LOYENS & LOEFF

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EU Tax Alert

- European Commission launches BEFIT: framework for an EU corporate tax system
- European Commission proposes harmonized TP rules and 'fast-track' procedure
- European Commission proposes Directive for Head Office Tax system for micro, small and medium-sized enterprises
- AG Kokott's Opinion on VAT position of Board of Director activities (*TP*, C-288/22)
- General Court's judgment on Belgian Excess Profit rulings ('EPRs') (T-131/16)

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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).

Highlights in this edition are:

- European Commission launches BEFIT: framework for an EU corporate tax system
- European Commission proposes harmonized TP rules and 'fast-track' procedure
- European Commission proposes Directive for Head Office Tax system for micro, small and medium-sized enterprises
- AG Kokott's Opinion on VAT position of Board of Director activities (*TP*, C-288/22)
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Highlights in this edition

European Commission launches BEFIT: framework for an EU corporate tax system

On 12 September 2023, the European Commission (EC) proposed a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT). The BEFIT proposal was announced earlier and contains a common corporate income tax framework for groups active in the EU. BEFIT lays down rules for calculating an aggregated tax base for members of a BEFIT group and the allocation of the tax base between (eligible) BEFIT group members.

The proposal is strongly connected to the Pillar 2 Directive, as well as to the complementary Council Directive proposal establishing a Head Office Tax system for micro, small and medium-sized enterprises (SMEs) and the Council Directive proposal on Transfer Pricing, submitted by the EC on the same date (see below).

If adopted, Member States must implement BEFIT by 1 January 2028 and apply its provisions from 1 July 2028. BEFIT will have a major impact on the tax calculation and administration of multinational groups with a European footprint. For more information of the main characteristics of BEFIT, please see our web post on such proposal.

European Commission proposes harmonized TP rules and 'fast-track' procedure

As part of the BEFIT package, the EC presented, on 12 September 2023, a legislative proposal for a Council Directive that integrates key Transfer Pricing (TP) principles into EU law.

Based on the proposal, all Member States must apply the arm's length principle for corporate income tax purposes in accordance with the OECD TP Guidelines and are bound to specific provisions in respect of corresponding or compensating adjustments, including a 'fast-track' procedure to resolve double taxation. The proposal also includes the obligation to apply the most appropriate TP method and the burden of proof in relation to the application of other non-prescribed methods. In this regard, the Directive proposal seems to provide stricter rules than those laid down in the OECD TP Guidelines and in many Members States.

The proposal harmonizes both TP principles and documentation requirements within the EU, which will impact the TP approach of MNEs across all Member States. If adopted, Member States must apply the provisions as from 1 January 2026.

For more information about the most important aspects of the proposed TP Directive and its implications for taxpayers, please see our web post on such development.

European Commission proposes Directive for Head Office Tax system for micro, small and medium-sized enterprises

As part of the BEFIT package, the EC presented, on 12 September 2023, a legislative proposal for a Council Directive establishing a 'Head Office Tax system' for micro, small and medium-sized enterprises and amending Directive 2011/16/EU (DAC).

The proposed Directive provides micro, small and medium-sized enterprises (SMEs) at the initial stages of expansion with an option to compute the taxable result of their permanent establishments (PEs) in other Member States, on the basis of the rules of the Member State where the Head Office (i.e., headquarters of the SME) is resident for tax purposes. This simplified approach, which is referred to as 'Head Office Taxation' (HOT), does not touch upon applicable tax rates and social security rules (which would remain those of the Member States where the PEs are located), nor does it affect existing bilateral tax treaties.

SMEs in the scope of this proposed Directive are those defined under the Accounting Directive (Directive 2013/34/EU) which operate exclusively through PEs in one or more Member State. SME groups with subsidiaries and shipping activities covered by a tonnage tax regime are excluded from the scope of the Directive.

The application of this new regime is optional and thus, left to the discretion of eligible SMEs. The option will last for five years. Both its granting and renewal are, however, strictly confined by eligibility requirements aimed to address potential risks of circumvention of the rules.

In addition to its substantive simplification rules, the proposed Directive also provides significant procedural simplification by means of a 'one-stop-shop' (OSS), whereby the tax filing, tax assessments and the collection of the tax due by the PE(s) are dealt with through one single tax authority (named 'filing authority') (i.e. the

tax authority in the Member State of the head office). This would enable in-scope SMEs to interact only with the tax administration of the Member State of their head office both for the procedure to opt in and for filing obligations and paying taxes. Under the proposal, the 'filing entity' for all PEs will be the head office of the SME. Tax audits, appeals and dispute resolution procedures would continue to be handled in accordance with the procedural rules of the respective Member States.

Last but not least, the HOT Directive proposal includes certain amendments to Directive 2011/16/EU (DAC) to ensure a timely and streamlined exchange of information between the relevant tax authorities and, in this way, answer the needs and simplification purpose aimed at by the HOT Directive proposal.

The HOT Directive proposal is designed as a complementary measure to BEFIT, which is primarily aimed at large groups operating across the EU. The HOT Directive proposal simplifies rules for SMEs during their early stages of expansion. If SMEs successfully expand and grow, they may outgrow the scope of the HOT rules but then, they will be able to opt into BEFIT. In this way, the EC considers that smaller businesses will be able to choose the best option for their own needs throughout their lifecycle.

For more information about the most important aspects of the proposed please see here.

AG Kokott's Opinion on VAT position of Board of Director activities (*TP*, C-288/22)

On 13 July 2023, AG Kokott of the CJ issued her opinion in the case TP (C-288/22).

TP is a natural person who is a member of the Board of Directors for various companies in Luxembourg. The Luxembourg tax authorities argued that TP is a VAT taxable person and that, therefore, VAT is due on the remuneration it receives. TP argued that he does not perform its work independently and that, therefore, his remuneration is not subject to VAT.

AG Kokott concluded in her Opinion that TP should not be considered a VAT taxable person that performs an independent economic activity. This conclusion is based on a 'typological approach', whereby she compared the activities of TP against the 'standard' characteristics of a VAT taxable person, such as bearing economic risks and acting for his own risk and account. For example:

- The remuneration received by TP was not for his own activities, but as part of a collective body and accordingly, there was no independent assumption of risks by TP.
- The activities performed by TP could only benefit the company for which it was appointed and thus lacked own economic initiative.
- The remuneration received by TP was not determined by means of negotiation but rather by another body of the company.
- TP participated in the success of the company in the same way as a shareholder, which cannot be considered equivalent to bearing own economic risks.

General Court's judgment on Belgian Excess Profit rulings ('EPRs') (T-131/16)

On 20 September 2023, the General Court confirmed that the tax exemptions granted by Belgium to companies forming part of multinational groups constitute an unlawful State aid.

Between 2004 and 2014, Belgium granted Excess Profit Rulings (EPRs) to Belgian entities which form part of multinational corporate groups. Those entities can benefit from an exemption of certain 'excess' profits, i.e., profits exceeding the profit that would have been made by comparable stand-alone entities in similar circumstances. These EPRs were granted to entities if they centralised activities, created employment or invested in Belgium. The rationale was that the Belgian subsidiary or branch of the multinational group should not be taxed on profits that could not have been made in Belgium if such an entity was a stand-alone entity operating under similar circumstances.

In 2016, the European Commission (EC) challenged those EPRs and found that the exemption it granted constituted unlawful State aid and ordered recovery of the identified aid.

Belgium and several companies appealed before the General Court of the European Union (the General Court) and on 14 February 2019, the General Court found that the EC had failed to prove that the EPRs constituted a 'scheme', as opposed to individual aid measures and, on that ground, annulled the EC's decision.

The EC appealed this first judgment and the Court of Justice of the European Union (the CJ) which set aside

the judgment of the General Court on 16 September 2021, finding that the EC had correctly determined that the Belgian legal framework for EPRs as such qualified as State aid. The CJ, therefore, referred the case back to the General Court.

The General Court has now ruled for the second time in this case and confirmed the EC's classification of the regime as unlawful State aid. The key issue was the identification of the reference system to determine whether the EPRs deviated from the 'ordinary' Belgian tax rules. The General Court first observed that the EC did use Belgian law as reference scheme for its analysis and properly interpreted such law (despite the explanations provided by the Belgian government). In particular, the General Court took the view that Belgian law would require a prior corresponding adjustment in the other jurisdiction in order to have a downward adjustment in Belgium. The administrative practice in the EPRs was thus considered not in line with the 'ordinary' Belgian tax system.

On the criterion of advantage, the General Court considered that the EC had demonstrated that the reference system in Belgium was the taxation of all profits actually recorded by undertakings subject to taxation in Belgium, to which the deductions provided for by law are to be applied and that the EPRs resulted in an exemption not provided for by the reference system. Moreover, the General Court upheld the EC's approach, considering that given that the downward adjustments were, in the General Court's view, not in line with Belgian tax law, the rulings granted an advantage to their beneficiaries by unduly reducing their tax base. The EC did not have to quantify an advantage for each beneficiary.

On the selective nature of the regime, the General Court considered that the EC had correctly concluded that the scheme differentiated between operators who were in a comparable factual and legal situation: entities forming part of a multinational group which benefited from the excess profit exemption were treated more favourably. Other Belgian tax resident entities could not benefit from this unilateral downward transfer pricing adjustment. The scheme at issue was considered to be selective because it was not open: (i) to companies that had decided not to make new investments, centralize activities or create employment in Belgium; and (ii) to undertakings that were part of a small group (Belgium did not provide for any ruling granted to a small group).

The General Court, therefore, sided with the EC on finding that the regime was selective, as it favoured certain companies over others which were in a comparable factual and legal situation. The General Court then concluded that the scheme satisfied all of the criteria to qualify as State aid and, in the absence of valid arguments why the aid would be compatible with the internal market, considered that the scheme consisted of an unlawful State aid.

Direct Taxation

European Parliament report on agreed DAC8 proposal

On 13 September 2023, the European Parliament (EP) adopted a Report on the proposal for a Council directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8). The report recommends some amendments to the final DAC8 text already agreed by the Council on 16 May 2023.

Among the main amendments suggested by the EP, it is possible to mention: (i) The one year postponement of the deadline for Member States to implement DAC8 in their national legislation, which would lead DAC8 to become applicable on 1 January 2027; (ii) The extension of the deadline for reporting from January 31 to July 31 of the calendar year following the year to which the information relates; (iii) The introduction of an obligation for Member States to ensure that penalties for non-compliance are enforced against the parties actually at fault and to introduce a temporary penalty reduction regime for SME's crypto-asset service providers; and (iv) The inclusion of a mandate for Member States to use the 'Commentaries on the Model Competent Authority Agreement' and the 'Common Reporting Standard' in order to ensure consistent implementation and application of DAC8.

Although the report of the EP is not binding on the Council, it must be taken into account by the EC and Member States when proposing or agreeing new rules. Based on this latest development, it is expected that DAC8 proposal will soon be formally adopted.

European Commission publishes CBAM implementing regulation on reporting requirements transitional period

On 17 August 2023, the EC approved the implementing regulation for reporting rules during the transitional phase of the Carbon Border Adjustment Mechanism (CBAM).

The CBAM officially came into effect on 17 May 2023, requiring importers to report embedded emissions of specific industrial products and imported electricity to ensure equitable carbon pricing between imports and EU-produced goods and electricity. During the transitional phase, which runs from 1 October 2023 to 31 December 2025, only reporting obligations are applicable and, as yet, no carbon pricing has been imposed. Carbon pricing becomes effective on 1 January 2026. In such context, the newly enacted implementing regulation outlines the reporting requirements for EU importers of CBAM-covered goods and the methodology for calculating the embedded greenhouse gas emissions during their production that will be taken in to account for this purpose .

According to the requirements of the EC's implementing regulation, relevant importers must report various details such as: (i) type of goods with their CN code, (ii) quantity and embedded emissions, both direct and indirect, and (iii) details of production locations and routes. The reports will go to the CBAM Transitional Registry managed by the EC. Amendments are allowed for two months after the reporting quarter. Penalties for non-compliance range from EUR 10 to EUR 50 per ton of unreported emissions.

Regarding the methods for calculating embedded emissions in imported products, the rules applicable depend on the specific production process. However, the monitoring of the embedded emissions for every production process must be done by relying on one of two EU-approved methods by default. Recognizing the limited time for importers and producers in third countries to adapt to CBAM requirements, alternative monitoring methods are permitted until 2025.

For more information about the CBAM regulation please see our latest web post on this topic.

CJ judgment on German rules providing for a differential tax treatment of employees working in development aid projects financed by European and National resources (*RF v Finanzamt G*, Case C-15/22)

On 7 September 2023, the CJ delivered its judgment in the case *RF v Finanzamt G* (Case C-15/22). The case addresses the question of whether the principle of sincere cooperation, in conjunction with Articles 208 and 210 TFEU, preclude a national practice that creates a difference in treatment between the taxation of employees assigned to a project financed by the European Development Funds (EDF) and those assigned to similar projects financed from national budgetary resources.

This case concerns a German national administrative practice under which, an income tax exemption is granted for salaries paid for working on foreign development aid projects that are funded to a level of at least 75% by a Federal Ministry responsible for development cooperation or by a State-owned private development assistance company. However, under such practice, the salary of an employee working on an aid project that is funded by the EDF does not benefit from such an exemption.

In the period from 12 April 2009 to 31 October 2012, RF worked as a project manager for a development aid company established in Germany. Because the development aid company considered that RF's salary was exempt under the Notice from the Ministry of Finance, it did not withhold tax at source on that salary for the financial years 2011 and 2012, and did not pay that tax to the competent tax authorities. The development aid company was subjected to a payroll tax audit, which led to those authorities deciding that RF's salary should be subject to income tax in respect of 2011 and 2012, against which RF appealed. The referring court stated that, on the basis of national law, the appeal was unfounded, as RF's salary was not directly financed by any national budgetary resources and her activity abroad, therefore, was not linked to German public development aid. Nevertheless, the referring court harboured doubts as to the compatibility of the legislation at issue with EU law. The referring court decided to stay the proceedings and to refer the question to the CJ.

As a preliminary point, and although the referring court did not include this issue in its question, the CJ first analysed whether the relevant tax practice at issue in the proceedings falls within the scope of the free movement of capital. In contrast to the AG's Opinion, the CJ stated that the movement of capital involved in the distribution by the 7th EDF of financial assistance does not constitute a capital movement between Member States or between a Member State and a third country, but between that entity and, as a rule, a third country. On such basis, the CJ found that the case cannot come within the scope of the free movement of capital. According to the CJ, the same is true of the distribution of financial assistance by the 9th ED.

Addressing the main questions referred for a preliminary ruling, the CJ assessed whether the principle of sincere

cooperation enshrined in Article 4(3) TFEU, read in conjunction with Articles 208(1) and 210(1) TFEU, must be interpreted as precluding the application of the German tax practice described above.

In this regard, the CJ noted that - in the present case - it is not apparent that there is a positive obligation on the Member State concerned that may be read with the principle of sincere cooperation such to have the effect of creating individual personal rights. Pursuant to the Court, the obligations under Articles 208 and 210 TFEU are also too general to create such rights. Moreover, the Court noted that while Member States and the EU are able to rely on the obligations foreseen by the aforementioned provisions, by contrast (and in the absence of a more concrete explanation) they cannot be raised by individuals as against a Member State or the EU.

Regarding the negative obligation set out in Article 4(3) TEU, the CJ found that the German tax practice does not jeopardise the attainment of the EU's objectives given that the EDFs are neither prevented nor even deterred from financing development aid actions. Consequently, the Court understood that this national tax practice of not exempting income tax for employees assigned to development aid projects funded by an EDF, does not violate the duties of sincere cooperation.

In light of the foregoing the CJ decided that the answer to the question referred for a preliminary ruling is that Article 4(3) TEU, in conjunction with Articles 208 and 210 TFEU, must be interpreted as not precluding a national tax practice, whereby there is no exemption from income tax for the salary earned by a worker assigned to an activity associated with public development aid where that activity is financed by an EDF, whereas such benefit is foreseen under projects funded by national budgetary resources.

CJ judgment on whether the imposition of a withholding tax on gross income to non-resident service providers is in line with the freedom to provide services (*Cartrans Preda*, Case C-461/21)

On 7 September 2023, the CJ delivered its judgment in the case *Cartrans Preda* (C-461/21). This case deals with the issue of whether national legislation providing for the taxation of non-resident service providers by means of the imposition of a withholding tax on the (gross) remuneration paid by the resident recipient of the services is compatible with the freedom to provide services.

In this case, a Romanian company named Cartrans Preda (Cartrans) had entered into an agreement with Denmark's FDE Holding A/S (FDE), authorizing the latter to apply on its behalf for VAT refunds in respect of fuel purchased by Cartrans in various EU Member States. FDE obtained a percentage of the VAT refunded in each country as a consideration for its VAT refund service. Following an inspection carried out by the Romanian tax authorities, they issued a tax assessment requiring Cartrans to pay certain sums by way of tax on income received by non-resident persons. The Romanian Tax Administration classified the fees paid to FDE as 'commission' on which Cartrans should have applied a withholding tax. Cartrans disagreed with such view and argued that the fees were a remuneration for services within the meaning of the Romanian-Danish tax treaty, which were taxable only in Denmark. It also claimed that there was a difference in treatment that restricted its freedom to provide services within the EU, because no withholding tax at source was applicable to the remuneration paid to a Romanian company that provides similar services. On the basis of those considerations, the Regional Court of Romania had doubts about whether the activity of recovering VAT constituted a 'supply of services' and whether the withholding tax on gross revenue applicable only to payment made to non-resident suppliers is compatible with EU law.

The CJ first dealt with the question of whether an activity consisting of recovering VAT and excise duties on behalf of an undertaking from the tax authorities of several Member States constitutes a supply of services. The CJ ruled that EU law defines the concept of 'services' broadly, encompassing any supply not covered by other fundamental freedoms to ensure that all economic activities fall under EU provisions. In this case, the CJ determined that a contract for recovering VAT from multiple Member States is considered a 'service' within the meaning of EU law, regardless of its classification under national law or double taxation conventions. This ruling is in line with the Opinion of the AG.

Subsequently, the CJ examined whether legislation in a Member State, which mandates the recipient of services to withhold income tax for service providers from other Member States while exempting providers within the same Member State offering equivalent services, can be considered a restriction on the freedom to provide services. First, the CJ ruled that the service provider and the service recipient are distinct legal entities, each entitled to the freedom to provide services. Therefore, an obligation

to withhold tax at source, such as the one at hand, which adds an administrative burden and liability risks, may make cross-border services less appealing to resident recipients. This will result in their being discouraged from choosing non-resident service providers. Consequently, in the Court's view, such an obligation constitutes a restriction on the freedom to provide services. The CJ proceeded to assess whether this restriction can be justified. In this case, the Romanian Government argued that the need to ensure effective tax collection constitutes an overriding reason in the public interest that justifies the restriction. They asserted that without such legislation, collecting taxes from non-residents would rely on the assistance of other Member States' authorities. The CJ acknowledged that ensuring effective tax collection is considered an overriding reason of public interest that can justify such a restriction. Procedures such as withholding tax at source, accompanied by liability rules, can be deemed suitable, especially when non-resident providers offer occasional and short-term services in a foreign State. Furthermore, the CJ emphasized that imposing an administrative burden and liability on the recipient for withholding taxes from non-resident service providers appears specific and necessary for effective tax collection. Ultimately, the CJ ruled that it falls upon the referring court to assess whether legislation similar to the one in question can genuinely serve an overriding reason in the public interest, whether it is suitable for achieving that objective, and whether it maintains proportionality in light of that objective.

Finally, the CJ addressed the issue of whether the freedom to provide services must be interpreted as precluding national legislation such as the one assessed in the case under which, as a general rule, does not allow non-resident service providers to deduct business expenses, whereas resident service providers do have that possibility. In this regard, the Court found that such difference is liable to place non-resident service providers at a disadvantage as compared with resident service providers and that it constitutes a restriction on the aforementioned freedom. Rejecting the explanations provided by the Romanian Government to justify such restriction, the Court again left to the referring court the task of ascertaining (in accordance with cited case law of the CJ), whether such a restriction pursues a legitimate objective that is compatible with the FEU Treaty and is justified by overriding reasons in the public interest.

AG Pikmäe's Opinion on whether an additional solidarity tax on domestic branches of non-resident credit institutions is compatible with the freedom of establishment (*Cofidis*, Case C-340/22)

On 13 July 023, AG Pikmäe delivered his Opinion on whether the freedom of establishment is compatible with national legislation which allows only resident credit institutions and subsidiaries of non-resident credit institutions, having legal personality (to the exclusion of branches of non-resident credit institutions, which do not have legal personality) to deduct their own funds and comparable debt instruments from the tax base in respect of a tax on the liabilities of those entities.

This case involved a Portuguese branch of a credit institution, Cofidis, which is headquartered in France. Cofidis faced a Portuguese levy known as the ASSB. The ASSB was introduced to provide financial support for social security and to equitably distribute the tax burden within the banking sector. According to Cofidis, the levy operates in such a way that non-resident credit institutions, due to their lack of legal personality, are unable to deduct equity and similar debt instruments from their tax base. In contrast, resident credit institutions and subsidiaries of non-resident credit institutions with legal personality can avail of this deduction.

AG Pikmäe first addressed the admissibility of the second question referred to the CJ for a preliminary ruling. The Portuguese Government argued that such question was inadmissible in so far as it was based on an allegation made by the Cofidis, which was a matter of Portuguese law not yet verified by the referring court and, therefore, hypothetical and abstract. However, contrary to what the Portuguese Government maintained, the AG found that the question was relevant and not purely hypothetical, as the referring court had already confirmed the applicant's allegation regarding the interpretation of the Portuguese law.

The AG went on to elaborate that, in his opinion, there is indirect discrimination against non-resident credit institutions seeking to establish themselves in Portugal through a branch. Indeed, he asserted that there is no doubt that allowing the deduction of the value of those debt instruments eligible as equity from the ASSB tax base implies that branches of non-resident credit institutions are being treated less favourably than resident

credit institutions and subsidiaries of non-resident credit institutions.

The AG concluded his Opinion by analysing the applicability of justifications for this indirect discrimination. More specifically, he examined to what extent can Portugal invoke the need for a balanced allocation between Member States of the power to impose taxes. The AG considered that this was not the case. He argued that, in line with established case law, a Member State that has chosen to grant a tax advantage to companies established within its territory and has consequently refrained from exercising its taxing power over those companies, cannot rely on the necessity of a balanced allocation between Member States of the power to impose taxes to justify the taxation imposed on a company established in another Member State. Therefore, the AG recommended that the CJ rule that the ASSB levy infringes the freedom of establishment.

The Italian Supreme Court extends the participation exemption regime to EU companies

On 19 July 2023, the Italian Supreme Court issued its decision in case *n. 21261*. The case addresses the issue of the applicability of the Italian Participation Exemption (PEX) for non-resident entities.

In this case, a French company sold its participation in an Italian company and realized a capital gain. The French company had claimed a refund from the Italian Tax Authorities amounting to the difference between the ordinary capital gain tax and the reduced rate under the PEX regime. This claim was based on the EU non-discrimination principles, specifically on Article 49 (Freedom of establishment) and 63 (Free movement of capital) of the TFEU. According to the Italy-French tax treaty, the gains derived from the disposal of a participation (if the seller holds at least 25% of the profit rights) may be taxed by Italy.

Because the French entity satisfied all the conditions mandated for an Italian company under the PEX regime, the Supreme Court concurred that the failure to acknowledge the advantageous regime for the seller would constitute discriminatory treatment inconsistent with the EU fundamental freedoms. Furthermore, the Court emphasized that the discrimination against the French company persisted despite the tax credit that France is obliged to extend to its resident taxpayer. This persistence of discrimination arises from the fact that the gain is subject to only partial taxation in France, and the treaty restricts the credit to the corresponding French tax amount.

Poland launched legal proceedings against two EU initiatives from the fit for 55 package

Poland has launched legal proceedings against two significant EU climate policies from the ‘Fit for 55’ climate package: the Carbon Border Adjustment Mechanism (CBAM) and the revised EU Emissions Trading System (ETS). The Fit for 55 climate package targets a 55% emissions reduction by 2030.

The Polish government argues that CBAM, which aims to tax carbon-intensive imports, should have undergone unanimous voting instead of qualified majority voting. Additionally, Poland challenges changes to the ETS, particularly the Market Stability Reserve, asserting that these changes violate energy solidarity principles by reducing greenhouse gas emission allowances.

Poland’s resistance to the EU’s Fit for 55 climate package primarily arises from its heavy reliance on coal for electricity generation. The country’s legal objections extend to measures such as the ban on internal combustion engine car sales by 2035 and heightened greenhouse gas targets. These legal challenges reflect Poland’s concerns regarding the potential impact of these policies on its economy and energy security.

State Aid

Failure to examine the defined ‘normal’ taxation constituting the reference framework (*P, Fachverband Spielhallen eV and LM v European Commission*, C-831/21P)

On 21 September 2023, the CJ delivered its judgment in *P, Fachverband Spielhallen eV and LM v European Commission* (Case C-831/21).

The Appellants argued that the deductibility for German corporate tax purposes of a special levy on the profits of a public casino in the region of North-Rhine-Westphalia constituted State aid. They argued that this levy was not a special tax qualifying as deductible business expense but should be treated as a non-deductible distribution of profits. The Commission and the General Court had

disagreed with that stance and found that there was no selective advantage and thus, no unlawful State aid arising from the deductibility of this special levy.

The CJ annulled the judgment of the General Court. It first emphasized that for national tax measures to be considered 'selective,' the EC must identify the reference system (normal tax system) applicable in the Member State and demonstrate that the measure deviates from it, differentiating between operators in comparable situations. The CJ found that the General Court had made an error by not examining the appellants' argument concerning the identification of the reference system in the EC's decision (and, in particular, whether the special levy was validly assimilated to a deductible business expense under German corporate tax rules), as this identification is crucial for assessing selectivity and the existence of an economic advantage. The General Court was wrong to consider that the arguments raised by the Appellants could not, if upheld, vitiate the assessment of an economic advantage.

The CJ ordered the case to be referred back to the General Court for further examination, as the General Court's failure to review the EC's interpretation of German tax law (to define the appropriate reference framework for the selectivity and economic advantage analyses) precluded a final judgment by the CJ.

General Court's judgment on the Spanish tax scheme on the deduction of goodwill amortisation linked to indirect acquisitions of shareholdings in foreign companies (T-826/14)

On 27 September 2023, the General Court cancelled the European Commission's (EC) decision declaring the deduction of goodwill amortisation linked to indirect acquisitions of shareholdings in foreign companies to be unlawful State aid.

Spanish legislation allowed such deduction and, after a formal investigation, the EC had found in 2009 and 2011 that it constituted unlawful aid but recognised that some taxpayers could benefit from legitimate expectations.

In 2013, the EC reviewed what it considered to be a new (or expanded) interpretation of the tax scheme by the Spanish authorities, which also granted the deduction for amortisation of goodwill arising from indirect holdings in foreign entities through direct holdings in foreign holding companies. A year later, the EC concluded that this allegedly new, expanded interpretation was unlawful State aid and ordered recovery.

Spain and various beneficiaries of the measure challenged that decision on the ground that there was no 'new aid' and that the EC had violated the principles of protection of legal certainty and legitimate expectations.

The General Court, in its judgment of 27 September 2023, sided with the applicants and annulled the EC decision. In particular, it agreed that the allegedly new interpretation was actually already covered by the initial decisions of 2009 and 2011. The EC could not simply withdraw rights granted to Spain and beneficiaries of the scheme under these initial decisions, given that the EC, already at that time, was availed of accurate information. Thus, the EC had violated the principles of legal certainty and legitimate expectations.

In any event, even if the EC had been entitled to adopt the new decision of 2014, there would still be a violation of the principle of legitimate expectations in view of an initial public answer on the (non-aid) characterisation of the scheme given by the EC in 2006. The position of the EC in the 2014 decision should have been the same as that in the 2009 and 2011 decisions, i.e., maintaining the scheme for some taxpayers that benefited from legitimate expectations.

VAT

CJ judgment on VAT refund to customer for incorrectly charged VAT by supplier (*Michael Schütte*, C-453/22)

On 7 September 2023, the CJ delivered its judgment in the case *Michael Schütte* (C-453/22).

Schütte is a farmer who bought wood from various suppliers. These suppliers issued invoices to Schütte subject to 19% VAT. Schütte issued invoices to its own customers subject to 7% VAT. It was later established in a court case that the correct VAT rate for supplies of wood was 7% in Germany. Following this development, the German tax authorities denied Schütte the right to reclaim VAT on the purchase invoices stating that the 19% VAT was wrongfully charged. The suppliers refused to reimburse Schütte for the amount of VAT that was charged in excess of 7%, as Schütte's claim was made outside the national statute of limitation rules. The German tax

authorities further denied Schütte's request for revision of the VAT amount that was wrongfully charged.

The CJ ruled that Schütte was entitled to a refund from the German tax authorities of the VAT amount wrongly charged, including tax interest in case the VAT was not refunded within a reasonable period. The CJ considered that wrongfully charged VAT should be refunded if there is no fraud, no adverse effects on the public budget have been established, and the taxpayer cannot be blamed for negligence.

AG Kokott's Opinion on VAT liability for fake invoices for fictitious transactions (*P sp. z.o.o.*, C-442/22)

On 21 September 2023, AG Kokott of the CJ issued her Opinion in the case *P* (C-442/22).

P is a VAT taxable person with 14 employees. During 2010 and 2014, an employee of P issued fake invoices for almost 1500 fictitious transactions. These sales invoices were issued in the name of P. The Polish tax authorities argued that P, in its capacity as employer, had failed to exercise due diligence in preventing the issuance of the fake invoices and consequently held P liable for the VAT wrongfully charged on the fake invoices.

The CJ ruled that P can indeed be held liable for the fake invoices issued by one of its employees if:

- The recipient of the invoice could not be refused deduction of the VAT charged on fake invoices,
- The issue of the invoices by the employee is attributed to P on account of responsibility, and
- P itself did not act in good faith.

AG Kokott concluded that good faith is not present when the ostensible issuer of an invoice is himself at fault. A taxable person may also be deemed to have been at fault if it can be attributed to him that he has failed in the selection or supervision of employees.

Customs Duties, Excises and other Indirect Taxes

CJ judgment on the primary rules of origin where the production of goods involves more than one country or territory (*Stappert Deutschland GmbH*, C-210/22).

On 21 September 2023, the CJ delivered its judgment in the case *Stappert Deutschland GmbH*. The main question concerns the validity of the criterion for determining non-preferential origin relating to goods falling under the Harmonised System ('HS') subheading 7304 41, included in Annex 22-01 to Delegated Regulation (EU) 2015/2446 ('DA').

Tube blanks (of HS subheading 7304 49) from China were sent to South Korea, where they were cold-rolled and drawn into stainless steel pipes and tubes (of HS subheading 7304 41). The core issue was whether these imported stainless steel pipes and tubes obtained non-preferential origin in South Korea. Anti-dumping duties, namely, were to be levied on imports of tube blanks falling under HS subheading 7304 49 with Chinese non-preferential origin.

According to the applicant, the last economically justified stage of substantial transformation took place in South Korea and determines the origin, in accordance with Article 60(2) of the Union Customs Code ('UCC'). However, according to the German customs authorities, the workings in South Korea did not confer non-preferential origin, as the primary rule of in Annex 22-01 DA was not met.

As a general rule set out in Article 60(2) UCC, goods whose production involves more than one country or territory originate in the country or territory where they underwent their last substantial and economically justified processing or working, resulting in the creation of a new product or constituting an important stage in the manufacturing process ('substantial transformation'). Annex 22-01 contains the explanatory rules on the last substantial transformation for several tariff classification codes. Notably, for products classified with HS subheading 7304 41, the primary rule includes a change from hollow profiles of subheading 7304 49.

Under that criterion, the cold forming of hollow profiles from HS code 7304 49 to HS code 7304 41, constitutes a substantial transformation, as cold forming brings

irreversible changes to their physical, mechanical and metallurgical properties. However, the cold forming of a tube or a pipe, also falling within HS subheading 7304 49, does not determine the origin of the finished product under this rule.

The European Commission has not provided any convincing justification for objectively explaining that difference in treatment between stainless steel pipes or tubes, on the one hand, and hollow profiles, on the other, all of which fall under HS subheading 7304 41 and were obtained from products falling under HS subheading 7304 49.

According to the CJ, the European Commission is empowered to adopt delegated acts laying down the rules according to which goods are considered to have undergone their last, substantial and economically justified processing or working. However, it cannot, in the absence of objective justification, adopt entirely different solutions for similar working and processing operations.

The CJ, therefore, ruled that the primary rule included in Annex 22-01 DA is invalid as it excludes given operations from conferring on a product the status of product originating in the country where those operations took place, whereas analogous operations determine the acquisition of origin for similar products.

In conclusion, the CJ decided that the primary rule is invalid given that it excludes the change of tariff heading resulting from the transformation from tubes and pipes under HS subheading 7304 49 into seamless tubes, pipes and hollow profiles of iron or steel, cold-drawn or cold-rolled (cold reduced) under HS subheading 7304 41, from conferring on those products the status of products originating in the country where that change took place.

CJ judgment regarding the excise duty suspension arrangement owing to an unlawful act solely attributable to a third party (*KRI SpA*, C-323/22).

On 7 September 2023, the CJ delivered its judgment in the case *KRI SpA* ('KRI') (C-323/22) regarding the interpretation of the first sentence of Article 14(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 2004/106/EC of 16 November 2004 ('Excise Directive').

KRI, a company established in Italy, operates a business for the storage and transport of petroleum. In its capacity as authorised warehouse keeper, KRI made, from its tax warehouse situated in Italy, 196 consignments of mineral oils under an excise duty suspension arrangement to BMB Projekt d.o.o, a company established in Slovenia that was authorised as a registered warehouse keeper to receive these products.

For the purposes of movement under an excise duty suspension arrangement, KRI drew up, for each consignment, an accompanying administrative document ('AAD'). An audit carried out by the Italian Customs Authorities showed that the AAD contained falsifications and that it was not proven that the mineral oils had been released for consumption outside the Italian territory. Being unable to determine the place where the mineral oils had irregularly been released for consumption, those authorities also considered that those irregularities had been committed within Italian territory.

In those circumstances, they decided that it was for the Italian State to recover the excise duties due on the mineral oils. KRI disagreed with the recovery of the excise duties because the falsification of documents was attributed solely to illegal acts by a third party.

In those circumstances, the Italian Supreme Court of Cassation decided to stay the proceedings and to refer to the CJ for a preliminary ruling whether the first sentence of Article 14(1) Excise Directive must be interpreted as meaning that the exemption from tax that it lays down in respect of losses occurring under a suspension arrangement as a result of fortuitous events or force majeure applies to the authorised warehouse keeper, which is liable for the payment of duty, in the case of a departure from the suspension arrangement owing to an unlawful act solely attributable to a third party, where the warehouse keeper was wholly uninvolved in that unlawful act and where it had a legitimate expectation that the products moved in accordance with the rules under the arrangement for the suspension of duty.

The wording of the first sentence of Article 14(1) Excise Directive indicates that the warehouse keeper is exempt when two conditions are met. First, there must be a 'loss' that occurred under the suspension arrangement. Second, this 'loss' must be due to fortuitous events or force majeure.

According to the CJ, a 'loss' of a product which is under a suspension arrangement can mean only the material impossibility for that product to be released for consumption, or even to enter into commercial channels of the European Union. However, a product which, in circumstances such as those in this proceeding, departs irregularly from a suspension arrangement nevertheless remains within the commercial channels of the European Union.

In conclusion, the CJ ruled that the exemption from tax, as per the first sentence of Article 14(1) Excise Directive, does not apply to a warehouse keeper, even when a departure from the suspension arrangement is due to an unlawful act solely attributable to a third party. This holds true even when the warehouse keeper was entirely uninvolved in the unlawful act and had a legitimate expectation of compliance with suspension arrangement rules.

CJ judgment on whether refund rights on tax prohibited under EU law may be transferred (*KL, PO v Administrația Județeană a Finanțelor Publice Brașov*, Case C-508/22)

On 28 September 2023, the CJ delivered its judgment in the case *KL, PO v Administrația Județeană a Finanțelor Publice Brașov* (C-508/22) on whether refund rights on a tax on motor vehicles prohibited under EU law may be transferred by the taxable person who paid that tax to a subsequent purchaser of the vehicle.

The CJ judgment was delivered in the context of proceedings between, on the one hand, KL and PO, as the heirs of AX, and, on the other, the District Finance Administration, Brașov, Romania (the 'tax authority'). It concerned the reimbursement of a special registration tax on passengers cars and motor vehicles, which was levied in breach of EU law at the time of the first registration of a vehicle, to a subsequent purchaser of that vehicle.

In the case, two questions were referred to the CJ. First, whether Article 110 TFEU must be interpreted as meaning that the amount of a tax levied, in breach of EU law, by a Member State on motor vehicles at the time of first registration may be incorporated in the value of those vehicles, with the result that the claim against the State on account of the unlawful levying of that tax is considered to have been transferred, upon the sale of those vehicles, to subsequent purchasers thereof. Second, whether the same provision referred to above, must be interpreted as precluding national legislation which provides that the aforementioned tax levied by a Member State, can be refunded only to the taxable person who paid that tax, and not to a subsequent purchaser of the vehicle in question.

Regarding the first question, the CJ noted that even though indirect taxes in commerce are normally passed on in whole or in part to the final consumer, it cannot be generally assumed that the charge is actually passed on in every case. On such basis, it understood that it is for the national court to assess, on the basis of the circumstances of the case before it, whether the tax has actually been passed on in whole or in part to any of the subsequent purchasers. The Court noted that in so far as the national court finds that the tax was actually passed on to the subsequent purchaser, there is nothing, in principle, to preclude a finding that the claim against the State on account of the unlawful levying of that tax was transferred, along with the right of ownership of the vehicle, to the purchaser. It therefore replied to the first questions by stating that that Article 110 TFEU must be interpreted as meaning that the amount of a tax levied, in breach of EU law, by a Member State on motor vehicles at the time of their first registration may be incorporated in the value of those vehicles, with the result that the claim against the State on account of the unlawful levying of that tax is considered to have been transferred, upon the sale of those vehicles, to the subsequent purchasers thereof.

Concerning the second question, and reflecting on existing case law and principles governing the refund of taxes levied in breach of EU law, the CJ understood that Article 110 TFEU must be interpreted as not precluding national legislation which only allow the refund to the taxable person (and not to a subsequent purchaser), provided that the purchaser who actually bore the burden of that tax may, in accordance with detailed national procedural rules, obtain the reimbursement thereof from the taxable person who paid the tax or, if necessary, from the tax authorities, where, in particular, repayment by that taxable person proves impossible or excessively difficult.

CJ judgment on the application of stamp duty to financial intermediation services fees in connection with placement of securities (*A, S.A. v Autoridade Tributária e Aduaneira*, Case C-335/22)

On 19 July 2023, the CJ delivered its judgment in the case *A, S.A. v Autoridade Tributária e Aduaneira* (C-335/22), which concerns the question of whether the imposition of a stamp duty on investment services provided by a bank to a company in relation to marketable securities in the form of bonds and commercial papers is precluded by Article 5(2)(b) of Council Directive 2008/7/EC.

The aforementioned provision expressly prohibits, in any form whatsoever, the indirect taxation of loans contracted in the form of the issue of bonds or other negotiable instruments irrespective of the issuer, and all the formalities relating thereto, as well as the creation, issuance, admission to the stock exchange, putting into circulation or trading of those bonds or other negotiable securities.

A is a Portuguese banking institution which is also active in the financial intermediation sector. Between 1 September and 31 December 2018, as part of its activity, A participated, as a financial intermediary, in several transactions for the issuance of transferable securities in the form of marketable securities, such as bonds and commercial papers, by providing market placement services for those securities to eight trading companies. For those placement services, A received commissions on the basis of which it assessed and paid to the State a stamp duty. Taking the view that stamp duty was not payable on those placement fees, A brought an action before the Tax Arbitration Tribunal of Portugal, which referred the case to the CJ, which was asked whether Article 5(2)(b) of Directive 2008/7 must be interpreted as precluding national legislation which provides for the imposition of stamp duty on the remuneration which a capital company pays to a banking institution to which it has entrusted the placement on the market of negotiable securities such as securities such as securities bonds and newly issued commercial paper.

In its judgment, the CJ first held that the services of placing negotiable securities such as bonds and newly issued commercial paper on the market are closely linked to and a necessary step of the transactions of issuing and putting into circulation those securities within the meaning of Article 5(2)(b) of Directive 2008/7. Therefore, in the Court's view, they must be regarded as forming an integral part of an overall transaction in the light of the capital raised in question. Furthermore, the CJ noted that, it is irrelevant, for the purposes of this provision, that it was chosen to entrust the market placement transactions to third parties rather than to carry them out directly.

In the light of the foregoing considerations, the CJ concluded that Article 5(2)(b) of Directive 2008/7 must be interpreted as precluding national legislation which provides for the imposition of stamp duty on the remuneration which a capital company pays to a banking institution to which it has entrusted the placement on the market of negotiable securities such as bonds and newly issued commercial paper, regardless of whether the companies issuing the securities in question are legally obliged to use the services of a third party or have chosen to use them voluntarily.

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