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EU Tax Alert

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

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

Bevola is a Danish company which is a subsidiary and sub-subsidiary of Danish companies which themselves are controlled by Jens W. Trock, the group's parent company, which is also in Denmark. Bevola's Finnish establishment closed in 2009. The losses incurred by its establishment, were not and cannot be deducted in Finland following the closure. In those circumstances, Bevola applied to be able to deduct those losses from its taxable income in Denmark for the tax year 2009. The tax authorities rejected the application on the ground that Danish corporation tax did not allow the inclusion in taxable income of income and expenditure relating to a PE situated abroad, unless the company had opted for the international joint taxation scheme. Bevola appealed from such decision considering that the Danish law was in breach of the freedom of establishment. It relied mostly on the CJ reasoning in the *Marks & Spencer* case (C-446/03, EU:C:2005:763), as it was of the view that it was applied to Bevola's situation.

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

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

Then the CJ went on to analyse possible justifications considering that the Danish legislation could be justified both by the need to maintain a balanced allocation of the powers to tax and the coherence of the tax system. It further added (although not expressly relied on by the

Danish Government) that such legislation also prevents the risk of double use of losses. Subsequently and regarding proportionality, the CJ was of the view that where there is no longer any possibility of deducting the losses of the foreign PE in the Member State in which is situated, the Danish legislation would not be proportional. The CJ reaffirmed that in order for losses to be considered definitive they must satisfy the requirements in paragraph 55 of the *Marks & Spencer* judgment. Furthermore, the CJ stated that the criterion of definitive losses implies that the foreign PE has ceased to receive any income so that there is no longer any possibility of the losses being taken into account in the foreign Member State.

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

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

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

Hornbach-Baumarkt AG appealed from this decision considering that the German legislation at stake leads to unequal treatment in cases involving domestic and foreign transactions since, in a case involving purely domestic transactions, no corrections of income would be made in order to reflect the presumed amount of the remuneration for guarantees granted to subsidiaries. In that connection, it submitted, in particular, that it is apparent from the judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26), that a provision must be regarded as a restriction on the freedom of establishment which is not justified due to the fact that it is disproportionate. Contrary to the requirements stemming from that judgment, the German legislation does not contain any provision concerning the opportunity to present commercial justification in order to explain a non-arm's-length transaction. According to Hornbach-Baumarkt AG, there were commercial reasons to explain why no remuneration was given for the comfort letters at issue. Those commercial reasons were related to supportive actions to replace the equity capital of the foreign group companies. The Tax Office contended that, even though the German legislation did not contain a separate provision concerning the presentation of evidence of any commercial justification for a transaction, the taxpayer, however, does have the opportunity to present evidence of the reasonableness of the transaction carried out.

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

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

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

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

Legislative proposal changing the Netherlands tax consolidation regime

On 6 June 2018, the Netherlands Ministry of Finance published a legislative proposal to change the Netherlands tax consolidation regime. Based on the proposal, several provisions included in the Netherlands corporate income tax act (CITA) and the Netherlands dividend withholding tax act (WHTA) must be applied as if the Netherlands tax consolidation regime does not apply. Most importantly, two interest deduction limitations, rules limiting the possibility of loss compensation following a shareholder change and rules limiting the application of the participation exemption are affected. The scope of these limitations will be broadened if they need to be applied as if there is no fiscal unity. These changes were found necessary to bring the consolidation regime in line with EU law and had been announced as early as 25 October 2017.

If approved by Netherlands parliament, most proposed changes will enter into force with retroactive effect from 11.00 hours, 25 October 2010.

Background

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

Content of the legislative proposal

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

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

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

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

Replacement of the Netherlands tax consolidation regime

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

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

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

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

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

Commission orders Luxembourg to recover State aid granted to ENGIE

On 20 June 2018, the Commission announced its finding that advance tax rulings (ATRs) granted by Luxembourg to ENGIE constitute unlawful State aid. Luxembourg must now recover some EUR 120 million from ENGIE. This decision should not directly impact other taxpayers, as it concerns an individual measure.
According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), measures that affect trade between Member States and distort, or threaten to distort, competition by granting a selective advantage to certain undertakings, are incompatible with the EU Single Market. ATRs should not have the effect of lowering the tax liability of the beneficiaries compared to other taxpayers in a similar legal and factual situation.

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

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

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

State Aid/WTO

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

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

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

CJ dismisses appeal of United States to intervene as interested party in the Apple case

On 17 May 2018, the Vice-President of the Court issued an order concerning the appeal submitted by the United States in the Apple case (C-12/18). By this appeal the United States asked the CJ to set aside the order of the General Court dated 15 December 2017 that rejected its application to intervene in support of the form of order sought by Apple Sales International (ASI) and Apple Operations Europe (AOE) concerning the action brought by ASI and AOE for the annulment of Commission Decision C(2016) 5605 final of 30 August 2016 on State aid implemented by Ireland to Apple.

The Vice-President of the Court confirmed the General Court decision and dismissed the appeal of the United States. He considered that the United States did not demonstrate the existence of 'an interest in the result of the case') as required by Article 40 of the State of the CJ. According to this order, the lack of certainty as to the repatriation by Apple of the amounts resulting directly from the profits generated by the activity of ASI and AOE is, in itself, a sufficient ground to justify, in law, the General Court's decision that the interest of the United States in the result of the case was not established.

AG concludes to review decision not to recover because of absolute impossibility

On 11 April 2018, the AG delivered his Opinion concerning a series of cases addressing an Italian municipal real estate tax exemption for non-commercial entities (Joined cases C-622/16P to C-624/16P).

Those cases deal with a 2012 Commission decision not to order recovery of unlawful aid as it would be absolutely impossible for local authorities to gather the necessary information to do so. AG Wathelet pointed out that the Commission motivated this finding only by pointing out that tax and land registry databases provided insufficient information. While recovery might be burdensome, this does not make it necessarily impossible. Therefore, the AG concluded that the CJ should annul the General Court's judgment to uphold the Commission's decision not to recover.

Commission approves Portuguese tonnage tax regime and seafarer scheme

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

Direct Taxation

AG Mengozzi opines on German legislation providing for taxation of profits of companies subject to low taxation and application of standstill clause (*X-GmbH*)

On 5 June 2018, AG Mengozzi delivered his Opinion in case *X-GmBH v Finanzamt Stuttgart-Korperschaften* (C-135/17). The case deals with the German legislation providing for taxation of profits of foreign companies which are subject to low taxation (tax lower than 25%) and arising from passive activities. It is analysed whether such legislation amounts to a breach to the free movement of capital which, if not covered by the standstill clause of Article 64 TFEU, may be justified by the need to address wholly artificial arrangements. Concretely, the case involved a 30% participation in the Swiss company Y.

AG Mengozzi started by analysing the German legislation in order to determine whether it fell within the scope of the free movement of capital. In that regard, he noted that the German legislation provides for the taxation of undistributed profits of companies subject to low taxation. He stressed that the legislation at stake applied irrespective of any distribution of profits and as long as there was at least 1% of participation in a company located in a third country. Therefore, and because the legislation at stake was not applicable only to situations where there was a definitive influence the AG concluded that the free movement of capital was applicable. Furthermore, it observed that the legislation in stake amounted to a restriction to such freedom as it placed cross-border situations in less favourable conditions when compared to domestic situations as a participation in a German subsidiary would never be subject to taxation of undistributed profits.

Subsequently, the AG assessed whether the standstill clause could apply. In this regard, had noted that the legislation under scrutiny was already in force by 31 December 1993. Such legislation was subject to amendments in 2000 but such amendments never actually entered into force. In 2001, there were new amendment that essentially maintained the original features of the legislation already existing on 31 December 1993, decreasing the shareholding that triggered the taxation of undistributed profits from 10% to a mere 1% shareholding. Ultimately, the AG concluded that the standstill clause under Article 64 TFEU was applicable in this case. For the AG, the case in the main proceedings of the Swiss company was a situation already covered under the legislation in force at 31 December 1993, it involved direct investment and there had been no material changes since then.

For the case that the Court did not consider the standstill applicable in this case, the AG went to assess whether there were possible justifications to the restrictive measure. The AG started by observing that a Member State may not justify a restrictive measure as a mechanism to guarantee the possibility to obtain tax revenue. Subsequently, he analysed the justifications raised based on the need to prevent tax avoidance, preserve a balanced allocation of the powers to tax between Member States and the need to guarantee effective fiscal supervision.

As regards the need to prevent tax avoidance, the AG noted that the German legislation does not specifically address wholly artificial arrangements with the specific aim of preventing such arrangements. The AG further dealt with the argumentation raised by France that considered that, in the context of third countries, Member States should be authorized to maintain national legislation aimed at addressing wholly artificial arrangements with the main, but not unique purpose of avoiding the tax due. The AG recalled that in other judgments such as *Haribo* (C-436/08 and C-437/08) EU:C:2011:61 of 10 February 2011 and *Secil* (C-464/14) EU:C:2016:896 of 24 November 2016, the CJ mentioned that also as regards third countries, a transaction constitutes a wholly artificial arrangement if has the single purpose of avoiding the tax normally due.
As regards preserving the balanced allocation of the powers to tax among Member States, the AG considered that the German legislation was adequate to achieve such objective.
Finally, and concerning the effectiveness of fiscal supervision, the AG noted that on 1 January 2017, the OECD Multilateral Convention of Mutual Administrative Assistance entered into force. However, in Article 30 of such Convention, Switzerland had made a reservation according to which it would not provide assistance to tax credits existing before 1 January 2017. Therefore, and as regards the tax years at stake in these proceedings – 2005/2006 -, the AG observed that the referring court may consider that there is no effective mechanism of exchange of information in place unless – which is up to the referring court to determine - there is a bilateral agreement in force between Switzerland and Germany.

New transfer pricing decree sets out Netherlands tax authorities' interpretation of the 2017 OECD Transfer Pricing Guidelines

On 11 May 2018, the State Secretary of Finance published a new transfer pricing Decree in which he sets out his interpretation of the arm's length principle as embedded in Netherlands tax law (the **Decree**). The Decree explains the view of the Netherlands tax authorities (**NTA**) on the 2017 OECD Transfer Pricing Guidelines (**2017 Guidelines**) and it documents certain positions of the NTA on topics where the 2017 Guidelines leave room for interpretation.

The Decree entered into effect on 12 May 2018. The State Secretary takes the position that, to the extent that the revisions of the 2017 Guidelines are a further clarification of the arm's length principle, they also apply to years before publication of the 2017 Guidelines. However, the Decree remains silent on which parts of the guidance are 'new' and which parts are merely a clarification. If taxpayers act in line with the Decree, this reduces the risk of discussions with the NTA. If taxpayers deviate from the Decree, this does not necessarily mean that their transfer pricing needs to change. If, however, taxpayers take positions that differ from the contents of the Decree, they may expect discussions with the NTA and this might lead to controversy and potentially, to litigation.

Important topics
The Decree reiterates various positions from an earlier decree published in 2013 (see our newsletter Quoted, May 2014), but includes new views of the NTA on the following topics.

- The Decree confirms that the NTA follow the position taken in the 2017 Guidelines that the performance of risk control and risk mitigation functions, and the financial capacity to assume a risk, overrule contractual arrangements.
- The Decree recognizes the relevance the 2017 Guidelines attach to the development, enhancement, maintenance and protection (**DEMPE**) in respect of the

entitlement to the returns on intangibles. The Decree states that 'development' and 'enhancement' generally carry the most weight.
- The *discounted cash flow method* can be used to determine the value of an intangible asset from the perspective of the buyer and the perspective of the seller. According to the Decree, the price of the intangible is somewhere between those two values.
- The Decree claims that the NTA are authorized to use 'hindsight' to determine whether the transfer pricing for so-called 'hard-to-value intangibles' should be challenged.
- The Decree mentions that purchase price allocations prepared in relation to an acquisition 'can be a good indicator' for the minimum price the taxpayer would like to receive for the intangible.
- The Decree gives the NTA's view on what costs are to be included in the cost base when using cost-based transfer pricing methods, and what costs should be treated as disbursements. Only costs that are an indicator of value creating functions should be included in the cost base.
- The Decree offers more flexibility for low-value adding services, by accepting both the OECD's simplified method for low-value adding services involving a 5% profit mark-up and on-charging low-value adding services without a mark-up.
- The Decree explicitly mentions that the NTA will consider imposing penalties 'depending on the facts and circumstances of the case'. The Decree explicitly states that the NTA will not do so for every deviation from the policy set out in the Decree.

Relevance of the Decree

The contents of the Decree help taxpayers understand why the NTA take certain positions in practice. If taxpayers act in line with the Decree, this reduces the risk of discussions with the NTA.

If a taxpayer deviates from the Decree, this does not necessarily mean that changes need to be made. Only the NTA is bound by the contents of the Decree and taxpayers are at liberty to take different positions. If taxpayers take positions that differ from the contents of the Decree, they may expect discussions with the NTA and this might lead to controversy and potentially to litigation. When deviating from the Decree, we recommend thoroughly documenting the justification of the transfer pricing system.

Entry into force

The Decree enters into effect on 12 May 2018. The State Secretary takes the position that, to the extent that the revisions of the 2017 Guidelines are a further clarification of the arm's length principle, these revisions also apply to years before the 2017 Guidelines were published. Therefore, the NTA may apply certain elements of the Decree with retroactive effect. However, the Decree remains silent on which parts of the guidance should be considered 'new guidance' and which parts are merely a clarification.

VAT

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

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

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

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

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

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

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

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

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

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

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

Customs Duties, Excises and other Indirect Taxes

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

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

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

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

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

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

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

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

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

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

Implementing Regulation (EU) No 1214/2014

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

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

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

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

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

The product has a specialised saddle in locking cap for fixing a rod (presented separately) in its head.
The product corresponds to the ISO/TC 150 standards for implant screws and is presented for use in trauma surgery

as a part of a system for posterior stabilisation of the spine. It is installed using specific tools.
At importation, it is not presented in a sterilised packing. The product is marked with a number and therefore traceable throughout production and distribution.'

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

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

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

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

The CJ made the following considerations

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

According to the Court's settled case law also, the intended use of a product may constitute an objective criterion for classification, provided that it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (judgment of 26 May 2016, *Invamed Group and Others*, C-198/15, EU:C:2016:362, paragraph 22 and the case law cited).

Moreover, it must be borne in mind that even though the Explanatory Notes to the HS lack binding force, they are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation. The same is true of the Explanatory Notes to the CN (judgment of 12 June 2016, *Lukoyl Neftohim Burgas*, C-330/13, EU:C:2014:1757, paragraph 35 and the case law cited).

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

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

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

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

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

Therefore, classification under that heading may be envisaged only if the systems at issue in the main proceedings do not come within any of the other subheadings of CN heading 9021 (see, to that effect, judgment of 13 July 2006, *Uroplasty*, C-514/04, EU:C:2006:464, paragraph 56).

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, it should be noted that, while the application by analogy of a classification regulation to products similar to those covered by that regulation facilitates consistent interpretation of the CN and the equal treatment of traders, such an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading (judgment of 26 April 2017, *Stryker EMEA Supply Chain Services*, C-51/16, EU:C:2017:298, paragraphs 61 and 62). It follows that if the referring court were to conclude that the spinal fixation systems at issue in the main proceedings, having regard to their objective characteristics and properties as well as their intended and actual use (see, to that effect, judgments of 4 March 2015, *Oliver Medical*, C-547/13, EU:C:2015:139, paragraphs 51 and 52, and of 25 February 2016, *G. E. Security*, C-143/15, EU:C:2016:115, paragraph 55), were not intended principally for the treatment of fractures, then Implementing Regulation No 1214/2014 should not be taken into account for the purpose of their classification under the appropriate CN subheading.

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

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

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

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

The CS ruled as follows:

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

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