Tax News Alert
Luxembourg ./. EU Commission – Decision of the CJEU
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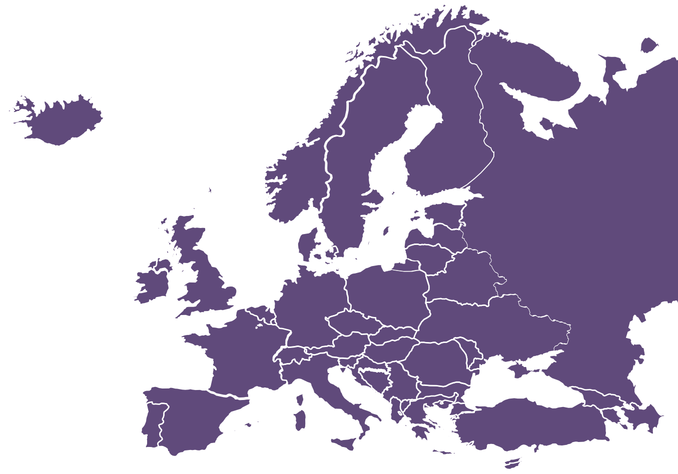

On 04 October 2016, the Court of Justice of the European Union ("**CJEU**") issued its decision on the infringement procedure against Luxembourg (C-274/15 (Commission v. Luxembourg).

Current rules for Independent Group of Persons ("IGP")

The Luxembourg VAT Law (hereafter "**VATL**") currently provides for a VAT exemption related to the services provided by IGPs to their members in Luxembourg (article 44.1.y VATL). Such IGP can either be in the form of an agreement or in corporate form. They aim at sharing costs for support services amongst the members of a certain group of persons (usually companies) without adverse VAT effects. The VAT exemption had been specified in further detail by the Grand-Ducal Decrees dated 21 January 2004 and 7 August 2012. In particular, the Luxembourg rules allow for an IGP with members that have a partial VAT deduction right (of up to 30% or even up to 45% in certain cases). Further, the IGP is disregarded for the purchase of services supplied to it and therefore enables the members to deduct the related input VAT in accordance with their respective pro rata of input VAT recovery.

Decision of the CJEU

Now, the CJEU has decided that:

- ***The Grand Duchy of Luxembourg has infringed its obligations under article 2(1)(c) and article 132(1)(f) of Directive 2006/112/EC by implementing and maintaining provisions which provide***

for a VAT exemption for the supply of services by independent groups of persons to their members even though such services are not rendered for the purpose of an activity which is not a VAT-exempt activity of the members or an activity for which they are not considered to be a VAT taxable person.

In its reasoning the CJEU pointed out that even though according to article 132(1)(f) the IGP may supply VAT-exempt services to members who exercise a VAT-exempt activity or an activity for which they are not considered to be a VAT taxable person, this would not preclude the fact that an IGP could also render VAT-exempt services to members which have a VAT taxable activity. In particular, according to the CJEU, it does not limit the application of the VAT exemption to IGPs with members that exclusively perform activities for which they are not considered to be a VAT taxable person. However, members who also perform VAT taxable supplies, may only benefit from the VAT exemption on supplies made to them by the IGP as far as such supplies are solely benefiting the VAT exempt activity or an activity for which they are not considered to be a VAT taxable person. During this infringement procedure, Luxembourg had failed to demonstrate why it is extraordinary difficult for the IGP to only invoice their VAT-exempt services solely for the members' VAT-exempt activities or for an activity for which they are not considered to be a VAT taxable person.

- The Grand Duchy of Luxembourg has infringed its obligations under article 168(a) of Directive 2006/112/EC by implementing and maintaining provisions authorising a member, within the meaning of article 132(1) (f) of the Directive, to claim an input VAT recovery right for services received which have not been supplied to him but to the group.

The CJEU clarified in its findings that the IGP is a separate VAT taxable person and as such to be distinct from its members. Following the general rule in article 168 of the Directive 2006/112/EC, a VAT taxable person can claim the input VAT for supplies made to it by other VAT taxable persons. However, it is contrary to this rule to allow members of the IGP (as a separate VAT taxable person) to deduct input VAT on the supplies to the IGP.

- The Grand Duchy of Luxembourg has infringed its obligations under article 14(2) (c) and article 28 of Directive 2006/112/EC by implementing an administrative practice considering as unremarkable for VAT purposes where a member, within the meaning of article 132(1) (f) of the

Directive, has acquired goods or services in his own name but on behalf of the group and assigns such costs to the group.

Regarding this part of the decision, the CJEU again stresses the point that the IGP is a VAT taxable person in its own right. Transactions between the members and the IGP are therefore to be treated as transactions between different VAT taxable persons and fall within the scope of VAT. Consequently, a supply to a member in its own name but on behalf of the IGP creates the fiction of two separate transactions for VAT purposes.

With its reasoning, the CJEU followed broadly the opinion of the Advocate General and interpreted the VAT exemption allowed for IGPs in the VAT Directive strictly. According to this decision, the current rules as applied by Luxembourg, go beyond the scope of article 14(2) (c) and article 28 of Directive 2006/112/EC and, hence are considered as a violation of the VAT Directive 2006/112/EC.

What are the consequences for Luxembourg?

Following this decision of the CJEU, the Luxembourg rules will have to be revised. The restrictions for the Luxembourg IGP following this decision would probably lead to a loss of its major advantages, in particular for groups of members which have a partial VAT deduction right (such as many players in the financial sector). Existing IGPs therefore have to be reviewed and alternative structures will need to be developed.

This decision might now result in implementing the alternative of VAT groupings (i.e. rules to consider several legal entities of a group as one single VAT taxable person) in Luxembourg in order to provide for a solution for intra-group supplies. We are following this discussion closely and will keep you duly posted.

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