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What to do with CJEU case law? The (unexpected) answers of Belgium in the real estate sector following the *Temco* case

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Exemptions enshrined in the European VAT Directive[1] have, from the outset, triggered uncertainties for taxpayers and have led to discussions in academic circles, reports from policymakers and litigation with tax authorities. In addition to the challenges that the interpretation of such provisions typically raise, the number of deviations to the principle of taxation is among one of the major causes of inefficiency of the European VAT system.[2]

The exemption provision applicable to the letting of immovable property[3] has a special status: it is the only one of the 'exemptions for other activities' where Member States have real discretionary power. Indeed, in addition to the fact that an option to tax may be implemented domestically[4] (something Belgian policymakers have not yet done), the VAT Directive allows Member States to apply further exclusions to the scope of this exemption.[5] In recent decades, Belgium has developed an interpretation of the concept of the letting of immovable property taking the definition found in its Civil Code as a starting point.[6] Since the *Temco* case,[7] and

1 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347 of 11 December 2006 (hereinafter 'VAT Directive').

2 See eg OECD, *Consumption Tax Trends 2012* (Measuring Performance of VAT: The VAT Revenue Ratio).

3 See Art 135(1)(l) VAT Directive; Art 44, para 3, 2 Belgian VAT Code.

4 According to Art 137(1)(d) VAT Directive.

5 In that respect, it is interesting to note that the 'betting' exemption only authorises Member States to subject the exemption 'to conditions laid down by each Member State' (Art 135(1)(i) VAT Directive), while the 'management' exemption grants Member States the right to define the management of investment funds (Art 135(1)(g) VAT Directive). Given the peculiarities in the language of each provision, caution is needed when trying to translate outcomes or findings applicable to one exemption to others.

6 See eg point 2 of administrative circular 73-004/2 dated 12 January 1973, stating: 'par location immobilière, on entend, pour l'application de la présente circulaire, la convention par laquelle une des parties s'engage à faire jouir l'autre d'un immeuble par nature pendant un certain temps et moyennant une rémunération que celle-ci s'oblige à lui payer' (translation: 'a contract by which one of the parties undertakes to allow the other the enjoyment of a thing during a certain time, in exchange for a certain sum which the latter undertakes to pay to the former'). Although no reference is made there to civil law, this definition shares many of the characteristics provided in Art 1709 of the Belgian Civil Code relating to the civil law form of *louage de chose* (literally, the 'letting of things'). A further reference to civil law concepts is made, although not yet explicitly and *a contrario*, in the abovementioned circular, under point 6. The provisions of the Belgian Civil Code dealing specifically with the letting of immovable property are to be found in Arts 1714 *et seq* (see, in particular, Art 1719 requiring that the landlord provide the tenant with 'peaceful enjoyment' (*jouissance paisible*).

7 Case C-284/03 *Etat belge v Temco* [2004] ECR I-11256 (CJEU).

in particular its domestic application, the Belgian VAT community is fighting hard to get back onto its feet. The purpose of this contribution, in addition to discussing the letting of immovable property exemption, is to suggest a way forward to increase legal certainty in this matter for taxpayers and tax authorities.

I. VAT treatment of the letting of immovable property in Belgium prior to *Temco*

The VAT Directive provides for a high level of discretionary power and flexibility when scoping the exemption applicable to the letting of immovable property. Traditionally, Belgium has relied rather extensively on the VAT exemption for the letting of immovable property, initially for practical reasons,[8] and later, most likely for budgetary reasons.[9] Belgium is one of the few countries that has not implemented the option allowing taxable persons a right of option for taxation in respect of such transactions.[10]

The Belgian VAT Code exempts the leasing, letting and assignment of leases[11] of immovable property by nature from VAT,[12] with the exception of defined supplies of services[13] and financial leasing constructions (provided certain conditions are met).[14] Belgium has used its discretionary power by, amongst other things, excluding defined warehousing transactions from the VAT exemption.[15] The Belgian VAT Code does not contain any reference to a definition of the terms 'leasing', 'letting' or 'assignment of lease'.[16] However, since the early 1970s, the reference to the definition as provided in the Belgian Civil Code has been used when assessing whether a particular contractual arrangement is VAT exempt or not. This position, initially taken in an administrative circular dated 12 January 1973, has been repeatedly confirmed over the years.[17] Back in 1973, the Belgian tax authorities tried to make as precise as possible the

8 See C Amand, *Location immobilière en TVA belge, approche formelle, historique et prospective de l'arrêt de la cour de cassation du 4 juin 2010, 'Mons Expo'*, TFR, 410, p 868: 'La Belgique et l'Italie n'avaient pas les moyens administratifs de mettre en œuvre la TVA ... [L]e Parlement européen a suggéré l'introduction rapide d'un système TVA et d'autoriser des exemptions de TVA à condition qu'elles ne concernent que des opérations n'ayant pas d'impact ... sur le commerce intracommunautaire.' See also, from the same author, *Hervorming van het btw-stelsel van onroerende verrichtingen*, AFT, 1993, pp 245–54.

9 D Stas, *Na 40 jaar btw nog steeds zoveel onzekerheden inzake onroerend goed*, AFT, 2011/12, p 42.

10 And in fact, the only one of the group of the first six countries that formed what is now the European Union (see C Amand, G Schellmann and R Vermeulen, 'Immovable Property and VAT: Lessons from the Past and from New Member States [2005] *International VAT Monitor*). See also Case C-381/97 *Belgocodex* [1998] ECR I-8153 (CJEU).

11 Such an item is not provided in the exemption at the EU level, which refers only to the leasing and letting of immovable property. It has however been confirmed by the CJEU that the concept of leasing or letting of immovable property under Community law encompasses the assignment of leases (see Case C-108/99 *Cantor Fitzegerald International* [2001] ECR I-7257 (CJEU)).

12 The expression 'by nature' is a clear addition from Belgium compared to the provision of the VAT Directive.

13 Art 44, para 3, 2°, a of the Belgian VAT Code exempting 'l'affermage, la location et la cession de bail de biens immeubles par nature à l'exception des prestations de services suivantes: la mise à disposition d'emplacements pour véhicules; la mise à disposition d'emplacements pour l'entreposage de biens; la fourniture de logements meublés dans les hôtels, motels et établissements où sont hébergés des hôtes payants; la mise à disposition d'emplacements pour le camping'.

14 Art 44 para 3, 2°, b of the Belgian VAT Code in conjunction with Royal Decree no 30 dated 29 December 1992.

15 Such a system typically excludes from the benefit of the VAT exemption warehousing used exclusively for storage, although the presence of an office space within the warehouse has been included, provided certain conditions are met (see Decision no 84.364, 29 September 1995).

16 The absence of a definition is a common factor that the Belgian provisions share with the VAT Directive.

17 See eg preliminary ruling no 300.116 dated 21 August 2003.

scope of transactions subject to VAT; the abovementioned circular has provided guidance and details that have been used over time and that, to some extent, are still used today.[18]

Because of the financial consequences of the VAT exemption in the real estate sector for taxpayers, practices to develop *sui generis* agreements not meeting the conditions to qualify as letting of immovable property under the Belgian Civil Code (and, therefore, subject to VAT) have developed,[19] together with the use of those legal forms that were expressly taxable under the Belgian VAT Code, either because they are specifically excluded from the VAT exemption provision[20] (such as warehousing facilities or financial leasing of facilities) or because they are finding their grounds in other provisions of the VAT Code. Amongst those, the right to exercise an economic activity, considered as a supply of services under Article 18, para 1, 6° of the Belgian VAT Code, has been prevalent, especially in certain sectors, such as (but not limited to) shopping malls and office spaces.[21]

II. The *Temco* case and its collateral effects in Belgium

Since the beginning of the year 2000, and at the initiative of the European Commission,[22] questions relating to the interpretation to be given to the terms 'leasing or letting of immovable property' have literally invaded the bench of the Court of Justice of the European Union. This was initially an attempt by the European Commission to tackle what were considered to be constructions with adverse tax consequences for the Commission's own resources,[23] but then evolved to address more traditional leasing arrangements.[24] In most of these cases, the Court of Justice retained, amongst the decisive criteria, the agreed term of the arrangement to distinguish a transaction comprising the letting of immovable property (in a broad sense) from other activities.[25]

In the *Temco* case[26] the Court of Justice explored new avenues. Temco Europe deducted input VAT on refurbishment works undertaken on a building it owned, arguing that it per-

18 eg to distinguish between taxable provisions of accommodation and the mere letting of furnished housing, or the criteria to be used to consider whether the use of a room in a restaurant or similar provider should fall within the scope of taxation (see, for the former, point 91 of the circular—*contra* Cass, 22 June 2012, F.11.0090.F/1—and, for the latter, points 35 *et seq*).

19 eg when parties to an agreement disregarded the application of the relevant provision of the Belgian Civil Code or introduced specific modalities to contradict the definition as set forth in the Belgian Civil Code. For more detail on such practices, see eg D Stas, *Na 40 jaar btw nog steeds zoveel onzekerheden inzake onroerend goed*, AFT, 2011/12, pp 38–47; W Panis, *De BTW-vrijstelling voor onroerende verhuur: kenmerken, uitsluitingen en alternatieven*, TFR, 275–60.

20 This does not mean that such regimes were not subject to challenge by authorities. See, for example, the case law on the letting of premises and sites for parking vehicles (Case C-173/88 *Morten Henriksen* [ECR] 1989 I-2763 (CJEU) and, in Belgium, Antwerp, 21 March 2006, 2003/AR/2152).

21 See eg D Stas, *Gebruiksovereenkomst kantoren: onroerende verhuur?*, TFR, 197–275.

22 See Case C-358/97 *Commission v Ireland* [2000] ECR I-6301 (CJEU); Case C-359/97 *Commission v United Kingdom* [2000] ECR I-6355 (CJEU).

23 Case C-358/97 *Commission v Ireland* [2000] ECR I-6301 (CJEU), point 22 (we should remind ourselves that the issue at stake was the VAT treatment of tolls collected as consideration for the use of toll roads and toll bridges).

24 See, *inter alia*, Case C-409/98 *Mirror Group plc* [2001] ECR I-7175 (CJEU); Case C-108/99 *Cantor Fitzegerald* [2001] ECR I-7275 (CJEU); Case C-326/99 *Goed Wonen* [2001] ECR I-6831 (CJEU); Case C-275/01 *Sinclair Collis* [2003] ECR I-5965 (CJEU).

25 Case C-326/99 *Goed Wonen* [2001] ECR I-6831, point 52 (CJEU); Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, points 27–30.

26 Case C-284/03 *Temco Europe SA v Kingdom of Belgium* [2004] ECR I-11256 (CJEU).

formed taxable output transactions by allowing three affiliates to carry on their activities in the property by virtue of three distinct transfer agreements. The main characteristic of each agreement was that it was effective for the duration of each transferee's activities but the transferor had the right, at any time, to require each transferee to vacate the premises.[27] The request for a preliminary ruling to the Court of Justice was made by the Brussels Court of Appeal. Before the lower court, the taxpayer successfully argued that these agreements were not to qualify as exempted letting of immovable property because of the precarious character of the rights granted to the transferees.[28] The Court of Justice held in November 2004 that the transactions as described, having as their essential objective making available, in a passive manner, premises or parts of buildings, in return for a payment linked to the passage of time, were transactions comprising the letting of immovable property within the meaning of the provisions of the VAT Directive, and not the provision of a service capable of being categorised in a different way. It further applied, in its reasoning, settled case law confirming that exemptions shall have their own independent meaning in Community law and must therefore be given a Community definition.[29] These were rather firm statements that had unexpected consequences for the real estate sector in Belgium.

The first unexpected turn of events was the time the tax authorities took to analyse the consequences of the *Temco* case. The Minister of Finance repeatedly pushed back answering questions from parliament members on this topic;[30] statements finally came in November 2005 and May 2006.[31] The Minister indicated that the Belgian position regarding the VAT treatment of the letting of immovable property was only based on the Civil Code definition and that such an interpretation was too restrictive considering the case law of the Court of Justice rendered since 2000. However, the Minister only derived consequences of this statement for one specific area: the VAT treatment of domain concessions (*concession domaniale*). The traditional approach taken by the tax authorities was to exclude domain concessions from the definition of the letting of immovable property. This completely changed in November 2005: when conditions as described by the case law of the Court of Justice are met, such arrangements shall be treated as the letting of immovable property.

This change was later reinforced by the Court of Justice in the *CO.GE.P.* case in 2007,[32] which held that a legal relationship under which a person has been granted the right to occupy and use, including exclusively, public property, namely areas of State maritime property, for a specified period and against payment, is covered by the concept of 'leasing or letting of immovable property' within the meaning of the VAT Directive. Considering that this would harm competition for its industries,[33] Belgium decided to change the Belgian VAT Code in

27 *Ibid*, point 6.

28 Civ Bruxelles, 29 November 2000, RG no 97/7739/A.

29 See, *inter alia*, the cases referred to in *Temco* (n 26) at point 16.

30 Oral question no 5064 from Mr Goyvaerts dated 19 January 2005, Question no 731 from Mr Arens dated April 2005 and Question no 773 from Mr Fournaux dated May 2005 were left almost unanswered.

31 Question no 1272 from Mr Wathelet dated 3 May 2006. In his reply, the Minister only confirmed that the passive character is the key factor in appreciating the concept of the letting of immovable property.

32 Case C-174/06, *CO.GE.P* [2007] ECR I-09359 (CJEU). It is interesting to note that the Belgian ruling commission in a ruling dated May 2007, only a couple of months prior to the *CO.GE.P* case, ended up considering that constructions formalised under domain concessions could be considered as falling under the right to exercise an economic activity and, therefore, be subject to VAT (Preliminary Decision no 600.298, 29 May 2007).

33 See eg Oral question no 4288 from Mr Verherstraeten dated 11 May 2011.

order to exclude a number of concessions from the scope of the VAT exemption.[34] This represents a further step in adopting domestic measures reducing the scope of the VAT exemption, as authorised by the VAT Directive.

Surprisingly, the old administrative position applicable to the concession to extract goods[35] has not been revised; therefore, parties are still free to determine the VAT treatment applicable by reference to the contractual framework.

The second consequence is that many Belgian jurisdictions[36] have revisited established positions by approaching transactions exempted from VAT through the prism of the *Temco* case, and have often arrived at the same results. In such judgments or decisions, the definition of the letting of immovable property was based exclusively on the autonomous Community definition provided by the Court of Justice of the European Union, with explicit reference to the passive nature of the operations at stake. As an example, the Court of Appeal of Antwerp held that ancillary cleaning and laundry services provided to tenants of apartments do not affect the merely passive nature of the activity and, hence, such activity shall be VAT exempt.[37]

A third consequence, which may be seen as a collateral effect, is that many rulings of the tax authorities (and even one decision by our Supreme Court) on the business centres sector have referred to the *Temco* case. Belgian policymakers developed, coincidental to the *Temco* case, a framework for the activities of so-called 'business centres'; provided that a number of well-defined services are rendered to the users of business centres, their activities will be considered not as the letting of immovable property but as taxable activities.[38] *Temco* played a role in the refusal of the Belgian Supreme Court to raise a preliminary ruling before the Court of Justice of the European Union in the *Mons Expo* case involving transactions similar to those of business centres[39] in 2010. The Supreme Court referred only to the Community definition of the letting of immovable property as provided by the Court of Justice of the European Union to appreciate the nature of transactions, disregarding Belgian law concepts that had developed

34 New provision of Art 44, para 3, 2°, a of the Belgian VAT Code excludes from the exemption the 'letting' of immovable property by nature in the exploitation of ports, navigable channels and airports (introduced in 2009).

35 Administrative circular 73-004/2 dated 12 January 1973 provides that the VAT treatment of such transactions depends on the contractual framework: either the parties consider that they fall under the definition of letting of immovable property (and are, therefore, VAT exempt) or they consider that it is a taxable supply of goods to be extracted (see also Administrative Decision ET 33.856 dated 8 February 1980).

36 See eg Gent, 9 January 2007, FJF, no 2007/201; Civ Bruxelles, 3 September 2007, FJF, no 2008/95.

37 Antwerp, 13 May 2008, no 2006/AR/2069.

38 See the conditions set out in administrative circular no 39/2005 (ET 108.816) dated 27 September 2005. The development of a such regime is not linked to the *Temco* case, as it was introduced after the *NV Becolab* case heard by the Brussels Court of Appeal on 3 March 2005 (no 2002/AR/79), which had to distinguish between the VAT exempted letting of immovable property (defined by reference to the conditions provided by the Belgian Civil Code) and the taxable right to exercise an economic activity. The regime was further confirmed by recent ruling decisions (see eg Decision no 2010.392, 21 December 2010). One may find some benefit in the application of such a regime, at least for those operating such business centres. It is still unclear whether it will apply in situations where, for example, the operator is, by nature, a VAT exempt taxpayer. One may think of situations such as where lawyers (who are still considered as VAT exempt taxpayers in Belgium—see Art 44, para 1, 1°) who own a property let spare office space, together with ancillary services complying with those required under the business centres circular: should such situations be captured by the circular and be subject to VAT (and in practice, is this done, and even more importantly audited consistently?) or would other exemptions provisions come into play (eg the cost-sharing exemption or even VAT unity mechanisms)? This is one practical issue but potentially involves three different tax regimes (and associated compliance).

39 Cass, 4 June 2010 (C.09.0285.F), FJF, no 2011/50.

over the years, as though they were no longer relevant and the discretionary powers to appreciate the extent of the exemption had simply disappeared.

III. The decision of the Brussels Court of Appeal following the preliminary ruling, and subsequent Supreme Court decision

Following the decision of the Court of Justice in *Temco*, the case was referred back to the Court of Appeal of Brussels. The decision of the Court of Justice was rather affirmative and self-serving:[40] the Court made it clear that the transactions at stake in the *Temco* case should, from a Community law point of view, be treated as the letting of immovable property; the reference to the national court's discretion to apply the Court of Justice's judgment to the national situation was seen by many as rather formal. To the contrary, the Brussels Court of Appeal held on 15 June 2011[41] that the taxpayer rightly considered its activities as not falling within the scope of the European definition[42] of the letting of immovable property, based on the non-exclusive character of the disposal. The reasons provided differed from those offered by the lower court, which considered the precarious nature of the agreement as the key distinguishing element from the letting of immovable property, but the outcome was the same: the transfer agreements conferred a right to deduct to the transferor as they are not captured by the definition of the letting of immovable property. By so doing, the Brussels Court of Appeal has not properly justified its decision, as it failed to examine whether the disposal was exclusive towards third parties. That is, at least, what the Belgian Supreme Court considered in its decision dated 6 June 2013.[43] The case is therefore to be re-judged in front of another court of appeal. Uncertainties remain.

IV. What should Belgium be doing to improve legal certainty?

The above tends to demonstrate that the development of a Community interpretation made by the Court of Justice of the European Union may lead to the creation of more legal uncertainty than anything else in the real estate sector, where Member States have preserved a significant degree of autonomy.

When confronted with unexpected consequences such as those of the *Temco* case, Member States, and Belgium in particular, should take appropriate measures rather than using a trial-and-error method;[44] given the provisions of the VAT Directive in this matter, Member States should give priority to changing the provisions of their domestic law. On the other hand, reducing the scope of the exemption and implementing the option to tax in the field is

40 For the avoidance of doubt, this does not mean that the authors believe it was the right one.

41 Bruxelles, 15 June 2011, no 2011/AR/20.

42 Amand's comment that such a transaction did not fall under the Belgian Civil Code definition of what should constitute the letting of immovable property is interesting as it fosters a debate on whether Belgian policymakers have put too much emphasis on a particular decision of the Court of Justice (see Amand (n 8) 873; Stas (n 9) 42).

43 Cass, 6 June 2013, no F.12.0005.F (not yet published).

44 The recent administrative circular published to address the particular situation of shopping malls should be noted (administrative circular no 34/2012 (ET 99.377) dated 29 October 2012): it provides many derogations and discretionary powers for the authorities in a sector where practices have often lacked consistency.

certainly possible[45] (but precedents should not be disregarded[46]). Whether the introduction in the domestic law of particular Member States of a stand-alone definition of the concept of letting of immovable property is feasible remains to be seen.[47] Such interventions should always target legal certainty for taxpayers and within the overall objectives of the VAT system. In that context, the recent *BLM* case[48] should be pointed out: it has the merit of re-stating a clear definition of the characteristics of the letting of immovable property by pointing to three elements: (i) payment of rent, (ii) period of time, and (iii) the right to occupy the rented space and to exclude all other people. Such criteria were those used by the Court of Appeal of Brussels to define the absence of letting of immovable property in the *Temco* case.

Upon clarification of such basic concepts, it will then be time to progress to other Loch Ness monsters of the VAT system in the real estate sector, and they are many—the consequences of the recent *Field Fisher Waterhouse* case[49] on the Belgian situation being just one, unresolved, example.

45 As the CJEU stated in the *MacDonald Resorts* case, when assessing time-sharing arrangements, these may well fall within the definition of (exempted) letting of immovable property but Member States have the opportunity to exclude them from the exemption should they be willing to do so (Case C-270/09 *MacDonald Resorts Ltd* [2010] ECR I-13179, point 52).

46 In that respect, the recent decision (22 June 2012) of the Belgian Supreme Court dealing with the VAT treatment of furnished houses should be noted (Cass, 22 June 2012, F.11.0090.F, p 20). The Court suggested that the criteria provided under the Belgian administrative circular of 1973 (ie whether the services are of the same nature as those developed in the hotel sector) should be disregarded and replaced by the Community law definition. Should this interpretation be correct, the effectiveness of the discretionary power granted to Member States to reduce the scope of the exemption would be significantly reduced.

47 See Amand (n 8) 873; Stas (n 9) 42.

48 Case C-346/10 *BLM* (CJEU, 29 March 2012), not yet published.

49 Case C-392/11 *Field Fisher Waterhouse LLP* (CJEU, 27 September 2012), not yet published.