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EU Tax Alert

Recent developments for tax specialists

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Highlights in this edition

- CJ judgment on VAT fixed establishment concept (Case *SC Adient Ltd & Co. KG, C 533/22*). *Read more >*
- CJ judgment on VAT taxability of transactions within VAT group (Case *Finanzamt T, C 184/23*). *Read more >*
- EU Council adopts EU Anti-Money Laundering Package. *Read more >*
- Political agreement reached on FASTER proposal. *Read more >*

EU Tax Alert

In this publication, we look back on recent tax law developments within the European Union (EU). We discuss, amongst other things, relevant case law of the Court of Justice of the European Union (CJ), Opinions of its Advocate Generals (AG), as well as relevant case law of the national courts of the Member States.

Furthermore, we set out important tax plans and developments of the European Commission (EC), the Council of the European Union (Council) and the European Parliament (EP).

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1. Highlights in this edition

CJ judgment on VAT fixed establishment concept (Case *SC Adient Ltd & Co. KG*, C533/22)

On 13 June 2024, the Court of Justice of the European Union (CJ) issued its judgment in the case SC Adient Ltd & Co. KG (C533/22). The case concerns toll manufacturing arrangements in a corporate group and the VAT fixed establishment concept.

The Adient group is active in the automotive industry. The principal company is located in Germany (Adient DE). Adient DE engaged a group company in Romania (Adient RO) as a toll manufacturer to provide manufacturing and assembly services for car seat covers. Adient DE was in possession of a Romanian VAT number due to its products being located in and sold from Romania. Adient DE was not registered as a VAT fixed establishment in Romania. Adient DE provided its German VAT number to Adient RO for the procured services. Adient RO did not charge any Romanian VAT to Adient DE due to the VAT reverse charge mechanism.

The Romanian tax authorities argued that Adient RO should have charged Romanian VAT to Adient DE. It reasoned that Adient DE possessed a VAT fixed establishment in Romania as a result of its 'possessing' the human and technical resources of Adient RO. The employees of Adient RO did not have any decision-making power for the supplies of goods by Adient DE in terms of quantities, prices or parties involved.

The CJ reasoned that Adient RO should, in principle, be deemed to act in its own name and in its own economic interests as an independent contract partner as opposed to being under the effective control of Adient DE. In that regard, the CJ established that the employees and technical means of Adient RO cannot be attributed to Adient DE, even if those resources are, in fact, used entirely for Adient DE under an exclusive service agreement. The CJ ruled that Adient DE, therefore, should in principle not be considered to possess a VAT fixed establishment in Romania.

According to the CJ, a VAT fixed establishment could only be present if the service provider does not remain responsible for its resources and thus, the recipient of the services would dispose of these resources as its own. The involvement of Adient RO with the supplies of finished products by Adient DE is not relevant for the VAT fixed establishment analysis if only preparatory or auxiliary services are rendered via the available resources of Adient RO.

CJ judgment on VAT taxability of transactions within VAT group (Case *Finanzamt T*, C184/23)

On 11 July 2024, the CJ issued its judgment in the case *Finanzamt T* (C184/23) which deals with the question of whether supplies of services made for consideration between legally independent persons closely linked by financial, economic, and organizational relations should be subject to VAT and whether the entitlement to deduct input VAT plays a role in this determination.

S operates a university school of medicine and in that capacity, provides VAT exempt patient care services for consideration. S also provides teaching services that are governed by public law for which it is not considered a taxable person for VAT purposes. S is the controlling company of U-GmbH, which provided cleaning services in respect of the premises used for the business activities of S.

EU Member States may treat persons in their country who are closely bound to one another by financial, economic, and organizational links as one VAT taxable person. This 'consolidated' VAT taxable person is known as a 'VAT group' or 'VAT fiscal unity'. S and U-GmbH considered that the cleaning services were not subject to VAT due to the existence of a VAT group between S and U-GmbH. The German Tax Authority disagreed by arguing that the services provided by U-GmbH constituted a deemed supply of services given the use of the services for the non-taxable educational activities performed by S. This implied that non-recoverable VAT would have been due on this deemed supply.

The CJ ruled that supplies for consideration between members of the same VAT group are not subject to VAT. This is also the case if the members of the VAT group perform activities that do not entitle an input VAT deduction.

EU Council adopts EU Anti-Money Laundering Package

On 30 May 2024, the Council of the European Union adopted a package of new anti-money laundering and countering the financing of terrorism (AML/CFT) rules. The package consists of: (i) An EU 'single rulebook' regulation, which will officially enter into force on 10 July 2027, and includes all rules applicable to the private sector to protect the EU internal market from money laundering and the financing of terrorism; (ii) A Regulation establishing a new EU anti-money laundering authority (AMLA), which will officially apply from 1 July 2025; and (iii) a new Directive on anti-money-laundering mechanisms at national level (6th AML Directive), which must be transposed into national legislation by 10 July 2027. The package was published in the Official Journal of the European Union on 19 June 2024.

For more information about the EU-AML package or other financial regulatory topics, please see our website post on this topic or contact our Financial Regulatory Team.

Political agreement reached on FASTER proposal

On 14 May 2024, the Economic and Financial Affairs Council (ECOFIN) of the EU reached a general political agreement on a compromise text of the proposed Directive on faster and safer relief of excess withholding taxes (FASTER). In the meeting, key issues were resolved, and several important amendments were approved, with the compromise text now ready for re-consultation with the European Parliament and legal-linguistic revision, after which the proposal would have to be formally adopted by the Council.

The new FASTER Directive would contain the following main features:

- Two fast-track procedures enhancing the current standard withholding tax relief or refund procedures: (i) a 'relief at source procedure' whereby the applicable tax rate is applied at the payment date of dividends or interests; and (ii) a 'quick refund procedure' whereby initially the withholding tax is deducted at the payment date but the refund of the excess withholding tax is granted within a fast term.
- A common EU digital tax residence certificate that investors (taxpayers) would be required to use in order to benefit from these fast-track procedures;
- A register and standardised reporting obligations for financial intermediaries. Registration would ensure that only certified financial intermediaries can apply for a relief of withholding tax on behalf of their clients through the fast-track procedures. Standardised reporting would harmonise the main compliance requirements in this area across the EU and would equip tax authorities with the essential information to check the eligibility for the relief of withholding tax, to trace the relevant payments and to avoid potential tax abuse or fraud.

If finally approved, Member States will have to implement the FASTER Directive into national law by 31 December 2028, with the new rules becoming applicable as from 1 January 2030.

2. Direct Taxation

AG Kokott's Opinion on whether a tax exemption applicable only to externally managed collective investment undertakings is compatible with the free movement of capital (*F.S.A. v Dyrektor Krajowej Informacji Skarbowej*, Case C-18/23)

On 11 July 2024, AG Kokott issued her Opinion in the case *F.S.A. v Dyrektor Krajowej Informacji Skarbowej* (C-18/23) which deals with the question of whether the free movement of capital must be interpreted as precluding the legislation of a Member State under which non-resident internally managed investment funds are subject to corporation tax on their income generated in that Member State, whereas resident externally managed investment funds are exempt from that tax. The AG opined that Article 63(1) TFEU must be interpreted as not precluding such national legislation on the basis that there is no indirect discrimination between resident externally managed investment funds and non-resident internally managed investment funds.

The case concerned F S.A., a closed-end investment fund established in Luxembourg ('the applicant'), which applied to the Polish Tax Office ('the defendant') for an advance tax ruling establishing that the income which it generated in Poland was exempt from tax. The defendant refused to issue the advanced tax ruling on the grounds that the applicant was an internally managed investment fund and that, under Polish national law, only externally managed investment funds can take advantage of the tax exemption. This is because an essential condition for benefiting from the aforementioned tax exemption is that the investment fund is established in accordance with the Polish Law on investment funds, which foresees that no investment funds managed internally can be established. The applicant brought an action against this decision before a Polish Regional Administrative Court. Having doubts as to whether Polish law as it stands is compatible with the fundamental freedoms and the Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS), this domestic court referred the case to the CJ. In essence, it asked the Court whether Article 63 TFEU must be interpreted as precluding the aforementioned national legislation under which resident externally managed investment funds are exempt from corporate tax and non-resident internally managed investment funds are not.

In her Opinion, AG Kokott assessed whether the Polish rules lead to a discrimination with regard to the free movement of capital. First, she noted that under Polish law on investment tax, no investment funds managed internally (that is to say, by their own bodies) can be established and that, consequently, the Polish tax exemption on corporation tax applies only to domestic externally managed investment funds (e.g., managed by an independent management company). In this regard, she considered that this distinction between externally and internally managed investment funds provided for in Polish company law does not entail an indirect discrimination. This conclusion is substantiated, among other things, on the fact that: (i) it cannot be assumed that the Polish legislation systematically favours national investment funds as the exemption applies regardless the domicile of the investment funds; (ii) the Polish legislature is likely seeking precisely to bring about equal treatment for non-resident and resident investment funds.

Second, regarding the issue of whether the criterion of differentiation chosen by Poland is at all liable to have a discriminatory effect, the AG considered that no form of correlation is evident between the external or internal management of the investment fund and its

registered office (i.e., externally managed foreign investment funds are treated in the same way as externally managed domestic investment funds for tax purposes; and internally managed foreign investment funds are treated in the same way as compared to domestic entities for tax purposes). Consequently, she considered that there is no discriminatory criterion of differentiation and that the chosen criterion cannot 'intrinsically' result in a difference in treatment depending on the registered office of the investment fund. The AG reinforced this conclusion on the fact that EU law (UCITS Directive) grants Member States the option of authorizing only internally or only externally managed investment funds in national law and that a finding that there is indirect discrimination in the present case would infringe Poland's fiscal autonomy.

Third, AG Kokott examined whether resident externally managed investment funds and non-resident internally managed investment funds are in an objectively comparable situation, in light of the aim pursued by the national provisions at issue. Considering that the decision to authorize (and exempt) only externally managed investment funds in Poland is based on reasons of investor protection (the investors' assets pooled in the investment fund are to be separated from the management company's asset sphere), she found that externally managed investment funds domiciled in Poland and internally managed investment funds domiciled abroad are therefore not in an objectively comparable situation.

Finally, the AG considered that if, on the other hand, the Court were to assume that there is indirect discrimination and an objectively comparable situation, the difference in taxation would in any event be justified by an overriding reason in the public interest (effective investor protection) and proportionate.

Position of the EU and its Member States for the second substantive session of the Ad Hoc Committee to draft terms of reference for a UN Framework Convention on international tax cooperation

On 16 July 2024, the Economic and Financial Affairs Council (ECOFIN) approved the position of the European Union and its member states for the second substantive session of the ad hoc committee to draft terms of reference for a UN Framework Convention on international tax cooperation. The second substantive session of the ad hoc committee will take place from 29 July to 16 August 2024.

Among other things, the document outlining the EU position notes that: (i) the terms of reference for a UN Framework Convention on International Tax Cooperation are crucial to clarify and determine the future work, including high-level commitments and procedural rules; (ii) in general, there is a need for greater clarity in the terms of reference on the procedures that will be followed by the intergovernmental negotiating committee similar to what has been done in other UN processes; (iii) the EU strongly advocates in favour of a consensus-based decision making process in respect of the negotiation and adoption of the text of the Framework Convention and its protocols; (iv) it will be critical to ensure that the discussions and the associated work on the issues are as complementary and coordinated as possible with the ongoing work at other international fora.

Furthermore, in the position document, the EU expresses concerns regarding the reference to the simultaneous development of early protocols in the terms of reference and reiterates that no early protocol should be discussed until the negotiations on the Framework Convention are concluded. In addition, it mention that the EU believes that the principal decision on development of protocols, as well as the decision regarding their substance, number and timing, should be taken by the intergovernmental negotiating committee and that the commitments in the terms of reference should be high-level, illustrative, and complementary to already existing commitments.

It is worth noting that the latest draft setting out terms of reference for a U.N. framework convention on international tax cooperation does not take into account the EU concerns that early protocols should be negotiated separately from the convention.

Commission publishes its Annual Report on Taxation 2024

On 2 July 2024, the European Commission published the Annual Report on Taxation 2024 (ATR) which presents an overview and in-depth analysis of the design and performance of Member States' tax systems. The report aims to inform stakeholders of recent developments, as well as provide policymakers with insights that can help them improve the functioning of tax systems in the EU.

In general, the ATR looks at the development of the tax mix from various perspectives to inform the debate about: (i) the challenges faced by different types of taxes and different tax bases; and (ii) how the design of taxes can affect different economic agents and their behaviour. Furthermore, it discusses both recent reforms in tax systems and changes in the main indicators used by the Commission to assess taxation policies in EU Member States and at EU level.

In addition, the ATR describes the different legislative initiatives tabled by the European Commission in the last year to streamline business operations across the EU, reduce compliance costs and improve tax procedures. In particular, the report describes the following legislative proposals: (i) Directive for Business in Europe: Framework for Income Taxation (BEFIT); (ii) a Directive establishing a Head Office Tax (HOT) system for SMEs; (iii) a Directive on Transfer Pricing; (iv) a Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER); and (v) the VAT in the Digital Age package (ViDA) (Section 2.2.1.). The ATR also discusses measures for the Green Transition. Interestingly, the Unshell proposal is not referred to in this document.

It is worth noting that the ATR merely provides some basic background on the aforementioned proposals and does not address their current state of play. Finally, also worthy of note is that the ATR also addresses tax avoidance, evasion and aggressive tax planning (Section 3.4.2) noting that the global minimum tax is likely to improve the current situation.

ECOFIN report to the European Council on tax issues

During the last Economic and Financial Affairs Council (ECOFIN) meeting under the Belgian Presidency held on 21 June 2024, Ministers approved the progress report on tax issues, which provides an overview of the progress achieved in the Council during the term of the Belgian Presidency (January to June 2024), as well as an overview of the state of play of the most important dossiers under negotiations in the area of taxation.

The key takeaways from the report regarding direct taxation dossiers are the following:

- **Unshell**: The report notes that most delegations support the objective of the proposal but believe that further technical work is necessary. Some of the most discussed issues in relation to the Unshell proposal include the tax consequences, minimum substance and exchange of information elements.
- **Transfer Pricing (TP) Directive**: The report notes that the Commission proposal cannot be supported by the Member States in its current form. Although Member States generally support the objectives of improving legal certainty regarding the application of the arm's length principle and a common interpretation of the OECD TP Guidelines, they raised some general concerns about the inclusion of transfer pricing rules into a Directive and the text of the proposal (e.g. risk of possibly creating a double standard in the field of transfer pricing, as well as about the 'loss of flexibility' that the Member States currently have in negotiating and applying the OECD TP Guidelines). However, a large number of Member States find it useful to establish an 'EU Transfer Pricing Platform' (i.e., a new 'soft law' forum, similar to the Joint Transfer Pricing Forum). The report indicates that the discussions on this matter may continue at future ECOFIN meetings.

- **Head Office Tax System (HOT) Directive**: Although the general objectives of the HOT proposal are supported, concerns have been raised about the potential burdens on tax systems, risks linked to competitiveness of the domestic market and potential effects on tax revenues. A number of Member States have expressed support for a more general orientation debate.
- **BEFIT**: Member States support the objective of simplifying corporate taxation rules but have concerns whether BEFIT would achieve this. In particular, concerns exist in relation to how BEFIT would operate with existing rules and the determination of the preliminary tax result for in scope groups. Technical analysis of the proposal will continue, with some Member States also calling for a political discussion.

In addition, the report discusses the priorities for the next legislative cycle. In this regard, it notes that the High Level Working Party on Tax Questions held a general discussion on the priorities for the upcoming mandate. Member States reportedly stressed the need to focus on fighting tax avoidance and reducing administrative burdens for individuals, companies and tax administrations. In particular, allowing for sufficient time for the transposition of new legislation was emphasized. This point was also noted in the context of direct taxation where Member States pointed out the workload and IT adjustments required for the implementation and application of new legislation. Alongside needing to focus on the implementation of adopted legislation, Member States also underlined a preference to completing the work on current tax initiatives before launching new ones. They also suggested that Member States should be involved more before new tax initiatives are launched.

Finally, it is important to note that - in addition to approving the progress report on tax issues and among other things - on 21 June 2024, the ECOFIN also: (i) approved conclusions on the progress made by the Code of Conduct Group during the Belgian Presidency; (ii) discussed 2024 European Spring Semester Package; and (iii) took note of the work carried out in the ad hoc committee to draft terms of reference for a UN Framework Convention on International Tax Cooperation.

EU Tax Observatory publishes report on taxing ultra-high net worth individuals

On 25 June 2024, the EU Tax Observatory published a new report entitled 'A blueprint for a coordinated minimum effective taxation standard for ultra-high net worth individuals' ahead of the July meeting of G20 Finance Ministers in Rio de Janeiro, Brazil. The report was commissioned by the G20 to the Director of the EU Tax Observatory (Gabriel Zucman) and presents a proposal for an internationally coordinated standard ensuring an effective taxation of ultra-high-net-worth individuals.

In the baseline proposal, individuals with more than $1 billion in wealth would be required to pay a minimum amount of tax annually, equal to 2% of their wealth. This standard could be flexibly implemented by participating countries through a variety of domestic instruments, including a presumptive income tax, an income tax on a broad notion of income, or a wealth tax. The report presents evidence that contemporary tax systems fail to tax ultra-high-net-worth individuals effectively, clarifies the case for international coordination to address this issue, analyses implementation challenges, and provides revenue estimations.

The main conclusions of the report are that: (i) building on recent progress in international tax cooperation, such a common standard has become technically feasible; (ii) it could be enforced successfully even if all countries did not adopt it by strengthening current exit taxes and implementing 'tax collector of last resort' mechanisms as in the coordinated minimum tax on multinational companies; (iii) a minimum tax on billionaires equal to 2% of their wealth would raise $200-$250 billion per year globally from around 3,000 taxpayers; extending the tax to centimillionaires would add $100-$140 billion; (iv) this international standard would effectively address regressive features of contemporary tax systems at the top of the wealth distribution; (v) it would not substitute, but support domestic progressive tax policies, by improving transparency about top-end wealth, reducing incentives to engage in tax avoidance, and preventing a race to the bottom; (vi) its economic impact must be assessed in light of the observed pre-tax rate of return to wealth for

ultra-high-net-worth individuals which has been 7.5% on average per year (net of inflation) over the last four decades, and of the current effective tax rate of billionaires, equivalent to 0.3% of their wealth.

Hungarian Presidency publishes its priorities and program

On 18 June 2024, the recently started Hungarian Presidency of the Council of the EU published its priorities and program under the slogan 'Make Europe Great Again'. The main priorities of the Hungarian presidency held from 1 July 2024 until 31 December 2024 are: (i) New European Competitiveness Deal; (ii) The reinforcement of European defence policy; (iii) A consistent and merit-based enlargement policy;(iv) Stemming illegal migration; (v) Shaping the future of cohesion policy; (vi) An economy-centred EU agricultural policy; (vii) Addressing demographic challenges.

Concerning taxation, Hungary's main priority is to effectively advance the discussions on the taxation files and international issues currently on the agenda, achieving progress which responds to the needs posed by new business models, international cooperation, and fiscal revenues. High-priority areas within this field are: fighting tax evasion, ensuring legal certainty for taxpayers, and supporting the international engagement of the European Union. In the area of taxation, Hungary sees an opportunity to enhance the competitiveness of European businesses through digitalization, the efficient use of information, and simplification.

CJ finds inadmissible a request for a preliminary ruling on whether making a tax refund conditional on the withdrawal of judicial appeals filed in another Member State is compatible with EU law (Case, *Monmorieux*, C-380/23)

On 13 June 2024, the CJ delivered its judgment in the case *Monmorieux* (C-380/23). The case deals with the issue whether an administrative practice, whereby, in the context of a mutual agreement procedure conducted under a tax treaty between two Member States, a taxpayer can only obtain reimbursement of the tax unduly levied by the first Member State on the condition that they withdraw the judicial appeals they have filed before the courts of the second Member State, so that the tax paid in this second Member State could become definitive, is compatible with the free movement of persons, services and capital.

The case concerns UN, a Belgian national who lived in France from 2008 to 2014, but worked in Belgium. UN paid taxes in France under the special frontier workers' regime. The Belgian tax authority later claimed that UN was resident in Belgium and taxed him accordingly, including a 50% penalty. UN appealed this tax decision in Belgian courts and simultaneously requested a mutual agreement procedure in accordance with the French-Belgian tax treaty. In 2017, the Belgian tax authority agreed with the French authority that UN did not have a permanent residence in France and would refund his French taxes if he withdrew is Belgian tax appeals. UN considered this condition violated his fundamental rights.

The CJ, however, declared the request for a preliminary ruling inadmissible, as the national court did not sufficiently explain the connection between the disputed national practice and the cited EU legal provisions. Specifically, the national court did not demonstrate how the requirement to withdraw judicial appeals conflicted with the principles of the EU law articles referenced.

French Supreme Administrative Court rules that mandatory flat tax for non-resident individuals is a restriction of the free movement of capital (Case *Num. 489370*)

On 31 May 2024, the French Supreme Administrative Court (Conseil d'État) ruled that non-resident individuals must be allowed - under the free movement of capital (Article 62, TFEU) - to elect for progressive taxation on capital gains from the sale of shares in French companies, similar to resident individuals.

The case involved a French national residing in Norway who challenged the French tax authorities' guidelines which imposed a flat-rate tax of 12.8% on capital gains for non-resident shareholders owning 25% or more of a company's profits. Resident individuals, however, could opt for progressive taxation, potentially reducing their tax burden significantly.

The Court analysed the case under the free movement of capital, as the tax did not depend on shareholders' voting rights but on their profit rights. The Court found that the flat-rate tax for non-residents could result in higher taxation compared to residents, which is discriminatory and contrary to the EU freedoms. The Court ruled that there is no objective difference between resident and non-resident taxpayers that justifies this different tax treatment. Pursuant to the Court, the coherence of the French tax regime does not constitute a valid reason for this discrimination. Consequently, the Court annulled the French tax authorities' guidelines which prevented non-residents from opting for progressive taxation.

AG Kokott's Opinion on the limits imposed by legal professional privilege in the context of a request of information made under the DAC (Case *F, Ordre des Avocats du Barreau de Luxembourg v. Administration des contributions directes*, C-432/23)

On 30 May 2024, AG Kokott delivered her Opinion in the case *F, Ordre des Avocats du Barreau de Luxembourg v. Administration des contributions directes* (C-432/23). The case deals with the issue of whether and, if so, under what conditions, a tax administration may seek disclosure from a lawyer in the context of an exchange of information on request (EoIR) under Directive 2011/16 (DAC). In particular, the case deals with the question of whether advice or representation provided by a lawyer on tax matters can generally be excluded from the protection afforded to legal professional privilege (LLP) under EU law,

This case involves a request of information made by the tax administration of Luxembourg to a law firm named F in relation to one of its clients, a Spanish legal entity called K. The request for information was made as a consequence of an information order submitted by the Spanish tax administration to its Luxembourg equivalent regarding entity K. The information requested concerned the services provided by F to K in connection with the acquisition of two shareholdings. F refused to provide the requested information on the basis that it had acted as lawyer/legal counsel for the group to which K belongs and that, therefore, it was prevented by law from communicating information concerning its client in so far as that information was covered by its LPP. Furthermore, F asserted that the services were not related to taxation but exclusively concerned corporate law. In Luxembourg, LLP does not apply to tax advisory or representation matters. Disagreeing with such views, the Luxembourg tax administration imposed a fine on F for failing to comply with the information order. After two appeals, the case reached the Luxembourg's High Administrative Court, which decided to stay the proceedings and refer several questions to the CJ.

In her Opinion, AG Kokott addresses several questions referred to the Court: (i) The scope of the protection afforded by LLP and whether the information order interferes with Article 7 of the Charter, (ii) whether the responsibility for protecting LLP lies with the EU or the Member State, and (iii) what requirements EU law attaches to national legislation imposing a duty to cooperate on lawyers, as information holders, in order to ensure that that legislation is compatible with Article 7 of the Charter.

Regarding the first question, AG Kokott considers that the protection of LPP is comprehensively protected by Article 7 of the Charter and covers any legal advice, with regard to both its content and its existence. On such basis, she found that: (i) it is impossible to draw distinctions between the various fields of law - as Luxembourg has done in this case - when determining the scope of the protection afforded by LPP; (ii) the protection extends to legal advice in the field of company and tax law, and in particular, to provide advice on the establishment of a corporate investment structure; and (iii) legal

persons too can rely on that right as protected under the Charter. Regarding the existence of right's interference, the AG noted that an information order from the tax administration demanding all documents related to an advice on specific transactions does constitute an interference with the right to respect for communications between lawyers and their clients afforded by Article 7 of the Charter. Moreover, she found that there would be further interference if the Luxembourg tax administration proceeded to share the information obtained with the Spanish tax administration. Lastly, she indicated that it falls to the referring court to also examine whether the interference is justified, which infers, inter alia, that the information order is lawful (e.g. foreseeably relevant).

When it comes to the second question, the AG is of the opinion that: (i) The DAC is compatible with Article 7 and Article 52(1) of the Charter, in so far as it does not include, beyond Article 17(4), any provision which formally permits interference with the confidentiality of exchanges between lawyers and their clients in the context of the system of EoIR and which itself defines the scope of the limitation on the exercise of the right in question; (ii) the national legislation of each Member state can and must stipulate the conditions, the scope and the limits of the duty to cooperate incumbent on lawyers, as information holders, in the context of the EoIR under the DAC.

Finally, concerning the third question, the AG first noted that, in principle, any obligation on a lawyer to disclose information concerning a relationship with a client leads to interference with the right to respect communications between lawyers and their clients that is protected by Article 7 of the Charter. According to the AG, the decisive question is therefore, whether and, if so, under what conditions such interference can be justified, as well as whether such justification respects both the principle of proportionality and the essence of the fundamental right concerned.

The AG then assessed the proportionality of the interference with Article 7 of the Charter. Acknowledging the legitimate objective of general interest pursued by the system of EoIR, the AG first analysed the necessity of the measure. In this regard, she applied the less restrictive test and noted that: (i) Luxembourg tax administration must ensure that the requesting Spanish authority has exhausted its own avenues of enquiry to no avail by (at least) obtaining confirmation that all enquiries have been exhausted in the latter requesting State; and (ii) in the requested State (i.e., Luxembourg), there should also be no less restrictive measure for the person concerned (i.e., F), which is for the referring court to examine on a case-by-case basis. Concerning the appropriateness of the measures, the AG noted that not all information that comes to the knowledge of a lawyer is subject to the special protection of LPP and, thus, information obtained in commercial practice (e.g., as part of a management consultancy firm) does not require the same protection as that obtained as part of the provision of legal advice. Furthermore, she noted that these principles apply not only to lawyers but also to tax advisers and other groups of professionals, Finally, she questioned the proportionality of the information order issued to the lawyer in the case, as a consequence of its referral to 'all available documentation'.

On such basis, the AG highlights the need to strike a balance between the general interest of combating tax evasion and fraud and protecting LPP, concluding that 'national legislation under which advice and representation provided by a lawyer in tax matters other than criminal tax law does not generally fall within the scope of the protection of LPP, and which therefore, does not allow for any balancing of interests on a case-by-case basis either, is contrary to Article 7 of the Charter'.

CJ judgment on the denial of voluntary tax assessments to Swiss residents under the EU-Swiss Agreement on the free movement of persons (Case, *AB v Finanzamt Köln-Süd*, C-627/22)

On 30 May 2024, the CJ delivered its judgment in the case *AB v Finanzamt Köln-Süd* (C-628/22). The case deals with the issue of whether the Agreement on the Free Movement of Persons (AFMP) between Switzerland and the EU precludes legislation of a Member State under which employees resident in Germany may avail themselves of the voluntary income tax assessment mechanism (which provides the opportunity to receive a tax refund, deduct expenses and credit German wage tax withheld), whereas that right is denied to German employees resident in Switzerland.

The case involves a Swiss national, AB, who resides in Switzerland and works in Germany. AB was partially liable to income tax in Germany because of receiving employment and rental income in the latter country. AB requested a voluntary assessment to include tax-deductible occupational expenses connected with his taxable activity in Germany. The German tax office issued notices of assessment using only the income from rental and leasing as a basis for calculating AB's income tax, taking the view that tax on income from employment had already been paid by means of the amount withheld at source. Consequently, neither the German wage tax already paid nor the solidarity surcharge was offset against the calculated amount of AB's German income tax. In addition, the tax authority denied voluntary assessment on the ground that it was limited to workers who had their place of residence or habitual abode in an EU Member State or in a State party to the EEA Agreement. As a consequence of these assessments, AB filed a complaint based on the Free Movement of Persons Switzerland – EU/EFTA (AFMP) and the right to equal treatment.

The AFMP is a treaty entered into between Switzerland and the EU which lifts restrictions on EU and Swiss citizens to work and live in the territories of the contracting parties. Amongst other things, the AFMP forbids discrimination on grounds of nationality. It is important to note that the CJ ruled that, as Switzerland has not joined the internal market, the interpretation of EU law concerning the internal market cannot automatically be applied to the interpretation of the AFMP.

In its judgment, the CJ first evaluated the applicability of the AFMP. The CJ recognizes that an employed person, such as AB, who has transferred his residence to Switzerland and is employed by an employer established in Germany, has the right to rely on the provisions of the AFMP against the latter State. This enables him to benefit fully from the right of residence provided for in the AFMP provisions, while maintaining his economic activity in his country of origin. The CJ further noted that the free movement of persons guaranteed by the AFMP would be impeded if a national of a Contracting Party to the AFMP were to be placed at a disadvantage in his or her State of origin solely for having exercised his or her right of free movement. Consequently, the CJ ruled that AB's situation falls within the scope of the AFMP.

The CJ continued to evaluate the scope of the terms of the AFMP. Referring to the Schumacker case (C-279/93), the CJ considered that in the case of a tax concession which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute 'discrimination' where there is no objective difference between the situations of the two such as to justify different treatment in that regard. The CJ further argued that the German legislation treats resident taxpayers in the same way as certain non-resident taxpayers and thus accepts that their situations are comparable for the purpose of taxing their wages received in Germany. Consequently, the Court considered that it cannot be asserted that a taxpayer's non-resident status in itself makes his or her situation objectively different from that of a resident taxpayer.

Furthermore, the CJ considered that the discrimination cannot be justified by the overriding reason in the general interest relating to the need to preserve fiscal coherence. The CJ argued that in order for an argument based on such a justification to succeed, the existence of a direct link must also be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy. According to the CJ, there is no such direct link in a situation such as that at issue.

Next, the CJ examined the AFMP's standstill provision on the ground of which the German Government alleged that the rules in question could remain in force as they entailed restrictive measures that were already existent at the time the AFMP was concluded. In this regard, the CJ concluded that such provision does not permit denying employed persons who reside in Switzerland and work in Germany the possibility to opt for the voluntary assessment scheme. Finally, the Court noted that, in view of the fundamental nature of the principle of equal treatment, the Contracting Parties' ability to maintain measures that may constitute exceptions to that principle should have been the subject of an express provision of the AFMP, which is not the case here. Based on the above, the CJ concluded that the AFMP precludes the German legislation in question.

EU Commission takes action against Member States for failure to comply with the exchange information under DAC7 and transpose the Public CbCR Directive

On 23 May 2024, the European Commission (EC) sent formal notices to four Member States (i.e., Germany, Hungary, Poland and Romania) citing their failure to promptly exchange information on income from sellers of digital platforms, as required under DAC7. This action marks the first stage of an infringement procedure. The Member States have two months to rectify their non-compliance; failure to do so may prompt the EC to start the second stage of issuing reasoned opinions.

In addition, on the same date, the EC issued reasoned opinions to six Member States (i.e., Belgium, Italy, Cyprus, Austria, Slovenia, and Finland) for failing to fully transpose the Public Country-by-Country Reporting (CbCR) Directive into their national laws. This action follows up on the initial letters of formal notice sent in July 2023. The Member States in question have a two-month period to rectify their non-compliance; failure to do so may lead to the EC referring the cases to the CJ.

CJ reasoned order on the compatibility of Bulgarian withholding tax on dividends distributed to companies established in Gibraltar with freedom of establishment (Case *Entain Services (Bulgaria)*, C-287/23)

On 16 May 2024, the CJ issued a reasoned order in the case *Entain Services* (C-297/23). This case deals with the issue whether the freedom of establishment is compatible with national legislation of Bulgaria that levies tax on dividends distributed by a resident company to a company established in Gibraltar, whereas dividends distributed to resident companies and to companies established in other Member States are exempt from that tax.

This case involved a Bulgarian company, called Entain, which was wholly owned by its parent company established in Gibraltar. Entain distributed dividends to its parent company without withholding or paying tax in Bulgaria. The tax authorities issued a tax reassessment notice for the recovery of tax on dividends paid to the parent entity, because it was of the opinion that the Directive 2011/96 (Parent-Subsidiary Directive) applies neither to Gibraltar nor to companies incorporated in Gibraltar. Entain appealed against this notice to the referring court arguing that, as noted by the Court in its judgment of 2 April 2020, GVC Services (Bulgaria) (C-458/18), the inapplicability of Directive 2011/96 to companies incorporated in Gibraltar were without prejudice to the obligation to comply, at the time of the facts of the dispute in the main proceedings, Articles 49 and 63 TFEU. The referring court referred the case to the CJ for a preliminary ruling on the interpretation of Directive 2011/96.

In essence, the referring court asks whether the provision in national law levying a tax on dividends distributed by a resident company to a company established in Gibraltar, whereas dividends distributed to resident companies and to companies established in other Member States are exempt from that tax, is compatible with the freedom of establishment or free movement of capital.

First the CJ assessed which freedom applies in the case at hand. The CJ stated that it follows from case law that the purpose of the legislation at issue must be considered to determine whether it falls within the scope of on or other of the freedoms (Judgment of 7 April 2022, A SCPI Case C-342/20). Given that in the case at hand, the distributing company is wholly owned by the receiving company, the CJ found that the freedom of establishment is applicable because the case concerns national legislation affecting shareholdings that enable significant influence over a company's decisions.

Regarding the existence of a restriction to such freedom, the Court noted that in the present case, dividends distributed by a company established in Bulgaria to companies established in that Member State are exempt from withholding tax, as are also dividends distributed to companies established in other Member States. However, that exemption does not apply to dividends distributed to companies established in Gibraltar. In the Court's view, this results in a difference in treatment depending on the registered office of the companies receiving the dividends.

Furthermore, when assessing the comparability between the situation of resident and non-resident beneficiaries of dividends, the CJ considered that as the provisions of Bulgarian law do not make the benefit of the withholding tax exemption subject to the condition that the dividends are taxed at the level of the recipient company, the non-taxation of those dividends in Gibraltar cannot make the situation of a recipient company established in Gibraltar different from that of a company established in Bulgaria. Therefore, the Court found that the withholding tax constitutes a restriction of the freedom of establishment.

Next the CJ assessed whether the aforementioned restriction could be justified on the need to combat tax avoidance and evasion. In this regard, the Court noted that when ascertaining whether a transaction pursues an objective of tax avoidance, evasion and abuse, the competent national authorities cannot merely apply predetermined general criteria, but must carry out an individual examination of the transaction concerned as a whole. The Court reiterated is findings in the case Euro Park Service (C-14/16) which held that the imposition of a tax measure of general application automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being required to provide even the prima facie evidence or indicia of avoidance, fraud and abuse, would go beyond what is necessary to prevent tax avoidance, fraud and abuse. On such basis, the CJ found that the automatic exclusion of companies established in Gibraltar from the exemption from withholding tax (which appears to stem from the application of Bulgarian law by administrative and judicial authorities) is a practice that does not satisfy the requirements set out in the Court's case law (i.e., judgments in Cilevičs and Others, C-391/20, PrivatBank and Others, C-78/21, and SIAT, C-318/10 and others). However, the Court noted that it is ultimately for the national court to determine whether, in the present case, those requirements are satisfied.

In conclusion, the CJ ruled that the withholding tax levied on dividends distributed by resident companies to companies established in Gibraltar, whereas dividends distributed to resident companies and to companies established in other Member States are exempt from that tax without those companies being required to fulfil any condition, is a restriction of the freedom of establishment which is not justified by an overriding reason relating to the public interest and does not comply with the principle of proportionality.

CJ judgment on whether the exclusion of tax debts from debt discharge procedures is compatible with the Directive on restructuring and insolvency (Case, *SF v Instituto da Segurança Social and Others*, C-20/23)

On 8 May 2024, the CJ delivered its judgment in case *SF v Instituto da Segurança Social and Others* (C-20/23). The case addresses the question of whether the exclusion of tax debts from discharge procedures is compatible with the provisions laid down in Directive (EU) 2019/1023 (Directive on restructuring and insolvency). The Opinion of the Advocate General in this case was included in the EU Tax Law Alert 204.

The case involves an applicant that had been declared insolvent and applied for a debt discharge under Portuguese law. The insolvency administrator granted the requested discharge of debt, except for tax and social security debts, according to Portuguese national law. The debtor appealed, arguing the exclusion of these type of debts foreseen by Portuguese law lacked due justification and was contrary to EU Directive 2019/1023. The Court of Appeal stayed proceedings and referred the case to the CJ.

The CJ first examined whether Article 23(4) of Directive 2019/1023 on restructuring and insolvency must be interpreted as meaning that an exclusion of a specific category of debt other than those listed in that provision is possible only if it is 'duly justified'. The CJ concluded that it is apparent from the wording that the specific categories of debt are not exhaustively listed. Furthermore, following Recital 81 of the Directive, the CJ concluded that it is apparent that the EU legislature considered that Member States should be able to exclude further categories of debt when duly justified. This justification must derive from national law or from the procedure which led to them. The CJ noted that it appears that Portuguese law provides for a justification for the exclusion, but that the referring court alone has the jurisdiction to interpret and apply national law.

Next, the CJ assessed whether Article 23(4) of the Directive on restructuring and insolvency must be interpreted as meaning that the Member States have the power to exclude certain specific categories of debt from the discharge of debts, such as tax and social security debts, and thus confer on them a privileged status. In this regard, the Court found that Member States can exclude certain debts, such as tax and social security debts, from discharge if justified under national law, as these debts serve specific purposes and are not comparable to commercial or private sector debts. In the Court's view, Article 23(4) allows this discretion. On such basis, the CJ considered that this exclusion does not unduly favour public institutional creditors over others.

In conclusion, the CJ ruled that Article 23(4) of Directive 2019/1023 must be interpreted as meaning that the list of dischargeable debts contained therein is not exhaustive and that specific categories of claims other than those included in that list (e.g., tax debts) may be the subject of discharge of debt, restricted discharge of debt or a longer discharge period, provided that such a decision is duly justified in national law.

EU Commission opens public consultation on the functioning of the DAC

On 7 May 2024, the EC initiated a focused public consultation to assess the performance of the Directive on Administrative Cooperation (DAC) and its subsequent amendments, DAC 2 through DAC 6. This is the second evaluation to be made by the EU Commission on the DAC, following the first evaluation of such framework published in 2019.

This public consultation invites stakeholders and interested parties to provide their insights and experiences regarding the EU's framework for administrative cooperation among national tax authorities. It aims to evaluate the effectiveness, efficiency, and ongoing relevance of DAC2 through DAC6 (DAC7 and DAC8 are not included), as well as their alignment with other policy initiatives and priorities, and the added value they bring to the EU. The evaluation covers the functioning of the DAC during the period spanning from 2018 to 2022. Stakeholders have until 30 July 2024, to submit their feedback via the EU Commission website.

French Supreme Administrative Court judgment on whether EU law allows resident companies to deduct final losses realized through a PE located in another Member State (Case *Tax authorities v. Financière SPIE Batignolles*, Num. 466062)

On 26 April 2024, the French Supreme Administrative Court issued its decision on whether EU law allows companies based in France to deduct final losses incurred by a permanent establishment (PE) in another EU Member State from their taxable income in France.

The case concerns a French company with a PE in Luxembourg for a construction project. After the PE closed in 2015, the French company sought to offset the losses from Luxembourg against its profits in France, citing the CJ's '*Marks and Spencer*' and '*Bevola*' judgments.

Initially, lower courts ruled in favour of the French company, but the Supreme Administrative Court overturned these decisions, ruling against the taxpayer. The French Court cited the principle of territoriality in French tax law and the France-Luxembourg tax treaty, which disallowed such deduction for losses from a Luxembourg PE.

The French Court made reference to CJ case law, stating that different tax treatments do not breach the freedom of establishment if the situations are not objectively comparable. In this case, France and Luxembourg did not treat domestic and foreign permanent establishments in the same way due to the tax treaty, which rendered the situations not objectively comparable. Therefore, the French Court concluded that the inability to offset Luxembourg PE losses did not restrict the freedom of establishment. The French Court did not send a request for preliminary ruling to the CJ.

3. State Aid

CJ dismisses Bilbao Port Authority's Appeal on Bizkaia's Tax Exemption (Case *Autoridad Portuaria de Bilbao v Commission*, C-110/23 P)

On 30 May 2024, the CJ delivered its judgment in the case *Autoridad Portuaria de Bilbao v Commission* (Case C-110/23 P) where the Bilbao Port Authority sought to set aside the judgment of the General Court of 14 December 2022 (Case C-110/23 P) in which the latter Court decided to uphold the European Commission's decisions on Bizkaia's Tax Exemption (T-126/20).

On 8 January 2019, the European Commission had found that aid granted by Spain to its port authorities, in the form of exemptions from corporate tax, constituted selective advantages incompatible with the internal market, under State aid case SA.38397 (the 'Commission's Decision'). Spanish ports are managed by port authorities, which act with a degree of financial, functional and administrative autonomy, as a public legal body with its own assets, independent of the Spanish state. On such basis, the Commission proposed several appropriate measures to ensure that Spanish port authorities (including in Bizkaia and Gipuzkoa) are subject to corporate tax in the same manner as other undertakings. In its proposal, the European Commission mentioned that abolishing the current partial or full exemptions from corporate tax would adequately address the issue. By letter of 7 October 2019, Spain unconditionally and unequivocally declared that it accepted the proposed measures. Until then, ports in Spain had been exempt from corporate tax on their main sources of revenue, such as port fees, income from rental or concession contracts. In the Basque Country (of which Bizkaia is a province), ports were fully exempt from corporate tax. The tax regimes applicable to ports in Spain existed prior to the entry into force of the EU Treaty. Therefore, these exemptions are considered 'existing aid'; in relation to which, reimbursements would not be required from beneficiaries.

On 14 December 2022, the Court, confirmed the Commission's Decision, and dismissed the action filed by the Port Authority of Bilbao, which argued that: (i) Bizkaia's tax exemption does not constitute an advantage; (ii) there was a lack of a full analysis of the data available at the time when the existence of an advantage was examined; (iii) Bizkaia's tax exemption is not a selective measure; (iv) Bizkaia's tax exemption did not improve the applicant's competitive position or affect trade between Member States; and (v) Bizkaia's tax exemption was compatible with the internal market on the basis of Article 107(3)(c) TFEU.

The General Court rejected the five pleas invoked by the applicant, dismissing the action in its entirety. In particular, the Court considered that: (i) Bizkaia's tax exemption is liable to confer an advantage on the applicant; (ii) the evidence which the applicant complains the European Commission failed to analyse was not relevant for the purposes of determining the existence of an advantage in the present case; (iii) Bizkaia's tax exemption contains neither a definition of the public service obligations incumbent on the Spanish port authorities nor an objective and transparent calculation of the compensation for the provision of such services of general interest; (iv) the European Commission was correct to consider that the Spanish port authorities were active on markets where competition existed, since Spanish ports participate in intra-Community trade; and (v) Bizkaia's tax exemption, as operating aid, did not fall within the scope of Article 107(3)(c) TFEU.

On 22 February 2023, the port authority brought an appeal before the CJ against this judgment, claiming that the CJ should: (i) set aside the General Courts judgment due to it being vitiated by an error of law; (ii) rule on the substance of the case and declare that the action of annulment must be upheld; and (iii) order the European Commission to pay the costs incurred by the Bilbao Port Authority in its proceedings. Furthermore, the Authority claimed that the tax exemption should have been assessed in conjunction with the principle of self-sufficiency.

On 30 May 2024, the CJ issued its judgment upholding the General Court's decision and dismissing the appeal filed by the port authority in its entirety. In its judgment, the Court considers that the General Court relied on several undisputed grounds to reach the conclusion that the tax exemption for Biscay is capable of conferring an advantage to the appellant. Furthermore, the Court did not agree to the appellant's allegation that the General Court had infringed its obligation to state reasons and to abide by the principles of sound administration and sincere cooperation, also confirming that the European Commission does not have to further examine specific circumstances of individual awards when such awards are made in the context of aid schemes.

Thus, by dismissing the Authority's appeal, the CJ ultimately upheld the European Commission's decision on Bizkaia's Tax Exemption being incompatible with the internal market.

General Court's judgments on Spanish Tax Lease System (CasesT-508/14, T-509/14, T-700/13 and T-401/14)

On May 2024, the General Court issued several judgments in relation to the Spanish Tax Lease System (STL system) which allowed for shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, to the detriment of shipyards in other Member States.

These judgments were issued in the following cases: (i) *Caixabank v Commission* (Joined Cases T700/13) and *Vego Supermercados v Commission* (Joined Cases T-465/14) of 8 May 2024; (ii) *Duro Felguera v Commission* (Joined Cases T401/14) and *Naturgy Energy Group v Commission* (Case T-508/14) of 15 May 2024; and (iii) *Decal España v Commission* (Case T-509/14) of 29 May 2024.

In these judgments, the Court found that that it was no longer necessary to rule on the actions seeking the annulment of Article 1 and Article 4(1) of the Commission Decision of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain, as both articles mentioned above were annulled by the CJ's judgment in *Spain v Commission, Lico Leasing and Pequeños y Medianos Astilleros Sociedad de Reconversión v Commission, Caixabank and Others v Commission* (Joined Cases C-649/20 P, C-658/20 P, C-662/20 P). Since, in the latter judgment, the CJ only partially annulled the Commission's State Aid decision (which is still partially valid and requires Spain to recover the unlawful aid) the General Court had to address the remining claims made by the applicants, which were ultimately rejected on the basis of several grounds. Thus, the General Court decided to dismiss the remainder of the actions.

4. VAT

CJ judgment on VAT aspects of expropriation transfer of land (Case *Makowit*, C182/23)

On 11 July 2024, the CJ issued its judgment in the case *Makowit* (C182/23).

J.S. is a farmer who used agricultural land in the course of his economic activities. The agricultural land was labelled as part of the business assets of the farming undertaking. The Polish State Treasury unilaterally decided that the agricultural land would have to be used to construct a road. J.S. was subsequently expropriated by the Polish State Treasury resulting in a transfer of the land by J.S. to the Polish State Treasury. In dispute is whether J.S. is liable for VAT in relation to the transfer of the (building) land.

The CJ ruled that the transfer of the (building) land should attract VAT because the land was allocated to the economic activities of J.S. in a broad sense. For this purpose, it makes no difference, according to the CJ, that J.S. did not carry out any activity relating to the marketing of real property and that J.S. also did not take any steps itself to effectuate the land transfer.

No agreement on ViDA under Belgian Presidency of the Council

During the last Economic and Financial Affairs Council (ECOFIN) meeting under the Belgian Presidency held on 21 June, one of the key priorities was to reach an agreement on the VAT in the Digital Age package. However, agreement was blocked by Estonia which cited concerns about the deemed supplier regime for digital platforms operating in the short-term accommodation and passenger transport sectors. In particular, Estonia argues that such rules contradict the principle of VAT neutrality and would negatively affect SMEs.

It should be noted that the suggestion made by Estonia to make the deemed supplier regime voluntary (via an opt-in mechanism) was not accepted by other Member States. In turn, the small concession to grant Member States more flexibility to limit the administrative burdens for small businesses and online platforms in the implementation of the deemed supplier regime was rejected by Estonia.

The task of finding a political agreement on this file now falls to the Hungarian Presidency of the Council.

Opinion AG Ćapeta on statutory payment obligations being considered as ‘price discounts’ (Case *Novo Nordisk AS*, C-248/23)

On 6 June 2024, AG Ćapeta of the CJ delivered her Opinion in the case *Novo Nordisk AS* (C-248/23).

Novo Nordisk AS is a Danish company that is engaged in the distribution of pharmaceutical products in Hungary. Novo Nordisk entered into an agreement with NEAK, a Hungarian public health insurer. Under this agreement and Hungarian legislation, Novo Nordisk must pay an amount to NEAK that depends on the sales volume of government-funded pharmaceuticals as well as an additional amount related to a statutory payment obligation. Novo Nordisk considered both payments as ‘price discounts’ and requested a VAT refund

for the VAT component included in those payments. The Hungarian Tax Authorities did not agree with this approach regarding the payments made under the statutory obligation.

AG Ćapeta concluded that the payments by Novo Nordisk under the statutory obligation meet the requirements to be taken into account as ‘price discounts’. The underlying reasoning is based on the notion that it is not sufficiently clear to Novo Nordisk under Hungarian law that the statutory payment obligation is a tax that cannot be treated as a price reduction. According to the AG, if this had been clear, the payments made under the statutory obligation might have to be regarded as a ‘tax’ that cannot be taken into account as a ‘price reduction’.

CJ judgment on input VAT deduction regarding in-kind contribution of property (Case *P. sp. z o.o.*, C241/23)

On 8 May 2024, the CJ issued its judgment in the case *P. sp. z o.o.* (C241/23).

P is a Polish company that sought to increase its capital through in-kind contributions from W and B. P concluded an agreement with W and B to acquire real estate and cash contributions in return for the issuance of shares in P to W and B. The latter issues sales invoices to P subject to VAT based on the issue value of the P shares. P deducted the VAT charged on the invoices issued by W and B. The Polish tax authorities argued that P was only entitled to input VAT deduction on the (lower) nominal value of the shares and not on the (higher) issue value of the shares.

The CJ ruled that the VAT taxable amount for the supplies made by W and B is equal to the issue value of the shares issued by P where the relevant parties agreed that the consideration for the contribution was to be that issue value.

5. Customs Duties, Excises and other Indirect Taxes

CJ judgment on the concept of 'import' and 'importer' and the applicability of the REACH Regulation for substances which are subject to customs supervision (Case *Triferto Belgium*, C-654/22)

On 11 April 2024, the CJ delivered its judgment in the case of *Triferto Belgium* on the scope of the concepts of 'import' and 'importer' and the applicability of Regulation No 1907/2006 (REACH Regulation) to substances subject to customs supervision under the customs warehousing procedure.

In 2019, Triferto, an undertaking established in Belgium, ordered more than one tonne of urea from an undertaking established in Singapore. The urea was delivered in Ghent by an undertaking established in Germany (Belor), which physically introduced the shipment of urea into the EU and stored it in a customs warehouse. Belor submitted a registration for the urea to ECHA in accordance with Article 6(1) of the REACH Regulation and made the customs declaration for these goods. However, the Belgian competent authority, the Federal Public Service Health (FPS for Health), considered that in fact Triferto, rather than Belor, should be regarded as the importer in accordance with the REACH Regulation and therefore, was responsible for submitting a registration to ECHA. As a result, the FPS for Health imposed a fine on Triferto for failing to submit a registration to ECHA.

Triferto disputed this and argued that the undertaking responsible for the physical introduction of the substance in question should be considered the importer of that substance, irrespective of the fact that Triferto had purchased it. It also argued that it is open to the undertakings concerned to agree that the undertaking which makes the customs declaration is the importer within the meaning of the REACH Regulation. Subsequently, two preliminary questions were referred to the CJ.

First, the CJ examined whether the requirement to submit a registration under Article 6(1) of the REACH Regulation applies to substances stored in a customs warehouse where there has been no previous customs procedure involved. According to Article 2(1)(b) of the REACH Regulation, the Regulation does not apply insofar substances are subject to customs supervision and do not undergo any treatment or processing, where they are placed under a specific customs procedure set out in that article. Since the customs warehousing procedure is not a specific customs procedure expressly referred to in Article 2(1)(b), the CJ considered that there is no exclusion from the scope of the REACH Regulation for substances placed under the customs warehousing procedure.

Second, the CJ examined whether a buyer of a substance imported into the EU is not itself required to submit the registration for that substance if another undertaking established in the EU has assumed responsibility for importing that substance into the EU. Under the REACH Regulation, an 'import' is the physical introduction into the customs territory of the EU – an 'importer' is any natural or legal person established in the EU who is responsible for the import. In light of this, the CJ considered that both Belor and Triferto could be covered by the concept of 'importer' in accordance with Article 3(11) of the REACH Regulation. Consequently, since *Belor* has assumed responsibility for importing the urea into the EU and has submitted the registration in accordance with Article 6(1)

of the REACH Regulation whereby it was established that the obligations relating to the registration had not been circumvented, the CJ held that, in these circumstances, the buyer itself is not required to submit a registration for a substance imported into the EU.

CJ judgment on the compatibility with EU law of national legislation which provides for the immediate implementation of judgments by national courts at first instance which have not yet become final (Case *OSTP Italy Srl*, C-770/22)

On 11 April 2024, the CJ delivered its judgment in the case of *OSTP Italy Srl* ('OSTP') on the immediate implementable nature of judgments at first instance annulling customs measures relating to traditional own resources of the European Union.

The Genoa Customs and Monopolies Agency issued additional and amending tax notices to OSTP for unpaid anti-dumping duties on imports of steel tubes originating in China. Following these notices, fines were imposed on OSTP. These notices and fines were subsequently annulled by the Tax Court of First Instance. Subsequently, the Customs and Monopolies Agency appealed against those judgments before the Tax Court of Appeal, which did not formally hand down a decision suspending the implementation of those judgments.

Pending the appeal, the Customs and Monopolies Agency sent OSTP a preliminary notice of registration of a mortgage, stating that in the event of non-payment of the amounts specified in the tax notices, a mortgage would be registered on OSTP's properties for an amount equal to twice the amount of the tax notices. OSTP challenged this preliminary notice before the Tax Court of First Instance, arguing that, under national legislation, the amounts claimed under tax notices cease to be payable if a court of first instance upholds an action brought against a tax notice.

Subsequently, the CJ was asked by the Tax Court of First Instance whether Articles 43 to 45 of Regulation (EU) No 952/2013 ('UCC') are to be interpreted as precluding national legislation which provides for the immediate implementation of judgments at first instance which have not yet become final, where those judgments concern traditional own resources of the European Union.

The CJ considered that Article 43 of the UCC expressly states that Articles 44 and 45 do not apply to appeals lodged with a view to the annulment, revocation or amendment of a decision relating to the application of customs legislation taken by a judicial authority.

Therefore, the CJ ruled that Articles 43 to 45 of the UCC must be interpreted as not precluding national legislation which provides for the immediate implementation of judgments at first instance which have not yet become final, where those judgments concern traditional own resources of the European Union.

CJ judgment on the compatibility of Portuguese Stamp Duty with the free movement of capital (Case *Faurécia v Portugal*, C-420/23)

On 20 June 2024, the CJ delivered its judgment in the case *Faurécia v Portugal* (Case C-420/23). The case deals with the issue of whether the free movement of capital precludes legislation of a Member State under which short-term cash transactions are exempt from stamp duty if they involve two entities established in that Member State, but are not exempt if the borrower is established in another Member State.

The case involves Faurécia, a company established in Portugal, which is wholly owned by two companies established in France belonging to the same group. As part of a cash-pooling system Faurecia, as a lender, and the French shareholder, as a borrower, concluded a loan agreement. Under Portuguese law, stamp duty is required for certain financial transactions. However, it is exempt if both parties are established in Portugal,

or if the lender is established in another Member State and the borrower is established in Portugal. The exemption does not apply if the lender is established in Portugal and the borrower is established in another Member State.

Following four tax inspections carried out in 2019, relating to the financial years 2014 to 2017, the Tax and Customs Authority issued an additional tax assessment, taking the view that stamp duty was payable on the grant of such loans by Faurécia. After the dismissal of its administrative appeal against that assessment, Faurécia brought an action before the referring court alleging a breach of the principles of non-discrimination and free movement of capital.

The referring court decided to stay proceedings and to ask to the CJ whether the exemption of stamp duty is compatible with the non-discrimination principle (Article 18 TFEU) and the free movement of capital (Article 63 TFEU). Since Article 18 TFEU applies independently only to situations governed by EU law where the TFEU does not lay down specific non-discrimination rules, and given that the CJ has already held that loans granted by residents to non-residents constitute a movement of capital falling within the scope of Article 63 TFEU, the CJ considered that the case involved solely the free movement of capital.

The CJ found that the Portuguese tax rules, which exempt only domestic borrowers from stamp duty, create a difference in treatment based on the borrower's place of residency. This difference diminishes the attractiveness of foreign investments for Portuguese residents and restricts non-resident borrowers from raising capital in Portugal. Consequently, the Court understands that such national legislation constitutes a restriction of the freedom of capital.

When considering whether the distinction in treatment made by the Portuguese law is linked to situations that are objectively comparable, the CJ found that the difference in treatment resulting from such legislation is not based on an objective difference in situation.

Next, the CJ examined whether that restriction on free movement may be justified by an overriding reason in the public interest. The CJ ruled that neither the referring court nor the Portuguese Government had put forward any overriding reason in the public interest justifying the restriction imposed by that legislation.

Consequently, the CJ concluded that Article 63 TFEU must be interpreted as precluding legislation of a Member State under which short-term cash transactions are exempt from stamp duty if they involve two entities established in that Member State, but are not exempt if the borrower is established in another Member State.

Updated Q&A Document on CBAM

On 19 July 2024, the European Commission published the latest update of the Questions and Answers (Q&A) document on the Carbon Border Adjustment Mechanism (CBAM). The previous update to this document was made on 28 February 2024.

The CBAM Regulation was published in the Official Journal of the EU on 16 May 2023 and entered into effect on 1 October 2023. The CBAM transitional period is applicable as from the latter date until December 2025, requiring reporting declarants to submit quarterly CBAM reports. The quarterly CBAM reports should include information on the quantity of imported products covered by CBAM and their embedded emissions.

For more information on the CBAM Regulation, please see our Tax Flash on this topic.

European Parliament Releases Briefing on Revision of Energy Taxation Directive as Part of ‘Fit for 55’ Legislation Package

On 26 June 2024, the European Parliament published a briefing EU legislative in progress (the Briefing) summarizing the revision of the Energy Taxation Directive (2003/96) proposed by the European Commission in July 2021 (the proposal), as part of the ‘Fit for 55’ legislative package.

In particular, the Briefing highlights the following aspects: (i) Main concepts of the Directive; (ii) existing situation and issues with the Directive; (iii) preparation of the proposal; (iv) The changes the proposal would bring; and (v) its legislative process. As of July 2024, work is still ongoing on this file in both the Council of the EU and the European Parliament.

Get in contact

For more information, please reach out to Dennis Weber or Harmen Zeven via the contact details below. The contributors to this edition of the EU Tax Alert were Juan Manuel Vázquez, Liselot Bakker, Daan Both, Grisha van der Linden, Gino Sparidis, Bram Middelburg, Emma van Doornik, Bruce van Schaik, and Gijs Groenewoud.

Dennis Weber

Of counsel / Tax adviser

T +31 20 578 57 50
E dennis.weber@loyensloeff.com

Harmen Zeven

Partner / Tax adviser

T +31 10 224 66 55
E harmen.zeven@loyensloeff.com

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