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EU Tax Alert

- CJ rules that Bulgarian legislation requiring interest arising from the expiry of the statutory time limit for payment until the date on which evidence is furnished about tax treaty application contravenes the freedom to provide services (*TTL*)
- CJ rules on limitation of deduction of losses incurred by Danish PE in the context of the group taxation regime in Denmark (*NN A/S*)
- CJ rules that a company and its branch established in another Member State constitute a single taxable person for VAT (*TGE Gas*)

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Highlights in this edition

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

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

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

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

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

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

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

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

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

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

regard for the principle of proportionality. That principle would, by contrast, be respected if the setting off, against the Danish group's profits, of the loss sustained by the resident PE of its non-resident subsidiary were accepted, by derogation from the rule laid down in its legislation, as the group would have demonstrated that the setting off of the abovementioned losses against the subsidiary's profits is actually impossible in the other Member State.

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

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

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

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

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

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

State Aid/WTO

General Court dismisses appeal of Netherlands seaports in respect of tax liability of ports

As of 2016, the Netherlands changed its corporate tax law, such to include government-operated companies in its scope, pending a formal State aid investigation. In January 2016, the Commission concluded its investigation and found that the existing exemption of government-operated companies constituted State aid. As the law had already been changed there were no further consequences, as recovery was not an issue (the exemption qualified as existing aid). Initially however, the new 2016 law did not apply to publicly-held seaports. Therefore, the Commission ordered the Netherlands to withdraw this exemption before the start of the next fiscal year (2017 onwards).

On appeal (case T-160/16 of 31 May 2018), six affected seaports argued that the Commission should not have taken this decision while other procedures in regard to competing ports in Belgium and France were still pending. (In 2017, the Commission concluded that existing exemptions for these ports had to be abandoned before 2018.) In essence, the General Court held that the Commission was under no obligation to conclude all cases in parallel in order to avoid a distortion of a level-playing field. Applicants could not invoke the difference in timing in order to trigger annulment of the decision, as they were receiving incompatible aid which should be brought to an end.

The Court also indicated that the investigation into the Netherlands regime was already at a more advanced stage and the situations in other countries are not comparable. In France, there was only a partial exemption at the time, in Belgium, the ports were not subject to corporate tax but they were subject to a substitute tax on legal entities and in Germany, the exemption for government-operated ports was far more complex in its design, as their method of financing resulted in taxable losses which affected their tax liability.

CJ overturns annulment of Spanish tax lease decision

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

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

Direct taxation

Austria Presidency states that there is broad support in the European Council to implement a digital services tax

The Austrian Minister of Finance stated that there is a broad support in the Council in order to implement a digital services tax as soon as possible. He believes that it is realistic for an agreement to be reached by the end of this year.

The digital services tax means that digital activities in the member states will be taxed and it will apply to revenues from those activities in which users make a substantial contribution to the value added. According to the proposal of the Commission, only those companies with minimum global revenues of 750 million euros or revenue within the EU of at least 50 million euros will be affected by the tax.

According to the Austrian Minister of Finance, this also underlines the position held by France and Germany, which have suggested a “sunset clause”. This means that the digital services tax would be a temporary levy valid until an agreement has been reached on an international level.

AG Wathelet opines that French dividend withholding tax legislation is in breach of the free movement of capital (*Sofina and others*)

On 7 August 2018, AG Wathelet delivered his Opinion in case *Sofina SA, Rebelco SA, Sidro SA v Ministre de l’Action et des Comptes publics* (C-575/17). The case deals with the French withholding tax legislation that provides for a different treatment depending on whether dividends are paid to resident or non-resident companies in a loss-making position. In the case of dividends paid to non-resident loss-making companies, the withholding tax is charged over gross income whereas in an identical but purely domestic scenario, the withholding tax is charged only when the receiving company obtains positive income.

The companies Sofina SA, Rebelco SA and Sidro SA, are Belgium resident companies which received dividends during the course of 2011 as a result of their French minority shareholdings (not eligible for the purposes of the Parent-Subsidiary Regime). As per the application of Article 119 bis of the French Tax Code together with Article 15 (2) of the French – Belgium tax treaties those dividends were subject to a 15% withholding tax. The Belgian companies at stake ended the 2011 year with a negative result and therefore, submitted claims before the French tax authorities for the purposes of obtaining the refund of the tax withheld. As a loss-making French resident company would only be effectively taxed by its French sourced dividends as from the moment that its taxable income becomes positive. Accordingly, the Belgium companies considered that they suffered a less favourable treatment when compared to French ones.

The AG started by considering that the difference in treatment between dividends paid to domestic and non-resident companies amounted to a restriction to the free movement of services. As regards the possible justifications raised by the French government: the need to preserve a balanced allocation of the powers to tax between Member States and the need to guarantee an effective fiscal supervision, the AG rejected both justifications. As regards the first justification, the AG considered that the arguments of the French government are not convincing and that in any case, France could achieve identical aims with non-discriminatory measures such as subjecting to withholding tax both dividends distributed to residents and non-residents. As to the second justification, he was also of the view that the effectiveness of fiscal supervision cannot be a valid reason to adopt a measure that essentially affects only non-residents.

The second and third questions referred deal with the issue whether the effective tax burden over the dividends paid to residents and non-residents leading to a restriction to the free movement of capital by a legislation that excludes non-residents from deducting expenses directly related with the payment of dividends while such expenses are deducted in the case of purely domestic dividends may be justified. Such justification would be based on the difference between the general tax rate of 33.43% applicable to residents in a subsequent taxable period and the withholding tax rate of 15% applicable to non-residents.

According to the AG, such difference in treatment may not be justified by the difference in tax burden on a subsequent period and therefore, amounts to a restriction to the free movement of capital.

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

On 25 July 2018, AG Wathelet delivered his Opinion in case *Commission v France* (C-416717). The case deals with two separate questions: first, the improper interpretation and application of the CJ judgment *Accor* (C-310/09) by the French Conseil d'Etat (Supreme Court) and second, about the breach of preliminary reference by the French Supreme Court.

In the 15 September 2011 judgment in the *Accor* case, it ruled that the French legislation under which a French company would receive a tax credit in respect of French source dividends redistributed to its shareholders, while no equivalent tax credit was available in respect of dividends received from subsidiaries located in other Member States amounted to a restriction to the fundamental freedoms. Following the CJ judgment in *Accor*, the French Supreme Court delivered two judgments setting the refund of the unduly levied taxes to certain conditions, notably by refusing to take into account taxation suffered by non-resident sub-subsidiaries, limiting the refunded amounts to one third of the dividends distributed whenever the distributing company in another Member State suffered taxation superior to the French tax rate (33,33%) and setting certain proof requirement in order to obtain the refund.

The Commission considered that the conditions set forth by the Conseil d´Etat in its judgments amounted to a breach of EU law.

In this regard, the AG considered that by refusing to take into account the tax suffered by non-resident sub-subsidiaries, while such taxation is taken into account in the case those low-tier subsidiaries are resident companies, France has maintained a discriminatory tax legislation which the CJ had addressed in its judgment in *Accor*.

As regards the second question under the proceedings, the AG observed that the obligation to submit a preliminary reference to the CJ under Art. 267 (3) TFEU aims, in particular, to avoid that national case law of a Member State is not in accordance with EU law. The breach of the obligation to make a preliminary reference is one of the elements to be taken into account when determining the responsibility of a Member State arising from a decision of last instance Court. According to the AG, the acknowledgement of a breach of preliminary reference to the CJ is further enhanced when it follows after a prior judgment from the CJ. In the current proceedings, the AG considered that the question about the tax credit concerning the taxation suffered by non-resident sub-subsidiaries had not been decided by the CJ in the *Accor* case but it had nevertheless been dealt with by the CJ in the UK case *FII GLO* case (C-35/11). Therefore, a possible difference between the French and the UK solution would create a risk of different solutions between Member States which is not compatible with the obligation of preliminary reference to the CJ by last instance Courts. In accordance, the AG concluded that France has breached the obligation that is imposed on the Conseil d État concerning Article 267 (3) TFEU.

AG Sanchez-Bordona opines that Netherlands legislation on the calculation of social security contributions is not in breach of the free movement of workers (*Zyla*)

On 11 July 2018, AG Sanchez-Bordona delivered his Opinion in case *K.M. Zyla v Staatssecretaris van Financien* (C-272/17). The case deals with the Netherlands legislation that applies a *pro rata temporis* tax deduction for social security contributions. In accordance, such deduction is calculated based on the period of time that those contributions are made in the Netherlands.

K.M Zyla is a Polish citizen who worked in the Netherlands during the first half of 2013. During this period, he made contributions to the Netherlands Social Security System and paid the corresponding income tax. Upon his return to Poland, he did not obtain sufficient income during the second half of that year in order to make social contributions in Poland nor to pay income tax in that country.
The Netherlands tax authorities, in order to calculate the statutory reduction to the contributions previously made by Zyla, applied a reduction *pro rata temporis* considering the time (six months) in which those contributions were made in the Netherlands. Zyla appealed this decision considering that he should be entitled for the entire deduction as otherwise that would lead to a distinction between residents and non-residents.

The AG considered that the regime of reduction *pro rata temporis* does not give rise to a disadvantage. As long as it is applied strictly in proportion to the period of contributions and there are no asymmetries in the deductible amounts, there is no disadvantage. The AG rejected that the *Schumacker* doctrine would apply in this case. According to the AG in the *Schumacker* case, the taxpayer resided exclusively in Belgium while obtaining income for his activity only in Germany without any change of his habitual residence. Differently, in the case under analysis, Zyla had resided part of the year of 2013 in the Netherlands. Therefore, the place of residence and of income coincided until he moved to Poland where he no longer worked throughout the remainder of that year. Therefore, the AG concluded that the circumstances are not identical so as to allow the application of the *Schumacker* case by analogy.

VAT

CJ concludes that Estonian sales tax does not have characteristics of turnover tax and therefore it is not precluded under the VAT Directive (*Viking Motors*)

On 7 August 2018, the CJ issued its judgment in case *Viking Motors and others v Mallinna linn, Maksu- ja Tolliamet* (C-475/17). The case deals with the interpretation of Article 401 of the VAT Directive. Concretely, the case deals with reimbursement of sales taxed paid by the appellants.
Based on Estonian law, local authorities are allowed to introduce a sales tax. This tax shall be paid by traders who are registered in the register of economic activities and who conduct their activity in the field of retailing, catering or the provision of services and shall be charged on the value based on the price of the goods or services sold in the territory of the municipality or city. After paying this sales tax, Viking Motors AS (amongst other appellants) requested for repayment of the paid amounts as the appellants stated that the sales tax infringes Article 401 Directive and therefore the sales tax had been paid unduly. Article 401 of the Directive provides that the VAT directive shall not prevent a Member State from maintaining or introducing taxes as long as they cannot be characterized as turnover taxes, provided that the collecting of those taxes, in case of trade between Member States, does not give rise to formalities connected with the crossing of borders.

Based on EU Case Law, there are four characteristics that must be met in order for a tax to be regarded as a ‘turnover tax’: i. the tax applies generally to transactions relating to goods or services, ii. the tax is proportional to the price charged by the taxable person in return for the supplied goods and services, iii. the tax is charged at each stage of the production and distribution process, irrespective of the number of transactions which have previously taken place, and iv. the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that, at any given stage, the tax only applies to the value added at that stage and the final burden of the tax rests ultimately on the consumer.

The case eventually came before the Supreme Administrative Court of Estonia, which came to the conclusion that the sales tax did not formally show the third and fourth essential characteristics of VAT within the meaning of the EU case law, since that tax was not levied at every stage of the production and distribution process and there was no right to deduct the tax paid at an earlier stage. However, with the application of this tax on sales, the same objective was achieved as that which would have been achieved thanks to the third and the fourth characteristic. As such, the Estonian Supreme Administrative Court decided to refer questions to the CJ for a preliminary ruling.

According to the CJ, the sales tax at issue did not require taxpayers to charge the sales tax to the purchaser. Thus, the passing-on of that tax to the final consumer was a possibility and not an obligation. Therefore, it is not certain that the tax is borne by the ultimately consumer in a way similar to the tax on consumption such as VAT. Furthermore, the CJ considered that tax levied on production is likely to fall outside the scope of Article 401 of the VAT Directive. The CJ noted that the sales tax at issue does not adversely affect the operation of the common system of VAT provided that it is not levied on commercial transactions in a way comparable to VAT.

Customs Duties, Excises and other Indirect Taxes

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

On 25 July 2018, the CJ issued its judgment in case *Commission v Combaro SA* (C-574/17P). The case deals with an appeal by the Commission where it asks the Court to set aside the judgment of the General Court of 19 July 2017, *Combaro* v *Commission* (T-752/14) by which that court annulled Commission Decision C(2014) 4908 final of 16 July 2014, finding that the remission of import duties is not justified in a particular case (REM 05/2013).

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

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

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

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

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