LOYENS & LOEFF

EDITION 194

EU Tax Alert

- CJ's judgment on whether Belgian legislation requiring digital platforms to provide relevant information on tourists accommodation establishments is in line with EU law (*Airbnb Ireland v Région de Bruxelles-Capitale*, C-674/20)
- CJ's judgment on compatibility of Portuguese withholding tax applicable to non-resident collective investment undertakings with the free movement of capital (*Allianzgi-Fonds Aevn* C-545/19)
- More flexibility for EU Member States to differentiate VAT rates
- CJ's judgment on VAT fixed establishment concept (*Berlin Chemie A. Menarini SRL* – C-333/20)

Introduction

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

Highlights in this edition are:

- CJ's judgment on whether Belgian legislation requiring digital platforms to provide relevant information on tourist accommodation establishments is in line with EU law (*Airbnb Ireland v Région de Bruxelles-Capitale*, C-674/20)
- CJ's judgment on compatibility of Portuguese withholding tax applicable to non-resident collective investment undertakings with the free movement of capital (*Allianzgi-Fonds Aevn* C-545/19)
- More flexibility for EU Member States to differentiate VAT rates
- CJ's judgment on VAT fixed establishment concept (*Berlin Chemie A. Menarini SRL* – C-333/20)

Contents

Highlights in this edition

CJ's judgment on whether Belgian legislation requiring digital platforms to provide relevant information on tourists accommodation establishments is in line with EU law (*Airbnb Ireland v Région de Bruxelles-Capitale*, C-674/20)

On 27 April 2022, the CJ published its judgment in the *Airbnb* case (C-674/20) which deals with the issue of whether Belgian legislation requiring intermediaries of tourist accommodation establishments to provide the tax authorities with certain information on particular tourist operators is within the scope of the Directive on Electronic Commerce and aligned with the freedom to provide services (Article 56 TFEU.

Belgium has in place a harmonized regime for the taxation of tourist accommodation establishments in the Brussels Region, under which a flat-rate tourist tax is imposed on the operators of these type of establishments. Intermediaries such as Airbnb are neither liable to pay that tax nor required to levy it. However, one specific provision of this Belgian regime (the 'Provision') obliges intermediaries to report, upon the written request of the tax authorities, certain information about the particular operators of tourist establishments. A failure to comply with such duty renders the intermediary liable to an administrative fine.

In application of the aforementioned Provision, the tax authority of the Central Brussels Region sent two requests for information to Airbnb asking for information concerning the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight accommodation establishments and of accommodation units operated during the year end. As a result of Airbnb not complying with these requests, the Brussels tax authority imposed several fines. Airbnb questioned the relevant requests by means of an action for annulment of the Provision brought before the Constitutional Court of Belgium (the referring court). Airbnb argued that it provides an 'information society service' under the E-Commerce Directive (Directive 2000/31) and that the Provision fell within the scope of this directive (even when such directive expressly states that it is not applicable to 'the field of taxation'). Uncertain about the interpretation of those terms and the appropriate classification of the Belgian Provision in that regard, the Belgian Court referred the case to the CJ.

The main issues addressed by the Court in its judgment relate to: (i) Whether the E-commerce Directive must be interpreted as meaning that the Provision falls within the 'field of taxation' and must, therefore, be regarded as excluded from its scope; and (ii) Whether or not Belgian legislation at issue contravenes the prohibition laid down in Article 56 TFEU (freedom to provide services).

Regarding the first point, the Court considers that the Belgian Provision must be regarded as being indissociable, as regards its nature, from the legislation of which it forms part and, accordingly, falls within the 'field of taxation' which is expressly excluded from the scope of the Directive on electronic commerce.

In relation to the second point, the CJ finds the Belgian Provision not to contravene the prohibition laid down in Article 56 TFEU on the following grounds. First, the Court considers the Provision not discriminatory as it lays down an obligation to comply with a request for information from the tax authorities for all intermediaries whose activity concerns tourist accommodation establishments located in the Brussels Capital Region, irrespective of where those intermediaries are established (and, consequently, regardless of the Member State in which they are established), and irrespective also of the way in which those economic operators mediate (whether by digital means or in accordance with other methods of connection). In this regard, the court recognizes that the development of technological means and the current configuration of the specific market led to the finding that intermediaries providing their services by means of an online platform are likely, under legislation such as that at issue, to be faced with an obligation to transmit data to the tax authorities which is more frequent and greater than that imposed on other intermediaries. However, the Court understands that such greater obligation is merely a reflection of a larger number of transactions by those intermediaries and their respective market shares.

Second, the CJ observes that even when the Belgian reporting obligation may create additional costs (in particular, in connection with the search for and storage of the data concerned), particularly in the case of intermediation services provided by digital means, the data at issue are stored by intermediaries with the result that the additional cost to those intermediaries created by this obligation appears to be limited.

CJ's judgment on compatibility of Portuguese withholding tax applicable to non-resident collective investment undertakings with the free movement of capital (*Allianzgi-Fonds Aevn* C-545/19)

On 17 March 2022, the CJ ruled on the case *Allianzgi-Fonds Aevn*, (C-545/19) which concerns the compatibility of the Portuguese withholding tax applicable to non-resident collective investment undertakings (UCITs) with the free movement of capital (Article 63 TFEU).

Under Portugal's tax regime, dividend distributions made to UCITs formed under Portuguese law are exempt from CIT. In lieu of such tax, Portuguese UCITs are subject both to a stamp duty (charged quarterly on the UCITS' net book value) and to a specific tax on dividends received by resident UCITs under certain specific conditions. On the other hand, the aforementioned CIT exemption does not apply to non-Portuguese UCITs, which must pay withholding tax on the dividend they receive.

The case at hand involved Allianzgi-Fonds Aevn, a German based UCIT that received dividends from some Portuguese undertakings in 2015-2016. As a consequence of the tax regime described above, such dividend distributions were subject to Portuguese withholding tax of 25%. Under the understanding that the Portuguese regime provided for a discriminatory tax treatment of non-resident UCITs, Allianzgi-Fonds Aevn lodged an appeal against the relevant tax assessments through which the Portuguese tax authority applied the withholding tax. As a result of such appeal being rejected by the tax authority, the applicant questioned this latter decision against the Portuguese Tax Arbitral Tribunal, which finally referred the case to the CJ for a preliminary ruling. Advocate General (AG) Kokott published her Opinion on 6 May 2021.

In its judgment, the CJ first rules that the case should only be examined from the perspective of the free movement of capital, as any restriction on the freedom to provide services resulting from the relevant legislation is an inevitable consequence of the former and does not, therefore, justify an independent examination of the case in the light of the latter. The Court then finds that the Portuguese legislation introduced an unfavourable treatment for dividends paid to non-resident UCITs which could deter non-resident UCITs from investing in entities resident in Portugal and discourage Portugal-based investors from acquiring shares in such undertakings.

The CJ thus concludes that such unfavourable treatment restricts the free movement of capital.

When analysing whether this unfavourable treatment concerned objectively comparable situations, the Court finds that, when receiving dividends, the situation of a resident UCIT is similar to that of a non-resident UCIT since, in both cases, there is a risk of economic double taxation of dividends paid by companies resident in Portugal. Finally, when assessing whether the unfavourable treatment was justified by overriding reasons in the public interest, the CJ rules that neither the preservation of the balanced allocation of the power to impose taxes between Member States nor the preservation of the coherence of the Portuguese tax system are sufficient reasons to justify the restriction on the free movement of capital existing in the case at hand.

More flexibility for EU Member States to differentiate VAT rates

The Council of the European Union formally adopted Council Directive (EU) 2022/542 on 5 April 2022. This legislative proposal entails that Member States will have more policy freedom in respect of implementing (super) reduced and zero VAT rates.

Member States must still apply the standard rate of at least 15% and may choose to implement two reduced rates of at least 5% for products listed in Annex III of the EU VAT Directive. However, new categories have been added to that list under the new VAT rate system. These include, amongst others, the supply of pharmaceuticals, medical products, digital and/or physical publications, admissions to (digital) events, the supply and construction of housing as part of a social policy and solar panels.

Member States will further be allowed to implement a super-reduced rate (lower than 5%) and a 0% rate to certain universal products such as pharmaceuticals. These options are restricted to certain products such as medicines and medical equipment, foodstuffs and solar panels.

The proposal also stipulates that fossil fuels and chemical pesticides and fertilizers will no longer benefit from the reduced VAT rate from 2030 and 2032 respectively.

CJ's judgment on VAT fixed establishment concept (*Berlin Chemie A. Menarini SRL – C-333/20*)

On 7 April 2022, the CJ issued its judgment in the case *Belin Chemie* (C-333/20) which concerns the interpretation of the VAT fixed establishment concept in the case where a parent company procures sales support services from its foreign subsidiaries.

The business operations of Berlin Chemie AG consist of the supply of pharmaceutical products in, amongst others, Romania. For that purpose, Berlin Chemie AG acquired local marking and sales support services from its Romanian subsidiary. The Romanian company issued invoices to Berlin Chemie AG subject to the reverse charge mechanism on the basis that its services were taxable in Germany. The Romanian tax authorities argued that Romanian VAT was due in respect of the services because Berlin Chemie AG maintained a fixed establishment for VAT purposes in Romania as a result of the procurement of the services.

For VAT purposes, the 'fixed establishment' concept refers to any foreign establishment characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable the taxable person to receive and use the procured services for its own needs. In that regard, the question raised in the present case is whether it is necessary for those resources to belong to Berlin Chemie itself or whether it is already sufficient to have immediate and permanent access to such resources through the Romanian subsidiary company.

In its judgment, the CJ states that it is not a requirement for a taxable person to own the human or technical resources itself in order to maintain a fixed establishment in another Member State. The taxable person should have the right to dispose of those human and technical resources in the same way as if they were its own (for example, based on employment or leasing contracts).

In this case, the Court notes that it was clear that Berlin Chemie did not have its own human and technical resources in Romania, but that those resources belonged to the Romanian company. The Romanian company was also not directly involved in the supplies of pharmaceutical products by Berlin Chemie in Romania. The CJ, therefore, considers that the sales support services were, in principle, received by Berlin Chemie in Germany after which Berlin Chemie used its German human and technical resources to conclude the Romanian pharmaceuticals contracts. In the CJ's view, this means that Berlin Chemie did not maintain a fixed establishment in Germany for VAT purposes.

State Aid/WTO

CJ rules on Commission's denial to provide access to documents in State aid investigation (*Huhtamaki Sarl*, T-134/20)

On 2 March 2022, the General Court ruled that a taxpayer was wrongly denied access to certain documents requested in a State aid investigation, as the relevant decision did not allow the taxpayer to understand the reasons which led the Commission to arrive to such conclusion.

Huhtamaki Sàrl (Huhtamaki) was engaged in financing activities, granting interest-bearing loans to group entities. It was financed mainly with an interest-free loan granted by an Irish sister company. The Luxembourg tax authorities approved three advance tax agreements (ATAs) confirming the arm's length character of the remuneration realised on the financing activities.

By decision of 7 March 2019, the Commission opened a formal State aid investigation procedure concerning the ATAs issued by the Luxembourg tax authorities in favour of Huhtamaki. On 3 October 2019, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), Huhtamaki requested access to the non-confidential version of documents submitted by Luxembourg to the Commission in the context of the State aid investigation. These documents were: (i) the list of recipients of the ATAs; and (ii) the ATAs issued by Luxembourg during the years 2010 to 2012 (jointly: 'the documents requested').

The Commission refused access to the documents requested, pursuant to Article 4(2) and (3) of Regulation No 1049/2001. Article 4, paragraphs 2 and 3 of Regulation No. 1049/2001, provides for a general presumption of confidentiality. The Commission took the view that the documents requested fell under the general presumption of confidentiality, based on the exceptions in paragraph 2 for commercial interests of a natural or legal person and in paragraph 3 for the purpose of inspections, investigations and audits. According to the Commission, the interest that Huhtamaki might have in obtaining access to documents in order to prepare for its defence was not of public interest, so that it could not be taken into account in the assessment of whether there is an overriding public interest.

Upholding the general presumption of confidentiality, the General Court considers, however, that the contested decision failed to explain why it was not possible to provide the applicant with a non-confidential version of the requested documents. The Court notes that the Commission had merely stated that the 'the general presumption of confidentiality precludes the possibility of granting partial access to the file' and that 'access would undermine the interests of the investigation and the protection of the commercial interests of the recipient undertakings'.

As such, the grounds of the contested decision neither enabled Huhtamaki to understand the reasons which led the Commission to reject the arguments which it had put forward to rebut the general presumption of confidentiality, nor did they enable the Court to carry out its review of the lawfulness of the denial. The Court, therefore, concludes that the contested decision denying access to the documents should be annulled.

General Court decides on Commission's decision on State aid granted through a tax ruling in Gibraltar (*Mead Johnson Nutrition*, T-508/19)

On 6 April 2022, the General Court annulled Commission Decision (EU) 2019/700 of 19 December 2018 as regards the Gibraltar corporate income tax exemption regime, insofar as it considered that the individual aid granted by Gibraltar after 31 December 2013 on the basis of advanced tax rulings (ATR) is unlawful and incompatible with the internal market ('the Contested Decision').

MJN Holdings (Gibraltar) Ltd ('MJN Gibraltar') was a Gibraltar-based group company with a 99.99% interest in the capital of the Dutch limited partnership, Mead Johnson Three CV ('MJT CV'), which granted sub-licenses to another group company in return for royalties. In 2012, the Gibraltar tax authorities granted MJN Gibraltar an ATR confirming the non-taxation of the royalty income received by this company from MJT CV.

In the Contested Decision, the Commission had found that: (i) the 'exemption' for passive interest and royalty income applicable between 2011 and 2013 under Gibraltar's Income Tax Act (ITA) 2010 constituted an unlawfully implemented State aid scheme which was incompatible with the internal market; and (ii) the tax treatment granted by Gibraltar in ATRs issued to five Gibraltar-based companies with a shareholding in Dutch limited partnerships constituted prohibited individual State aid incompatible with the internal market. These ATRs, which confirmed the non-taxation of the royalty income of these companies, would have continued to apply after the 2013 amendment of Gibraltar's ITA 2010, under which royalties were included among the categories of taxable income.

In its judgment, the General Court deals with the two issues referred to above (i.e., whether the non-taxation from 2010 to 2013 of royalty income received by Gibraltar companies constituted an unlawful State aid scheme and whether the individual tax rulings granted to the applicants could be considered as unlawful individual State aid).

In relation to the first issue, the General Court considers that the non-taxation of royalty income from 2010 to 2013 was a deviation from Gibraltar's normal tax system, according to which the royalties should be taxed. Based on this, the Court upholds the Commission decision and concludes that the non-taxation of royalty income received by Gibraltar companies constituted an unlawful State aid scheme.

As regards the second issue, the General Court partially annuls the Commission's Contested Decision on the basis of procedural grounds. In this regard, the Court considers that the Commission must rectify its initial decision if it changes its reasoning on decisive facts or the legal characterization of decisive facts in the assessment of aid. This should allow interested parties to submit observations in a meaningful way. The General Court notes that the preliminary analysis contained in the decision to extend proceedings diverged, in every respect, from the Commission's reasoning in the contested decision.

Pursuant to the General Court, the assessments contained in the Commission's decision to extend proceedings were not sufficient to make it clear that the formal review procedure concerned not only the grant of ATRs, but also the continued effect of some of those rulings, and the compliance of those rulings with the ITA 2010 in force on 1 January 2014. Those latter elements were decisive in identifying the measure under examination by the Commission and in finding that individual State aid had been granted to MJN Gibraltar on the basis of the ATR.

The Court further notes that the differences between the analysis contained in the decision to extend proceedings and the Contested Decision were such that the Commission should have adopted a corrective or a second decision to extend proceedings in order to enable the applicants to participate effectively in the procedure. Therefore, as regards to the second issue analysed in the case, the General Court finds that the Contested Decision must be annulled insofar as it relates to the individual State aid granted to MJN Gibraltar and others.

AG's Kokott opinion on the offsetting of foreign levied taxes against a retroactive tax liability arising from incompatible aid (*Fossil (Gibraltar) Limited*, C-705/20)

On 10 March 2022, AG Kokott opined that foreign levied taxes may be set-off against a retrospective tax liability arising from an incompatible State aid. Pursuant to Kokott, the set-off of a tax paid abroad in respect of the retrospective tax liability does not constitute State aid.

The case concerns Gibraltar's Income Tax Act 2010 ('ITA 2010'). Under ITA 2010, as originally enacted, passive interest and royalties were not chargeable to tax, irrespective of the source of the income or the application of the territoriality principle. By way of its Decision 2019/700, the Commission considered that the State aid scheme in the form of the income tax exemption for passive interest and royalties under the ITA 2010 is incompatible with the internal market. On that basis, the United Kingdom had to recover all incompatible aid granted on the basis of the passive interest and royalty exemptions.

Fossil (Gibraltar) Limited ('Fossil Gibraltar') had royalty income that had not been taxed under the ITA 2010, due to the exemption of royalties from income tax. The implementation of Decision 2019/700 led to retroactive tax liability for Fossil Gibraltar on the royalty income.

All royalty income received by Fossil Gibraltar was included in the United States tax base of its shareholder (Fossil Group, Inc.). Tax on that income was paid in the United States at the rate of 35%. Section 37 of the ITA 2010 also provides for a form of tax relief for taxpayers who have paid income tax both in Gibraltar and in other countries in respect of the same profits. In accordance with that provision, Fossil Gibraltar requested that the taxes paid in the United States were to be set-off against Fossil Gibraltar's royalty income. The retroactively prescribed taxation of the royalty income would thus be rendered ineffective, as it could be set-off against the taxes levied on that same income in the United States.

AG Kokott considers that, on the one hand, Decision 2019/700 concerns the non-taxation of certain types of income as a selective advantage, since those types of income should in fact have been taxed in a coherent tax system. On the other hand, she notes that Section 37 of the ITA 2010, concerns the offsetting of taxes paid abroad in respect of royalty income, against the tax payable in Gibraltar in respect of such same item of income. Pursuant to Kokott, such offsetting presupposes the taxability of the income in Gibraltar and therefore, is consistent with Decision 2019/700. She thus finds that Decision 2019/700 does not preclude a taxpayer from offsetting foreign income against a retroactive tax liability for incompatible State aid on that same income.

The remaining question addressed by the AG is whether the set-off of a tax paid abroad in respect of royalty income in itself should be regarded as prohibited aid. In this respect, the AG considers that the decision as to which foreign taxes can be set off against domestic tax liability and under which conditions this should be possible is such a decision of a general nature, which falls within the abovementioned discretion of the Member State. Its purpose is to avoid double taxation, an objective recognized both in the OECD and the EU. In Kokott's view, the fact that only those taxpayers satisfying the conditions of double taxation are covered by the set-off, does not lead to selectivity under EU State aid rules. She finally notes that the mere fact that only taxpayers satisfying the conditions for the application of a measure can benefit from it cannot, in itself, render it a selective measure nor lead to a circumvention of Decision 2019/700.

European Commission Approves French Tax Scheme to Attract Investment to Saint-Martin

The European Commission has authorized a French tax aid scheme to stimulate productive investments as well as investments in housing in Saint-Martin. The scheme has an estimated total value of EUR 20 million and applies until the end of 2025. It is available to all companies subject to corporate income tax, regardless of their size and sector of activity.

The measure is designed as a tax advantage (35% reduction of corporate income tax) in respect of new productive investments or housing that they finance in Saint-Martin, or in respect of subscriptions in companies in Saint-Martin that make such investments. The Commission found that the scheme (i) will have a positive impact on the supply of financing for productive investments as well as investments in housing sector in Saint-Martin, (ii) is proportionate, and (iii) will have limited negative effects on competition and trade. On this basis, the Commission concluded that the scheme is in line with EU State aid rules.

European Commission opens an in-depth investigation into Greece support of Postal Service Provider

The European Commission has opened an in-depth investigation to assess whether the support by Greece to its national postal service (ELTA) is in line with EU State aid rules. ELTA is the largest provider of postal services in Greece.

Based on its preliminary assessment, the Commission has doubts on whether certain measures in favour of ELTA are in line with State aid rules. The in-depth investigation concerns three topics.

First, the Commission has doubts on whether ELTA was legally entitled to an additional Universal Service Obligation compensation of EUR 149 million for the period 2013-2018.

Second, the Commission has doubts on whether the capital injection of EUR 100 million into ELTA's share capital in December 2020 has been granted on market terms.

Third and most notably, the Commission has doubts on whether the VAT exemption applicable to all postal services of ELTA since 2000 qualifies as aid. While the measure would be considered existing aid for the period before August 2010, it would constitute new aid for the period starting in August 2010. The Commission has doubts on the compatibility of such new aid.

Direct Taxation

CJ decides on the compatibility of a tax exemption applicable solely to investment funds constituted by contract (*A SCPI*, Case C-342/20)

On 7 April 2022, the CJ delivered its judgment in the case *A SCPI* (C-342/20). The case concerns the question of whether a specific tax exemption applicable solely to collective investment funds (CIF) constituted in accordance with contract law (but not to non-resident alternative CIF constituted in accordance with statute and benefiting from a system of tax transparency in the Member State of establishment) is compatible with the free movement of establishment and capital.

Under Finnish law, CIFs that are constituted by contract are entitled to an exemption of rental income and of profits from the disposal of immovable property or shares in companies owning immovable property. Differently, non-resident alternative CIFs constituted in accordance with statute are not entitled to such exemption. This is the case, even when a fund is not subject to income tax in the Member State where it is established because of being considered tax transparent there. A CIF and a special CIF may be established in Finland only in contractual form.

A SCPI is a CIF established in France where it is treated as tax transparent. An SCPI invests in immovable property in the Euro area. Based on the regime mentioned above, the Finnish tax authorities ruled that A SCPI was not exempt from Finnish income tax since it was constituted under statute. An action was brough by A SCPI against such decision which led the Helsinki Administrative Court to refer the matter to the CJ for a preliminary ruling. AG Saugmandsgaard Øe published his Opinion on 6 October 2021.

The CJ examines the case only from the perspective of the free movement of capital as the legislation under examination covers investments carried out with a view of making a financial investment, without any intention to influence the management and control of the undertaking. When examining this issue, the Court notes that while Finish CIFs may adopt the legal form that enables them to obtain the exemption, non-resident CIFs are subject to the conditions laid down by the legislation of their Member State of establishment. Consequently, although the condition relating to contractual form does not constitute a condition which only resident CIFs are capable of fulfilling, the fact remains that that condition is liable to place those undertakings at an advantage over CIFs constituted under foreign legislation. Based on this, the CJ considers that the legislation under examination deters non-resident CIFs from investing in immovable property in Finland. It therefore concludes that this less favourable treatment constituted a restriction on the free movement of capital.

The CJ further notes that the main purpose of the exemption examined in the case is to avoid double taxation of income from investments and to endeavour to treat investments made through funds as direct investments for tax purposes. It then considers that a non-resident collective IF constituted under statute which benefits from an exemption in respect of its income or a system of tax transparency in its State of residence, is in a comparable situation to a resident IF formed in accordance with contract law. Finally, the Court finds no overriding reasons in the public interest that could justified the aforementioned restriction.

CJ rules on compatibility of Belgian alimony payment deduction with the free movement of workers (*Commission v Belgium*, Case C-60/21)

On 10 March 2022, the CJ delivered its judgment in the case *Commission v Belgium* (C-60/21), which relates to the difference in treatment between Belgian residents and non-resident individuals for the purposes of a deduction for alimony payments.

Under Belgian tax law, taxpayers who are resident in Belgium can partly deduct (i.e., 80%) their alimony payments for income tax purposes, whereas non-resident individuals can only do so when at least 75% of their income is generated in Belgium. The Commission understood that this legislation was in breach of the free movement of workers (Article 45 TFUE and 28 EEA Agreement) as non-resident taxpayers who cannot fulfil the aforementioned requirement in their State of employment (Belgium) nor benefit from that deduction in their State of residence (because of a lack of sufficient income in the latter State) would be in a less favourable situation than a Belgian resident. The Commission therefore brought an action against Belgium for failure to fulfil its obligations under EU law.

After reflecting on both the implications of the free movement of workers and the discriminatory treatment of resident and non-resident taxpayers, the CJ observes that, in the case at hand, the deduction of alimony payments by non-residents is subject to an additional condition (i.e., that at least 75% of the total income is generated in Belgium) which does not apply to resident taxpayers. According to the CJ, this condition is based on the presumption that, if the 75% threshold is not reached, the Member State of residence of the taxpayer is able to consider the taxpayer's entire personal and family situation. However, the CJ notes that in cases where the taxpayer has not received, in the territory of the Member State of his residence, any or only modest income, that State may not be able to take into account the entire personal and family situation of the taxpayer. In such circumstances, the Court finds that the refusal by the Member State in which the income in question is received (Belgium) to grant a tax advantage leads, to the detriment of that taxpayer, to discrimination within the meaning of the CJ's case law. Therefore, given that the additional requirement for non-residents is of a general nature and does not consider the personal and family circumstances of the taxpayers concerned, the Court concludes that such condition is incompatible with the free movement of workers.

Opinion of AG Rantos on the compatibility of Belgian dividend exemption regime which limits the transfer of deferred deductions in cases involving mergers with the EU Parent-Subsidiary Directive and the principle of fiscal neutrality (*Allianz Benelux SA v Belgium*, C-295/21)

On April 28 2022, AG Rantos issued his Opinion in the case C-295/21, regarding whether Article 4(1) of the EU Parent-Subsidiary Directive (90/435/EEC, hereinafter: the 'PSD') is compatible with the Belgian practice that limits the amount of surplus income definitively taxed (hereinafter: 'RGD') transferred between companies that were previously independent and became part of the same group as a consequence of a merger.

Under Article 4(1) of the PSD, the jurisdiction of the parent company must either abstain from taxing profits distributed to the company or deduct tax paid on profits by the subsidiary. The purpose of this provision is to mitigate double taxation of profits distributed between companies in the same group but based in a different Member State.

The present case involved an insurance company named Allianz Benelux SA which was the outstanding entity after a serious of mergers and acquisitions among several companies belonging to the insurance sector. Some of the companies absorbed in these reorganizations (which were then brought together under the corporate name of Allianz Benelux) had RGD surpluses that could be transferred to subsequent years. The absorbed companies had, at the time of the takeover, both RGD surpluses and losses. As for losses, the applicable Belgian law provided that the amount of losses passed on and deductible by the absorbing company was limited pro rata (i.e., in proportion to the part that represents the net tax assets of the absorbed company over the total net tax assets of the absorbing company and of the absorbed company).

Allianz Benelux fully transferred these RGD surpluses during the period 2004 – 2007 and part of this transfer was rejected by the Belgian Tax Administration, which claimed that Allianz Benelux could carry over the RGD surpluses only on a pro rata basis. Allianz Benelux brought an administrative appeal against this decision, which was dismissed and led to a second appeal before the Brussels Court of Appeal (the referring court). Allianz Benelux argued that the denial of a full transfer to an absorbing company of the transferable RGD held by an absorbed company led, first, to taxing this income; second, to a breach of Article 4(1) of PSD; and third, to a breach of the principle of fiscal neutrality.

The main issue referred to the CJ was whether Article 4(1) of the PSD (in conjunction with the provisions of Directives 78/855 and 82/891) opposes the Belgian legislation that provides that ‘the dividends received by a company be integrated into its tax base and then deduct up to 95% of its amount’ and that allows, where appropriate, the transfer of that deduction to fiscal years subsequent tax returns, but that, however, in the event of absorption of said company within the framework of a merger operation, limits the transmission of the transfer of that deduction to the absorbing company in the proportion described above.

In his Opinion, the AG considers the question referred to be admissible, but assesses it solely in the light of the PSD.

In this regard, he first examines whether the reduction in RGD surplus constitutes direct or indirect taxation of exempt dividends pursuant to the first indent of Article 4 of the PSD. Under the understanding that previous case law of the CJ (i.e. *Cobelfret* C-138/07, *KBC* order C-439/07 and C-499/07, *Brussels Securities* C-389/18, etc.) was pronounced in a different factual and legal context, the AG finds that (i) Article 4(1) of PSD does not provide for the possibility of admitting an unconditional transfer of surplus RGD from the absorbed company to the absorbing company; and (ii) the case law of the CJ cannot be interpreted in that sense, as Allianz Benelux wrongly maintained. Therefore, he considers that there is no reason to extend the scope of application of such Article or that of the CJ case law cited above to the present case.

Second, the AG notes that no other provision of EU law appears to enshrine the right, claimed by Allianz Benelux, to an unconditional transfer of surplus RGD from the absorbed company to the acquiring company.

Third, the AG understands that the Belgian RGD regime does not entail direct taxation of the absorbing company in view of the (almost) full deduction it enjoys. As regards indirect taxation, the AG applies the CJ’s reasoning in the *Brussels Securities* judgment (i.e. indirect taxation could only occur in a situation in which, due to the application of national law, the recipient company finds itself in a less favourable position than if the dividends received by the parent company had been purely and simply excluded from the calculation of the tax base) and considers that the situation where the pro rata limitation applies to both RGD surplus carry over and merger loss carry over does not appear to entail higher taxation than assumed in the that the dividends would have been excluded from the tax base of the beneficiary company. Thus, he finds that fiscal neutrality appears to be respected in both situations.

Fourth and finally, the AG considers that, although the question of the justification for the contested Belgian measure does not arise in the present case, the limitation introduced by Belgian law as regards the scope and extent of the possibility of deducting the amounts corresponding to the RGD (in the context of merger operations) seems that, at first glance, may be justified in view of the legitimate objective of combating tax abuse and fraud, provided that (obviously) the national measure is necessary and respects the principle of proportionality.

Based on the above, the AG concludes that Article 4(1) of the PSD must be interpreted in the sense that it does not oppose the Belgian legislation under examination. This is a legislation providing that dividends received by a company shall be integrated into its tax base and then deducted up to 95% of its amount and which allows (where appropriate) the transfer of such deduction to subsequent fiscal years, but that, however, in the event of absorption of said company within the framework of a merger operation, limits the transmission of said transfer in a given proportion.

Opinion of AG Rantos on the compatibility of DAC6's notification obligation with the EU Charter of Fundamental Rights (*Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering*, C-694/20)

On 5 April 2022, AG Rantos published his Opinion in the case C-694/20 about the compatibility of DAC6's notification obligation on intermediaries with Article 7 (i.e., the right for private and family life) and Article 47 (i.e., the right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union (the 'Charter').

Based on the DAC6, intermediaries such as lawyers or tax advisers who design, market, organize or make available for implementation or manage the implementation of reportable cross-border arrangements, have an obligation to report such arrangement to the tax authorities. An exemption to such rule applies, when the reporting obligation infringes the intermediary's professional privilege (e.g., lawyers and notaries). In those cases, the relevant intermediary has instead an obligation to notify the other intermediaries involved or, if there are none, the relevant taxpayer about their reporting obligation (the 'Notification Obligation'). The question brought to the CJ refers to whether this latter obligation of lawyers to notify other intermediaries involved is compatible with Articles 7 and 47 of the Charter.

Following the CJ's case law and that of the European Court of Human Rights, the AG first holds that the right to a fair trial implies a link with legal proceedings and that such link is not present in the case at hand, since the relevant intermediary does not act as a representative of its client in legal proceedings with the tax authorities. The AG therefore finds that the Notification Obligation is not in breach with Article 47 of the Charter.

With respect to the right to private and family life, the AG states that the rights guaranteed in Article 7 of the Charter correspond with the rights guaranteed in Article 8 of the European Convention on Human Rights (the ECHR). Subsequently, he notes that Article 8 EVRM provides for a broader protection as it also includes the relationship between a lawyer and its client outside of legal proceedings. However, based on the case law of ECHR, he clarifies that certain activities of lawyers (i.e., acting outside their 'usual role' as representative of their clients or legal advisers) are not covered by Article 8 ECHR. Based on these grounds, the AG notes that when applying the relevant exemption to DAC6's reporting obligation, a distinction needs to be made between the cases in which a lawyer acts 'as a lawyer' (who would avail himself of the prerogative of professional secrecy and, therefore, to enjoy a waiver of the obligation to report), and the cases in which this protection is inappropriate. The AG therefore notes that, since the prerogative of professional secrecy has not been subject to harmonization at European level, it is primarily for the national court to establish the aforementioned distinction.

As regards the issue of whether DAC6's Notification Obligation could be in breach of Article 7 of the Charter, the AG notes that, at first glance, the contested provision cannot infringe the rights protected under Article 7, because the third party intermediary is already aware of the information transmitted by the lawyer, including the latter's name. However, he also finds that, in certain situations (even assuming that the intermediary lawyer and the third party intermediary know each other), interference with the right to respect for private life could occur. Nevertheless, the AG finds that that such interference is justified by the objective pursued by the DAC6.

Last, but not least, the AG assesses whether the subsidiary obligation of a third party intermediary to disclose to the tax authorities the name of the lawyer who was involved in a reportable transaction but protected by a professional privilege is in breach of Article 7 of the Charter. Regarding this issue, the AG opines that this constitutes indeed a breach of such provision that cannot be justified since providing the tax authorities with the name of another intermediary who relied on a legal privilege is not necessary to achieve the objective of the DAC6 Directive.

Opinion of AG Collins on the deductibility of foreign permanent establishment losses (*Finanzamt B v W AG and joined party Budesministerium der Finanzen*, C-538/20)

On 10 March 2022, AG Collins published his Opinion in the case C-538/20 which deals with the issue of whether an EU parent entity can deduct the final losses of a permanent establishment (PE) that ceased its activities, under the circumstances where the profits and losses of such PE are exempt from taxation in the parent entity's

State of residence as a consequence of the application of a tax treaty.

The present case involved a German parent entity (W) which has a PE in the United Kingdom (UK). Due to the fact that this PE ceased its activities, its losses could no longer be carried forward in the UK. According to the parent entity, these losses incurred by W's branch in the UK were final and, therefore, should be available for carry forward in Germany. The German tax authorities, on the other hand, thought otherwise and refused to take these final losses into account.

The aforementioned dispute was brought before the German Federal Finance Court which referred five preliminary questions to the CJ: (i) Does the freedom of establishment (Articles 49 and 54 TFEU) precludes a tax regime of a Member State which prevents a resident company to deduct the final losses of a PE situated in another Member State, where the profits and losses of such non-resident PE are exempt from tax in the State of residence because of a double tax treaty?; (ii) If the first question is answered in the affirmative, do these Articles also prevent legislation that states that these losses cannot be deducted by the German legal entity for German trade tax purposes?; (iii) If the first question is answered in the affirmative, could the losses be considered final if at least the theoretical possibility exists that the parent entity reopens a PE in that Member State?; (iv) If the first and third question are answered in the affirmative, should the losses of the PE that could have been carried forward once to a subsequent tax period also be taken into account by the Member State of the parent entity?; (v) If the first and third questions are answered in the affirmative, should the cross-border final losses then be considered in the amount that the parent entity could have taken into account in the jurisdiction of the PE if not precluded by law?

To answer the aforementioned questions, the AG first observes that a provision that allows the losses of a PE's to be taken into account in calculating the profits and taxable income of the company to which it belongs constitutes a tax advantage. He further considers that the differential treatment that could arise from granting such an advantage only to a PE situated in the Member State of the resident company and not to a foreign PE, is liable to constitute a restriction of the freedom of establishment. However, the AG opines that this was not the case in the present circumstances, as the Member State of the parent entity does not have the power to tax a foreign PE based on the double tax treaty entered into between both Member States. Understanding that, in the case at hand, the two categories of PE are not objectively comparable, the AG concluded that Articles 49 and 54 TFEU do not prevent the legislation at issue.

In the case that the CJ should take a different view of the proposed answer to the first question, the AG also addresses the other questions. With respect to the second one, he opines that as far as the German trade tax resembles an income tax, this question should also be answered in line with the response to the first question. Regarding the third question, the AG states that it would go too far to consider the losses not final based on the purely hypothetical situation that a new PE will be opened in the UK. By doing so, the losses could namely never be considered final, which would render the 'obligation to take final losses into account' arising from the *Marks & Spencer* case (C-446/03) meaningless.

With respect to the fourth question, the AG opines that losses which could still be carried forward once, should not be deemed final. This is because otherwise, the initially successful activity of the PE would be taxed solely in the Member State where it was situated (UK), whereas the loss-making activities would be financed by the Member State of the parent entity (Germany). This would be contrary to an appropriate allocation of the power to impose taxes. Finally, the AG answers the fifth question by stating that the amount of losses taken into account cannot be higher than the amount calculated by applying the rules of the parent entity's State of residence. The losses should, however, also be limited by the amount calculated in accordance with the rules of the State in which the PE is situated.

ECOFIN Council fails to reach political agreement on the latest draft of the EU Pillar 2 Directive

After failure to reach agreement on the EU Pillar 2 Directive at the meeting of 15 March 2022, a revised compromise text of said Directive was negotiated during the Economic and Financial Affairs Council of the EU (ECOFIN) meeting held on 5 April 2022. The new compromise text differs from the 12 March version in the following elements: (i) it extends to six years the maximum deferral period that Member States can opt for; and (ii) Member States where no more than twelve (previously it was ten) UPE of in-scope groups are located can therefore choose to not apply the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR) until 31 December 2029. Due to reservations made by Poland (which asks for a legally binding link on the implementation of both Pillar One and Pillar Two), the ECOFIN did not reach a political agreement on April. The EU Pillar 2 Directive is to be discussed again at the next ECOFIN meeting on 24 May 2022.

Commission publishes its full proposal for an EU directive on Debt-Equity Bias Reduction Allowance (DEBRA)

As announced in its revised work program for 2022, on 11 May 2022 the European Commission published its full proposal for an EU directive on Debt Equity Bias Reduction Allowance (DEBRA). This legislative proposal aims at mitigating the tax induced debt-equity bias and encourage companies to finance their investments through equity contributions rather than debt financing. The DEBRA initiative was first announced in the Commission's Communication of 18 May 2021. Its roadmap was published on 14 June 2021, feedback was opened until 12 July 2021 and a public consultation ran from 1 July 2021 to 7 October 2021. The Commission's proposal released on 11 May presents the features of the DEBRA directive in full. The adoption of this Directive will require unanimity in the Council (Article 115 TFEU). For more information on the DEBRA proposal please see our website.

VAT

CJ rules on suspension of appeal against VAT assessment in anticipation of conclusion of criminal proceedings (*SC Cridar Cons SRL*, C-582/20)

On 24 February 2022, the CJ delivered its judgment in the case *Cridar* about the suspension of an appeal procedure against a VAT assessment whilst awaiting the outcome of criminal proceedings against a taxable person.

The Romanian tax authorities established during an audit that Cridar was involved in VAT fraud. Criminal charges were filed against Cridar. Further, Cridar was denied the right to recover VAT in respect of transactions that were presumed to be fraudulent. At the time that this VAT assessment was imposed, the Romanian tax authorities did not possess all the objective information concerning Cridar's involvement in the VAT fraud because the criminal investigation was still ongoing. The Romanian tax authorities, therefore, suspended Cridar's right to appeal against the VAT assessment until the relevant facts were clarified during the criminal proceedings.

In its judgment, the CJ rules that the Romanian tax authorities were allowed to suspend the appeal procedure against the VAT assessment under the following three conditions:

1. The suspension does not unreasonably delay the appeal procedure; and
2. The decision ordering the suspension is sufficiently motivated by law; and
3. If it is established that the right to recover VAT was undeservedly denied, Cridar should obtain repayment of the tax amount (including default interest) within a reasonable period of time.

The CJ also rules that, in those circumstances, it is not required that the execution of the VAT assessment is also suspended. This means that Cridar should pay the full VAT assessment amount without (temporarily) being able to appeal against the payment. This practice would only not be compatible with EU law in the event of serious doubt concerning the legality of the assessment, in order to prevent serious and irreparable damage to the interests of the taxpayer.

Opinion AG Capeta on the qualification of 'city cards' as multi-purpose vouchers (*DSAB Destination Stockholm AB*, C637/20)

On 24 February, AG Capeta of the CJ delivered her Opinion in the case *DSAB Destination Stockholm AB*.

DSAB issues city cards to tourists visiting Stockholm. That card gives cardholders the right to be admitted to around 60 attractions, such as sights and museums, for a limited period of time and up to a certain value. DSAB argued that the city card should be considered a multi-purpose voucher as a result of which no VAT was due upon issuance thereof to the tourists. The Swedish tax authorities disagreed that the city card should be considered a voucher and argued that VAT was due by DSAB upon issuance of the city cards.

For VAT purposes, a voucher is an instrument that entails an obligation for a supplier to accept it as consideration or part consideration for a supply of goods or services and which contains information about the goods or services for which the voucher can be used as consideration, or, alternatively information about the potential suppliers.

In her Opinion, AG Capeta argues that the city cards should indeed be considered a 'voucher' for VAT purpose. Since the supplied services are unclear at the time of purchase of the card, it should be classified as a multi-purpose voucher (and not as a single-purpose voucher). In that respect, it is not relevant that the services covered by such a card cannot all be used within a given time by the average consumer. The AG therefore opines that the transfer of the vouchers should not be subject to VAT but rather that VAT is levied upon redemption thereof by the tourists.

Opinion of AG Pitruzella on right of VAT recovery for parent company if purchases are made for the benefit of its subsidiary companies (*Finanzamt R*, C98/21)

On 3 March 2022, AG Pitruzella of the CJ delivered his Opinion in the case *Finanzamt R* about the right to recover VAT on purchases by a parent company that mainly benefitted its subsidiaries.

W-GmbH was the parent company of X-KG and Y-KG. W-GmbH provided services against remuneration to X-KG and Y-KG. W-GmbH acquired specific goods and services with the aim of contributing them to X-KG and Y-KG for the purpose of their own commercial activities. X-KG and Y-KG were involved in transactions concerning residential real estate. These transactions are typically exempt from VAT and do not give entitlement to recover VAT on expenses. W-GmbH reclaimed all input VAT charged on the purchases that it contributed to X-KG and Y-KG. This VAT refund right was denied by the German tax authorities on the ground that the capital contribution by W-GmbH concerned a non-economic activity (that does not lead to the right to recover VAT on costs).

The right to reclaim VAT is (inter alia) subject to the condition that the taxable person uses the procured goods and services to perform transactions that are taxed with VAT. According to the AG, the capital contribution by W-GmbH serves, in its nature, for the receipt of dividends from X-KG and Y-KG. It was also established that the procurements by W-GmbH were directly linked to the VAT exempt activities of X-KG and Y-KG and that these did not serve the business purposes of W-GmbH itself. The AG therefore considers that W-GmbH should not have the right to recover VAT on the goods and services contributed to X-KG and Y-KG.

Opinion of AG Kokott on the option for a VAT taxed transfer of real estate (*UAB, ARVI ir ko*, C-56/21)

On 24 March 2022, AG Kokott of the CJ delivered her opinion in the *ARVI* case about the conditions to opt for a VAT taxed transfer of real estate.

ARVI transferred a real property to a company called 'UAB'. The transfer of real estate is in most cases exempt from VAT by operation of law. The Lithuanian VAT rules offer taxable persons the possibility to opt for a VAT taxed transfer.

ARVI and UAB also applied for a VAT taxed transfer. However, the Lithuanian tax authorities disregarded this outcome because UAB was not a registered VAT taxable person at the time of the transfer. As a result, ARVI was obliged to repay input VAT recovered in respect of the property to the Lithuanian tax authorities. In her opinion, AG Kokott states that the condition that the purchaser should be a VAT registered taxable person is compatible with these provisions and that such a 'formal' condition does not violate to neutrality and proportionality principles of the EU VAT system.

Get in contact

For more information, please contact Dennis Weber or Harmen Zeven via the contact details below. The contributors to this edition of the EU Tax Alert were Dennis Weber, Gino Sparidis, Pierre-Antoine Klethi, Juan Manuel Vázquez, Jorn Steenbergen, Roemer Schimmelpenningh, Quinten Mulder and Bram Middelburg.

Dennis Weber
Of counsel / Tax adviser
T +31 20 578 57 50
E dennis.weber@loyensloeff.com

Harmen Zeven
Partner / Tax adviser
T +31 10 224 66 55
E harmen.zeven@loyensloeff.com

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

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

LOYENS LOEFF

LOYENSLOEFF.COM

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

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