested at CJ level; Ryanair filed an appeal in April 2021.

CJ overturns General Court judgment in the Spanish football cases (*FC Barcelona*)

On 4 March 2021, the CJ set aside a General Court judgment overturning the Commission's decision in the Spanish football cases.

Upon the introduction of a corporate tax regime for professional Spanish sport clubs, four clubs (FC Barcelona, Athletic Club Bilbao, Atlético Osusana and Real Madrid) were allowed to remain in the regime for non-profit legal persons, which had enjoyed a lower special income tax rate until 2016. The General Court held that the Commission had failed to prove the presence of an advantage, as non-profit persons also enjoyed less favourable deduction rates for reinvestments of extraordinary profits.

The CJ pointed out that the reduced tax rate as such benefited each of the four football clubs for an indefinite period of time and to an unlimited amount, without any further implementing measures being needed. As a result, the Commission could indeed find this to be an aid scheme, notwithstanding the possibility that upon recovery the actual benefit per club might be reduced by certain disadvantages that accompany the non-profit regime. As the Spanish regime had not been notified, FC Barcelona, who separately appealed the Commission's decision next to Spain, could not invoke the protection of legitimate expectations.

CJ finds Belgian Excess Profit Rulings to constitute tax scheme

On 16 September 2021, the CJ decided to set aside the General Court's judgment that effectively forced the Commission to start investigating each Belgian Excess Profit Ruling separately. (See C-337/19P, *European Commission v Belgium and Magnetrol*.) The CJ found that the European Commission met the standard to find that the Belgian legal framework for Excess Profit Rulings as such qualified as a tax scheme, which could be ruled on as a whole. While in the meantime, the European Commission has opened 39 individual investigations, it had not closed those investigations, awaiting the outcome of this judgment.

As a result, the General Court will now have to address the material aspects of the case and determine whether the Belgian Excess Profit Ruling regime as such qualified as unlawful State aid and, if so, to uphold the Commission's 2016 recovery decision for the entire scheme. It would still be up to Belgium to calculate the benefit in each individual case (if any) following the Commission's instructions included in its decision, which has already taken place as the pending proceedings did not affect its duty to recover in the meantime.

Commission takes UK to court on Gibraltar exemption for passive interests and royalties

In March 2021, the European Commission decided to take the UK to court as it had failed to recover illegal State aid that arose from a Gibraltar tax exemption for passive interests and royalties from two benefitting companies. As the recovery decision dates from 2018, it is pre-Brexit. In line with the Withdrawal Agreement, the failure to implement the decision in time arose before the end of 2020, hence bestowing the CJ competence to rule on the matter. The two companies involved already have appeals pending, one with the General Court contesting the recovery decision as such (without requesting an interim order to suspend recovery) and the other with a domestic court. The Gibraltar court decided to refer the matter to the CJ and to stay the recovery order, as the company involved might be entitled to relief of taxes already paid in the US on said royalties, which the Commission rejected.

While the CJ can deal with a failure to recover directly, especially as in the first case, the appeal has no suspensory effect (without filing for an interim order by the Union's Courts), it is questionable whether in the second case, the Member State is to blame as the national courts can decide, in rather extreme cases where domestic law is clearly misapplied, to provide interim relief next to filing an immediate request for a preliminary ruling by the CJ.

Regional deviation from a national levy of beverage bottle deposits and not imposing fines leads to serious difficulties

On 9 June 2021, the General Court annulled a 2018 Commission decision declaring a German exemption of a beverage bottle deposit not to be State aid (Case T-47/19).

Some beverage border shops in Germany were allowed by local (State) authorities not to levy a deposit on bottles sold to Danish clients on the condition that they would sign an export declaration stating that bottles would be consumed outside of Germany. The General Court held that the non-levying of the deposit did amount to State aid, as this was a federal levy and the exemption that was locally created did not seem to apply throughout the whole of Germany. The Commission could only confirm that it applied in two German border States and left whether others tolerated it as well in the middle.

More importantly the General Court held that not imposing a fine may potentially lead to State aid as well. The Court held that the decision not to impose a fine did not rely on the existence of uncertainty with regard to the applicable federal law, but it was based on an interpretation by local (State) authorities not to apply the levy. So, while the General Court leaves room not to impose a fine in the case of real uncertainty, it does not leave room not to impose a levy because of deviating regional administrative policy where the domestic federal law was clear and unambiguous and had a very wide scope. (The German federal law did follow the lead of the European Packaging Directive, which also did not provide for a border shop exemption, but this does not seem to have played a role as such.) In general, this case might play a future role where local (tax) authorities apply an in itself consistent policy which deviates from national law that is not followed by other local authorities responsible for carrying out such law.

The General Court did stress that the exemption seemed to be based on protecting employment and economic activity in border shops and had nothing to do with reasons inherent to the environmental protection objective of the legislation. The Commission, therefore, should have opened a formal investigation as serious difficulties existed.

General Court opening decision in NIKE investigation stands

Nike and Converce filed an appeal with the General Court to have the Commission's decision to open a formal state aid investigations into some of their rulings annulled. On 14 July 2021 (case T-648/19), the General Court held that there was sufficient reason for the Commission to open a formal investigation to gather more information to address certain doubts it had. The Court also underlined that NIKE's claim of being treated unfairly as being singled out from a larger group of ruling recipients was not relevant, as the Commission has discretion to select the cases it pursues regardless of whether a body of 98 advance pricing agreements (APAs) issues by the tax authorities constituted an aid scheme as such, as NIKE argued.

The General Court of the CJ confirms that the aid granted by Austria to Austrian Airlines is comparable to the internal market (*Austrian Airlines*)

On 14 July 2021, the General Court of the CJ dismissed the action brought by Ryanair and Laudamotion and upheld the Commission decision that the State aid granted by Austria to an Austrian group company of Ryanair constituted State aid that is compatible with the internal market (Case T-677/20).

Background of the case
An Austrian company of the Lufthansa group received aid in the form of a subordinated loan convertible into a subsidy. This aid was intended to compensate the company for the damages resulting from the COVID-19 pandemic. This aid was notified by Austria in June 2020.

On 6 July 2020 the Commission decided that the aid granted constituted State aid that is compatible with the internal market based on Article 107(2)(b) TFEU. Ryanair and Laudamotion brought an action for the annulment of the decision based on the following arguments: (i) the Commission had failed to examine possible aid to or from Lufthansa, (ii) infringement of the principles of non-discrimination, free provision of services and freedom of establishment, (iii) misapplication of Article 107(2)(b) TFEU and a manifest error of assessment, (iv) that the Commission should have initiated the formal investigation procedure, and (v) infringement of the duty to state reasons.

The General Court's reasoning

The failed review of possible aid to or from Lufthansa
First, Ryanair and Laudamotion claimed that the Commission had failed to verify whether the aid at issue also benefits 'Lufthansa'. If that were the case, the measure at issue would be incompatible within the meaning of Article 107(2)(b) TFEU since it would then no longer cover the costs related to the damage suffered by the Austrian company. The aid could then be used for purposes other than its original objective. Subsequently, it is stated that the Commission had failed to take account of all the aid granted to the Lufthansa group and therefore, had failed to assess whether additional aid could overcompensate the Austrian company for the damage which the aid at issue was intended to remedy.

The General Court stated that in the *Lufthansa* decision of 25 June 2020 (SA.57153 (2020/N)), which constitutes a contextual factor in the present case, the Commission had already considered all the aid measures granted to the airlines of the Lufthansa group, including the Austrian company, and the relationship between these measures. In this decision all the additional aid granted or proposed in favour of airlines in the group had been considered to be limited to the minimum necessary and the risk of overcompensation was ruled out. Furthermore, since all the aid measures put in place a mechanism for deductions, under which the aid granted by one Member State to the entire Lufthansa group is reduced by the aid granted by other Member States to a particular company in that group, the overall amount received by that group remains the same. Finally, the General court concluded that there was no real risk that the aid at issue granted to the Austrian company could also benefit other airlines in the Lufthansa group.

Infringement of the principles of non-discrimination, free provision of services and freedom of establishment
Ryanair and Laudamotion claim that the Commission had infringed the principle of non-discrimination and the

principle of free provision of services and the freedom of establishment on the ground that the aid granted only benefits the Austrian company.

The General Court, however, ruled that in so far the aid may amount to discrimination, it was justified. This because the difference in treatment is appropriate for the purpose of remedying the damage suffered because of the COVID-19 pandemic and does not go beyond what is necessary to achieve that objective. With respect to the principle of freedom to provide services the General Court noted that this freedom in the field of transport is governed by a special legal regime whereby Article 56 TFEU does not apply as such to the air transport sector. The EU legislature adopted Regulation No 1008/2008 on common rules for the operation of air services the purpose of which is to define the conditions for applying in the air transport sector the principle of free provision of services. Subsequently, the General Court stated that Ryanair and Laudamotion had not demonstrated how the exclusive nature of the measure at issue is such as to discourage them from establishing themselves in Austria or from providing services from and to that country.

Remaining arguments
With respect to the remaining arguments of Ryanair and Laudamotion, the General Court ruled that the Commission did not make a mistake in its assessment of the proportionality of the aid and in particular, in calculating the amount of damages to be compensated and the amount of aid. The argument that the Commission should have started the formal investigation procedure was not examined as the General Court ruled that this argument no longer has to be investigated because the merits of the first three arguments have already been examined. Finally, the General Court ruled that the Commission decision contained a sufficient statement of reasons whereby this argument must also be rejected.

Conclusion
The General Court rejected the arguments of Ryanair and Laudamotion and therefore, the action must be dismissed in its entirety.

Recovery of Spanish goodwill amortization scheme upheld

In 2009, the European Commission found that a Spanish tax amortization provision for financial goodwill, restricted to foreign acquisitions, constituted unlawful State aid as far as it concerned intra-EU acquisitions. Such amortization had allegedly been introduced to remedy the adverse effects of acquiring 5% and more shareholdings in non-resident companies, provided that they carried out business activities abroad subject to a corporate tax similar to that of Spain. In 2011, the Commission was a bit more tolerant with respect to extra-EU takeovers, where no recovery was deemed necessary for most of the aid granted prior to the opening of the formal investigation in 2007.

This case ended up at the CJ a second time, after the famous *World Duty Free/Banco Santander* judgments of 2018, and in a series of judgments on 6 October 2021, it finally ended this case (see, inter alia, Joined cases C-51/19P and C-64/19P *WDF and Spain v Commission*). It did indeed uphold the Commission's finding that the regime created diverts from the reference framework that does not allow for the amortization of financial goodwill (except in the case of entering into a Spanish business combination) and therefore, let the recovery decisions stand.

Block-exemption regulation to be revised to facilitate the EU's Green Deal and its digital ambitions

The European Commission will be updating its block-exemption regulation, most probably early 2022. Based on this regulation, some tax schemes will not have to be submitted to the European Commission for upfront approval if certain conditions are met.

Amongst the revisions to be expected are the inclusion of tax incentives for private investors that provide risk capital to small or medium-sized enterprises either directly or via a financial intermediary. Rules on aid for research, development and innovation (R&D&I) will also be widened as to explicitly facilitate innovation in digital technologies and solutions and technology infrastructure, which may also affect R&D&I-related tax incentives.

Partial relief of energy-intensive industries from environmental taxes or levies will now be covered. This would cover reduced tax rates or the use of a fixed or capped amount of tax or levy due. Apart from obligatory energy audits, also the implementation of recommendations from such audits and a substantial investment in greenhouse gas emissions will be relevant for approval.

A reduction of environmental taxes and parafiscal levies for certain sectors (other than the energy sector) which is passed on to consumers would lead to significant sales reductions, and will be capped at 80% of the tax involved and be subject to the condition that all undertakings in the same sector will have access to this. This in order to facilitate the initial introduction of such taxes. Also, in order for certain biomass fuels to continue to qualify for tax reductions they must comply with stricter sustainability and greenhouse gas emissions savings criteria than set by the EU before.

Note that whether these or any other tax measures would actually be introduced by a Member State is still that State's prerogative; the block-exemption regulation only provides a framework to make it possible without the need to await a Commission decision if maximum amounts of aid and other conditions are respected.

Direct Taxation

Brexit & Direct Taxation: The EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement concluded between the EU and the UK (the TCA) only deals with the EU (direct tax) Directives in a limited way. The provisions that were included mainly relate to responsible tax governance and minimum standards.

For example, the TCA does not facilitate continued application of the Parent-Subsidiary Directive (2011/96/EC), the Merger Directive (2009/133/EC) and the Interest and Royalties Directive (2003/49/EC) vis-à-vis the UK. In other words, the UK is now considered a third country for purposes of these Directives, meaning that they are no longer applicable in relation to UK companies. The foregoing also means that the European legalisation facilitating cross-border legal mergers has lost effectiveness in relation to the UK. Needless to say, provisions implemented in national law (even if based on European Directives) remain applicable as long as they are not amended or repealed.

Notwithstanding the above, Articles 5.1 and 5.2 (Part two, Title XI, Chapter 5) of the TCA do provide some guidance regarding good governance and taxations standards. These provisions are, inter alia, of relevance for the Anti-Tax Avoidance Directive (ATAD) 1 and 2. In short, both the EU and the UK commit to maintain certain OECD standards. Hence, it is expected that most of provisions of ATAD 1 and 2 will be (largely) maintained. It is however yet to be seen whether the UK sees an opportunity to divert from European regulations as far as these are more stringent than the OECD standards.

In relation to the application of DAC 6 (EC/2018/822), the UK government has already undertaken action. On 31 December 2020, the scope of mandatory reporting under DAC 6 has been narrowed down substantially. Only cross-border arrangements falling under the Category D Hallmark (broadly, those that (a) have the effect of circumventing the OECD's Common Reporting Standard or (b) obscure beneficial lownership) will be reportable. This narrower reporting obligation will not only apply to future arrangements but will also apply to historic arrangements for the period prior to 31 December 2020. This implies that UK lawyers will (as far as the other Hallmarks are concerned) no longer be considered as "other intermediaries involved" which will create an additional administrative burden for other intermediaries.

Article SERVIN.2.3 of the TCA relates to the national treatment of inbound investments. Each Member State shall accord to investors of the UK no less favourable treatment than that it accords, in like situations, to its own investors, with respect to establishment and operation in that Member State. Further, enterprises from an investor in the UK shall be treated no less favourable in the Member State than enterprises from its own investors.

Article COMPROV.16 of the TCA states that (in principle) nothing in the TCA shall be construed as conferring rights or imposing obligations on persons. However, this does not necessarily preclude any (in)direct effect of the TCA, for example through an interpretation of other agreements in conformity with the TCA.

Committee on Economic and Monetary Affairs (European Parliament) calls for Commission's immediate action on digital economy: European Digital Services Tax and Digital Levy

On 26 January 2021, the Committee on Economic and Monetary Affairs of the European Parliament called for an EU Action on taxing the digital economy.

This Committee praised the efforts in the G20/OECD IF to reach a global consensus as to find the solutions to address the challenges posed by the taxation of digital economy calling for a swift agreement by mid-2021. In particular, it highlighted the fact that the OECD proposal does not ringfence the digital economy but seeks a comprehensive solution. It further acknowledges the fact that both Pillars One and Two are complementary, supporting a solution in which one Pillar is not adopted without the other.

At the same time, this Committee regrets the failure of the OECD on finding a solution by October 2020 stressing that the COVID-19 has increased the transition to a digitalised based economy. Therefore, and regardless of the progress of the negotiations at the G20/OECD IF, it calls the Commission to present proposals by June 2021 and in particular, to consider introducing a European Digital Services Tax as a first step. It further welcomes the conclusions of the Council for the Commission to put forward additional own resources including a digital levy.

EU list of 'non-cooperative jurisdictions' updated

On 22 February 2021, the European Union list of 'non-cooperative jurisdictions' (the EU List) was updated by the Economic and Financial Affairs Council (ECOFIN).

With the ECOFIN update on 22 February 2021, the EU List is now composed of the following jurisdictions: American Samoa, Anguilla, Dominica, Fiji Guam, Palau, Panama, Samoa, the Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu. Barbados has been removed from the previous list and Dominica added with this update. This list is updated from time to time, typically resulting in certain jurisdictions being added to or removed from the list.

For more info about the tax implications for Luxembourg regarding this update see our flash.

EU public country-by-country reporting (CBCR) proposal developments

On 25 February 2021, the EU Member States' Ministers of Internal Market and Industry discussed the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, also known as the public country-by-country reporting (CBCR) proposal. The proposal, which has been stalled since 2016, entails, inter alia, public tax reporting obligations for companies with a total consolidated group revenue of at least EUR 750 million. The Portuguese Presidency of the Council concluded that there was a broad political support for the proposal. However, several Member States have expressed strong concerns with respect to the proper legal basis and the precedent it could potentially create.

According to those states, the disclosure of income tax information must be based on Article 115 TFEU (special legislative procedure) since both the aim and the content of the proposal relate to fiscal provisions, rejecting thereby the appropriateness of the legal basis of the initial proposal, i.e. Article 50(1) TFEU (ordinary legislative procedure). Despite the dispute regarding the legal basis, the EU is to move ahead with the proposal to the next legislative phase. On 3 March 2021, the Member States' Ambassadors mandated the Portuguese Presidency to engage in negotiations with the European Parliament for the swift adoption of the proposal

Proposed measures in the field of taxation to include crypto-assets and e-money (*DAC8*)

The Commission has started working on bringing crypto-assets and e-money within the scope of the automatic exchange of information rules by amending Directive 2011/16/EU (DAC8). It published a roadmap in November 2020 which was followed by a feedback period from 23 November 2020 up to and including 21 December 2020. The public consultation and the first proposal for a directive are planned for the first and third quarters of 2021 respectively. The proposal should provide tax administrations with information to identify taxpayers that are notably active in crypto-assets and e-money.

The two main problems that the DAC8 should tackle are:

(i) the lack of information at national tax administrations about the emergent use of crypto-assets and e-money that could possibly result in revenue losses for the EU budget; and,

(ii) the disparity in the sanctions applied based on the current provisions and other necessary improvements to be made to the DAC.

With respect to point (i), it is stated that the lack of centralized control for crypto assets, its pseudo-anonymity, valuation difficulties hybrid characteristics and the rapid evolution of the underlying technology are challenging regarding tax obligations. Given that crypto assets can be used both for payment and investment purposes, their classification and the potential tax compliance becomes even more difficult The DAC8 proposal should ensure adequate tax transparency with a view to ensuring correct taxation in that respect.

With respect to point (ii), there is a need to address some inefficiencies of the current DAC. The differences between Member States following from the limited provisions in DAC should be addressed by this proposal through a cohesive framework for sanctions. The significant differences between Member States should be scaled down by better defining the terms 'effective, proportionate and dissuasive' and lead Member States towards a more closely coordinated application of sanctions. Other necessary adjustments/improvements will also be addressed in the proposal.

Reflection paper on the EU tax policy post-implementation of Pillar 1 and Pillar 2

The Platform for Tax Good Governance published a reflection paper on the future of corporation tax policy in the EU. The paper takes as its baseline the assumption that both Pillar 1 and Pillar 2 of the OECD reforms are agreed and implemented in full in the EU. The purpose of this paper is to stimulate reflection and open discussion in the Platform on Tax Good Governance on the future of EU corporate tax policy.

Several potential developments are elaborated on, such as the impact on EU Secondary Legislation. The paper expects, for example, the Interest & Royalties Directive and the Anti-Tax Avoidance Directive to be affected by the implementation. Please note that the topics discussed in the paper are not exhaustive. The paper is finalized with several questions to help structure the discussion.

One particularly relevant question is the effect of the implementation on proposed directives such as the CCTB and the CCCTB.

Council of the EU adopts new rules to strengthen administrative cooperation and include sales through digital platforms (*DAC7*)

On 22 March 2021, the Council of the EU adopted new rules to address the issue of loss of tax revenue and the unfair advantage to traders on digital platforms over traditional businesses as income through digital platforms is often unreported and tax is not paid. These rules will apply as from 1 January 2023 and create the obligation for digital platform operators to report the income earned by sellers on their platforms and for Member States to automatically exchange this information. The reporting will only take place in one Member State. Furthermore, the exchange of information and cooperation between EU tax authorities will be improved, e.g., it will become easier to obtain information on groups of taxpayers.

Eurogroup statement on the euro area fiscal policy response to the COVID-19 crisis and the path forward

On 15 March 2021, the Eurogroup has published a statement concerning the fiscal policy response to the COVID-19 crisis in the euro area, and the path forward. First, the Eurogroup positively concludes that the European measures have supported confidence, protected millions of jobs, and cushioned the impact of the pandemic crisis on companies, thereby shielding incomes and productive capacity from the worst effects of the pandemic.
Close coordination of these fiscal support measures within the Eurogroup are a key part of the joint economic policy response to date. The Eurogroup states that it will continue to protect the economy in the euro area through the development of the necessary level of fiscal support. In a second stage, once the health situation improves, fiscal measures should gradually shift towards more targeted actions to promote a resilient and sustainable recovery. In a third stage, once the recovery is firmly under way, the focus should shift towards increased public debt levels by implementing sustainable medium-term fiscal strategies, with an emphasis on improving the quality of public finances, raising investment levels and supporting the green and digital transitions.

Commission launches public consultation on DAC8

In EU Tax Alert 187 (March 2021), it was discussed that the Commission had started working on bringing crypto-assets and e-money within the scope of the automatic exchange of information rules by amending Directive 2011/16/EU (DAC8). After the published roadmap in November 2020 and the subsequent feedback period from 23 November 2020 up to and including 21 December 2020, the Commission has now launched the public consultation. The consultation lasts from

10 March 2021 until 2 June 2021. The first proposal for a directive is still scheduled for the third quarter of 2021.

Commission launches public consultation with respect to the planned 'Recommendation to Improve the Situation of Taxpayers in the Single Market'

As part of the 'Tax Action Plan – Communication for fair and simple taxation supporting the recovery', the Commission announced it will publish a Communication taking stock of taxpayers' existing rights under EU law (roadmap published on 30 October 2020) together with a Recommendation to facilitate the implementation of taxpayers' rights and to simplify tax obligations. The public consultation with respect to the Recommendation started on 10 March 2021 and will last up to and including 2 June 2021. The Communication and the Recommendation are planned for adoption in the third quarter of 2021.

According to the Commission, the complexity of tax rules and procedures often leads to many taxpayers not making full use of the possibilities of the national legal framework to protect their interests. This non-optimal use of existing taxpayers' rights can have a negative effect on economic and business behaviour and it may hamper the proper functioning and full potential of the single market. Increasing awareness of taxpayers' rights can help smoothen the relationship between taxpayers and tax administrations and can improve tax compliance. The Commission's initiative, therefore, aims at recommending to Member States how relationships between taxpayers and tax administrations could be enhanced. It will, therefore, first analyse the selected list of issues related to the rights under EU law after which, it will reflect on possible ways to enhance the relationship between taxpayers and tax administrations. In the end it will reflect on how to make better use of taxpayers' rights and observe how to further improve this relationship.

The Commission releases roadmap with respect to the initiative to introduce a common EU-wide system for withholding tax

The Commission had earlier released a planned initiative to introduce a common EU-wide system for withholding tax on dividend or interest payments. The initiative also includes a system for tax authorities to cooperate and to exchange information with each other. The Commission has now launched its roadmap with respect to this initiative. The feedback period lasts from 28 September 2021 until 26 October 2021. After that, the public consultation is scheduled for Q3 2021 whereafter the adoption by the Commission is planned for Q4 2022.

Council of the European Union approves Public Country-by-Country reporting Directive

The Council of the European Union adopted on 28 September 2021, its position at first reading on the public Country-by-Country reporting. Under the proposed directive, EU and non-EU based multinationals are required to publicly disclose income tax information if they have a total consolidated revenue of more than EUR 750 million.

The next step is that the European Parliament needs to approve the Council's position. When the public Country-by-Country obligations are to come into force depends on when the Directive will enter into force. The rules will apply at the latest to financial years starting on or after two years and six months after the date of entry into force of the directive. If, for example, the directive enters into force in November 2021, the rules will apply, at the latest, to financial years starting in or after May 2024.

CJ declares itself incompetent to answer preliminary questions with respect to the interpretation of the General Data Protection Regulation (*GDPR*)

On 10 December 2020, the CJ delivered its judgment in case *Land Nordrhein-Westfalen v D.H.T.* (C-620/19).

The case deals with preliminary questions of the German Bundesverwaltungsgericht on the interpretation of the restrictions of the GDPR. D.H.T. is the liquidator in the insolvency of the German company J&S Service. D.H.T. requested information of the German tax authorities to determine whether it was opportune to initiate an actio pauliana in the context of the insolvency proceedings. The German tax authorities rejected this request and legal actions were brought against this decision. Finally, the German Bundesverwaltungsgericht stated that the GDPR is not directly applicable in this case given that the main proceedings do not concern personal data relating to a natural person within the meaning of the GDPR or the right to access data within the meaning of Article 15 GDPR.

However, because the German law refers to the provisions of the GDPR, the court referred three preliminary questions to the CJ. In short, it would like to know whether tax authorities can restrict access to tax data based on the restriction grounds of the GDPR.

The CJ started by ruling that it is, in principle, obliged to answer preliminary questions that concern the interpretation of EU law. The CJ repeated that it has also jurisdiction to rule on cases in which the facts fall outside the scope of EU law (i.e., purely national situations) but the provisions of EU law are applicable because the national law refers to the content of these EU provisions. The CJ clarified however, that it can only examine provisions of EU law and may not determine the scope of reference to EU law under national laws of Member States. The limits which the national legislature may have placed on the application of EU law to purely national situations by virtue of national laws alone are matters of national law and, therefore, may only be examined by national courts.

Furthermore, the CJ noted that under German Law, the provisions of the GDRP, contrary to the GDPR itself, are also applicable to legal persons and that the person to whom the information requested relates is a legal person. Therefore, the preliminary questions concern the interpretation of the restriction grounds of the GDPR in a situation where those provisions have been declared applicable to legal persons. According to the CJ however, the provisions under German law, therefore, do not limit themselves to extending the scope of the provisions of the GDPR but also modify their purpose and scope.
This because the aim and context in which the GDPR was adopted are fundamentally different from the aim and context of the German law, given that the aim of the GDPR is to ensure respect for the fundamental rights of individuals. German law, however, does not in fact refer to the protection of personal data of natural persons, which, under EU law, is governed by the GDPR, but to the concept of 'protection of personal data of legal persons', which is a specific feature of national law.
In those circumstances, the preliminary questions do not really concern the interpretation of a provision of EU law, the scope of which has been extended by a provision of national law, but a concept of national law which has no equivalent in EU law. Therefore, the CJ concluded that it cannot be said that the provisions of EU law have as such been made applicable by national law, even if only outside the scope of the GDPR, and that it has no jurisdiction to answer the preliminary questions.

CJ rules that the applicability of an interest deduction limitation to payments made to a group entity in another Member State is in breach of the TFEU (*Lexel AB*)

On 20 January 2021, the CJ delivered its judgment in case *Lexel AB v Skatteverket*, (C-484/19). The case deals with a Swedish interest deduction limitation that applies to interest paid by a Swedish group company to another group company in France. The question raised was whether the denial of the interest deduction is in breach of the freedom of establishment in Article 49 TFEU.

Lexel AB (Lexel) is a Swedish company that acquired 15% of the shares in a group company. To finance this acquisition, Lexel took out a loan from a French group company that was part of a tax entity in France. Lexel made loan interest payments that were subsequently used to offset losses within the tax entity. In Sweden, interest expenses in relation to a debt owed to an associated company are non-deductible unless the interest income is subject to a nominal tax rate of at least 10% in the State of the beneficiary y(the 10% rule). However, even if this 10% rule is met, the interest is still not deductible if the main reason for incurring the debt is to secure a substantial tax benefit t(the exception). The Swedish Tax Agency (STA) confirmed that the 10% rule is applicable to the interest paid by Lexel, but nevertheless, refused the deduction of the interest payments in reliance on the exception. Lexel brought actions against the STA's decision during which it was stated that the exception could not have been applicable if the recipient of the interest had been established in Sweden. In that situation, Lexel and the recipient would then have been in a position to carry out intra-group financial transfers in accordance with the Swedish group contribution rules without it being inferred that the purpose of such a transaction was to secure a substantial tax benefit The preliminary question referred to the CJ was whether it was compatible with Article 49 TFEU to refuse a deduction for interest paid based on the exception whereas such exception would not have been applied if both companies had been Swedish as they would then have been covered by Swedish group contribution rules.

The CJ started by observing that Lexel could have secured a deduction of the interest without the applicability of the exception if the recipient had been established in

Sweden. Therefore, the exception is never raised against the deduction of interest charges related to a loan from another group company established in Sweden, whereas it is applicable if the beneficiary of the interest is in another Member State. Therefore, the CJ ruled that there was a difference in treatment between domestic and cross-border situations in breach of Article 49 TFEU unless it could be justified by an overriding interest in the public interest. With respect to the justifications the CJ first concluded that a justification by grounds relating to the fight against tax evasion and tax avoidance could not be accepted. In order to apply this justification the objective of the restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality to escape the tax normally due. According to the Court however, the Swedish interest deduction limitation is expressly aimed at any substantial tax benefit whereby the application is not limited to purely artificial arrangements. The fact alone that a company desires the deduction of cross-border paid interest, in the absence of any artificial transfer, cannot justify a measure which undermines the freedom of establishment.

Subsequently, the CJ noted that a justification by the need to safeguard the allocation of the power to impose taxes between the Member States cannot be accepted either. It stated that the exception in the Swedish law seeks to prevent the erosion of the domestic tax base and that such objective cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States. It noted that the interest would have been deductible if the recipient had not been an associated company and where the conditions of a cross-border intra-group or external transaction correspond to those on an arm's-length basis, there is no difference between those transactions in terms of the balanced allocation of the power to impose taxes between the Member States. Overall, the CJ concluded that the Swedish legislation was not in line with the freedom of establishment as it prohibited interest deduction at the level of a company established in Sweden with respect to interest paid to a group company established in another Member State, on the ground that the principal reason for incurring the debt appears to be to secure a substantial tax benefit whereas such a tax benefit would not have been deemed to exist if both companies had been established in Sweden as in that situation they would have been covered by the provisions on intra-group financial transfers.

CJ rules that granting ordinary rather than full offsetting the taxation at source is not a discriminatory tax treatment (*Société Générale*)

On 25 February 2021, the CJ issued its judgement in case *Société Générale SA v Ministre de l'Action and des Comptes publics* (C-403/19). The case deals with the French ordinary credit method that limits the tax credit granted to the amount which the Member State of residence would receive if those dividends alone were subject to corporation tax, without offsetting in full the levy paid in the other Member State (of source).

SGAM Banque, established in France, is part of the tax-integrated group of which Société Générale, also established in France, is the parent company. During 2004 and 2005, SGAM Banque carried out securities lending transactions involving the remittance by the borrower of securities intended to guarantee those lent by SGAM Banque, which thus temporarily became the owner of the remitted securities. The standard contract signed between SGAM Banque and its contracting partners provided that SGAM Banque was required, in principle, to return to the borrower securities equivalent to those given as collateral, so that the borrower could benefit from the payment of the dividends attached to those securities and, in the absence of restitution, pay it a sum of money or remit property to it, of a value equal to the amount of those dividends. SGAM Banque also carried out fund structuring transactions consisting, in particular, in managing baskets of shares corresponding to management profiles set by its contracting partners. In that context, SGAM Banque received the dividends attached to securities included in the equity baskets, which it had acquired, but was required, in respect of the performance sold to its contractual partners, to repay a sum corresponding to the amount of dividends received and any increase in the value of the securities. In return, the customers paid SGAM Banque a fixed remuneration fee for managing the equity basket. In the context of those two types of transactions, SGAM Banque received, in the case of securities held by companies resident in Italy, the UK and the Netherlands, dividends less withholding tax paid on the dividends in those three countries respectively. Consequently, SGAM Banque offset – against the amount of corporate income tax due in France for the years ended 2004 and 2005 –

tax credits corresponding to those withholding taxes on the basis of the tax treaties concluded with Italy, UK and the Netherlands.

Following an audit of the accounts, the competent tax authorities challenged the allocation of a fraction of those tax credits and revised upwards the amount of the corporation tax. Société Générale, considered that with reference to the judgments of 28 February 2013, Beker and Beker (C-168/11) and of 17 September 2015, Miljoen and Others (Joined Cases C-10/14, C-14/14 and C-17/14), that transactions made by companies subject to corporation tax in France involving the securities of foreign companies, are at a disadvantage compared to those involving securities of French companies, because of the method of calculating the ceiling of the tax credit under the applicable Tax Treaties, which would only allow for an insufficient amount of the tax levied by the Member State in which the dividends are paid to be offset against the corporation tax due in France. As regards the exercise by France of its powers of taxation, the CJ started by observing that French resident companies are subject to corporate income tax. In addition, France grants companies receiving those dividends a tax credit that can be offset against corporation tax. That tax credit is equal to the tax paid in the Member State in which the income arises, and may not exceed the French corporation tax corresponding to that income. Finally, as regards the method of calculation of the tax credit deductible from the tax already paid on foreign-source dividends, the basis of assessment and the rate of corporation tax corresponding to that income alone appear to be the same as that of the corporation tax which would be due if the dividends were domestic-source dividends. Therefore, the CJ noted that it does not appear that dividends distributed by companies established in Italy, the United Kingdom and the Netherlands are subject to a higher rate of corporation tax in France than that applied to domestic-source dividends.

However, Société Générale maintained that methods for calculating the tax credit to which such a company is entitled allow only for an insufficient amount of the tax levied by the withholding State to be deducted from the corporation tax paid in France, with the effect that, for a company established in France, placing transactions involving securities of non-resident companies at a disadvantage compared to those involving securities of resident companies. In this regard the CJ observed that such a disadvantage results from a difference between the tax base applied by the Member State in which the dividends are paid and that of French corporation tax, which determines the maximum amount of the tax credit that can be deducted. Furthermore, the CJ reminded (in line with Gilly case judgment of 12 May 1998, C-336/96) that, the purpose of a tax treaty is not to ensure that the taxation to which the taxpayer is subject in one Member State is not higher than that to which he would be subject in the other Member State.

Therefore, the CJ concluded that in the absence of discriminatory exercise by a Member State of its tax jurisdiction, a disadvantage resulting from the double taxation of foreign-source dividends, such as that at issue in the main proceedings, arises from the parallel exercise of tax jurisdiction by the States of the source of those dividends and by the Member State of residence of the shareholder company. Therefore it concluded that, in those circumstances, the national legislation at issue in the main proceedings cannot be regarded as reflecting a restriction on the free movement of capital prohibited under Article 63 TFEU.

CJ rules that an adverse tax regime for non-residents is in breach of the TFEU even if its applicability is optional (*MK*)

On 18 March 2021, the CJ delivered its judgment in case *MK v Autoridade Tributária e Aduaneira* (C-388/19). The case deals with the non-Portuguese resident MK that is subject to a more adverse tax regime than the tax regime applicable to Portuguese residents, whereas it was possible for MK to opt for this last-mentioned regime. The question raised was whether this more adverse tax regime combined with the option to opt for the more favourable tax regime is in breach of the Articles 18, 63 and 65 TFEU.

MK is a French resident that realized a capital gain on Portuguese immovable property. Under Portuguese tax law, such capital gain is 50% subject to a progressive tax rate if realized by Portuguese residents, whereas such capital gain is fully subject to a single rate if realized by non-Portuguese residents. In the tax return, however, EU residents such as MK can choose to be taxed in conformity with the tax regime for Portuguese residents. MK did not choose this option in its tax return whereby the Portuguese tax authorities applied the single rate to the entire capital gain. MK challenged the tax assessment on the ground that the legislation discriminates against taxable persons in other EU Member States and claimed that the legislation constitutes a restriction on the free movement of capital in Article 63 TFEU. MK based this claim on the *Hollman* case (C-443/06) in which the CJ had ruled that the Portuguese legislation constituted a restriction on the movement of capital. The tax authorities, on the other hand, argued that further to the *Hollman* case, the Portuguese legislature had amended the legal framework by introducing the possibility for EU residents to opt for the tax regime that applied to Portuguese residents and that MK simply did not choose this option in its tax return. MK pointed out that the CJ had ruled before in the *Gielen* case (C-440/08) that a choice between a discriminatory and non-discriminatory tax regime is not capable of remedying the discriminatory effects of such discriminatory tax regime. Therefore, the preliminary question referred to the CJ was whether Articles 18, 63 and 65 TFEU preclude legislation that enables capital gains not to be subject to a more adverse tax regime for non-residents by virtue of a choice made by the taxable person.

The CJ started by observing that Article 18 TFEU only applies independently to situations governed by EU law for which the TFEU lays down no specific rules of non-discrimination. Given that Article 63 TFEU provides for such rule and the liquidation of the immovable property constitutes a movement of capital, this freedom is applicable in this case. Subsequently, the CJ recalled based on the *Hollman* case that applying an assessment of 50% that only applies to capital gains realized by Portuguese residents and not to those realized by other EU residents constituted a restriction on the movement of capital. That conclusion, according to the CJ, is not called into question based on the *Hirvonen* case (C-632/13), in which the CJ ruled that the difference in tax treatment between non-residents and residents could be compatible with EU law provided that the single rate is not higher than that which would actually apply to residents. This because the CJ noted that in this case, non-residents are systematically subject to a tax burden greater than that applied to residents where capital gains are realized on the sale of property. Therefore, the CJ ruled that the basis for assessment at 50% for capital gains realized by Portuguese residents but not for non-residents who have opted for the tax regime for non-Portuguese residents constitutes a restriction on the free movement of capital unless this restriction could be objectively justified under Article 65 TFEU.

With respect to the justifications, the CJ first stated that the distinction between unequal treatment that is permitted under Article 65(1)(a) TFEU and arbitrary discrimination that is prohibited under Article 65(3) TFEU must be made. In that respect, the difference in treatment must either relate to situations which are not objectively comparable or be justified by an overriding reason relating to the public interest. The CJ ruled, however, that neither is the case with respect to the Portuguese legislation. The CJ again recalled that based on the *Hollmann* case, the tax advantage granted to Portuguese residents in any event outweighs the consideration for that advantage (i.e., the application of a progressive rate). Therefore, a direct link between the tax advantage and the offsetting of that advantage by a particular tax levy was not established, whereby the restriction could not be justified by the need to ensure the cohesion of the tax system. Finally, the CJ ruled that a choice as offered in the Portuguese legislation is not capable of excluding the discriminatory effects of the tax regime in dispute. Based on the *Gielen* case, the CJ stated that the Portuguese legislation which restricts the free movement of capital remains incompatible with EU law, even if its application is optional.

In summary, the CJ concluded that Article 63 TFEU, read in conjunction with Article 65 TFEU, precludes legislation of an EU Member State that entails a more adverse tax regime for non-residents combined with the option to opt for the more favourable tax regime applicable to residents of that Member State.

CJ annuls Commission Decisions to start formal investigation procedure and on State aid (*Commission v Poland*)

On 16 March 2021, the CJ annulled both Commission Decisions to start the formal investigation procedure and on State Aid with respect to the new Polish tax on the retail sector in case *Commission v Poland* (C-562/19 P). The CJ ruled that the Commission had made an error in determining the reference system to determine whether a selective advantage was given and that the Commission had based its provisional classification of the tax measure at issue as new aid on a manifestly incorrect analysis.

Background

The Polish legislature adopted a new tax on the retail sector that entailed a progressive tax rate of which the basis of assessment was monthly turnover.

The Commission adopted a decision to initiate the formal investigation procedure and required the Polish authorities to suspend the application of the new tax (suspension injunction). Following the procedure, the Commission adopted a negative decision in which it decided that the new tax constituted State aid within the meaning of

Article 107(1) TFEU. In the Commission's view, the new tax with its progressive tax rate would entail a transfer of State resources in favour of undertakings with a low turnover and therefore, did constitute an advantage for those undertakings. In respect of the examination of the condition of selectivity, the Commission decided that the relevant reference tax system was the new tax excluding the progressive tax rate. Applying such progressive tax rate was a derogation from the reference system that was not found justified by the nature or general scheme of the reference system. Furthermore, the redistributive purpose of the new tax put forward by the Polish authorities is not compatible with a turnover-based tax because it is levied on undertakings on the basis of their volume of activity and not on the basis of their charges, profitability, ability to pay or facilities from which, according to those authorities, only large undertakings can benefit.

The Polish authorities brought two actions before the General Court and both decisions were annulled. The Commission appealed before the Court. Hungary is the intervener at first instance (we also refer to the comparable case *Commission v Hungary* (C-596/19) in this EU Tax Alert).

Procedure before the Court

First ground of appeal
First, the Commission stated that the General Court infringed Article 107(1) TFEU by finding that the progressive nature of the new tax did not give rise to a selective advantage.

The CJ recalled the conditions that must be satisfied to classify a national measure as State aid. With respect to the condition that the advantage must be 'selective', the CJ observed that the Commission must begin by identifying the reference system in order to determine whether there is a derogation from this system that could not be justified. In that regard, the CJ observed that the determination of taxes falls within the discretion of the Member States in accordance with their fiscal autonomy. Therefore, it ruled that the progressive tax rate forms part of the reference system and that EU law does not preclude progressive taxation from being based on turnover as the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay. That profit in itself may constitute a better indicator is irrelevant in matters of State aid according to the CJ, as EU law only seeks to remove selective advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. Subsequently, the CJ stated that the Commission did not establish that the progressivity of the tax rates was designed in a manifestly discriminatory manner with the aim of circumventing the requirements of EU law on State aid. In the end, the CJ concluded that the progressivity of the tax rates is part of the reference system whereby there is no selective advantage for certain undertakings. The appeal is unfounded.

Second ground of appeal
Second, the Commission claimed that the General Court infringed Article 108(2) TFEU and Article 13 of Regulation 2015/1589 by annulling the decision to initiate the formal investigation procedure including the suspension injunction. According to the Commission, the General Court carried out a comparable review in respect of the negative decision, whereas it should have confined itself to a review in respect of a manifest error of assessment. Subsequently, it argued that the suspension injunction had been annulled because of the annulment of the decision to initiate the formal investigation procedure, whereas the legality of the suspension injunction had to be assessed independently.

The CJ stated that a review by the EU judicature of the legality of a decision to initiate the formal investigation procedure and a suspension injunction is limited to ascertaining whether the Commission has made a manifest error of assessment. It noted, however, that the Commission must examine sufficiently whether State aid could be considered present based on the information provided by the relevant Member State at the moment the procedure was initiated. If it appears that this was clearly not the case at that moment, the decision to start a formal investigation procedure must be annulled. The CJ rule in this case that the Commission had based its provisional classification of the new tax on a manifestly incorrect analysis. Both the decision and the suspension injunction, therefore, had to be annulled and by doing so, the General Court only carried out a review of the manifest error of assessment. Finally, the CJ rules that the General Court did not just annul the suspension injunction simply because of the annulment of the decision to start the formal investigation procedure. This is because the manifest error of assessment by the Commission also justified the annulment of the suspension injunction.
The appeal is unfounded.

CJ annuls Commission Decisions to start formal investigation procedure and on State aid (*Commission v Hungary*)

In the case *Commission v Hungary* (C-596/19 P) of 16 March 2021, the CJ annulled the Commission Decision on State Aid with respect to the new Hungarian advertisement tax. The CJ ruled that the Commission had made an error in assessing the reference system to determine whether there was a selective advantage with respect to the new advertisement tax and that no selective advantage was given by introducing a partial loss carry forward for loss-making undertakings in financial year 2013 connected to this new tax.

Background

In Hungary, a new advertisement tax was introduced that applied progressively by bands on turnover derived from broadcasting or publication of advertisements. The new tax also provided that taxable persons (i.e., any person who broadcasts or publishes advertisements in Hungary), who reported a loss or zero profit in financial year 2013, could deduct 50% of the losses carried forward from their 2014 taxable amount (loss mechanism). The Commission decided that the new tax and the loss mechanism both constituted State aid. According to the Commission, the progressivity of the new tax was a derogation from the reference system comprising a flat-rate tax and favoured smaller undertakings over larger undertakings. The loss mechanism also had to be considered a derogation from the reference system comprising taxation based on turnover (i.e., no deductibility of costs and/or losses contrary to the practice in relation to taxation of profits). Such mechanism introduced an arbitrary distinction between undertakings that had losses carried forward and did not make a profit in 2013 and undertakings that had a profit in 2013 whereby it favours undertakings with significant losses carried forward.

The Hungarian authorities brought an action before the General Court and the decision was annulled. The Commission appealed before the Court. Poland is the intervener at first instance (we also refer to the comparable case *Commission v Poland* (C-562/19) in this EU Tax Alert).

Procedure before the Court

First ground of appeal

First, the Commission argued that the General Court infringed Article 107(1) TFEU by finding that the progressive nature of the new tax did not give rise to a selective advantage.

The reasoning of the CJ with respect to this ground of appeal is comparable to the reasoning it had followed with respect to the first ground of appeal in *Commission v Poland* (C-562/19 P). In short, the CJ observed that the determination of taxes falls within the discretion of the Member States in accordance with their fiscal autonomy. It therefore ruled that the progressivity of the tax rates is part of the reference system which does not result in a selective advantage for certain undertakings. The appeal, therefore, is unfounded.

Second ground of appeal

Second, the Commission argued that the General Court had erred in law in finding that the loss mechanism was not a selective advantage.

The CJ started by recalling that the fact that only certain taxpayers satisfying the conditions of a measure can benefit from the measure, cannot in itself make it a selective measure based on case *Commission v World Duty Free Group and Others* (C-20/15 P and C-12/15 P). Its selectivity could also not be inferred from the mere fact that the measure is of a transitional nature as the decision to limit its application in time, in order to ensure a gradual transition between old and new taxes, falls within the fiscal autonomy of the Member States. According to the CJ, however, the fact that the loss mechanism was intended to be transitional leads to the conclusion that it cannot be regarded as part of the reference system or as a normal tax regime. Therefore, it should be assessed whether the loss mechanism introduces a difference in treatment between operators which are, in the light of the objective pursued by the advertisement tax, in a comparable factual and legal situation.

The CJ noted that the loss mechanism introduces a distinction between undertakings with losses carried forward without a profit in 2013 and undertakings that made a profit in 2013 since the latter are not entitled to carry forward their losses. The CJ ruled however that, considering the objective of redistribution of the new advertisement tax given the progressive tax rates, the two categories of undertakings are not in a comparable factual and legal situation. The choice of turnover as basis of assessment for the new advertisement tax does not lead to the conclusion that a transitional measure taking profit into account is inconsistent with the objective of redistribution according to the CJ. After all, profit also constitutes a neutral and relevant indicator of undertakings' ability to pay taxes. The criterion relating to the lack of profits in 2013 is, in that regard, objective as the undertakings concerned have had a lesser ability to pay taxes during 2014 on the date of entry into force of the new advertisement tax. The fact that the undertakings that would benefit from this loss mechanism were identifiable at the moment of the introduction of the new advertisement tax is in itself not capable of changing that conclusion. Finally, the CJ recalled, based on case *Commission and Spain v Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P), that tax measures with a condition linked to the profits made by a taxable person could not, on that account alone, be regarded as selective as such profits are a consequence of the contingent factor of the undertaking being profitable or not. This reasoning should also apply when the advantage entails a reduction of the tax assessment based on turnover taking into account the profits and the existence of losses of a taxable person whereby the advantage falls within the objective of redistribution which is structured around the ability to pay of undertakings. The appeal is unfounded.

General Court of the CJ annuls State aid decision in *Amazon* case

Factual background

The case concerned the arm's length nature of a royalty paid by a Luxembourg operating company (**LuxOpCo**) to a Luxembourg partnership (**LuxSCS**) – a tax transparent entity in Luxembourg – for the use of certain intangibles (technology, marketing-related intangibles and customer data).

In the 2003 tax ruling, the Luxembourg tax authorities had confirmed the arm's length nature of the deductible royalty payments. The supporting transfer pricing analysis applied the transactional net margin method (**TNMM**), a one-sided transfer pricing method, with LuxOpCo as tested party. Hence, it determined an arm's length remuneration for LuxOpCo and any business income in excess of that remuneration served to pay the royalty.

The Commission disagreed and considered that LuxOpCo's tax base was unduly reduced. It relied on two lines of reasoning:

- Primary line: LuxSCS does not (and is not able to) perform any significant people function and bear any risk in relation to the intangibles. By contrast, LuxOpCo has numerous employees and operates Amazon's EU business. Accordingly, LuxOpCo must be the entity entitled to the IP income and LuxSCS should just be entitled to recover its limited operating costs, as well as the intangibles development costs it incurred on a pass-through basis; and
- Secondary line: even if LuxSCS were found to perform some significant people functions and bear some risks related to the intangibles, a profit split would be more appropriate than using the TNMM transfer pricing method with LuxOpCo as tested party. Moreover, even if the TNMM with LuxOpCo as tested party were appropriate, LuxOpCo should earn a mark-up on the royalty expense. Finally, even if that were not required under transfer pricing rules, the fact that the 2003 ruling applied a 'cap and a floor' to LuxOpCo's income (without such cap-and-floor mechanism being backed up by the transfer pricing analysis) also resulted in a selective advantage.

Motives for the annulment by the General Court

The General Court, after confirming that group companies may be taxed in accordance with the arm's length principle, rejected all of these different lines of reasoning on the basis that the existence of a selective advantage was not demonstrated to the requisite standard:

- The functional analysis of the Commission wrongly depicted LuxSCS as merely a passive holder of intangibles, thereby ignoring the functions and risks borne by LuxSCS in exploiting them;
- The choice of LuxOpCo as tested party was also not wrong, given it was not easier to find comparables for LuxSCS than for LuxOpCo;
- Furthermore, LuxSCS should not earn a mere reimbursement of the intangibles development costs, as such an approach ignores the posterior increase in value of the intangibles. Also, LuxSCS's services were not low value-adding services; and
- The subsidiary lines relied on the same erroneous functional analysis (for the first part) and did not show the requisite standard of evidence that the choice of the profit level indicator or the application of the cap-and-floor mechanism reduced LuxOpCo's tax base.

Next steps

The Commission may appeal the judgment on matters of law before the Court of Justice. The Commission essentially lost on factual matters, which may complicate the appeal – it is likely that, just as in the *Apple* case, the debate around the burden of proof to demonstrate a selective advantage would be the main argument. For a further discussion of the impact of the Amazon case we refer to our news article.

The General Court of the CJ rules that tax rulings granted by Luxembourg to group companies of ENGIE entail State aid (*ENGIE*)

On 12 May 2021, the General Court of the CJ upheld the Commission decision of June 2018 finding that Luxembourg had granted unlawful State aid to ENGIE by means of various tax rulings.

ENGIE set up two financing structures that consisted of three successive stages: (i) a Luxembourg holding company transfers assets to one of its Luxembourg subsidiaries; (ii) this subsidiary takes out an interest-free mandatorily convertible loan (ZORA) with another Luxembourg subsidiary of the holding company to finance the acquisition; and (iii) the ZORA granting subsidiary enters into a prepaid forward sale contract with the holding company whereby the holding company acquires the rights to the shares that the subsidiary will issue at conversion of the ZORA. The ZORA will be repaid, upon its conversion, by issuing shares plus a premium representing, in essence, all the profits made by the subsidiary during the ZORA (the ZORA accretions). Due to the prepaid forward contract, the holding company will be entitled to the converted shares and the ZORA accretions.

The tax rulings that were issued by the Luxembourg tax authorities agreed that the ZORA accretions were deductible at the level of the ZORA taking subsidiary whereas these ZORA accretions were not taxed at the level of the ZORA granting subsidiary due to the corresponding loss of the same amount resulting from the prepaid forward contract nor at the level of the holding company due to the application of the Luxembourg participation exemption.

The Commission considered that the 'deduction without inclusion' outcome was not in line with Luxembourg tax rules and that ENGIE had received a selective advantage. The Commission claimed that Luxembourg law did not permit deducting expenses leading to exempt income whereby the parent entities of ENGIE (and ENGIE as a group) received an unlawful selective advantage.

The General Court of the CJ, after confirming again that the Commission was entitled to review tax rulings under State aid rules and that such review does not entail hidden tax harmonization, validated the Commission's lines of reasoning. It agreed with taking an economic approach to assess the arrangement as a whole rather than as separate transactions. It also validated the point that Luxembourg normally does not allow exempting income if the corresponding charge was deductible at the level of the payer. Therefore, ENGIE had received a selective advantage comparable to other taxpayers in Luxembourg. Finally, it ruled that the arrangement was abusive under the Luxembourg general anti-abuse rule (GAAR) whereby the Luxembourg tax authorities should have rejected the tax treatment approved in the various rulings.

The case reveals that the non-application of a GAAR and or special anti-abuse rule (SAAR) is a new line of attack of the Commission to combat State aid. The confirmation of the economic approach to 'pierce the veil' of separate related transactions is also a relevant element. ENGIE and Luxembourg may file an appeal with the CJ before the end of July 2021. For a further discussion of the impact of the *ENGIE* case we refer to our news article.

CJ rules on Belgium way of tax benefit calculation (*BJ*)

On 15 June 2021, the CJ delivered its judgment in the *BJ* case (C-241/20).

BJ is a tax resident of Belgium and is employed in Luxembourg, where BJ also owns an apartment which is rented out. In addition, BJ has two properties located in Belgium. The income from employment and the apartment is taxed in Luxembourg and exempt in Belgium. Belgium takes the Luxembourg income into account when determining the Belgium tax. The tax is then taken as the starting point for the application of certain specific tax reductions. Furthermore, the tax is reduced in proportion to the share of exempt Luxembourg income in BJ's total income. BJ lodged objections to the method of calculation as it does not allow him to fully benefit from these tax benefits, i.e., BJ was losing part of the tax benefits to which he is entitled under the Belgian scheme in proportion to his exempt Luxembourg income.

The CJ ruled that Belgium is in breach of EU law as BJ loses part of the tax benefit granted by Belgium using this method of calculation used for the amount of tax due. The fact that BJ has no significant income in Belgium is not important because Belgium is in a position to grant him the tax benefits in question. Nor is it important that BJ also enjoyed tax benefits in Luxembourg.

Portugal discriminates by only allowing a 50% deduction of dividend attached to shares listed on the Portuguese stock exchange (*Real Vida*)

In 1999 and 2000, Real Vida Seguros, S.A. (**Real Vida**) received dividends attached to shares listed on the Portuguese stock exchange and also on foreign stock exchanges, and deducted 50% of those dividends from its taxable base according to the Portuguese tax law. Following a tax audit, adjustments were made to the taxable base for the calculation of corporate income tax due for tax years 1999 and 2000 since the tax benefit of the 50% deduction should exclusively apply to dividends received on shares listed on the Portuguese stock exchange. Real Vida disagreed with the tax authorities, and claimed it is not in line with the free movement of capital. The Portuguese court consequently referred questions to the CJ for a preliminary ruling.

The CJ ruled that disallowing the 50% reduction of dividends from the corporate income tax base attached to shares listed on foreign stock exchanges is not in line with the free movement of capital. Although the Portuguese rule does not make an explicit distinction between dividends distributed by resident companies and dividends distributed by non-resident companies, it indirectly imposes a restriction on the free movement of capital as the number of non-resident companies whose shares are listed on the Portuguese stock exchange is limited, compared to the number of resident companies. As concluded in *Köln-Aktienfonds Deka* (C-156/17), an indirect restriction on the free movement of capital applies when a tax advantage is subject to a condition that, by its nature or in fact, is specific to the national market of that Member State in such a way that only resident companies of the Member State are capable of complying with that condition. In that sense, a Member State's tax practice, according to which favourable tax treatment is exclusively granted to dividends attached to shares listed on the national stock exchange, will result in investments in resident companies being favoured.

No justifications were applicable in this case. First, the CJ concluded that the situation of a taxpayer investing in shares listed on the Portuguese stock exchange was considered comparable with that of a taxpayer who makes investments in shares listed on foreign stock exchanges. Second, the promotion of the Portuguese stock exchange cannot justify a restriction of the fundamental freedoms guaranteed by the TFEU, according to the CJ.

Belgian Constitutional Court makes preliminary reference to the CJ on whether DAC6 is in breach of the EU Charter of Fundamental Rights

On 17 December 2020, the Constitutional Court (Grondwettelijk Hof) in Belgium took the decision to refer a preliminary question to the CJ with respect to DAC6 (C-620/19). The case deals with the question whether DAC6 infringes rights guaranteed in the Charter of Fundamental Rights of the EU (Case C-694/20). More information about DAC6 can be found here.

Under DAC6, intermediaries in EU Member States such as lawyers, accountants, tax advisers and – in some cases – taxpayers must report certain cross-border arrangements to the tax authorities of that Member State. Some intermediaries such as lawyers are bound by professional secrecy whereby they are not allowed to report cross-border arrangements to the tax authorities. Such intermediary must then notify any other intermediary involved that the obligation to report lies with this other intermediary or shifts to the relevant taxpayer (the notification obligation).

The Belgian Association of Tax Lawyers and other applicants argue before the Constitutional Court that it is impossible to fulfil their notification obligation towards other intermediaries without breaching professional secrecy. The information that is protected by professional secrecy in respect of the authorities is also protected in respect of other intermediaries who may be involved. Subsequently, the professional secrecy is an essential component of the right to respect for private life and the right of a fair trial. The obligation under DAC6, therefore, infringes the right of a fair trial and the right to private life as both are guaranteed in the Charter of Fundamental Rights of the EU. The preliminary question referred to the CJ by the Constitutional Court is whether the notification obligation infringes these rights.

Commission asks France and Sweden to amend its withholding tax rules on dividends

The Commission has requested France to change its withholding tax rules on dividends paid to 'Unit Linked insurance' companies established in other European

Economic Area (EEA) Member States. Unit Linked insurance is a live insurance scheme where the premiums paid by the policy-holder are used to purchase units in investment funds selected by that person, and where the dividends paid out by the funds are passed on by the insurer to the policy holder. Unit Linked insurance companies established in EEA Member States are required to pay a final withholding tax on French dividends received.

However, Unit Linked insurance companies established in France either pay no withholding tax on these dividends, or can credit the withholding tax paid against French corporation tax, which amounts to zero. The Commission deems that these rules infringe the free movement of capital (Article 63(1) of the TFEU and Article 40 of the EEA Agreement). France has two months to reply to the arguments raised by the Commission. Otherwise, the Commission may decide to send a reasoned opinion.

Furthermore, the Commission has notified Sweden of the potential incompatibility of its legislation with EU law on taxation of dividends paid to public pension institutions. Whereas Swedish public pension funds are, as government agencies, entirely exempt from tax liability, dividends paid to equivalent non-resident public pension institutions are subject to a withholding tax, commonly at a reduced rate of 15% as provided for in the tax treaties concluded between Sweden and other EU/EEA countries.

The Commission considers that such a fiscal scheme under which dividends paid to foreign public pension institutions are subject to less favourable treatment than similar distributions in purely domestic situations may infringe the free movement of capital (Article 63(1) of the TFEU and Article 40 of the EEA Agreement). Sweden has two months to reply to the arguments raised by the Commission after which, the Commission may decide to send a reasoned opinion.

Commission has published roadmap on communication on business taxation for the 21st century

The Commission has published a roadmap with respect to its Communication that aims to set out a medium-term vision for business taxation in the EU and a medium-term agenda for the Commission's action in this area. According to the Commission the current corporate tax framework is not aligned with the globalized and digitalized economy and is even less fit for the challenges to come (e.g., climate change and population aging). It will therefore set out principles and priorities for the EU business tax agenda over the coming years. It will also coordinate EU action with the discussions at an international level on taxation of the digital economy and minimum effective taxation. Given the focus of this Communication, targeted consultations will be the basis for engaging with stakeholders.

The feedback period lasted from 4 March 2021 until 1 April 2021, during which feedback was received from 20 parties. The Commission's adoption is scheduled for the second quarter of 2021.

Communication on business taxation for the 21st Century

On 18 May, the Commission issued a communication on business taxation for the 21st century. The announcements made in this communication are expected to translate into actual legislative proposals in the next three years. For a clear overview of all the announcements we refer to our tax flash and our timeline on this topic.

Commission proposes new Regulation to address distortion caused by foreign subsidies in the Single Market

On 5 May 2021, the Commission proposed a new Regulation to address potential distortive effects of foreign subsidies in the European Single Market. EU competition, trade defence instruments and public procurement are important in ensuring fair conditions for companies in the European Single Market and the Commission noted that the existing tools cannot be applied to foreign subsidies. This provides their recipients with an unfair advantage when acquiring companies in the EU which creates a 'regulatory gap'. The aim of the proposed Regulation is to address this regulatory gap and to ensure a level playing field in the European Single Market.

Based on the Regulation, the Commission will have the power to investigate financial contributions granted by public authorities of non-EU countries that benefit companies with an economic activity in the EU and to redress their distortive effects. To do so, the Commission introduces three tools:

a. A notification-based tool to investigate concentrations involving a financial contribution by a non-EU government;

b. A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government;
c. A general market investigation tool to investigate all other market situations and smaller concentrations and public procurement procedures.

With respect to (a) the acquirer or bidder has to notify ex-ante any financial contribution received from a non-EU government in relation to concentrations if the EU turnover of the company to be acquired is EUR 500 million or more and the amount of the financial contribution is at least EUR 50 million. With respect to (b) the acquirer or bidder has to notify ex-ante if the estimated value of the procurement is EUR 250 million or more. If companies are non-compliant with the notification obligations, fines may be imposed and the transaction may be reviewed as if it had been notified. With respect to (c) the Commission can investigate on its own initiative (ex-officio) and may request ad-hoc notifications. With respect to the potential redressive measures and commitments, the Regulation includes a range of remedies such as the divestment of certain assets or the prohibition of certain market behaviour.

The Regulation will now be discussed in the European Parliament and the Member States based on the ordinary legislative procedure. The proposal is also open for a public consultation until 22 July 2021.

The Commission releases planned initiative on a new EU system to avoid double taxation / withholding tax on dividend or interest payments

The Commission has released a planned initiative to introduce a common EU-wide system for withholding tax on dividend or interest payments. The initiative will also include a system for tax authorities to cooperate and to exchange information with each other.

The roadmap is not yet available but will be open for public consultation that is planned for the third quarter of 2021. The adoption by the Commission is scheduled for the fourth quarter of 2022.

2021 Annual Report highlights the contribution of taxation towards a more innovative, business friendly and healthier EU

On 18 May, the Commission published the 2021 Annual Report on Taxation, a yearly review of Member States' tax policies and their contribution to the priorities of the EU, such as the twin digital and green transitions, social fairness and prosperity, or combatting tax fraud. Annual tax revenue in the EU was stable in 2019 across Member States, with slight reductions in the average tax burden on labour and average corporate income tax from 21.9% in 2019 to 21.5% in 2020. Member States have continued to introduce new tax measures to support innovation and productivity, address the corporate debt bias and reduce the time it takes to comply with taxes. The report found that while environmental taxation can be a useful policy tool to help achieve climate and environmental policy goals and contribute to the economic recovery, the report shows that it is still underused in many Member States. Several EU Member States have raised taxes on tobacco, alcohol, and soft drinks to improve public health. The report also highlights that most Member States have introduced some measures to tackle aggressive tax planning but much remains to be done, notably in view of the current crisis. The report also pointed out that the COVID-19 pandemic has forced Member States and the EU to react with an unprecedented range of measures, including tax measures and direct support for households, businesses and the health sector. These helped cushion the impact of the crisis, providing liquidity to the hardest hit businesses and households and mitigating the adverse economic impact of the public health confinement measures introduced by Member States. Finally, the report discusses the possible role of tax policies in shaping our future economies and societies.

Commission proposes transformation of EU economy and society to meet climate ambitions and postpones digital levy

Fit for 55 package

In EU Tax Alert 189 (July 2021) it was mentioned that the Commission had issued a communication on business taxation for the 21st century and the announcements made in this communication are expected to translate into actual legislative proposals in the next three years. With respect to the measures in this communication that seek to increase 'green taxation' the Commission has now adopted a package of proposals (the so-called 'Fit for 55 package') to make, among others, the EU's taxation policy fit for reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. The measures contain, among others, a reform of the EU Energy Taxation directive, introducing a carbon border adjustment mechanism (**CBAM**) (to prevent dumping from businesses established in countries with laxer rules against pollution) and revising the EU emission trading system (**EU ETS**) to increase the price of carbon emission rights and further incentivise businesses to upgrade their production processes in a more environment-friendly manner. The latter two measures, CBAM and EU ETS, would raise own resources for the EU.

Digital levy postponed
In the communication for the 21st century, the Commission stated that the proposal for the EU Digital Levy would be released in July 2021. The Commission confirmed that it will prioritize the completion of a global tax accord before reassessing the EU Digital Levy. The proposal is now scheduled for October 2021.

Belgian Court of Appeal rules on abuse of Parent-Subsidiary Directive

On 1 December 2020, the Ghent Court of Appeal (Court) ruled on the question whether the exemption of withholding tax (WHT) laid down in the Parent-Subsidiary Directive (PSD) could be refused on the basis of abuse. This case is particularly relevant because it is the first time that a Court of Appeal has applied the Danish cases (see EU Tax Alert – April 2019 for more information on these cases). Solely the EU law relevant element 'abuse' in this case will be discussed.

In 2003, a United States private equity group acquired a Belgian group via a Netherlands limited partnership (commanditaire vennootschap: 'CV'). At the time, the Belgian group had operational companies located in Belgium and the Czech Republic. The group was restructured in 2006/2007 and again in 2012. The restructuring in 2012 involved the WHT exemption laid down in the PSD (as implemented in Belgium), which was relied upon in respect of the dividend distributed by a Belgian company to a Luxembourg holding company. Pursuant to the Danish cases the Court ruled that the prohibition of abuse should be considered a general principle of EU law. The Court, therefore, held that although the General Anti-Abuse Rule (GAAR) could not as a matter of principle be applied in this case, abuse of the PSD could still be sanctioned under the general EU law principles. Furthermore, the Court ruled that, for the application of the GAAR, it is not required that the taxpayer pursues a tax benefit for himself: it is sufficient that he (knowingly) cooperates in abusively obtaining a tax benefit for another taxpayer.

The Court evaluated the indications of abuse presented by the CJ in the Danish cases. Pursuant to those cases (and other CJ case law), all facts and circumstances and overall balance between the indications of abuse and the business interest relied upon should be taken into account. Consequently, the Court concluded that indications of abuse were present, shifting the burden of proof to the taxpayer. The Court ruled that the taxpayer did not provide sufficient counterproof. In line with the interpretation of the term 'beneficial ownership' by the CJ in the Danish cases, the Court stated that the term beneficial owner should be given a broad economic interpretation (substance over form approach).

This implies that the recipient of the income is only the beneficial owner if it benefits economically from the income and has the power to freely determine how to use that income.

Altogether, the Court concluded that - taking into account all facts and circumstances - there was no doubt that the Luxembourg holding company was used as a flowthrough company with the intention of allowing the profits (including capital gains) to accrue tax-free to the ultimate shareholders. The Court thus held that the entire context provides sufficient proof of the subjective and objective element of abuse of the PSD.

Netherlands Court rules that KA Deka is not entitled to the requested dividend tax refunds (*Köln Aktienfonds Deka*)

On 21 January 2021, the Court of Zeeland-West-Brabant (the Court) ruled that *Köln Aktienfonds Deka* (KA Deka) is not entitled to the requested Dutch dividend withholding tax (DWT) refunds.

Previously, the Court had referred preliminary questions to the Netherlands Supreme Court, which in turn referred preliminary questions to the CJ concerning the compatibility with EU law of the differences in the DWT regime, depending on whether the recipient is a non-resident Undertakings for Collective Investments in Transferable Securities Directive (UCITS) or a Netherlands resident UCITS qualifying as a so-called 'fiscal investment fund' (fiscale beleggingsinstelling: 'FBI'). In short, on 30 January 2020 (C-156/17), the CJ ruled that it is not contrary to EU law for the Netherlands to impose shareholder requirements for the refund of the DWT. The requirements should apply to both resident and non-resident UCITS. The requirement that profits are to be distributed to shareholders within eight months of the end of the financial year, however, was considered to be in breach of EU law (see EU Tax Alert of May 2020 for more information on this case).

Based on this judgment, on 23 October 2020, the Netherlands Supreme court issued its ruling, which states that non-resident UCITS are in principle objectively comparable to an FBI. Furthermore, the non-resident UCITS must agree to make a ‘substitute payment’ (in the form of a reduction of the DWT) to the Dutch Tax Authorities (DTA) to qualify for an actual refund. The DTA will only refund the DWT to the amount the claim of a refund of DWT exceeds the amount of the substitute payment.

In this case, KA DEKA did not take a position regarding the substitute payment, nor did it provide a calculation on the substitute payment. The Court considered that this would, in itself, be grounds for refusal of the refund. Subsequently, the Court found that KA Deka did not make a plausible cause for meeting the shareholder requirement. The Court, therefore, saw no reason to refer preliminary questions to the CJ on the ‘substitute payment’, as prescribed on 23 October 2020. The Court refused the refund of DWT to KA Deka.

Netherlands Supreme Court rules on three cases of refund of Dutch dividend withholding tax for foreign investment funds

On 9 April and 16 April, the Netherlands Supreme Court ruled on three cases regarding a refund of Dutch dividend withholding tax (DWT). These cases are connected with the *KA DEKA* case (C-156-17) in which the compatibility with EU law of the differences in the DWT regime was the central subject, depending on whether the recipient is a non-resident Undertaking(s) for Collective Investments in Transferable Securities Directive (UCITS) or a Netherlands resident UCITS qualifying as a so-called ‘fiscal investment fund’ (*fiscale beleggingsinstelling* (FBI)). Under Netherlands tax law, UCITS qualifying as an FBI may claim a refund of Netherlands dividend withholding tax. Please see EU tax alert 184 (May 2020) and EU Tax Alert 187 (March 2021) for more information on this case.

British open-ended UCIT case

The party concerned in this case is an open-ended UCIT, located in the United Kingdom. The party concerned qualifies as an umbrella fund with ten separate sub-funds. The Netherlands Supreme Court referred in its judgment to the conditions under which a non-resident UCIT is in a situation comparable to that of an FBI with regard to the so-called redistribution requirement, as laid down in its judgment of 23 October 2020 in the *KA DEKA* case. In short, foreign UCITS are deemed to have distributed all of the profit available for distribution, calculated according to Dutch standards, and that profit should be taxed at the level of the investors as if it had been distributed. The Netherlands Supreme Court ruled that the party concerned did not meet this requirement and therefore, was not objectively comparable to an FBI. The refund of DWT was denied.

Scottish unit trust case

The party concerned is an open-ended authorized unit trust, which is based in Scotland. In question was whether the legal form of the party concerned, i.e., a *unit trust*, was comparable to an open-ended mutual fund (*fonds voor gemene rekening*: FGR), and therefore would have access to the FBI regime. The Netherlands Supreme Court ruled that the Scottish unit trust is not objectively comparable to an FGR because its participation certificates are not freely marketable as they could only be sold to the Scottish unit trust itself. In addition, the Netherlands Supreme Court ruled that the Scottish unit trust cannot be regarded as special-purpose fund (*doelvermogen*) because these funds does not have parties entitled to a share in the profits. For that reason, the Scottish unit trust would not be subject to the Dutch CIT if it were established in the Netherlands. Altogether, the Scottish unit trust is not entitled to a DWT refund.

United States open-end diversified management company case

The party concerned is an open-end diversified management company located in the United States. The party concerned received dividends subject to DWT in several years after 2008. Before 2008, the refund scheme was in place. In short, an FBI was granted a refund, upon application, of dividend tax withheld at its expense in any year. The refund scheme was in place in all of the aforementioned cases. The refund scheme was replaced by the deduction scheme in 2008, which provides a withholding agent that is considered an FBI for Dutch CIT purposes a reduction to the dividend tax it is required to pay on the profits it distributes to its shareholders.

The party concerned invoked EU law, the free movement of capital to be precise and argued that it was comparable to an FBI, i.e., it should be entitled to a refund of DWT. The Court of Appeal ‘s-Hertogenbosch referred preliminary questions to the Netherlands Supreme Court on whether the change from the refund scheme to the reduction scheme has led to the introduction of an obstacle to the free movement of capital that did not previously exist within the meaning of Article 64(1) TFEU. The Netherlands Supreme Court ruled that the deduction scheme in an economic sense is not comparable to the refund scheme because the deduction differs per UCIT. For that reason, the free movement of capital is not hindered by the deduction scheme. Furthermore, the Netherlands Supreme Court does not consider it necessary to refer preliminary questions to the CJ as the two schemes differ in an economic sense.

CJ rules that Finland acts in breach of Articles 63 and 65 TFEU by treating income received from a Luxembourg UCITS differently to income received from a Finnish UCITS on the ground that the two UCITS do not have the same legal form (*E*)

On 29 April 2021, the CJ delivered its judgment in the case *E* (C-480/19). For the Opinion delivered in this case by AG Hogan of 19 November 2020, we refer to EUTA 186. The case deals with a natural person E residing in Finland who invested in a compartment of a SICAV in Luxembourg which is a UCITS within the meaning of the Directive 2009/65/EC (UCITS Directive). E submitted a request for a preliminary decision to the Central Tax Committee concerning the taxation of the earnings from the SICAV. In this request, E stated that the SICAV should be equated with a Finnish UCTIS within the meaning of the UCITS Directive whereby the earnings from the SICAV should be taxed the same way as earnings from a Finnish investment fund. The Central Tax Committee took the view that the SICAV was objectively comparable, in particular by virtue of its legal form, to a Finnish public limited company. Therefore, the earnings had to be considered dividends and taxed as income from employment. E brought an action before the Supreme Administrative Court in Finland stating that the taxation of the earnings distributed by the SICAV as income from employment is more stringent than the taxation of earnings distributed by a Finnish investment fund which is in breach of the free movement of capital pursuant to Article 63 TFEU. The Supreme Administrative Court decided to refer the question to the CJ, whether Articles 63 and 65 TFEU preclude that income received by a Finnish natural person from a Luxembourg UCITS within the meaning of the UCITS Directive is not, for the purposes of income tax, treated in the same way as income received from a Finnish investment fund within the meaning of the UCITS Directive because the legal form of the Luxembourg UCITS does not correspond to the legal structure of the Finnish investment fund.

The CJ started by observing that Article 63(1) generally prohibits restrictions on movements of capital between Member States and that Article 65(1)(a) TFEU states that Article 63 TFEU is without prejudice to the rights of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation. It is therefore appropriate to examine whether (i) there is a difference in treatment, (ii) whether the situations are potentially comparable and (iii) whether the difference may be justified. The CJ ruled that there is a difference in treatment since the income received from the SICAV by a Finnish natural person is subject to a less favourable tax treatment than income received by a Finnish natural person from a Finnish public limited company or from a Finnish UCITS. With respect to the question whether the situations are objectively comparable, the CJ noted that the SICAV and a Finnish UCITS are both types of UCITS within the meaning of the UCITS Directive but that this is not decisive for establishing whether the situations are comparable. As also mentioned in case *Fidelity Funds and Others* (C-480/16), the comparability of a cross-border situation with an internal one must be examined having regard to the objective pursued by the national provisions as well as their purpose and content. In that respect, the CJ ruled that a SICAV is objectively comparable to a Finnish UCITS since both entities are exempt from income tax and the earnings received from both are subject to taxation at the level of the participants. The CJ observed that a Luxembourg SICAV, unlike a Finnish UCITS, is equated to a public limited company but that the Finnish legislature does not make the distinction between income from capital and income from employment contingent on the legal form of the distributing body but, on the contrary, has taken the view that both earnings constitute income from capital. Therefore, it follows that, subject to verification by the referring court, the difference in treatment between the respective income received from a Luxembourg SICAV and a Finnish UCITS concerns objectively comparable situations. Finally, the CJ noted that the Finnish Government had not relied on reasons in the public interest to justify the restriction of movement of capital and that it had also not identified such reasons.

On the whole, the CJ came to the conclusion that Articles 63 and 65 TFEU must be interpreted as precluding a tax practice of a Member State according to which, for the purpose of the taxation of income of a natural person residing in that Member State, the income received from a UCITS established in another Member State cannot be equated with income received from a UCITS established in the first Member State on the ground that the latter does not have the same legal form.

Interest payments on optional reductions are not covered by EU tax law

The German company XY buys electricity and, after a conversion, delivers it to its customers. In separate proceedings for the 2006 tax year, the Bundesfinanzhof ruled that XY was entitled to apply the reduced rate of electricity tax. On that basis, the tax authorities amended the decision concerning the 2010 tax year and refunded the overpaid tax, in view of the 2006 proceedings. In 2014, XY requested a refund of interest, which was denied by the German tax authorities. XY's appeal before the court at first instance was dismissed. That court held that the reduced rate of electricity tax is optional from the point of view of European Union law, so that the levying of the tax at the standard rate, even if contrary to national law, does not constitute an infringement of European Union law. Consequently, the obligation arising from the case law of the Court to repay the excess tax with interest is not applicable. XY brought an action in revision against that judgment. The Bundesfinanzhof referred questions to the CJ. AG Szpunar published his Opinion on 12 May 2021.

AG Szpunar concludes that German tax authorities do not have to pay interest in respect of the wrongly paid electricity tax. European tax law does not require that tax unduly paid to be repaid with interest where the erroneous assessment of that tax results from the non-application by the German tax authorities of a reduced rate of tax to which the taxpayer was entitled and which was provided for in national law on the basis of an optional authorization. However, the aforementioned situation would be different if the failure to reimburse would result in a breach of the principle of equal treatment. AG Szpunar concludes that a national court should ascertain this in the light of the circumstances of the particular case.

Portuguese treatment of UCITS is not contrary to EU law, according to AG Kokott

Allianzgi-Fonds Aevn is a collective investment undertaking (UCITS) which has its seat in Germany and receives investment income in the form of dividends paid by undertakings resident in Portugal. In principle, Portugal treats dividends distributed to a UCITS formed under Portuguese law as exempt from CIT. It therefore makes no difference to the private investor whether he or she acquires shares directly or invests indirectly in another undertaking via a UCITS. In that respect, dividends distributed by undertakings to a resident UCITS which the latter in turn distributes to its investors are not taxed by Portugal at the level of the UCITS. Instead, a UCITS formed under Portuguese law is subject to stamp duty, which is charged quarterly as a tax under tax law on both the retained dividend income and the remaining total net book value. However, the exemption from corporation tax in respect of capital income of the UCITS does not apply to the applicant, as it is not an undertaking formed and operating under Portuguese law. The applicant, therefore, is subject to the general provisions of the Corporation Tax Code. Accordingly, dividends distributed by Portuguese undertakings to the applicant in 2015 and 2016 were subject to Portuguese corporation tax at a rate of 25%, which the distributing undertakings withheld at source and paid over to the Portuguese treasury. Allianzgi-Fonds Aevn lodged an appeal against the Portuguese tax assessments on the basis of which corporation tax had been deducted at source for the tax years 2015 and 2016. The competent tax authority did not grant those requests, and the case was eventually brought before the court, which referred preliminary questions to the CJ. The referring court raises five questions concerning the compatibility of a Portuguese provision of tax law with the fundamental freedoms. AG Kokott published her Opinion on 6 May 2021.

AG Kokott concludes that the difference in treatment between resident and non-resident UCITS does not evidently result in unfavourable treatment whatsoever from the outset, and, consequently, to a restriction of the free movement of capital. However, if the different treatment would lead to a restriction of the free movement of capital, it should be ascertained whether, in the light of the objective, and the purpose and content of the legislation at issue in the main proceedings as well, resident and non-resident UCITS are in a comparable situation (these criteria are derived from *Pensioenfonds Metaal en Techniek* (C-252/14)). AG Kokott concludes, in the light of the aim pursued by the national legislation, as well as of its purpose and content, a non-resident UCITS is not in a situation comparable to that of a resident UCITS. If the CJ, however, were to proceed on the assumption that the situations are comparable, AG Kokott lists four justifying circumstances that enter into consideration in the present case: (i) the preservation of the balanced allocation of the power to impose taxes between the Member States,

(ii) the avoidance of non-taxation, (iii) the preservation of the coherence of the Portuguese tax system, and (iv) safeguarding the principle of proportionality.

Based on the above, AG Kokott concludes that EU law does not preclude national legislation under which withholding tax is levied on dividends distributed by a resident company where those dividends are distributed to a non-resident UCITS which is not subject to corporation tax in the State of residence. This also applies if no corporation tax is levied on those dividends when they are distributed to a resident UCITS, but another taxation technique is applied which is intended to ensure that no corresponding income tax is levied until they are redistributed to the investor, and, until that point, a quarterly taxation of the total net assets of the resident UCITS is levied instead.

Refusal of cross border loss relief not contrary to EU law if business operations did not cease according to Netherlands Supreme Court

X BV belongs to the B group and holds the shares in the German A GmbH. The top holder of the companies in the B group is Norwegian A AS. In 2011-2012 E AS acquires 31.08% of the shares in A AS. Due to this acquisition, part of the losses of A GmbH in Germany can no longer be offset. X BV wants to offset the German losses to its profits. However, according to the Amsterdam Court of Appeals this would not be possible. X BV consequently lodged an appeal.

The Netherlands Supreme Court rules then that it is not contrary to EU law to refuse the cross border loss relief requested by X BV. Based on the *Marks & Spencer II case* (C-446/03), loss relief of a foreign subsidiary is possible conditionally where (i) the loss should be definitive, and (ii) there should be no possibility of the loss being offset in the future at the level of the subsidiary itself or a third party. The Supreme Court adds that there should also be no income at the subsidiary in the relevant Member State (*Marks & Spencer III*, C-172/13). As A GmbH has continued its business operations, it should be assumed that A GmbH has continued to receive income from its business, i.e., the losses, therefore, should not be definitive. Refusal of cross border loss relief, therefore, should not violate EU law.

VAT

Brexit and VAT: the UK-EU Trade and Cooperation Agreement

As a result of Brexit, supplies of goods from the EU to the UK (and vice versa) will be regarded as 0% VAT taxed export supplies instead of intra-Community supplies. The formalities relating to the 0% VAT rate for export supplies can be different than those applied to the 0% VAT rate for intra-Community supplies. Further, there will no longer be an obligation to file eEC Sales Listings in relation to goods supplied from the EU to the UK or the other way around. UK businesses supplying goods in the EU may no longer benefit tfrom the simplified dprocedure for triangular supplies, which could trigger additional VAT registrations of these businesses in the EU. This would only be different in case the UK taxable person already is registered for VAT purposes in one EU country. Similarly, EU business supplying goods in the UK may have to register themselves faster for UK VAT purposes.

Northern-Ireland will have a mixed status post-Brexit. It will remain part of the UK customs territory, while also having access to the EU single market for goods. This means that supplies of goods from the EU to Northern-Ireland and the other way around will be seen as intra-Community supplies. For these supplies, there still exists an obligation to file eEC Sales Listings. Moreover, VAT numbers that will appear on invoices relating to supplies of goods from the EU to Northern Ireland will be required to have the prefix xXI, to distinguish them from supplies of goods to Great Britain (i.e. England, Wales and Scotland). The ending of the Brexit transitional period also impacts the right to deduct input VAT on direct and general costs for EU taxable persons providing financial land insurance related services to recipients established in the UK. The same applies inbound to UK companies providing these types of services to EU based customers. Due to Brexit, those services will now give rise to VAT deduction, while this was not the case when the UK was still part of the EU and during the transitional period where the UK was still deemed to be part of the EU for VAT purposes.

CJ rules on VAT exemption for granting of credit and transactions concerning other negotiable instruments (*FRANCK*)

On 14 December 2020, the CJ delivered its judgment in case *FRANCK d.d. Zagreb v Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski* *upravni postupak* (C-801/19). Franck, a Croatian coffee and tea trader, made funds available to Konzum, a Croatian retailer. Parties did so through three types of contracts concluded simultaneously:

1. Financial Loan Agreement
   Based on this contract, Konzum issued a bill of exchange to Franck. Franck undertook to pay Konzum the sum mentioned in that bill of exchange in cash.
2. Contract for Assignment of Trade Receivables
   Pursuant to this contract, Franck transferred the bill of exchange to a factoring company. The factoring company paid Franck 95% to 100% of the amount as mentioned in the bill of exchange. Franck transferred that amount to Konzum's account while acting as guarantor of its repayment on the due date of the bill of exchange.
3. Commercial cooperation agreement
   Under this agreement, Konzum reimbursed Franck for the interest and costs charged to Franck by the factoring company. Further, Konzum also paid Franck a remuneration of 1% of the amount mentioned in the bill of exchange.

During an audit, the Croatian tax authority found that the remuneration of 1% under the commercial cooperation agreement had been treated as VAT exempt by Franck. The tax authority challenged this VAT treatment, also imposing a VAT assessment including penalties and interest on Franck. In short, the CJ was asked by the national administrative court to clarify whether the VAT exemptions for the granting of credit and transactions concerning other negotiable instruments apply to the transaction described above. The CJ stated that the economic purpose of the transaction was to satisfy Konzum's capital requirements, as Konzum was unable to borrow funds from financial institutions in Croatia due to its level of indebtedness and that of the group to which it belonged. From this, the CJ established that the main service provided by Franck consisted in making funds available to Konzum, which funds Franck obtained from a factoring company. The other services provided by Franck pursuant to the contracts are ancillary to this main service.

The CJ ruled that this service of Franck should be exempt from VAT because the nature of the supply is the granting of credit. However, it is for the national court to verify that the remuneration which Franck received relates to making the funds concerned available. For that analysis, it is irrelevant that the funds made available were reimbursed not to Franck but to the factoring companies.

Furthermore, the CJ clarified that the service provided by Franck is also covered under the VAT exemption for negotiable instruments, as the bills of exchange issued by Konzum must be regarded as such, provided that they contain an obligation on Konzum, as issuer, to pay the specified amount to the holder on their maturity. This must also be verified by the referring court. Furthermore, this conclusion is not overturned by the fact that Konzum was referred to in the contracts relating to the bills of exchange as a lender and Franck as a borrower.

CJ rules on the economic activity concept (*AJFP and DGRFP*)

On 20 January 2021, the CJ issued its judgment in case *AJFP Sibiu and DGRFP Braşov* (C-655/19). This case concerns the question if the sale of a property that was acquired under an enforcement procedure constitutes an economic activity subject to VAT. LN provided several loans to JM. The repayment of these loans was secured by property mortgages. Ultimately the loans were not repaid, resulting in three properties being auctioned to LN. LN sold all properties. The Romanian tax authority conducted a tax audit at LN, where it determined that the three transactions resulted in LN qualifying as a taxable person for VAT purposes. The turnover received from the property sales exceeded the turnover threshold, which led to a VAT assessment being imposed on LN (including interest and penalties). LN appealed this decision and the CJ delivered its judgment on 20 January 2021.

The CJ based its judgment on the fact that LN acquired the immovable properties due to confiscations in the course of enforcement proceedings that were initiated with the aim of repaying the loans provided by LN to JM. The CJ considered that the mere purchase and sale of an immovable property does not constitute exploitation of property for the purposes of obtaining income on a continuing basis, as the only turnover realized in such a transaction is the profit on the sale of the property. Furthermore, it considered that the mere exercise of ownership also does not form an economic activity. Based on this reasoning, and by taking into consideration that LN only sold with the intention of collecting its claims and did not actively take any steps to sell real estate, the

CJ ruled that LN's sales were not an economic activity and, hence, not subject to VAT.

CJ rules on VAT treatment of providing company vehicles to employees (*QM*)

On 20 January 2021, the CJ delivered its judgment in case *QM v Finanzamt Saarbrücken* (C-288/19). QM is an investment fund manager based in Luxembourg that made two vehicles, forming part of the assets of the business, available to staff members. The staff members both worked in Luxembourg and resided in Germany. The vehicles were used for both professional and private purposes. One of those vehicles was made available to the staff member free of charge, while QM deducted a portion from the salary of the other staff member in exchange for the use of the other vehicle. QM is subject to a simplified tax scheme in Luxembourg, which means that the act of making the two vehicles available was not subject to VAT, but also did not give rise to input VAT deduction relating to those vehicles. QM registered for VAT in Germany to declare VAT concerning the act of making those vehicles available. Those tax returns were accepted by the German tax authority. At a later stage, QM lodged a complaint in respect of the tax assessments relating to those returns, which was denied by the German tax authority. QM considered that the requirements for the levy of VAT on the provision of company cars in Germany were not met as the employees did not make a payment of gave up part of their salary to enjoy the use of these cars.

In this case, the CJ was asked to clarify under what circumstances the provision of company vehicles to a staff member should be considered a rental service of a means of transport and, if so, where such a service is taxable with VAT in the employer's or the employee's Member State. The CJ clarified that the provision of company vehicles, whereby the employee gives up part of his or her salary, forms a service rendered for consideration. For one of the staff members, this did not happen. Although the provision of the company car can still qualify as a fictitious service because of the use of company assets for private purposes of the employee, the CJ stated that such a service can never be regarded as a rental service of a means of transport due to the absence of an actual rent payment.

The other staff member did waive part of his or her salary. When an agreement exists with the employer on the duration and the right to use the vehicle and to exclude others from it (e.g., if the vehicle always remains at the disposal of the employee), the transaction should qualify as the long-term hiring of a means of transport, which is subject to VAT in the country of residence of the employees. This is for the referring court to determine

CJ rules on VAT treatment of commissionaire services (*UCMR-ADA*)

On 21 January 2021, the CJ issued its judgment in case *UCMR-ADA* (C-501/19). This case concerns the VAT treatment of the fees received by an organization in charge of the licensing of copyrighted works in their own name, but on behalf of the copyright owners.

UCMR-ADA is an organization for the collective management of the property rights associated with copyrighted musical works. It was designated by the Romanian Copyright Office as the sole organization in charge of collecting the copyright-related fees regarding the use of these works at concerts and other artistic events. For its own service, UCMR-ADA retained a commission from the amount of the royalties collected from the users. The remainder of the payment was then channelled to the copyright owners. The cultural association 'Soul of Romania' refused to pay the royalties claimed by UCMR-ADA. The Romanian court ruled that Soul of Romania had to pay these royalties, but also ruled that the fees for the copyright licence paid to UCMR-ADA should not have been subject to VAT. UCMR-ADA disagreed with this, arguing that the fees should be considered as the consideration for a supply of services within the meaning of the VAT Directive.

First of all, the CJ considered that the copyright owners supplied services within the meaning of the VAT Directive in favour of the music promoters. The fact that the royalties were collected by UCMR-ADA does not make this any different, as UCMR-ADA collected the royalties in its own name but for the account of the copyright owners. Because of this, the CJ also ruled that UCMR-ADA takes part in the supply of these services pursuant to article 28 of the EU VAT Directive, which implies that it shall be deemed to receive the supplies of services carried out by the copyright owners and to supply these services to the music promoters. In this respect, the royalty received by the collecting society shall be subject to VAT as the consideration for a supply of services.

CJ rules on conditions to form a VAT group (*M-GmbH*)

On 15 April 2021, the CJ delivered its judgement in the case *M-GmbH* (C-868/19).

PD is a German Kommanditgesellschaft. A-GmbH was its general partner. M-GmbH, D-GbR and natural persons C, D and E were its limited partners. Most decisions in PD were adopted by simple majority. In this regard, M-GmbH had six votes and the remaining four partners had one vote each. M-GmbH therefore held the majority of the voting rights in PD. A-GmbH and M-GmbH had the same director. PD was economically and organizationally integrated into M-GmbH. PD believed that it was also financially integrated with the M-GmbH and therefore met all conditions to form a VAT group.

M-GmbH and the partnership could not form a VAT group because Germany only allows legal persons to form a VAT group and further requires that only persons who are financially integrated into the partnership of the controlling company can be part of a VAT group.

In its judgment, the CJ ruled that Germany is not allowed to maintain this rule and that non-legal persons can also be part of a VAT group. EU countries have the option to implement the rules enabling the VAT group scheme. The CJ considers that the close financial links must be clarified on a national level. However, when a Member State has implemented the VAT grouping scheme, the close financial links required to form a VAT group must be interpreted autonomously and uniformly by EU countries. This interpretation is mandatory despite the optional character of the VAT grouping scheme. In this case, the CJ ruled that there are sufficient financial links between PD and M-GmbH to form a VAT group because M-GmbH could impose its will on PD by means of decisions taken by majority vote.

The CJ also addressed the issue that the VAT grouping scheme might be subject to certain restrictions. However, those restrictions must then be in line with the objectives of the VAT Directive, such as the prevention of tax abuse, fraud or avoidance. When a Member State imposes such restrictions, the principles of proportionality and fiscal neutrality should be respected. In this case, the CJ ruled that the restrictions imposed by Germany are not compatible with these principles.

CJ rules on VAT treatment of supplies between head office and branch (*Danske Bank*)

On 11 March 2021, the CJ delivered an important judgment in the *Danske Bank* case (C-812/19).

The Danish head office of Danske Bank is part of a VAT group with Danish group companies. Danske Bank also had a branch in Sweden. That branch could not be part of the Danish VAT group due to the territorial scope of the Danish VAT grouping regime. The head office charged costs to its Swedish branch for the use of a computer platform. The question referred to the CJ was whether these on-charges were subject to VAT in Sweden under the reverse charge mechanism. This is relevant because such self-assessed VAT would not be deductible by the Swedish branch due to its limited right to recover input VAT.

Generally speaking, on-charges between a head office and its branches are not subject to VAT because they take place within the same group of the taxable person. In 2014, the CJ delivered its judgment in the landmark *Skandia* case (C-7/13), where it ruled that internal recharges between a head office and a branch that is part of a VAT group are subject to VAT. The reasoning behind this judgment seemed to be that the head office and the branch are no longer part of the same taxable person due to the existence of the VAT group.

The *Danske Bank* case is often referred to as the '*reverse Skandia*', because the head office is part of a VAT group instead of the branch. According to the CJ, this should not lead to a different outcome. The CJ, therefore, ruled that that the head office and its branch are to be considered separate taxable persons for VAT purposes also in the *Danske Bank* case. Based on the *Danske Bank* case, it is now clear that in the case of a VAT group, all services between a head office and its branch – and vice versa – fall within the scope of VAT.

It is to be expected that the *Danske Bank* ruling will have a big impact on the market in general, specifically in the financial services industry. Some Member States, like the Netherlands, allow in practice a foreign head office and its branch to be absorbed into one single VAT group.

This gives rise to the question whether these practices will need to be adjusted in view of the Danske Bank ruling.

CJ rules on VAT consequences transformation of perpetual usufruct into full ownership (*Gmina Wrocław*)

On 25 February 2021, the CJ delivered its judgement in the case *Gmina Wrocław* (C-604/19).

The Municipality of Wroclaw ('Municipality') held the legal ownership of Polish real estate. These ownership rights were subject to perpetual rights of usufruct which granted the user the exclusive right to use the land. The user paid the Municipality an annual fee as consideration for the perpetual usufruct for its duration (generally between 40 and 99 years). According to Polish VAT law, the lease of land in perpetual usufruct constituted a supply of goods due to the transfer of (economic) ownership. As a result, the annual fees paid by the user were subject to VAT. Eventually the Polish law system was transformed, which resulted in the rights of usufruct being transformed into full ownership. The new legal owners had to pay a so-called 'transformation fee' to the Municipality.

The CJ was asked if these transformation fees were also subject to VAT because of the transfer into full ownership being considered a supply of goods. The CJ was also asked to address the question if the Municipality acted in its capacity as public authority, as a result of which these activities would not be subject to VAT.

The VAT Directive defines the concept of 'supply of goods' as the transfer of the right to dispose of tangible property as owner. There also exists a *lex specialis* to this main rule, stipulating that the transfer of the ownership of real estate, in pursuance of the law, against payment of compensation is to be regarded as a supply of goods as well. The CJ ruled that the transformation of the right of usufruct into full ownership qualifies as a supply of goods due to this *lex specialis* provision. Because of that, the CJ no longer had to clarify whether, for VAT purposes, an actual supply of the land by the Municipality had taken place pursuant to the main rule.

Next, the CJ addressed whether the Municipality received the transformation fees in its capacity as public authority. Although the Polish law governing the transformation required the Municipality to carry out an administrative procedure, the transformation fee was not fixed by the Municipality under a special legal regime. The CJ stated that this seems to indicate that the Municipality does not exercise powers conferred by public law in relation to the transformation of the rights of usufruct into full ownership. Although this is for the national court to verify, the CJ hinted that the Municipality does not act as a public authority, as a result of which the transformation fees are in principle subject to VAT.

CJ rules on VAT treatment nutrition monitoring and advice (*Frenetikexito*)

On 4 March 2021, the CJ delivered its judgement in the case *Frenetikexito* (C-581/19).

Frenetikexito operated a sports facility, where it promoted health related services, such as nutrition monitoring and advice. These services were performed by a qualified nutritionist accredited for that purpose. Frenetikexito offered different programs to its members. Some programmes included only well-being and fitness services, whereas others also included nutrition monitoring. If a customer signed up for a nutrition monitoring service, that service would be billed to him no matter the number of consultations that took place. It was possible to sign up for nutrition monitoring services separately from any other services. In both situations, Frenetikexito did not declare any VAT on the nutrition monitoring services.

In its judgment, the CJ analysed whether the nutrition monitoring services should be regarded as a separate service from the fitness services, and if so, if the nutrition monitoring services are exempt from VAT due to the VAT exemption for medical care. The concept of 'medical care' must necessarily have a therapeutic purpose in order for the VAT exemption to apply. This therapeutic purpose relates to protecting, including maintaining or restoring the health of persons. In this case, it is not disputed that a nutrition monitoring service may be a tool to prevent certain conditions, such as obesity. However, according to the CJ, the same applies to exercising itself as that may limit the occurrence of cardiovascular diseases. The CJ observed that the nutrition monitoring services have a health purpose, but not necessarily a therapeutic purpose. Accordingly, the CJ ruled that the medical care exemption did not apply to the nutrition monitoring services.

CJ rules on VAT treatment of discount under health insurance scheme (*Firma Z*)

On 11 March 2021, the CJ delivered its judgement in the case *Firma Z* (C-802/19).

Firma Z is a pharmacy established in the Netherlands that sold medicines to customers in Germany. Firma Z had two types of German end-consumers:

- private individuals insured by private insurance companies. These transactions were treated by Firma Z as distance sales for VAT purposes, as a result of which Firma Z charged German VAT to the end-consumers.
- end-consumers insured compulsory by health insurance companies pursuant to social security law. These supplies were treated as intra-Community supplies subject to the 0% VAT rate in the Netherlands.

Firma Z distributed the medicines directly to the private individuals they insured. In both cases, Firma Z offered a price discount directly to end-consumers for answering a questionnaire about their illnesses. Due to these price discounts, Firma Z asked for a refund of German VAT through a downward adjustment of the taxable base for the distance sales to the end-consumers. The refund request related to the discounts granted by Firma Z on both types of flows.

In its judgment, the CJ ruled that Firma Z was not entitled to a VAT refund for the discounts granted to the end-consumers secured pursuant to social security law. The transaction between Firma Z and the insurance company was subject to the 0% VAT rate and because of that there was no taxable amount to decrease according to the CJ.

CJ rules on place of supply rules (*Wellcome Trust Ltd*)

On 17 March 2021, the CJ delivered its judgement in the case *Wellcome Trust Ltd* (C-459/19).

Wellcome Trust Limited (‘WTL’) performs economic activities and therefore qualifies as a taxable person for VAT. As such, WTL is also registered for VAT purposes. Next to these activities, WTL also performs non-economic activities, such as the purchase and sale of shares in connection to the management of the assets of a charitable trust. WTL acquired investment management services from a supplier established outside the EU that were used for these non-economic activities. WTL did not provide its VAT number to any of the investment management suppliers. The CJ was asked to determine whether these services acquired are subject to UK reverse charge VAT pursuant to the rules for services rendered to taxable persons.

The CJ ruled that a taxable person is also acting as such when services are procured that relate to non-economic activities when these activities are carried out in a business capacity. WTL’s activity is unarguably a business activity. Because of that, the CJ ruled that UK VAT was due by WTL.

CJ rules on revision of incorrectly charged VAT (*UAB ‘P’*)

On 18 March 2021, the CJ delivered its judgement in the case *UAB ‘P’* (C-48/20).

UAB ‘P.’ is a Lithuanian company which provided fuel cards to Lithuanian transport companies allowing them to purchase fuel at service stations located in Polish territory. P. considered that it had purchased fuel from the service station and subsequently resold that fuel to its customers. Therefore, P. issued invoices including VAT to its customers. In a legal dispute, it was ruled that the fuel was supplied directly by the service stations to the transport companies for VAT purposes. P.’s actual activity was thus to finance the purchase of fuel at those service stations by Lithuanian transport companies using fuel cards. That activity constitutes a financial service exempt from VAT in Poland under the Law on VAT.

Any input VAT incurred by P. in connection to the fuel purchases is therefore not deductible. Further, the VAT amounts incorrectly charged by P. to its customers remained due. Normally, it would be possible to adjust these amounts by issuing credit invoices. In that case, the VAT amount paid by P. would be refunded, also because P.’s customer would pay back some of the input VAT previously deducted. The Polish VAT act stipulates that such a refund will not be granted if the credit invoices are issued as a result of an audit carried out by the Tax Authority. Since this was the case, P. was not given a VAT refund. In its judgment, the CJ addressed whether this practice was in breach with the principles of proportionality and neutrality.

The general rule is that any person who charges VAT on an invoice is liable to pay the VAT amount indicated on that invoice. This rule is intended to eliminate the risk of loss of tax revenue, which may be present if the recipient of that invoice would claim deduction of input VAT. The CJ clarified that Member States may adopt measures to ensure the correct levy of VAT and the prevention of tax evasion, but those measures must not go beyond what is necessary to attain these objectives and may not be used in such a way that they would undermine the neutrality principle. The CJ ruled that the Polish practice breached the neutrality principle. P. acted in good faith and without being granted a VAT refund for the incorrectly charged amount, P. would be imposed with a VAT burden in breach of the neutrality principle.

CJ rules on neutrality principle in connection to intra-Community acquisitions of goods (*A*)

On 18 March 2021, the CJ delivered its judgement in the case A (C-895/19).

A acquired goods in Poland from other Members States that were used for A's business activities. Taxable persons are required to self-assess VAT in connection to such intra-Community acquisitions. These self-assessed VAT amounts may also be deducted simultaneously in the same VAT return as the one in which the declaration takes place. Therefore, the net VAT payment on intra-Community acquisitions is in principle zero. In Poland, this 'neutral' outcome depends on the taxable person fulfilling certain formal requirements, such as that the amount of self-assessed output VAT is reported correctly and no later than three months after the end of the month in which the tax obligation arose.

In practice, invoices from foreign suppliers are often received too late as a result of which taxable persons do not always meet this deadline. Once this three-month period has expired, the amount of self-assessed VAT becomes payable together with penalties and interest for late reporting. This implies that the amount of input VAT deducted no longer equals the amount of VAT paid (including penalties and interest).

In its judgment, the CJ ruled that the abovementioned limitations imposed under the Polish VAT law breach the neutrality principle of the EU VAT system. This judgment might have a broader impact because the same limitations apply to intra-Community acquisitions of services and imports of services in Poland. Based on this judgment, these rules should also be considered as being in breach of the VAT Directive.

CJ rules on VAT exemption for insurance relates services (*Q-GmbH*)

On 25 March 2021, the CJ delivered its judgement in the case *Q-GmbH* (C-907/19).

Q-GmbH develops, markets and places insurance products. F-Versicherungs-AG ('F') engaged Q to render the following services in return for a brokerage fee:

- provision of a user license for an insurance product designed to cover special risks;
- placement of insurance contracts on behalf of F (including risk assessment); and
- management of insurance contacts and settlement of claims.

The referring court established that these services should be classified as a single supply for VAT purposes, where the granting of licenses for the use of insurance products is the main component. Q argued that these services are exempt from VAT. The German Tax Authorities disagreed and concluded that the services should be fully taxable with VAT.

In its judgment, the CJ first analysed the referring court's assumption that the three services qualify as one single supply. Because the insurer has no formal obligation to make use of Q's mediation services, the CJ concluded that these services are not essential to the distribution of the insurance product to future insured persons. Instead, it appears as if this mediation service constitutes an independent activity, which is a matter for the referring court to determine. The referring court must also ascertain whether the insurance contract management services are part of one single supply with the license granting activity.

The CJ then considered the VAT treatment of the provision of the user license. More specifically, the CJ assessed whether this service is exempt from VAT as an insurance and reinsurance transaction. The main characteristic of such a service is that an insurer covers a risk borne by the insured party in return for prior payment of a premium. These insurance services necessarily imply the existence of a contractual relationship between the insurer and the insured. Q's service cannot be classified as an insurance service because Q has no contractual relationship with the insured parties and is also not responsible for covering the risks insured on the basis of the insurance product it has licensed.

In the second place, the CJ considers if the VAT exemption for services related to insurance transactions performed by insurance brokers and insurance agents applies. The term ‘related’ covers different services that are closely connected with insurance transactions and constitute the essential parts of those transactions (such as the settlement of claims). The CJ argued that the granting of the user license may qualify as such. However, it is also required that the service be supplied by an insurance broker or agent. The essential aspect of the work of an insurance agent is to find prospective clients and introduce them to the insurer with a view to concluding insurance contracts. In connection to the granting of user licenses for insurance products, it seems as if this condition has not been met.

CJ rules on use-and-enjoyment rule (*SK Telecom Co.*)

On 15 April 2021, the CJ delivered its judgement in the case *SK Telecom* (C-593/19).

The South Korean company SK Telecom provided roaming services in Austria for users who live in South Korea but are temporarily staying in Austria. In order to enable these users to use their cell phones while in Austria, an Austrian network operator made its network available to SK Telecom against payment of remuneration in the form of a usage fee (including Austrian VAT). SK Telecom charged a roaming fee to its customers and argued that no Austrian VAT was due on these fees since they were taxable in South Korea for VAT purposes.

SK Telecom asked for a refund of the VAT charged by the Austrian network operator. This request was rejected by the Austrian Tax Authority because SK Telecom did not pay Austrian VAT on the roaming fees received from its customers. In South Korea, the roaming services were not subject to a sales tax comparable to Austrian VAT, as a result there would be a double non-levy of VAT on the roaming services. To prevent this mismatch, Austria made use of the policy option offered in the VAT Directive to shift the place of service to Austria when the ‘actual use’ of the services takes place in Austria.

In its judgment, the CJ ruled that roaming services for the use of the Austrian mobile phone network by South Korean residents should be considered as services the actual use of which takes place in Austria. According to the CJ, this also applies if the clients are residents of South Korea, but temporarily reside in Austria. The tax treatment of the roaming services in South Korea is not relevant for this assessment.

CJ rules on compatibility of sanctions with EU law (*Grupa Warzywna Sp. z o.o.*)

On 15 April 2021, the CJ delivered its judgement in the case *Grupa Warzywna Sp. z o.o* (C-935/19).

Grupa Warzywna sp. z o.o. (‘Grupa’) acquired an immovable property. This acquisition was treated as being subject to VAT and this input VAT was simultaneously deducted by Grupa. During an audit, the Polish Tax Authority considered that this acquisition was exempt from VAT. This implies that Grupa claimed a refund of incorrectly charged VAT. Such incorrectly charged VAT may not be deducted. Grupa adjusted its VAT return, which then resulted in a lower VAT refund. The Polish Tax Authority imposed a 20% penalty on Grupa because it had filed an incorrect VAT return. This penalty was based on the amount of input VAT that was wrongly deducted by Grupa.

Member States have the possibility to take measures in order to prevent fraud and to secure VAT revenues. From the reference for a preliminary ruling, it follows that that Grupa and its supplier mistakenly treated the supply as subject to VAT. Since Grupa corrected its VAT return there was also no risk of VAT revenue shortfalls. Because of that, the CJ ruled that the penalties imposed by Poland were not compatible with EU law. More specifically, such penalties breached the principles of proportionality and neutrality.

CJ rules on VAT treatment of restaurant services (*J.K.*)

On 22 April 2021, the CJ delivered its judgement in the case *J.K.* (C-703/19).

J.K. is a franchisee in a chain of fast-food restaurants that sell meals and other prepared foods. The offered products can be consumed inside or outside the restaurant. J.K.’s sales take place in-store, via a drive-through and in food courts. According to the Polish Tax Authority, J.K. offered restaurant services for which an 8% VAT rate applied. On the other hand, J.K. argued that its transactions should be regarded as supplies of food, for which a lower 5% VAT rate applied.

In its judgment, the CJ sheds light on whether the transactions performed by J.K. should be regarded as supplies of food or as restaurant services. The final assessment will need to be made by the referring court. The CJ ruled that the concept of 'restaurant, catering and hospitality services' includes the supply of food accompanied by sufficient additional services designed to enable the immediate consumption of that food by the final consumer. Important aspects in this respect are:

- the presence of waiters,
- the provision of services such as taking orders and serving food,
- the availability of closed and heated rooms specially equipped for the consumption of the food,
- the availability of checkrooms, toilets, furniture and tableware.

If a consumer chooses not to make use of the human and technical resources made available to him, the CJ argued that it should be assumed that the supply of foodstuffs is not accompanied by any additional service. By stating this, the CJ hinted that J.K.'s transactions should be regarded as supplies of goods for which a lower VAT rate applies in Poland.

CJ rules on the concept of a VAT permanent establishment (*Titanium Ltd*)

On 3 June 2021, the CJ delivered its judgment in the *Titanium Ltd.* Case (C-931/19).

Titanium is a real estate investor that is established in Jersey. Titanium owned a real property in Austria, which it leased to Austrian companies. Other than the real property, Titanium did not possess any assets in Austria, nor did it employ any local staff of its own there. Titanium outsourced the day-to-day property management to an Austrian real estate agent. On the other hand, Titanium retained the main decision-making power with regard to the Austrian real property, such as the power to enter into or to terminate tenancy agreements as well as decisions relating to capital expenditures and repairs.

Titanium did not pay any Austrian VAT in relation to the leasing of the Austrian real property. The Austrian tax authority disagreed and argued that the Titanium was liable to pay Austrian VAT on the ground that Titanium had a fixed establishment for VAT purposes in Austria.

In its judgment, the CJ held that Titanium did not possess of a fixed establishment by merely owning and leasing real property. For VAT purposes, the concept of a 'fixed establishment' requires a sufficient degree of permanence and a suitable structure, in terms of human and technical resources, to supply services on an independent basis. Since Titanium did not have any own staff in Austria and the real estate agent it appointed to perform certain administrative tasks was not allowed to make key decisions regarding the lease, the CJ ruled that the local presence of Titanium in Austria was not sufficient enough to act independently and to perform the leasing activities.

CJ rules on the VAT exemption for fund management services (*K and DBKAG*)

On 17 June 2021, the CJ delivered its judgment in the joint cases *K* (C-58/20) and *DBKAG* (C-59/20) about the VAT exemption for the management of ICBE and AIF funds.

In the first case, K was engaged by fund managers to perform administrative services relating to the calculation of yields for income tax purposes (such as fund settlements). K passed on the relevant information to the fund managers, who submitted the information to the tax authority. K argued that the tax calculation services are exempt from VAT as they fulfil the essential characteristics of fund management, whereas the Austrian tax authority argued that these services are specific tasks performed by accountants and tax advisers (as a result of which the fund management exemption should not apply).

The second case concerns the acquisition of IT software used for risk management and performance measurement. The software is specifically tailored to the investment fund sector and takes into account the complex requirements imposed by the legislature. The risk and performance indicators calculated with the IT software are used by DBKAG for the preparation of reports in order to meet its legal information requirements towards the authorities and investors with regard to risk management and performance measurement. According to DBKAG, these services are exempt from VAT under the fund management exemption. The Austrian tax authority argued that the VAT exemption does not apply because DBKAG only rendered a service of technical nature, which is not essential for the management of collective investment funds.

In its judgment, the CJ emphasized that in order for the fund management exemption to apply, the services must form a distinct whole that fulfils the specific, essential functions of the management of collective investment funds.

With regard to the notion of 'distinct whole', the CJ considers that it is not necessary for a task to be completely outsourced for it to be a distinct whole (as long as the essential characteristics of fund management are fulfilled).

As for the requirement that services be 'specific and essential', the CJ referred to an intrinsic link between the services and the management of special investment funds. The fund management exemption relates specifically to portfolio management and the administration of the investment vehicle itself. From the annexes of the ICBE Directive, it follows that this also includes the legally required activities of reporting, valuation and pricing (including tax returns). On the other hand, activities that are inherent to any type of investment do not fall within the scope of 'fund management'. This means that the tax calculation services provided by K fall within the scope of the VAT exemption as long as these services are intrinsically linked to the management of collective investment funds. The same applies to the IT software acquired by DBKAG, as long as this software is granted exclusively to collective investment funds and not to any other types of funds.

These aspects are to be ascertained by the referring court. In particular, the referring court should determine if the tax calculation services carried out by K correspond to the obligations imposed by Austrian law which are specific to special investment funds and therefore, differ from the obligations imposed on other types of investment funds. With regard to the IT services, it is apparent from the reference that the risk management and performance measurement services are specific to the management of collective investment funds.

CJ rules on payment of deferment interest in VAT cases (*CS and technoRent International*)

On 12 May 2021, the CJ delivered its judgment in the joint cases *CS and technoRent International* (C-844/19).

The request for a preliminary ruling is based on two different appeals. The first applicant is CS, who claimed a VAT refund in 2007, which at first, was partly granted. In 2013, the remainder (excess VAT) was paid out to CS after several legal procedures. The second applicant is technoRent International GmbH, who claimed a VAT refund due to downward purchase price adjustments in 2005, which was only paid out in 2013. Both applicants requested the Austrian tax authority to reimburse deferment interest (interest due because the Tax Authority refunded the VAT amounts too late). The Austrian tax authority rejected these appeals, stating that Austrian VAT law does not provide for payment of interest in these specific cases of late payment of excess VAT or a VAT refund.

The CJ reasoned that, in both cases, a taxable person is charged too much VAT, which was paid either indirectly through his suppliers or directly to the State. Based on settled case law, the CJ stated that when a refund of the excess VAT or a VAT credit is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person are compensated through payment of default interest. The CJ, therefore, ruled that both CS and technoRent International GmbH are entitled to an interest payment.

However, the Austrian VAT Act does not contain a provision regulating such a reimbursement. According to the CJ, there is however no rule of Council Directive 2008/9/EC with direct effect which may be invoked by either one of the applicants. The CJ, therefore, ruled that the referring court should do all that which is within its power to uphold a result in conformity with EU law, for example, by means of an application by analogy or a broad interpretation of national law in conformity with EU law.

CJ rules on obligation to revise input VAT when initially planned activity is ceased (*Skellefteå Industrihus AB*)

On 18 May 2021, the CJ delivered its judgment in the *Skellefteå Industrihus* case (C-248/20).

Skellefteå planned to develop an office building. In principle, the rental of real estate is exempt from VAT, but under certain conditions the landlord and the tenant may choose to opt for a VAT taxed lease. This option for VAT taxed lease results in the landlord being entitled to reclaim input VAT. During the construction phase, Skellefteå applied for this option for VAT taxation (optional tax liability scheme). Later on, one of the future tenants announced that it was no longer interested in renting office space, ultimately resulting in the cancellation of the project. This subsequently ended the optional tax liability scheme. Based on Swedish VAT law, the cancellation of the project effectively resulted in the retroactive reversal of Skellefteå's right to recover input VAT granted in the course of the optional tax liability scheme. Skellefteå argued that this obligation to immediately repay the input VAT previously deducted (including interest) was not compatible with the EU VAT Directive.

Based on settled case law, the CJ stated that the right to deduct VAT is in principle retained once it has arisen if the intended economic activity is not carried out. The reasoning behind this is to safeguard a neutral VAT treatment between the same investment activities though mitigating differences between businesses already carrying out taxable transactions and other businesses seeking to invest. However, when the taxable person ultimately starts to use the acquired goods or services to perform activities that are exempt or outside the scope of VAT, this will trigger an obligation to revise the input VAT earlier deducted. This obligation is interpreted broadly within the EU VAT Directive: the initial deduction is adjusted if the ultimate use entitles a higher or lower input VAT deduction.

In the past, the CJ had already held that a taxable person is not required to revise the input VAT deducted when that taxable person did not make use of the acquired goods or services because of circumstances beyond the taxable person's own control, provided the taxable person still intends to use these goods or services for a VAT taxed activity. Because of the above, the CJ ruled that the Swedish obligation to immediately repay the total amount of input VAT deducted is in breach of the EU VAT Directive. However, if the taxable person no longer plans to use the goods and services to carry out output transactions or uses them to carry out exempt transactions, this may lead to an obligation to repay (part of) the input VAT deducted. In such situations, national legislation imposing an obligation on a taxable person to adjust the initial input VAT amount does not breach the EU VAT Directive.

CJ on joint and several liability for default interest (*ALTI*)

On 20 May 2020, the CJ delivered its judgment in the case *ALTI* (C-4/20).
ALTI purchased a harvester, a tractor and other agricultural equipment from FOTOMAG. ALTI paid the invoices issued by FOTOMAG and deducted the input VAT charged on these invoices. FOTOMAG had previously acquired the equipment from a UK supplier, thus declaring an intra-community acquisition in Bulgaria. FOTOMAG did not pay the corresponding VAT liability. In a tax audit, it was found that:

- ALTI and FOTOMAG had entrusted one and the same person with their accounting, the management of their bank accounts and the submission of their VAT returns;
- The intra-Community acquisition of the agricultural equipment by FOTOMAG had been financed through a third-party company whose members were the managers of ALTI and FOTOMAG; and
- the transport of the combine harvester from the United Kingdom had been organised by a manager and representative of ALTI through another company.

These findings led the tax authorities to conclude that ALTI itself had organised the acquisition of the agricultural equipment by FOTOMAG through an intra-Community acquisition in order for VAT to be charged improperly and that ALTI knew that FOTOMAG would not pay the VAT amounts due. As a result, ALTI was held jointly and severally liable for the VAT amounts due by FOTOMAG, including the default interest.

The VAT Directive empowers Member States to provide that a person other than the person liable for the payment of VAT is to be held jointly and severally liable for the payment of VAT. Those provisions seek to ensure the efficient collection of VAT from the most appropriate person in the light of the specific situation. It follows from previous case law that Member States may hold a person jointly and severally liable for payment of VAT where, at the time of the supply to it, that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid. However, it should not be systematically difficult or impossible for a person held jointly and severally liable to prove that he acted in good faith. In the present case, it follows that this is not the case because the presumption of 'knew or ought to have known' in rebuttable in Bulgaria.

The CJ ruled that it falls within the procedural autonomy of the Member States to extend the joint and several liability to default interest. According to the wording of the VAT Directive, the joint and several liability only relates to the payment of VAT, but this does not preclude Member States from being able to impose a joint and several liability in connection to other elements as well. This is particularly the case because a broader interpretation of the joint and several liability clause serves to combat VAT abuse and it contributes to achieving the objective of ensuring the efficient collection of VAT.

CJ rules on national practice stipulating revision of input VAT in the case of insolvency proceedings (*Administrația Județeană a Finanțelor Publice Suceava and Others*)

On 3 June 2021, the CJ delivered its judgment in case C-182/20, about the obligation to revise input VAT when a taxable person ceases to perform activities subject to VAT.

BE ran a business that was ultimately declared bankrupt. In Romania, the transfer of (former) business assets in connection with an insolvency proceeding is automatically deemed to be a non-economic activity for VAT purposes. As a result, the Romanian Tax Authority issued a VAT assessment to BE relating to the input VAT previously deducted by BE for its economic activities. BE argued that it still qualified as a VAT taxable person during the course of the liquidation procedure and that the transfer of the assets was therefore subject to VAT (as a result of which the input VAT should not have to be adjusted).

In its judgment, the CJ ruled that BE did not cease its economic activities due to the insolvency proceedings. According to the CJ, the mere fact that the initiation of insolvency proceedings changes the purpose of a taxable person's transactions (in the sense that those purposes no longer include the long-term operation of its business) cannot affect the economic nature of the transactions carried out by a taxable person.

CJ rules on VAT treatment of services provided by insurance intermediary (*Radio Popular*)

On 8 July 2021, the CJ delivered its judgment in the case *Rádio Popular – Electrodomésticos SA* (C-695/19).

Rádio Popular – Electrodomésticos SA ('Radio') is a supplier of consumer electronics. Radio also acts as an insurance intermediary for consumers wishing to extend the warranty on purchased products. The insurance contract will be concluded directly between a third-party insurer and the consumer. In return for its brokerage services, Radio charged a brokerage fee to the consumers. Radio did not take the brokerage fees into account when calculating the VAT recovery on general costs, because it argued that the brokerage services were incidental financial transactions. The Portuguese tax authority argued that the brokerage services did not qualify as incidental financial transactions, resulting in a lower VAT recovery right for Radio with regard to general costs.

In its judgment, the CJ first assessed whether the brokerage services are VAT exempt under the insurance exemption. The insurance exemption applies to insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents. The CJ considered that the brokerage services rendered by Radio fulfilled the essential aspects of the work of an insurance agent (such as the finding of prospective clients and their introduction to the insurer, with the view of concluding insurance contracts). Because of this, the CJ ruled that Radio's brokerage services were VAT exempt. Due to the VAT exempt brokerage turnover, Radio will in principle be limited in its right to recover VAT on general costs.

When calculating the VAT recovery ratio for general costs, the turnover realized in connection with 'incidental financial transactions' does not have to be taken into account based on the EU VAT Directive. Radio argued that the brokerage services qualified as incidental financial transactions. The CJ did not follow this line of reasoning because 'insurance transactions' are not synonymous with 'financial transactions'. Because of this, the CJ ruled that the VAT exempt brokerage turnover should be taken into account by Radio for the computation of the VAT recovery ratio relating to general costs.

CJ rules on taxable amount for VAT purposes in case of fraud (*Tribunal Económico*)

On 1 July 2021, the CJ delivered its judgment in the case *Tribunal Económico-Administrativo Regional de Galicia* (C-521/19).

CB is an agent in the music industry acting on behalf of the Lito Group. CB would contact festival organizers to negotiate performances for the Lito Group. The Lito Group received its remuneration from the festival committees in cash and Lito Group did not issue any invoices to the festival organizers. For its services, CB received 10% of the total income realized by the Lito Group. CB received this remuneration in cash and did not issue any invoices to the Lito Group. During an audit, the Spanish tax authority discovered that CB had not declared VAT on the remuneration received from the Lito Group. As a result, a VAT assessment was imposed on CB. The tax authority and CB disagreed on the calculation of the VAT amount due. The tax authority argued that the remuneration received by CB was a price excluding VAT, while CB claimed that the remuneration included VAT.

The taxable amount for VAT purposes is the consideration received by the taxable person from its customer. The CJ ruled that, in the case of fraudulent transactions, the amount received should be regarded as including the corresponding VAT amount. This would only be different if, despite the fraud, it would be possible, under national law, for the taxable persons to pass on and subsequently deduct the VAT amount at issue.

CJ rules on VAT treatment of voluntarily granted discounts (*Boehringer Ingelheim RCV GmbH*)

On 6 October 2021, the CJ delivered its judgment in the case *Boehringer Ingelheim RCV GmbH* (C-717/19).

Boehringer is a supplier of pharmaceutical products such as medicines. Boehringer supplied its products to wholesalers. These wholesalers then supplied the products to pharmacies, where the products were distributed to Hungarian patients. In Hungary, the medicines developed by Boehringer were subsidized by a health insurance fund called 'NEAK'. The pharmacies received a subsidy from NEAK for the supply of the medicines as well as the patient's own contribution. Boehringer concluded an agreement with NEAK, based on which Boehringer granted volume discounts to NEAK. No legal obligation existed to conclude this agreement.

The Hungarian Tax Authority argued that Boehringer was not allowed to decrease the VAT taxable amount of its own supplies to the wholesalers with the amount of the discounts granted to the NEAK. In the first place, because there existed no legal obligation to provide the discounts and secondly, because the NEAK did not issue any invoices to Boehringer in connection to the discounts granted.

In its judgment, the CJ held that Boehringer was allowed to claim a refund of VAT in connection with the rebates granted to NEAK. By concluding the agreement with the NEAK, Boehringer had waived part of the remuneration received from the wholesaler. It would not stroke with the neutrality principle if Boehringer would then need to declare VAT based on a higher amount than it ultimately received. The fact that NEAK did not issue any invoices to Boehringer does not make this any different.

CJ rules on compatibility of Polish VAT practice for intra-Community acquisitions with EU VAT Directive (*G. sp. z o.o.*)

The CJ delivered its judgment in the case *G. sp. z o.o.* ('G') on 9 September 2021 (C-855/19).

G acquired diesel fuel in Poland from other EU countries. The Polish VAT regulation imposes an obligation on taxable persons to pay VAT on the intra-Community acquisitions before that VAT is formally due. In breach of the Polish VAT law, G failed to account for VAT on the intra-Community acquisitions within five days after the diesel fuel entered Poland and also failed to submit periodical statements about the number of acquisitions that took place. The Polish Tax Authority issued a VAT assessment (including interest and penalties) to G relating to the VAT amounts that were not reported on time based on the provisions of the Polish VAT regulation. In its judgment, the CJ answers the question whether the Polish practice is compatible with the EU VAT Directive.

In order for a VAT liability to arise, that VAT must first have become chargeable and for the VAT to have become chargeable, a chargeable event must first have taken place. With regard to intra-Community acquisitions, the chargeable event occurs when the intra-Community acquisition of goods is made. However, the VAT amount becomes due when the invoice is issued by the supplier of the goods or, at the latest, on the fifteenth day of the month following that in which the chargeable event occurred, where no invoice has been issued by the supplier before that date.

Although the VAT Directive offers the possibility to bring forward the date of payment of VAT that has become chargeable, the scope of this provision may not be extended to bring forward the date on which VAT becomes due. Consequently, the CJ ruled that Poland's national law which imposes an obligation to pay VAT on the intra-Community acquisitions before that VAT becomes due, is not compatible with the EU VAT Directive.

CJ rules on requirements for VAT refunds to non-established taxable persons (*GE Auto Service Leasing*)

The CJ delivered its judgment in the case *GE Auto Service Leasing* (C-294/20) on 9 September 2021.

GE Auto Service Leasing ('GE') is a VAT taxable person established in Germany. GE's business activity consisted of the provision of cars to Spanish companies on the basis of lease agreements, as well as the occasional sale of used vehicles on Spanish territory. GE asked the Spanish Tax Authority for a refund of Spanish VAT paid on its business expenses. The Spanish Tax Authority asked GE to provide the original invoices and to provide background on the transactions carried out in Spain as well as the destination of the acquired goods or services. GE failed to share the invoices relating to the refund request. The refund request was ultimately rejected by the Spanish Tax Authority because GE did not share all the required information to process the refund request on time.

The Eighth VAT Directive stipulates the conditions for granting VAT refunds to non-established taxable persons (like GE). In its judgment, the CJ assessed whether the provisions of this Directive allow tax authorities to refuse VAT refunds if the taxable person did not submit all the documents and information required within the prescribed period.

The right to recover input VAT is a fundamental principle of the neutrality of the EU VAT system. The neutrality principle requires that a VAT refund is granted to the taxable person if all material requirements thereto are fulfilled, even if not all formal requirements are fulfilled. However, not fulfilling all formal requirements can, in some cases, lead to the taxable person failing to provide the necessary evidence of meeting the material conditions of VAT deduction.

The CJ has previously ruled that the provisions of the Sixth VAT Directive do not preclude national legislation under which a taxable person may be refused to recover VAT when in possession of incomplete invoices. This is even the case if those invoices are supplemented with additional information that may prove that the transactions took place as well as the nature and the amounts involved with the transaction. In this *GE* case, the CJ ruled that the Eighth VAT Directive also does not preclude national legislation under which the right to a VAT refund may be refused where a taxable person, without reasonable justification and in defiance of requests for information, does not provide documents proving that the material conditions for a VAT refund are fulfilled. However, the CJ also stressed that these provisions do not preclude EU countries from accepting the provision of such evidence at a later date.

CJ rules on VAT recovery right for publicly financed media services (*Balgarska natsionalna televizia*)

On 16 September 2021, the CJ delivered its judgment *Balgarska natsionalna televizia* (C-21/20).

BNT is the public provider of audiovisual media services in Bulgaria. BNT does not receive any remuneration from the Bulgarian citizens. The business of BNT is partially subsidized by the State. BNT also realizes self-generated turnover by advertising, sponsoring and donations linked to the broadcasting activity. The deduction of input VAT on these expenses used by BNT to perform its activities was challenged. BNT argued that it was entitled to recover all input VAT, whereas the Bulgarian Tax Authority was only willing to grant a partial VAT refund for the broadcasting activities that were financed by revenue from BNT's commercial activities.

The CJ first assessed if the provision of publicly financed audiovisual media services should be considered an economic activity for VAT purposes. According to the CJ, this is not the case because the viewers do not pay a fee to BNT, as a result of which there is no legal relationship between BNT and its viewers. This means that the provision of the audiovisual media services should in principle be regarded as out of scope of EU VAT.

The CJ then ruled that BNT may not deduct input VAT charged on purchases of goods and services used directly for its non-economic broadcasting activities. For mixed use expenditures, which are used for BNT's economic and non-economic broadcasting activities, there is a partial VAT recovery right. It is for the Member States to determine the methods and criteria used for attributing the VAT amounts between these two turnover categories (taking into account the fundamental principles of the EU VAT system).

CJ rules on the margin scheme (*Icade Promotions SAS*)

The CJ delivered its judgment in the *Icade Promotions SAS* case (C-299/20) on 30 September 2021.

Icade Promotion SAS ('Icade') acquired plots of undeveloped land from private individuals and local authorities. These transactions were not subject to VAT. After dividing the land into apartment rights, Icade sold the land to private individuals for the purpose of the development of residential real estate. The VAT legislation in France contains a provision that stipulates that VAT will be due on the difference between the sales price and the acquisition price of the building land in the case the taxable person is not eligible for a refund of input VAT paid in connection with the acquisition. This margin scheme is based on an optional provision in the EU VAT Directive. This CJ ruling, therefore. is only relevant for the EU countries which have also implemented this provision in their national legislation.

Icade applied the abovementioned scheme based on which VAT was due on the profit margin realized with the on-sale of the land. However, Icade later requested a refund of the VAT amount paid to the French Tax Authority, based on the argument that this margin scheme did not apply. That provided a financial advantage to Icade because the on-sale of the plots of building land would then be exempt from VAT (as a result of which no VAT would need to be paid by Icade). The French Tax Authority disagreed and reasoned that the margin scheme did apply.

In its judgment, the CJ ruled that the VAT margin scheme does not apply to the on-sale of building land in the case that land was acquired in an undeveloped state and only became a plot of land with a building in the period between acquisition and the on-sale by Icade. In that case, the goods sold are not the same as the goods acquired by the taxable person. However, the CJ also emphasized that the margin scheme may be applied to the supply of building land if alterations are made to the characteristics of the building land between the moment of acquisition and on-sale (such as the division of the building land into different plots or the carrying out of work to connect the land to utilities such as gas or electricity). This shall, however, only apply if the land qualified as a building land at the moment of its acquisition.

CJ judgment on allocation of mixed-use assets (*Finanzamt N and Finanzamt G*)

On 14 October 2021, the CJ delivered its judgment in the joint cases C-45/20 (*Finanzamt N*) and C-46/20 (*Finanzamt G*).

The request for a preliminary ruling is based on two different appeals. The applicant in the first case acquired a newly built residential property, which also included an office. The applicant in the second case acquired solar panels and used some of the generated electricity himself and supplied the rest to a power supplier's transmission system. Both assets are used for non-business purposes and economic activities at the same time, as a result of which the taxable person should choose to (partially) allocate the respective asset to its business or non-business assets.

German VAT law stipulates that if no identifiable decision is made by the taxable person upon the deadline for the submission of the annual VAT return, it will automatically be assumed that the asset will be labelled a private asset. On the other hand, the applicants argued that they were entitled to a partial refund of the input VAT paid in connection to the acquisition of the mixed-use assets.

In its judgment, the CJ emphasized that the allocation decision is essential in establishing the right to deduct VAT. The right of deduction forms an integral part of the EU VAT system and in principle, may not be limited. However, based on various provisions in the EU VAT Directive and the principle of legal certainty, the CJ ruled that the German practice is, in principle, not in breach of the EU VAT system. In that regard, the CJ did state that the allocation decision is a formal decision and that failure to comply with such formal requirements does not lead to the withdrawal of the right to recover VAT. An allocation decision is valid if this decision can be demonstrated based on other objectives even when such a decision is not shared with the Tax Authority.

Customs Duties, Excises and other Indirect Taxes

Brexit & Customs: the UK-EU Trade and Cooperation Agreement

As a result of Brexit, supplies of goods from the EU to the UK (and vice versa) will be regarded as 0% VAT taxed export supplies instead of intra-Community supplies. The formalities relating to the 0% VAT rate for export supplies can be different than those applied to the 0% VAT rate for intra-Community supplies. Further, there will no longer be an obligation to file EC Sales Listings in relation to goods supplied from the EU to the UK or the other way around. UK businesses supplying goods in the EU may no longer benefit from the simplified procedure for triangular supplies, which could trigger additional VAT registrations of these businesses in the EU. This would only be different in case the UK taxable person already is registered for VAT purposes in one EU country. Similarly, EU business supplying goods in the UK may have to register themselves faster for UK VAT purposes.

Northern-Ireland will have a mixed status post-Brexit. It will remain part of the UK customs territory, while also having access to the EU single market for goods. This means that supplies of goods from the EU to Northern-Ireland and the other way around will be seen as intra-Community supplies. For these supplies, there still exists an obligation to file EC Sales Listings. Moreover, VAT numbers that will appear on invoices relating to supplies of goods from the EU to Northern Ireland will be required to have the prefix XI, to distinguish them from supplies of goods to Great Britain (i.e. England, Wales and Scotland). The ending of the Brexit transitional period also impacts the right to deduct input VAT on direct and general costs for EU taxable persons providing financial land insurance related services to recipients established in the UK. The same applies inbound to UK companies providing these types of services to EU based customers. Due to Brexit, those services will now give rise to VAT deduction, while this was not the case when the UK was still part of the EU and during the transitional period where the UK was still deemed to be part of the EU for VAT purposes.

The three elements determining the level of customs duties that need to be paid are the tariff classification code, the customs value and country of origin of the product. On the basis of the origin of the product, among others, a preferential tariff may apply.

The TCA sets out such preferential arrangements between the EU and UK. It stipulates that trade between the UK and the EU will in principle be duty and quota free for goods originating from the other party's jurisdiction. Depending on the type of the product certain rules apply to determine the preferential origin of a good under the TCA. In sum, these rules are:

- Wholly obtained;
- Change in tariff classification
- Specific cprocessing operation;
- A limited value of non-originating materials.

Importers must claim preferential treatment under the TCA. A claim for preferential tariff treatment under the TCA shall be based on:

- a statement on origin that the product is originating made out by the exporter; or
- the importer's knowledge that the product is originating.

Furthermore, to somewhat ease the administrative burden on traders, the TCA also provides for a cooperation between the EU and the UK in customs matters. Particularly notable is the mutual recognition programme of the Authorized Economic Operator authorization.

CJ rules that transportation costs already included in the price should not be added to the transaction value for customs valuation purposes (*Lifosa UAB*)

On 22 April 2021, the CJ delivered its judgment in the case *Lifosa UAB v Muitines departamentas,* (C-75/20). The preliminary question raised was whether the costs actually incurred by the producer for the transport, should be added to the transaction value in order to determine the customs value, when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer and those costs exceed the price actually paid by the importer, but that price corresponds to the real value of the goods.

The case concerns the import of fertilizer products into the customs territory of the European Union ('EU') by the Lithuanian importer (Lifosa). The goods were transported from Belarus via rail to the border crossing point with Lithuania. It was agreed between parties that the transport costs were to be borne by Naftan JSC ('the producer') up to the agreed place of delivery at the border in accordance with the Incoterm 'Delivered at Frontier' ('DAF'). However, the price paid by Lifosa to Naftan JSC was not high enough to cover these transportation costs.

Under EU customs law, the transaction value of the imported goods constitutes the 'primary basis' for their customs value and is the price actually paid or payable for the imported goods. If not already included in the price, certain element needs to be added, in order to reflect the real economic value of those goods. One of these elements is the cost of transport up to the place where goods are brought into the EU.

The Lithuanian customs authorities submitted that, if, for the purpose of determining the customs value of the imported goods, the transaction value is not adjusted by adding the transport costs incurred by the producer, the customs declarations do not reflect all of the elements of those goods that have economic value. In short, the transport costs cannot be included in the price paid by Lifosa, as the price does not cover the transport costs, according to the authorities.

Although the customs value declared was indeed lower than the costs actually incurred by the producer for the transport, Lifosa submitted that the price of the imported goods does reflect their real value because, first, the producer is unable to process or store them and, second, recycling them gives rise to very high costs.

After considering some relevant articles of both the Community Customs Code and Union Customs Code as well as some CJ case law, the CJ considered that the costs of transporting the imported goods to the EU should not be added to the transaction value of the goods when, according to the agreed delivery terms, the obligation to cover those costs lies with the producer, even though those costs exceed the price actually paid by the importer, provided that that price corresponds to the real value of the goods. The conditions of sale have to be taken into account, even if they do not accord with trade practice or may appear unusual for the type of contract in question.

The CJ added that a different interpretation would lead to the importer making double payment of costs of transporting the imported goods and, moreover, to the situation that where imports are subject to conditions of sale providing for such costs to be included in the sale price of those goods, the transaction value should automatically be corrected.

Clarification on the temporal application of EU customs law (*Jumbocarry Trading GmbH*)

Jumbocarry Trading GmbH ('Jumbocarry') (C-39/20) is a company established in Germany. Jumbocarry filed a customs declaration in the Netherlands on 4 July 2013 for the release for free circulation of a consignment of porcelain goods.

In the declaration, Bangladesh was indicated as the country of origin, on the basis of which a preferential rate of customs duty of 0% was applied. After discovering that the certificate of origin was false, the Inspector of the Dutch customs authorities ('Inspector'), informed Jumbocarry in writing that he intended to impose a retroactive customs assessment of customs duties at the standard rate of 12%. The inspector gave Jumbocarry the opportunity to express its point of view within 30 days after notifying its intention in accordance with article 22(6) of the Union Customs Code ('UCC'). On 18 July 2016, the Inspector issued a retroactive customs assessment for the customs debt that had incurred on 4 July 2013.

According to Article 103(1) UCC a customs debt shall not be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred, in this case 4 July 2013. According to Article 124(1)(a) UCC, a customs debt shall be extinguished where the debtor can no longer be notified of the customs debt. Following Article 103(3)(b) UCC, the statute of limitation of three (3) years is suspended for the period that the debtor is given to express its point of view. In this case, for 30 days.

On 1 May 2016, the UCC replaced the Community Customs Code ('CCC') which code did not include the rule that the statute of limitation is suspended for the time the debtor is given the opportunity to express its point of view. Therefore, according to the CCC the customs debt could not have been notified after 4 July 2016.

The Dutch Supreme Court has doubts about the temporal effect of the provisions of the UCC and referred to the Court of Justice of the European Union ('CJ') two preliminary questions:

- Are articles 103(3)(b) and 124(1)(a) of the UCC applicable to a customs debt that was incurred before 1 May 2016 and whose period of limitation had not yet expired as of that date?
- If the answer to the first question is in the affirmative, does the principle of legal certainty or the principle of legitimate expectations preclude that applicability?'

The CJ replied to the questions that Article 103(3)(b) and Article 124(1)(a) UCC, read in the light of the principles of legal certainty and the principle of legitimate expectations, must be interpreted as applying to a customs debt incurred prior to 1 May 2016 and which had not yet become time-barred on that date. As such, Jumbocarry had been notified in time and the customs debt had not been extinguished.

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