LOYENS & LOEFF

EDITION 182

EU Tax Alert

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- EU Council adopts VAT Implementing Regulation on new VAT rules for e-commerce
- AG Kokott opines on treating a subsidiary as a VAT fixed establishment of its parent company (*Dong Yang Electronics*)

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Highlights in this edition

CJ rules that non-EU pension funds can obtain the refund of dividend withholding tax if they are comparable to domestic pension funds (*College Pension Plan of British Columbia*)

On 13 November 2019, the CJ issued its judgment in case *College Pension Plan of British Columbia* (C-641/17). The case deals with the tax treatment of dividends paid by German companies to a Canadian pension fund and the possibility to claim a refund of the 15% withholding tax paid on those dividends on the basis that dividends received by resident pension funds do not increase their taxable amount, or increase it only very slightly. The CJ concludes that there is a restriction on the free movement of capital if the comparability test is fulfilled; i.e., if the non-resident pension fund allocates dividends received to make provisions for pensions that it will have to pay in the future so they are comparable to domestic funds.

When a German pension fund receives dividends, they are fully credited to the various pension fund agreements if the profits correspond to the technical interest rate used to calculate the contributions (accounting investments). Returns exceeding the technical interest rate (non-accounting investments) must be also credited at a rate of at least 90%. Thus, it is only to the extent that returns on non-accounting investments do not have to be credited to the various pension fund agreements that they result in a pension fund profit that must also be taken into account for tax purposes. On the contrary, non-resident pension funds are always subject to definitive dividend withholding tax, usually at a rate of 15%. Thus, the CJ identifies a restriction to the free movement of capital given that dividends paid to non-resident pension funds are the subject of less favourable treatment than that applied to dividends paid to resident pension funds, since the former are subject to definitive taxation of 15%, whereas the latter are exempt from tax in whole or in part.

As to the comparability test, the CJ concludes that a non-resident pension fund, which allocates the dividends received to provisions for pensions that it will have to pay in the future, intentionally or pursuant to the law in force in its State of residence, is in that regard in a situation comparable to that of a resident pension fund. That is a matter for the referring court to ascertain, but the CJ clarifies that the fact that allocations to the mathematical and other technical provisions do not constitute expenses incurred in order to generate income in respect of dividends cannot call into question that comparability of the situations.

None of the justification grounds raised in the proceeding (balanced allocation of taxing rights, coherence of the tax system and guaranteeing effectiveness of fiscal supervision) are accepted by the CJ.

Finally, the CJ addresses if this restriction may be covered by the standstill clause laid down by Article 64(1) TFEU to the extent it was a restriction existing on 31 December 1993 for the purposes of that provision. On the one hand, as to the temporal criterion, the CJ does not conclude on whether the introduction of special legislation relating to pension funds after 31 December 1993 is the circumstance that makes the tax situation of non-resident pension funds less advantageous compared to domestic funds. However, the CJ considers that the acquisitions of shareholdings and the receipt of dividends constitute a means by which a pension fund can honour its pension commitments and not a service that it provides to those insured persons. Based on that, unlike the case of

investment funds in the *Wagner-Raith* decision (C-560/13), the CJ does not find the necessary causal link between the capital movement and the provision of financial services. Therefore, the restriction does not meet the substantive criterion and cannot be covered by the standstill clause.

EU Council adopts VAT Implementing Regulation on new VAT rules for e-commerce

On 21 November 2019, the EU Council has adopted the VAT Implementing Regulation (2019/2026) which is an amendment of the VAT Implementing Regulation (282/2011). The amendment relates to the new VAT rules for e-commerce.

These new VAT rules are part of the VAT e-commerce package that was adopted on 5 December 2017 by the EU Member States.

The amended VAT Implementing Regulation provides detailed rules on the application of specific e-commerce provisions of the VAT Directive. Particularly, further technical clarifications are laid down regarding supplies of goods or services facilitated by online platforms to EU non-taxable customers and the records they would have to keep on sales made via their online platform.
In addition, this VAT Implementing Regulation also contains provisions with respect to the extension of the One-Stop-Shop regime to distance sales of goods in cross-border situations (both intra-Community and from third countries) and certain domestic supplies of goods.

The aim is to ensure a smooth transition to the new VAT rules for e-commerce that will enter into force on 1 January 2021.

AG Kokott opines on treating a subsidiary as a VAT fixed establishment of its parent company (*Dong Yang Electronics*)

On 14 November 2019, AG Kokott gave her opinion in the case *Dong Yang Electronics* (C-547/18). Dong Yang Electronics ('Dong Yang') is a company established in Poland that assembles printed circuit boards for LG Display, a company established in Korea ('LG Korea'). The materials to be assembled were provided to Dong Yang by LG Korea's Polish subsidiary LG Display Polska ('LG Poland Production'). Dong Yang returned the processed printed circuit boards after assembly to LG Poland Production. During these transactions however, LG Korea always remained the owner of the materials. LG Korea assured Dong Yang that it did not have a fixed establishment in Poland, did not employ staff, did not own property, and did not have technical equipment there. Consequently, Dong Yang sent LG Korea invoices for its assembly services without VAT because LG Korea is established outside of the EU.

The Polish tax authorities took the view that (i) LG Poland Production qualified as a VAT fixed establishment of LG Korea for VAT purposes and (ii) Dong Yang's services were performed to the benefit of that fixed establishment as LG Korea had access to the staff and technical resources of LG Poland Production through the contractual design of the business model. Moreover, Dong Yang should have identified LG Poland Production as the recipient and VAT fixed establishment of LG Korea based on the nature and use of the services it provided.

Dong Yang challenges the DTA's views and the dispute ended up before a regional administrative court who decided to stay the proceedings and refer to the CJ for a preliminary ruling. By its questions, the referring court asks (i) whether a Polish subsidiary of a non-EU parent company is on its own sufficient to constitute a VAT fixed establishment of the parent company and, (ii) whether a third party is required to examine contractual relationships between a parent company established outside the EU and its subsidiary in order to determine whether the former company has a VAT fixed establishment in Poland.

With respect to the first question AG Kokott concludes that a subsidiary of a company established outside the EU should in principle not be regarded as a fixed establishment for VAT purposes. A different outcome is only conceivable if the contractual structure chosen by the recipient of a service constitutes a violation of the prohibition of abuse. That would however require a tax advantage (that is obtained contrary to the purpose of the relevant provision). In this case, no tax advantage is gained as LG Korea would, if it incurred VAT on Dong Yang's services, be able to fully recover that VAT. As to the second question, the AG considers that in general contractual relationships between its customer and its subsidiaries are inaccessible to a service provider. Thus, insofar as there are no indications to the contrary, a taxable person may rely on a written statement from his customer that he does not have a VAT fixed establishment.

State Aid/WTO

CJ rules on restriction of eligibiltiy of energy tax rebate scheme

On 14 November 2019 the CJ issued a preliminary ruling in the (second) *Dilly's Wellnesshotel* case (C-585/17). Austria decided to limit an existing energy tax rebate scheme to the manufacturing industry as of 2011. The applicant, a provider of hotel services, was therefore refused the rebate in 2011. On appeal and after a first decision by the CJ, it was ruled that the restriction as such had to be notified in light of the restriction of an existing aid scheme as the implementing law failed to include the obligatory reference to the 2008 Block Exemption Regulation. Absent mandatory notification, the Austrian Federal Finance Court held that the restriction had not come into force and awarded the rebate.

On further appeal to the Austrian Supreme Administrative Court the case was again referred to the CJ. The CJ reitterated that (later) restricting those eligible for an aid scheme is subject to the notification requirement of Article 108(3) TFEU. However, as the revised aid scheme as such complied with the renewed 2014 Block Exemption regulation – the rebate followed from a specific formula leaving no discretion to tax authorites and ensuring a minimum energy tax to be paid – it would qualify for an exemption of notification nowadays.

Commission opens formal state aid investigation into tax treatment of Italian ports

On 15 November 2019 the Commission decided to open a formal investigation into tax exemptions granted to Italian ports. Port authorities are fully exempt from taxation, also with regard to their commercial activities as it seems, such as providing access to ports, (Remuneration for its public tasks such as controling local maritime traffic, safety and anti-pollution checks, is not subject of the investigation.) Should the investigation end in a finding of state aid, it will not result in recovery as the Italian exemption already existed prior to the establishment of the EU.

Italian refused to accept a Commission proposal for appropriate measures, i.e. to change its tax system, unlike Spain that recently committed to submit ports to normal corporate taxation as of 2020. The Netherlands, France and Belgium already had to amend their tax systems accordingly, following Commission decisions that were upheld by the General Court.

Direct Taxation

AG Hogan endorses the compatibility of the Italian financial transactions tax with the fundamental freedoms (*Société Générale S.A.*)

On 28 November 2019, AG Hogan delivered his Opinion in case *Société Générale S.A.* (C-565/18). The case deals with the compatibility of the Italian tax on financial transactions with the EU fundamental freedoms, in particular, with the free movement of capital. AG Hogan opines that Article 63 TFEU does not preclude national legislation from charging a tax on financial transactions (even if it is levied irrespectively of the State of residence of the financial market participants and the intermediary) because it does not create any discrimination.

The Italian tax on financial transactions is levied on the transfer of ownership of shares and certain participating financial instruments issued by Italian companies, as well as securities representing such instruments regardless of the State of residence of the issuing entity. The tax is also levied on transactions involving derivative financial instruments which mainly have as their underlying instrument one or more of the financial instruments previously mentioned (or the value of which depends essentially on one or more of those instruments), irrespectively of the place of conclusion of the transaction and the State of residence of the contracting parties. In the proceeding, the tax was paid by the Italian branch of a French company on financial transactions relating to derivative contracts where an entity resident in Italy had issued the security underlying such a contract.

AG Hogan concludes that the taxation of the derivatives of financial instruments can be analysed by reference to Article 63 TFEU based on two reasons. First, derivate financial instruments always represent an investment and only constitute a hedging service under certain specific circumstances (which are not apparent in the proceeding), so that principles governing free movement of services are secondary to principles governing the free movement of capital. Second, the domain covered by the tax at issue has not been harmonised, as it is not covered by Council Directive 2006/112 /EC of 28 November 2006 on the common system of value added tax nor by Council Directive 2008/7/EC of 12 February 2008 concerning

indirect taxes on the raising of capital. Additionally, he considers that, even if the tax at issue may possibly raise issues as to whether Italy has jurisdiction under international law to levy the tax in question (since the tax applies irrespective of where the matter was transacted), there is no need to address these issues.

AG Hogan argues that the identification of a restriction to the free movement of capital requires following the narrower definition of the concept of 'restriction' developed by the CJ in the field of taxation. Thus, it is not in itself sufficient that the measure at issue dissuades non-residents from investing in national financial instruments, the measure at issue must instead establish a direct or an indirect discrimination to the specific detriment of cross-border transactions.

Based on that, AG Hogan notes that, since the tax at issue is due regardless of the residence of the parties to the transaction or of any possible intermediaries, that tax does not create any discrimination of the kind prohibited by Article 63 TFEU. In particular, from the investors' standpoint, that tax does not constitute discrimination since that tax applies independently of their nationality or place of residence. Regarding the scope of the tax, the fact that only derivatives which have financial instruments governed by Italian law as underlying assets are covered is irrelevant given that they are not comparable to derivatives whose underlying assets are not governed by that law. As to the reporting obligations that this tax creates, AG Hogan opines that they seem to be limited to what is necessary to ensure the timely and effective enforcement of the tax.

Commission requests Germany to amend its legislation on capital gains taxation for certain real estate sales

On 27 November 2019, the Commission has decided to send a reasoned opinion to Germany regarding its tax legislation, which treats sales of real estate by domestic and foreign companies without business activities in Germany differently for the purposes of capital gains taxation. According to the German legislation, a deferral of capital gains taxation on reinvestment is only granted if the real estate was attributed to the fixed assets of a domestic business for at least six years without interruption. Corporations established under German law without business activity in Germany are deemed to have such a permanent establishment, whereas non-resident corporations generally are not. According to the Commission, this leads to a restriction of the free movement of capital in breach of the free movement of capital. If Germany does not act within the next two months, the Commission may decide to bring the case before the CJ.

Commission requests Spain to abolish restrictive conditions for tax deferrals in case of divisions of companies.

On 27 November 2019, the Commission has decided to send a reasoned opinion to Spain asking it to abolish conditions in Spanish legislation that allegedly run counter to EU rules on mergers, which are meant to ensure that business reorganisations such as mergers and divisions are not hampered by taxation issues at the time of restructuring. Taxation of capital gains resulting from such reorganisation should be deferred to a later sale or disposal of the assets and shares. Spanish law however attaches unduly restrictive conditions for certain types of divisions of companies. The tax deferral is not granted if the shareholders of the divided company do not receive the same proportion of shares in all companies resulting from the division, unless the acquired assets are branches of activity. If Spain does not act within the next two months, the Commission may refer the case to the Court of Justice of the EU.

Commission requests Austria and Ireland to transpose EU-wide interest limitation rules

On 27 November 2019, the Commission has decided today to send reasoned opinions to Austria and Ireland asking them to transpose into national legislation the interest limitation rule as required by the EU Anti-Tax Avoidance Directive (ATAD). Both Member States held that they had 'equally effective' interest limitation rules already in place and as such notified derogation requests under EU law. The Commission informed Austria and Ireland in July 2018 that it considers their national rules as not being 'equally effective' to the interest limitation rule set out in EU law and thus not justifying the postponement of transposition of that provision until 1 January 2024. Both Austrian and Irish measures were not included in the list that the Commission considers as measures which are 'equally effective'. So far, neither Austria nor Ireland has transposed or notified any national implementing measures for the relevant provisions. According to the Commission, if Austria and Ireland do not act within the next two months,

the Commission may decide to bring the cases before the Court of Justice of the EU.

Commission requests Denmark to amend its rules regarding taxation of dividends paid to non-resident investment funds in order to be in line with EU law

On 27 November 2019, the Commission has decided to send an additional reasoned opinion to Denmark regarding its tax rules which provide for a difference in treatment between dividends paid to domestic and foreign undertakings for collective investment in transferrable securities. In Denmark, dividends distributed to funds registered as "investment institutes with minimum taxation" are exempted from tax, but only if the institute is Danish. The Commission already addressed this issue in a reasoned opinion of April 2013, but put the case on hold to wait for the outcome of a preliminary ruling procedure before the CJ on the matter. In June 2018, the CJ held in case Fidelity Funds (C-480/16) that these rules constitute an unjustified restriction on the free movement of capital. However, Denmark has still not taken the legislative action necessary to bring the rules into line with EU law. If Denmark does not act within the next two months, the Commission may refer the case to the Court of Justice of the EU.

Commission asks Netherlands to amend its tax rules amounting to obstacles to the cross-border transfer of pensions

On 27 November 2019, the Commission has decided to send an additional reasoned opinion to the Netherlands asking it to change three sets of tax rules amounting to obstacles to the cross-border transfer of pension capital and the cross-border provision of pensions. First, foreign pension service providers have to give guarantees, such as collateral or bank guarantee to the Dutch authorities if they transfer pension capital to a foreign provider or if foreign providers want to provide services on the Dutch market. Second, (former) employees have to provide guarantees if their pension capital is transferred to a foreign provider or if they want to buy pension services from a foreign provider. Third, transfers of pension capital to foreign providers by workers taking up employment outside the Netherlands are tax exempt only if the foreign providers assume the responsibility for any tax claims or the taxpayer himself provides that guarantee. According to the Commission, these conditions restrict the free movement of citizens and workers, the freedom of establishment, the freedom to provide services and the free movement of capita.. If the Netherlands do not act within the next two months, the Commission may decide to refer the matter to the Court of Justice of the EU.

VAT

Cj rules on VAT exemption on IT services provided by hospital (*Infohos*)

On 20 November 2019, the CJ gave its judgment in the case *Infohos* (C-400/18). Infohos is a Belgian association specialized in providing 'hospital IT services' to its members. These services were exempted from VAT under the exemption for 'independent groups of persons'. This VAT exemption is available to groups of VAT exempt enterprises and non-taxable persons that performs activities in the public interest. As of September 2000, Infohos entered into an agreement with a non-member for the provision of its services. However, Infohos did not register itself for VAT purposes as it took the view that it was not a taxable person or at least one that solely performs VAT exempted services under the exemption for independent groups of persons.

Following an audit by the Belgian tax authorities, the authorities concluded that the services rendered to the non-member did not fall under the VAT exemption. Moreover, the national implementation of the exemption in Belgium requires Infohos to *exclusively* render services to members for the VAT exemption to apply. Thus, with supplying services to non-members, the services rendered to members lose the right to the VAT exemption.

In the procedure that followed, the Belgian court eventually turned to the CJ for a preliminary ruling. The CJ considers that it does not follow from the wording of the Sixth EU VAT Directive that services to members are excluded from the exemption if the association also provides services to non-members. Such a limitation of the exemption also does not follow from the context and purpose of exemption for independent groups of persons. Consequently, a Member State cannot apply such a general restriction to the exemption.

CJ rules on the application of the financial VAT exemption in regard of transfer of debt (*Paulo Nascimento Consulting*)

On 17 October 2019, the CJ delivered its judgment in the case *Paulo Nascimento Consulting* (C-692/17).

Paulo Nascimento Consulting (“PNC”) is a property agency and, in this capacity, PNC was mandated by a landowner to sell its agricultural land. PNC found a buyer, but the landowner refused the purchase offer. Furthermore, the landowner then refused to pay the fees charged by PNC for its services. PNC submitted a civil claim with the Court for payment of the fees for PNC’s services plus VAT and interest. In the course of these proceedings, a property belonging to the debtor was seized. As the debtor failed to pay, the property was allocated to PNC under the obligation for PNC to repay the difference between the value of the property and the value of its claim to the competent enforcement authority.

After the allocation, but prior to the finalization of the enforcement proceedings, PNC transferred all its rights and obligations with respect to the civil claim to a third party, for an amount superseding the payment due by the landowner. Next, PNC paid the VAT that corresponded with the amount that was due by the landowner for PNC’s services. The remaining amount was recorded as ‘other unspecified income’ in PNC’s accounts, on which no VAT was paid. The tax authorities however took the view that the assignment of a right for consideration by a taxable person acting as such qualifies as a supply of services for which, in this case, no VAT exemption was applicable.

This dispute was eventually brought before the Supreme Court, which referred to the CJ for a preliminary ruling. Essentially, the referring court asked whether the transfer of PNC’s position in the enforcement proceedings fall under the VAT exemption for granting, mediation or management of credit.

In this regard, the CJ considered that the transfer of the position by PNC was an extension of its economic activity. Also, it was carried out against remuneration. The transfer is thus in principle taxable. The CJ proceeds to consider that PNC transfers various rights and obligations which cannot be artificially split, but the most important part of this supply is the transfer of the immovable property. It was however unclear from the proceedings whether PNC already had the power to dispose of the property as the owner at the time of transfer. Taking this into account, the CJ ruled that if PNC did have the power to dispose at the time of transfer, the transfer consisted a supply of immovable property. If not, the transfer was considered the provision of a service. Lastly, the CJ ruled that no services in regard of credit were performed as the transaction at issue did not entail an obligation for the third party to pay interest intended to remunerate any credit granted to it. Consequently, no VAT exemption was applicable.

CJ rules on application of the VAT exemption for transactions concerning payments (*Cardpoint*)

On 3 October 2019, the CJ delivers its judgement in the case *Cardpoint* (C-42/18). Cardpoint is a German company that engages in services regarding the exploitation of cash machines. Cardpoint supplied these services to a client. On 7 February 2007 Cardpoint submitted an adjusted VAT return for the year 2005. Herein Cardpoint stated that the services they supply are exempted from VAT based on the VAT exemption for transactions concerning payments. These services contain: preparing and maintaining cash machines, supplying them, installing hardware and software to read bank card data, sending a request for approval of cash withdrawals to the bank that issued the bank card used for those withdrawals, providing the requested cash and recording the withdrawals. The German tax authorities rejected the adjusted VAT return.

These facts and circumstances led to a dispute that eventually came before the Bundesfinanzhof (the High Court of Germany). The High Court noticed that the services supplied by Cardpoint are similar to the services that were in dispute in another case named *Bookit* (C-607/14). In this case the CJ ruled that services regarding the purchase and sale of cinema tickets were only technical and administrative services and thus did not qualify for the VAT exemption for transactions concerning payments. According to the High Court, the difference in for what purpose a service is used does not justify a different VAT treatment. In both cases the supplied services consist of the exchange of information and technical and administrative assistance.

The High Court questions whether it should be taken into account that in this case, unlike in the Bookit case, there is no question of a separate contract of sale other than providing the requested cash and recording the withdrawals. Subsequently, the High Court is uncertain about whether the services supplied by Cardpoint must be qualified as technical and administrative services which do not fall under the meaning of transactions concerning payments. The High Court therefore stayed the proceedings and referred this question to the CJ for a preliminary ruling.

The CJ ruled that it follows from settled case law that services can only be qualified as transactions concerning payments if the services in itself are distinctive and essential for payment. Thus, the services must lead to a transfer of money and involve legal and financial changes. To determine if this is the case the functional characteristics of services are decisive. Since Cardpoint does not have any decision-making power regarding the payments, its services do not lead to a transfer of money or legal and financial changes. Even the fact that Cardpoint's services were indispensable to provide payments, does not alter that the characteristics of Cardpoint's services are not distinctive and essential for a transaction concerning payments. Thus, the CJ ruled that the services supplied by Cardpoint cannot be qualified as transactions concerning payments and therefore Cardpoint could not apply the VAT exemption.

CJ rules on requirements for zero VAT rate for export (*Unitel*)

On 17 October 2019, the CJ delivered its judgement in the case *Unitel* (C-653/18). Unitel is a Polish telecom company. From January until May 2007, Unitel sold mobile phones to two Ukrainian company's. Following an audit at Unitel, the tax authorities found out that the mobile phones had been exported to a location outside the European Union, but had not been obtained by the Ukrainian companies listed on the invoices. The Polish tax authorities therefore argued that the supplies of goods by Unitel to Ukraine were not exported and thus the zero VAT rate for export was not applicable.

These facts and circumstances led to a dispute that eventually came before the Naczelny Sad Administracyjny (the High Court of Poland). Unitel argued that the tax authorities used a wrong meaning of supply of goods for the zero VAT rate for export. They state that the material condition that goods must be exported to a destination outside of the European Union is fulfilled. A formal condition that is not fulfilled, is no reason to state that there is no supply of goods for the zero VAT rate for export. The authorities argued that a supply of goods must be seen in the context of a transition of the right to dispose by an owner. Since the Ukrainian companies are not identified as the buyers of the mobile phones, the tax authorities argue that there is no supply of goods and thus no zero VAT rate for export.

According to the High Court, the outcome of the dispute requires the meaning of supply of goods in the context of the zero VAT rate for export. It is not disputed that a supply of goods to a destination outside the European Union took place. Thus, there was the export itself of the goods. However, the High Court is uncertain about whether it is necessary that the entity designated on the supplier's invoice as the person acquiring those goods must be the same as the actual recipient of those goods in order to apply the zero VAT rate for export. The High Court therefore stayed the proceedings and referred this question to the CJ for a preliminary ruling.

The CJ ruled that when it is proved that goods were exported to a destination outside the European Union, it would be disproportionate to refuse the zero VAT rate for export based on the inability to identify the purchaser. The meaning of supply of goods for the zero VAT rate for export is therefore not dependent on the identification of the purchaser of the goods. There are two exceptions to this rule. If the failure to identify the person actually acquiring the goods prevents it from being proved that the transaction at issue constitutes a supply of goods to a destination outside the European Union, refusal of the zero VAT rate for export is required. Also, when it is established that a taxable person knew or should have known that a transaction was part of fraud committed against the common system of VAT, refusal of the zero VAT rate for export is required.

Opinion of AG Hogan on VAT exemption for services closely linked to sports by non-profit association and direct effect of VAT directive (*Golfclub Schloss Igling*)

On 7 November 2019, AG Hogan delivered his opinion in the case *Golfclub Schloss Igling* (C488/18). Golfclub Schloss Igling (Schloss Igling') is a German association with the purpose to engage in and promote the sport of golf. To this end, Schloss Igling performs various services related to the operation of a golf club. The German Tax Authorities took the view that Schloss Igling cannot apply the 'VAT exemption for certain services closely linked to sport or physical education by non-profit-making organizations' on account of Schloss Igling not qualifying as a charitable organization as required by German VAT law. The court of first instance in Munich annulled the Tax Authorities' decision on the ground that Schloss Igling is a non-profit organization within the meaning of Article 132(1)(m) of the VAT Directive, and that this provision, which has direct effect, requires Member States to exempt all activities closely linked to the practice of a sport by a non-profit organization. The Tax Authorities appealed to

this decision and the dispute was referred to the CJ for a preliminary ruling.

AG Hogan limited his opinion to the question of whether the VAT exemption of Article 132(1)(m) of the VAT Directive has direct effect, considering the fact that, according to the wording, Member States have to apply the exemption to ‘certain’ services. The AG recalls that a provision may be relied upon before national courts by individuals against a Member State, in particular where the latter has failed to implement the Directive timely and/or correctly, if that provision is unconditional and sufficiently precise. In this respect, the A-G notes: “a provision of EU law is to be considered as unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure by the institutions of the European Union or by the Member States. To be considered as sufficiently precise, a provision must describe the obligation that it states in unequivocal and unconditional terms.”

Based on an analysis of CJ Case Law - most importantly *British Film Institute* (C-592/15) and *London Borough of Ealing* (C-633/15) – the AG concludes that by way of the term ‘certain’, Article 132(1)(m) leaves Member States a discretion regarding the extent of their power to exempt certain services closely linked to sport. The very existence of such a discretion in itself means that the provision of Article 132(1)(m) cannot be regarded as unconditional in nature. Since the requirement of unconditionality is a prerequisite to the application of the direct effect doctrine, it follows that Article 132(1)(m) cannot be regarded as directly effective. This conclusion would only be different if the referring court would determine that Germany has exceeded the discretion granted to it based on Article 132(1)(m).

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