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EU Tax News

Issue 2019 – nr. 004 *May – June 2019*

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CJEU Developments

Finland – CJEU referral on the tax treatment of income from Luxembourg UCITS SICAV for Finnish resident individual and tax classification of UCITS SICAV for Finnish tax purposes

On 19 June 2019, the Supreme Administrative Court of Finland requested the CJEU to give a preliminary ruling. The question referred to the CJEU concerns the tax treatment of income received by a Finnish resident individual from a Luxembourg UCITS SICAV and whether it is contrary to Articles 63 and 65 of the TFEU that the income received by a Finnish resident individual from a UCITS SICAV is not taxed in the same way as income from a Finnish UCITS fund.

The underlying Finnish case is an advance ruling process that concerns a Finnish resident individual 'E'. Individual E had invested in class D units in sub-fund S of a Luxembourg UCITS SICAV. The class D units comprised distributing units.

According to Finnish tax law, income received by a Finnish tax resident individual from a Finnish UCITS fund, which can only be a contractual fund, is taxed as capital income (30 % tax rate for the first EUR 30k annually and 34 % thereafter). However, if a Finnish tax resident individual receives income from a Luxembourg UCITS SICAV, a corporate fund, the income is deemed to be taxed as the Finnish resident individual's earned income (the tax rate can exceed 50 % depending on the taxpayer's annual level of income). This difference effectively results from Finnish case law that does not consider Luxembourg SICAV funds comparable to Finnish contractual funds because of their difference in legal form, thereby resulting in different tax treatment for income therefrom.

To confirm whether the Finnish tax practice is contrary to EU law, the Supreme Administrative Court of Finland decided to stay the domestic process and wait for a ruling from the CJEU before deciding the matter.

It is worth noting that, while the case only specifically concerns income received by a Finnish resident individual from a Luxembourg UCITS SICAV, the decision could have wider implications, e.g. in relation to the comparability of non-Finnish corporate funds to Finnish contractual funds and, thereby, also affect the tax treatment of income received by UCITS SICAVs, and potentially other corporate funds, from Finland.

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Germany – AG Opinion regarding German dividends taxation for non-resident pension funds

AG Pikamäe has issued his opinion 0n the case *College Pension Plan of British Columbia* (C-641/17) on the German dividends taxation for non-resident pension funds. The main conclusions are as follows:

- The AG considers that the German dividends taxation for non-resident pension funds constitutes an unjustifiable restriction on the pension fund's free movement of capital (Article 63 TFEU).

- The free movement of capital is restricted as the effective tax burden for non-resident pension funds is assumed to be higher than the burden imposed on resident pension funds. The reason is that the German provisions require a withholding tax to be deducted at source and provide for a full corporate tax credit mechanism reserved for resident pension funds only. Therefore, dividends paid to resident pension funds are almost fully exempt from any tax burden whilst the withholding tax for dividends paid to non-resident pension funds constitutes a definitive tax.
- The restriction cannot be justified by an overriding reason relating to the public interest.
- The restriction is also not covered by Article 64 TFEU (so-called standstill clause).
- The fact that, according to the settled case-law of the CJEU, domestic and foreign taxpayers are only comparable in respect of the deductions that are directly linked to their income should be of no relevance for the decision to be taken by the Court. The AG bases this conclusion on his assessment that the credit mechanism is only available to domestic pension funds, which he considers to be the relevant discrimination.

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Spain – European Commission refers Spain to the CJEU for imposing disproportionate penalties for failures to report assets held abroad

The European Commission has referred Spain to the CJEU for imposing disproportionate penalties on Spanish taxpayers for the failure to report assets held in other EU Member States and EEA countries (Form 720). Currently, Spain requires resident taxpayers to submit information on the assets they hold abroad, including properties, bank accounts and financial assets. Failure to submit this information on time and in full is subject to penalties that are higher than those for similar infringements in a purely domestic situation, and which may even exceed the value of the assets held abroad. The European Commission considers that such penalties for incorrect or belated compliance with this legitimate information obligation are disproportionate and discriminatory. The penalties may deter businesses and private individuals from investing or moving across borders in the Single Market. Such provisions are consequently in conflict with the fundamental freedoms in the EU, such as the free movement of persons, the free movement of workers, the freedom of establishment, the freedom to provide services and the free movement of capital.

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Sweden – CJEU judgments 0n Swedish "final losses" cases

On 19 June 2019, the CJEU issued its judgments in *Memira Holding* (C-607/17) and *Holmen* (C-608/17).

The *Memira Holding* case was about a cross-border merger between a loss-making German subsidiary and a Swedish parent company. In the CJEU's view, *Memira Holding* may deduct the foreign losses in Sweden, but *only* if the Swedish parent company can demonstrate that it is impossible to use the losses in Germany in future periods. The fact that Germany does not allow losses to be taken over through a merger is thus not decisive in itself. Further possibilities to take over the losses must be assessed.

The CJEU states that losses in subsidiaries cannot be characterized as "final" if there is a possibility of deducting those losses economically in the subsidiary's state of residence, for example by transferring them to a third party. If, on the other hand, the parent company can adduce evidence to the contrary, then the losses of the German subsidiary would be deemed as final and it would then be disproportionate not to allow *Memira Holding* to take them into account in Sweden.

The *Holmen* case dealt mainly with questions regarding whether tax losses arising in indirectly held Spanish subsidiaries would be deductible for the Swedish parent company upon liquidations of the Spanish companies. In this case, the CJEU clarified that final losses arising in an indirectly held subsidiary should not be deductible for the parent company, unless all the intermediate companies between the parent company and the loss-making subsidiary are resident in the same EU Member State as the loss-making subsidiary. In the *Holmen* case the facts suggest that a loss could be deductible in Sweden, as all intermediate companies were from Spain. Along the same lines as in the *Memira Holding* case, the CJEU clarified that the mere fact that the subsidiary's state of establishment does not allow the transfer of losses in the year of liquidation cannot, in itself, be sufficient to deem the losses as "final". Further, the CJEU reiterated that losses in subsidiaries cannot be characterized as "final" if there is a possibility of deducting those losses economically in the subsidiary's state of residence, for example by transferring them to a third party.

It seems as if the CJEU took a slightly different path compared to the view suggested by the AG earlier this year. Unlike the views put forward by the AG, the judgments from the CJEU are, at least at first glance, more in line with the CJEU's previous case law. The CJEU clearly stresses that it is up to the foreign parent company to demonstrate that there are no possibilities at all to use the tax losses abroad, for example by selling the shares to a third party. If the parent company can demonstrate this, however, then the losses are deemed as final and should be potentially deductible for the foreign parent company. The outcome in the *Holmen* case also shows that losses in indirectly held subsidiaries, in certain (but not all) scenarios, can be utilized by the foreign parent company.

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Sweden – Swedish interest deducibility case referred to the CJEU

Sweden enacted tightened interest deduction limitation rules as of 1 January 2013. The main rule under the 2013 set of rules was that intra-group interest expenses are non-deductible. There are exceptions from this main rule stipulating when interest expenses can be deducted even if the loan is from a related entity. One of the exceptions can be found in the so-called 10% rule. That rule stipulates that interest costs on loans from related entities can be deducted if the income equivalent to the interest expenses would have been taxed with a tax rate of at least 10%. This assessment should be made as a hypothetical test based on the regulations in the country in which the related company actually having the right to the income is resident, assuming that the company would only have had this income. There is also an exception from the 10% rule, saying that if the main reason for the debt relationship is that the group will obtain a substantial tax benefit, then the interest expenses may not be deducted anyway.

As previously mentioned, the Swedish Supreme Administrative Court in November 2018 decided to grant leave to appeal in one case (case number 4849-4850-18) in order to assess whether it would be in line with the freedom of establishment to deny an interest deduction under the exception to the 10% rule. The case at hand has quite typical features. It concerns a Swedish company which acquired shares in a group company from a Spanish group company and financed the acquisition with an intra-group loan from a French group company. The French group company could offset the Swedish interest income against tax losses carried forward. The French corporate income tax rate was above 10%, but the Swedish Tax Agency, the Swedish Administrative Court and the Swedish Administrative Court of Appeal considered that the exception from the 10% rule was applicable and denied the deduction. The Swedish courts, however, noted that the deduction would have been granted if the French group company would have been resident in Sweden. This led to a restriction of the freedom of establishment. But the Swedish courts considered this to be justified and proportionate and thus the appeal was dismissed.

In a decision dated 5 June 2019 the Swedish Supreme Administrative Court concluded that there are different opinions on whether the exception from the 10% rule is in line with EU law. The company's view has support from the European Commission, while the Swedish Tax Agency, the Swedish government and the Swedish lower courts that have addressed the case are of the opposite view. The Swedish Supreme Administrative Court states that, based on current case law from the CJEU, it cannot conclude with certainty which view is the correct one. Thus, the Swedish Supreme Administrative Court decided to refer the case to the CJEU.

The question asked by the Swedish Supreme Administrative Court to the CJEU is whether it is in line with the freedom of establishment to deny a deduction for interest costs paid to a related entity resident in another EU Member state, based on the assumption that the main reason for the debt relationship was that the group would get a substantial tax benefit, while such a tax benefit would not have been deemed to exist if both companies had been Swedish, as they then would have been able to exchange group contributions with each other (i.e. could consolidate for tax purposes using the Swedish tax consolidation system of group contributions).

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National Developments

Austria – Austrian High Administrative Court implements recent CJEU case law on directive shopping

In its decision of 27 March 2019, the Austrian High Administrative Court overturned the decision of the Federal Fiscal Court of Austria (RV/7106377/2016) which had ruled in a given case that the use of a holding structure with both substance and function represented an abuse of the Parent-Subsidiary Directive. The ruling of the Austrian High Administrative Court (Ro 2018/13/0004) is in line with the principles established by the CJEU concerning directive shopping.

LuxCo1 (Holdco without substance) holds a participation of 39.73% in the Austrian L-AG. All the shares of LuxCo1 are held by LuxCo2 (Holdco with substance and employees), which is held (through a trustee situated on the Cayman Islands) by a Cayman Island fund. In 2015 the Austrian company distributed around EUR 10 m in profits to its shareholders. As the minimum holding period of one year for the withholding tax exemption at source was not met at that point, the Austrian company withheld the withholding tax due on this dividend. Subsequently, after the minimum holding period, LuxCo1 submitted an application for a refund of the dividend withholding tax. This application was rejected by the Austrian tax authorities with the justification that the structure set up fulfilled the purpose of directive shopping and is therefore deemed to be improper under Section 22 Austrian Federal Fiscal Code. An appeal against this assessment was dismissed by the Federal Fiscal Court of Austria, which arrived at the conclusion that there is no reasonable non- tax reason for the set-up of the structure.

The Austrian High Administrative Court overruled the Federal Fiscal Court of Austria decision. Based on the facts provided by LuxCo1 the purpose of the holding structure was to subdivide the group participations in regions, sectors and business areas to ensure a professional management and administration of the group participations. In addition, it was proven that LuxCo2 was treated as a taxable person for Luxembourg VAT purposes and must therefore (at least) partially be seen as an operating cooperation. The Austrian High Administrative Court further stated that corporate structures which enhance the capability of achieving aspirational goals constitutes an economic justification. In addition the economic activity of LuxCo2 was confirmed by virtue of its employees and business premises in Luxemburg, by virtue of which it managed LuxCo1. According to the Austrian High Administrative Court the structure used in this particular case is therefore not deemed improper under Section 22 Austrian Federal Fiscal Code and therefore the Parent-Subsidiary Directive is applicable for the case at hand.

The Austrian High Administrative Court's judgement is in line with the recent CJEU case-law concerning directive shopping (C-6/16, *Eqiom and Enka*, C-504/16 and C-613/16, *Deister Holding* and *Juhler Holding*). The ruling of the Austrian High Administrative Court stresses that the set-up of a company structure per se cannot be deemed improper according to Section 22 Austrian Federal Fiscal Code. Therefore, one needs to consider the economic justification as well as the company's substance when assessing the selected structure and the consequent applicability of refund claims according to the Parent-Subsidiary Directive.

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Denmark – Danish High Court rejects Fidelity Funds withholding tax reclaim on Danish sourced dividends

On 2 April 2019, the Danish Eastern High Court denied the refund of withholding tax (WHT) on Danish sourced dividends suffered by non-Danish investment funds. The claimants are investment funds resident in the United Kingdom and Luxembourg respectively and qualify as Undertakings for the Collective Investment of Transferable Securities (UCITS) (hereafter "the Funds" or "the claimant"). The Funds invested in Danish shares and received dividends in the period 2000-2009 which were subject to Danish WHT.

The main question in the case was whether non-resident investment funds could be subject to WHT on dividends received from their Danish shares while Danish resident investment funds compliant with the 'investment funds with minimum taxation status' are tax exempt on Danish sourced dividends.

The Danish Eastern High Court had referred the question of compatibility of the WHT legislation to the CJEU (C-480/16, *Fidelity Funds)*. The CJEU stated in its preliminary ruling of 21 June 2018 that: "Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident UCITS are subject to WHT, while dividends distributed to a UCITS resident in that same Member State are exempt from such tax, provided that that undertaking makes a minimum distribution to its members, or technically calculates a minimum distribution, and withholds on that actual or notional distribution the tax payable by its members."

However, the Danish Eastern High Court ruled that since the claimant did not opt for the investment funds with minimum taxation status, they could not be compared with a Danish investment fund with such tax status but rather should be compared with Danish investment companies, which are subject to 15% WHT on Danish sourced dividends. In doing so, however, the Danish Eastern High Court completely disregarded the fact that even if the Funds had complied with the requirements to be treated as an investment fund with minimum taxation, the Funds would not have been able to benefit from the exemption due to the Danish residency requirement.

The Danish Eastern High Court judgement has been appealed by the claimant to the Danish Supreme Court and the final outcome of the case is therefore still pending. Based on the CJEU's judgment, we find that non-resident investment funds – both UCITS and non-UCITS (alternative investment funds or AIFs) that are comparable to Danish AIFs – should be entitled to reclaim taxes withheld on dividend payments from Danish portfolio shares. As the CJEU judgment concerns the free movement of capital, investment funds resident in third countries should also be able to file a claim. In our opinion, the Danish Eastern High Court unjustifiably disregarded the fact that the Funds under Danish tax rules would not have been able to benefit from the tax exemption even if it had complied with the investment funds with minimum taxation status.

Based on the above, we recommend that foreign investment funds should continue to file protective claims in order to avoid potential claims from being statute barred. Claims should be filed for the years back to 2009. The general limitation period is, according to Danish tax law, three years but there are arguments to extend it to five or even 10 years.

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Netherlands – Projected amendments to Dutch anti avoidance rules following the CJEU's Danish Beneficial Ownership-cases

On 14 June 2019, the Dutch State Secretary of Finance answered parliamentary questions concerning the impact on Dutch legislation of the judgments of the CJEU in the so-called Danish beneficial owner cases (*T Danmark* etc., C-116/16). In that regard, the Dutch State Secretary of Finance announced changes to the existing anti-abuse provisions of the Dutch corporate income tax and dividend withholding tax laws. These changes will be included in the already announced Bill for the introduction of a conditional withholding tax on interest and royalty payments to low-tax jurisdictions and abusive situations that will be submitted on Budget Day 2019 (17 September 2019). As a result of these changes, the role of the current Dutch substance requirements (based on which the Netherlands establishes whether there is abuse) will change as of 1 January 2020. The objective of the announced amendments is that even in situations where the Dutch substance requirements are met, the Dutch Tax Authorities - unlike now - will be able to tackle abuse more effectively. It is important to note that the proposed changes will not only apply in relation to EU Member States, but also to third states (for example, the Dutch State Secretary of Finance in this context mentioned Singapore).

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Spain – Spanish draft bill implementing the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements

On 20 June 2019, the Spanish Ministry of Finance published the draft bill implementing the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements, also known as DAC6. The draft bill must now follow the entire Spanish legislative procedure. It is expected to enter into force on 1 July 2020 in line with the DAC6 requirements. The main outcomes from the draft bill are in line with DAC6, i.e. indirect taxes and excise duties are not included, nor domestic arrangements, and the draft bill defines "main benefit test" including a deferral of tax as a tax benefit.

Hallmarks

Hallmarks are generally in line with DAC6, however, the draft bill includes clarifications:

- With respect to hallmark A.2., the draft bill states that the "success fee" may be total or partial, and it seems to consider hallmark A.3. to be equivalent to "marketable arrangements".
- In relation to the hallmark C.1., "cross-border payments", the draft bill establishes that i) cross-border payments also include cross-border expenses, even if the payment has not been made; ii) the recipient of the income could be an indirect recipient or the person to whom the income is attributed; iii) for zero or almost zero tax rates it understands a tax rate lower than 1%; iv) a regime found not harmful by the Code of Conduct Group (Business Taxation) authorized by the EU would not qualify as a preferential tax regime; and v) non-cooperative jurisdictions are those jurisdictions included in the Spanish black list.

Legal Professional Privilege (LPP)

The draft bill recognizes LPP, in this sense, LPP generally upheld with respect to personal information of parties involved in a reportable arrangement, in particular non-wealth private and confidential data of clients to which the intermediary could have access as a result of his/her advice or legal representation. The draft bill clarifies that LPP protects data whose disclosure may violate the personal and family honour and privacy, as well as data related to commercial, industrial or professional secrets, commercial procedures, and data whose disclosure could be against the public interest. However, abstract information needs to be reported. The taxpayer may allow the intermediary to report by renouncing LPP.

Penalties

- Penalties from EUR 1,000 for each item of data not reported, with a minimum of EUR 3,000 and a maximum established depending on who is obliged to report. When the person obliged to report is the intermediary, the maximum penalty is equivalent to the fees of the intermediary. In those cases where there are no fees, the limit will refer to the market value of the activity of the intermediary. When the person obliged to report is the taxpayer, the maximum penalty will be the value of the tax arrangement.
- The filing of returns by means other than the official electronic means will constitute a tax offence in those cases in which there is an obligation to do so by such means, and will be punishable by a fixed fine of EUR 250 per item of data or set of data referring to the same return with a minimum of EUR 750 and a maximum of EUR 1,000.
- Penalties up to EUR 600 if the application of LLP is not notified.

Transitional period

Arrangements implemented between 25 June 2018 and 30 June 2020 must be reported in July and August 2020.

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Spain – Spanish Supreme Court rules tax on the retail sector in the Region of Navarra is not against the EU freedoms and does not constitute State aid

On 13 June 2019, the Spanish Supreme Court confirmed that the tax on the retail sector in the Region of Navarra does not violate the freedom of establishment and the freedom to provide services and it does not constitute State aid.

In particular, the Spanish Supreme Court stated that the tax on the retail sector at hand does not restrict the freedom of establishment and the freedom to provided services regardless of its configuration and application that takes into consideration the area (in square metres) devoted to the retail activity since the criteria is determined assessing factors such as the impact on the territory, environment and street commerce within the region.

Finally, the Spanish Supreme Court established that the tax on the retail sector in Navarra does not constitute itself an unlawful State aid. In addition, the Court stated that the exemption from this tax granted to collective commercial establishments and to those establishments specializing in gardening and sale of vehicles, construction materials, machinery or industrial supplies does not qualify as an unlawful State aid. The Court applied the same reasoning to the partial exemption from this tax granted to establishments selling movable assets, sanitation assets, woodworking for construction and bricolage.

The Spanish Supreme Court decision is somewhat aligned with the case-law from the EU General Court on the Polish tax on the retail sector dated 16 May 2019 (T-836/16 and T-624/17), although there are no references to those cases.

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Spain – Spanish National Court confirms the discriminatory tax treatment of non-resident pension funds

On 30 May 2019, the Spanish National Court, following previous cases from the Spanish Supreme Court and the CJEU, confirmed the discriminatory tax treatment of the Spanish tax rules on non-resident pension funds. The pension fund in the case at hand was resident in the United Kingdom.

The Spanish National Court recognized that pension funds resident in Spain and resident in other EU Member States are comparable, since both are subject to tax on dividend income. However, non-resident pension funds suffered higher taxation, i.e. they received a discriminatory tax treatment due to their place of residence. The Spanish National Court understood that the restriction against the free movement of capital cannot be justified. Thus, the non-resident pension fund had the right to claim the refund of the withholding taxes unduly levied.

Please note that this case considers the Non-Resident Income Tax Act applicable in 2010, i.e. applicable law prior to the tax reform adjusting the Spanish law to EU law.

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EU Developments

EU – Finland's tax priorities for the Presidency of the Council of the EU from 1 July – 31 December 2019

Finland published its priorities for the Presidency of the Council of the EU for the second half of 2019 in the second half of June 2019. For tax these read: "The ongoing discussions in the OECD on digital taxation will continue. We need to work harder to prevent harmful tax competition and tax evasion. Close cooperation within the EU should make it possible to take effective action in tackling aggressive tax planning and tax evasion and reducing harmful tax competition. These policy measures will make for a fairer and more predictable business environment. Finally, we must make sure that supervisors have sufficient powers and capacities to combat money laundering and terrorist financing."

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EU – ECOFIN Council meeting held on 14 June 2019

The ECOFIN Council is routinely (6-monthly basis) invited to report back to the European Council on progress on various tax issues, in particular as mentioned in its Council Conclusions of March and June 2012, May 2013, December 2014 and October 2017. The draft ECOFIN report to the European Council on tax issues was prepared and agreed in the Council High Level Working Party on Tax Questions (HLWP) on 4 June 2019, for submission to the Council via COREPER 2. The ECOFIN Council met on 14 June 2019 and endorsed the ECOFIN June 2019 update report and agreed to send it to the European Council on 20 June 2019 (EU summit).

The ECOFIN Council also adopted Council Conclusions on the Code of Conduct Group (Business taxation) and additionally formally endorsed a regular update of its "Overview of the preferential tax regimes examined by the Code of Conduct Group (Business Taxation) since its creation in March 1998."

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EU – European Commission formally responds to European Parliament TAX3 recommendations

The TAX3 Report (Special Committee Report on financial crimes, tax evasion and tax avoidance) was adopted by the European Parliament's Plenary by an overwhelming cross-party majority on 26 March 2019. Under the EU's Inter-institutional Agreement, the European Commission was required to provide a formal response within three months (i.e. by 26 June 2019) to the European Parliament as to whether it intends to issue any new legislative initiatives as a direct result of the TAX3 Report. The European Commission sent its formal response to the TAX3 Report as it was mandated to and highlighted that many recommendations fall to the competence of the EU's Member States. The European Commission reiterated its commitment to tax transparency of multinationals and preventing aggressive tax planning. Please contact the undersigned for more details.

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Fiscal State aid

Hungary – EU General Court annuls European Commission Decision on Hungarian Advertisement Tax

On 27 June 2019, the General Court of the European Union (General Court) issued its judgment in the Hungarian Advertisement Tax case (T-20/17).

In 2014, Hungary introduced an advertisement tax which is a special tax applied on turnover derived from the broadcasting or publication of advertisements in Hungary. Economic operators that broadcast or publish advertisements are subject to that tax, that is to say, in particular, newspapers, audio-visual media and billboard posters. The taxable amount of the tax is the gross turnover for the financial year generated by the broadcasting or publication of advertisements, to which progressive rates were applied. Moreover, taxable persons subject to advertisement tax whose pre-tax profits for the financial year 2013 were zero or negative could deduct from their 2014 taxable amount for that tax 50% of the losses carried forward from the earlier financial years.

In its final decision of 4 November 2016, the European Commission concluded that the tax system relating to the advertisement tax constituted a State aid measure incompatible with the internal market because it featured a) progressive tax rates and b) provisions prescribing a reduction in that tax in the form of deduction of losses carried forward for undertakings that were not profit making in 2013.

The General Court finds in essence, for the same reasons as those set out in its recent judgment concerning the Polish tax on the retail sector (joined cases T-836/16 and T-627/17), that there was no selective advantage constituting State aid stemming from the progressive structure of the advertisement tax.

Firstly, in determining the 'normal' reference tax framework, the General Court did not share the conclusion of the European Commission that a hypothetical or an incomplete system can be used. Instead, the examined system as a whole tax system (with its progressive rates) must be looked at as the reference framework.

Secondly, the General Court held that the European Commission cannot question the tax at issue based on its objective pursued either by claiming that a turnover-based system cannot reasonably be applying a progressive rate schedule. As regards whether the 50% deductibility of the losses of undertakings which were not profit-making in 2013 was compatible with the internal market, the General Court finds that that reduction in the taxable amount is established according to objective criteria irrespective of the choices of the undertakings concerned, and is not, therefore, selective.

Lastly, the General Court considered that the reduction for non-profit-making enterprises is consistent with the redistributive purpose of the tax and hence does not constitute a selective advantage.

For the above reasons, the General Court annulled the decision of the European Commission. The General Court's ruling is very likely to be tested before the CJEU in the near future. This is because basically the same question has been referred by the Hungarian courts to the CJEU directly in respect of a different progressive Hungarian turnover-based levy (C-75/18). AG Kokott in her recent opinion in the case at hand also advised that such a tax system cannot constitute a State aid measure that is incompatible with the Internal Market because it is not selective in nature. If the AG is followed by the CJEU, it very much seems that gross income / turnover-based progressive taxes do not infringe the EU's State aid rules.

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Luxembourg – European Commission opening decision into Luxembourg interest-free loans

On 3 May 2019, the European Commission published the non-confidential version of the opening decision in the State aid investigation into tax rulings granted by the Luxembourg tax authorities in relation to the Luxembourg treatment of interest-free loans granted by an Irish group company to another Luxembourg group company.

On 9 March 2019 the Commission announced in a press release that it will open a formal investigation into three rulings obtained by a Luxembourg subsidiary of a group from the Luxembourg tax administration in 2009, 2012 and 2013.

According to the facts as presented in the preliminary decision of the Commission now made public:

- The Luxembourg subsidiary which carried out intra-group financing activities had been granted interest-free loans from an Irish group subsidiary and used the funds to grant in its turn interest bearing loans to other group companies.

- The rulings confirmed that based on the Luxembourg domestic legislation as applicable at the time, the Luxembourg subsidiary can deduct from its taxable basis an amount of deemed interest on the interest-free loans corresponding to interest payments that an independent third party would have demanded for the loans in question.

According to the text of the decision, in the preliminary proceedings the Luxembourg tax authorities put forward arguments that the application of the deemed interest deduction was allowed by the Luxembourg domestic legislation applicable at the time of issuance of the rulings in question. The respective legal provision was interpreted as allowing a positive as well as a negative adjustment of the taxable basis of a taxpayer in order to bring it in line with a market remuneration that reflects the income truly generated in Luxembourg. This applied irrespective of the treatment in the country of residence of the creditor. In the case at hand there was no deemed interest income inclusion in Ireland at the level of the creditor of the interest-free loan. According to the opening decision, the European Commission expresses doubts if the treatment endorsed by the rulings in question can be justified, based on the following arguments:

- Similar to the "Belgian excess profits" State aid case, the Commission considers that the system of reference against which a selective treatment is to be assessed is the general Luxembourg tax system which subjects companies to taxation on their accounting profits and not the domestic transfer pricing provisions;

- Against this general system the Commission considers that the unilateral downward adjustment applied on the interest-free loans represents a selective advantage because in the European Commission's view it derogates from the principle of taking the accounting profit as the starting point in the assessment of the tax;

- Furthermore the Commission considers that the provisions of the Luxembourg income tax law invoked by the Luxembourg tax administration as allowing a downwards as well as an upwards adjustment of the profits of a company cannot support a downwards adjustment in the situation where there is no corresponding inclusion of income in the counter-party jurisdiction.

The decision is the latest in a number of high profile cases concerning State aid and taxation and it is the first one that concerns the treatment of interest-free loans. The decision represents at this stage the preliminary arguments of the Commission for opening a State aid investigation into the case. The final decision to be issued by the Commission further to the detailed investigation into the facts of the case will be important for properly assessing the implications of this case.

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Netherlands – CJEU judgment on competence of national courts to grant the benefit of a State aid scheme based on free movement of capital

On 2 May 2019, the CJEU issued its judgment in *A-fonds* (C-598/17). *A-fonds* is a special collective investment fund, with no legal personality, established in Germany and is exempt from corporate and business tax. Since its formation, all of its shares have been held by BBB, a body governed by German public law. BBB held through *A-fonds*, shares in Dutch companies and received dividends that were subject to Dutch withholding tax (WHT). The German fund and the Dutch tax authorities had a dispute on whether the fund was entitled to a WHT refund based on the free movement of capital since under former Article 10 par. 1 of the Dutch Dividend Withholding Tax Act (DWTA) only Dutch entities that were exempt from corporate tax could receive such a refund. The dispute ended up in litigation before the Dutch courts.

In the view of the Regional Court of Appeal, s-Hertogenbosch, the provision at hand was contrary to the free movement of capital. Therefore, *A-fonds* should be, in principle, entitled to a refund of dividend tax. However, the regional court wondered whether the granting of such a refund complied with the EU State aid rules. In that regard, the court noted that the WHT refund is inextricably linked to the corporate tax exemption of Article 2 par. 4 of the Dutch Corporate Income Tax Act (CITA) that was already considered an existing State aid scheme by the European Commission (with regard to Dutch public enterprises). The Dutch court decided to stay proceedings and requested a preliminary ruling from the CJEU on whether EU law precludes it from granting a benefit of a State aid scheme to ensure compliance with the free movement of capital. It asked in particular whether, where such an aid scheme is regarded as existing, the granting of the benefit of this scheme constitutes new State aid that, however, shall be notified to the Commission under Article 108(3) TFEU.

In the CJEU's view, an answer to the questions of the Dutch court requires a prior determination as to whether EU law precludes a national court from retaining its competence to examine whether the residence condition in the provision at hand complies with the free movement of capital, or whether this review falls within the sole competence of the Commission. Under settled CJEU case-law, while the assessment of the compatibility of aid measures with the internal market falls within the sole competence of the Commission, subject to review by the EU Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid has been infringed.

Nevertheless, the CJEU ruled – reiterating its previous case-law – that a national court is competent to assess whether the arrangements of an aid scheme comply with TFEU provisions –

other than those relating to State aid – only if those arrangements can be evaluated *separately* and thus, although forming part of the aid scheme, are not necessary for the attainment of its objective or its functioning. However, according to the CJEU, in the present case, the residence condition is indissolubly linked to the very object of the WHT refund (i.e. the benefitting of national undertakings only). Therefore, it is impossible to separate this condition without adversely affecting the division of competences between the Commission and the national courts in the matter of State aid. The Court then decided that if the WHT refund measure would be an aid scheme, the domestic court would not be competent to test the provision against the free movement of capital.

Taking into account that the Commission has exclusive competence to assess the compatibility of an aid scheme, under the review of the CJEU, in the present case the national court has no possibility to decide on the refund request based on the free movement of capital if that refund would be a State aid scheme. According to the Dutch court, the present case was a 'test case' as the Dutch tax authorities have already received almost 1,000 similar refund requests from foreign public enterprises based on the provision at hand.

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