Belgium: Recent and Pending CJEU Cases 2020/2021

Edoardo Traversa/Gaëtan Zeyen

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1. Introduction

The present contribution analyses the judgments *BJ* (15 July 2020, C-241/20) and *Commission v. Belgium and Magnetrol)* (16 September 2021, C-337/19) and the pending cases *Orde van Vlaamse Balies* (C-694/20), *Pharmacie Populaire* (C-52/21 & C-53/21) and *VP Capital* (C-414/21). Also filed during the covered period was the case *AirbnB Ireland* (C-674/20), dealing with the application of EU directives on electronic services (Directive 2000/31/EC and Directive 2006/123/EC) to procedural tax obligations adopted by the Brussels region and imposed on platforms acting as intermediaries for accommodation services.[1] For additional comments, we refer to the chapter on the Italian case in this book (a similar case was also filed by the Italian Council of State).[2]

2. Commission v. Belgium (Magnetrol International) (C-337/19)

2.1. Facts and legal background

Until 2004, multinational enterprises could secure an advance ruling on profit allocation and/or the arm's length character of pricing arrangements regarding cross-border related-party relationships.
Belgian tax authorities intended to ensure that only arm's length profits of a Belgian entity of a multinational group would be subject to taxation. Profits in excess of those arm's length profits and which were derived from synergies, economies of scale and other benefits, due to the Belgian entity being part of a multinational group ("excess profits"), were considered exempt from Belgian taxation and allocated to other group entities outside Belgium (without identifying them).[3]
Belgian tax authorities applied a two-step calculation to determine the amount of those "excess profits". First, the taxpayer would provide a transfer pricing report explaining how the Belgian group entity and its associated enterprises charged arm's length prices in their transactions. Second, a further report provided by the taxpayer would establish, under the transactional net margin method, the amount of "excess profits" corresponding to the difference between the amount of residual profit and the profit that a comparable standalone company would have made in circumstances similar to those of the entity without being part of a

1 Request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 10 December 2020 – Airbnb Ireland UC v Région de Bruxelles-Capitale, case C-674/20.
2 Case C-83/21, Airbnb Ireland UC, Airbnb Payments UK Ltd v Agenzia delle Entrate – Preliminary Ruling.
3 Response of the Finance Minister to parliamentary questions, see minutes of the Commission on Finance and Budget of 13 April 2005, CRABV 51 COM 559 – 19 and minutes of the Commission on Finance and Budget of 11 April 2007, CRABV 51 COM 1271 – 06.

multinational group. The taxpayer would then request an advance ruling[4] from the Belgian tax authorities to adjust the profits taxable in Belgium accordingly via a "correlative adjustment".

On 11 January 2016, the Commission adopted a negative State aid decision ordering Belgium to proceed with recovery from 55 beneficiaries.[5] When assessing whether the excess profit exemption entailed State aid, the Commission focused on the question whether it granted a selective advantage. The Commission proceeded with the three-step test now detailed in its Notice on the notion of State aid:[6] it (i) determined the reference system for the assessment of the selective advantage; (ii) established whether the measure in question constituted a derogation from that reference system; and (iii) assessed whether that derogation was justified by the nature and general scheme of the reference system.

According to the Commission, the relevant reference framework was the Belgian corporate tax system and, in particular, art. 185 § 1 Belgian Income Tax Code ("BITC"), which provides that the total amount of profits of companies is taxed. The Commission stated that this principle applies to all companies resident or operating through a permanent establishment in Belgium, so also to companies that are part of a multinational group.

The Commission concluded that the excess profit exemption derogated from this principle by differentiating between entities that are part of a multinational group (for which the exemption is available) and standalone entities or entities forming part of domestic corporate groups (for which it is not available). The Commission refused to consider that the excess profits system constituted an application of the arm's length principle (Article 9 of the OECD Model). It highlighted the lack of consistency in the choices of Belgian tax authority regarding transfer-pricing methodologies. It further pointed out, in relation to Belgium's argument regarding the avoidance of double taxation, that Belgian tax authorities neither required excess profits to be included in the tax base of an associated foreign-group entity in another tax jurisdiction nor that those profits had to be effectively subject to taxation by that other jurisdiction. It ultimately decided that the excess-profit tax-ruling system constituted an aid scheme that was illegal under EU State aid rules.

On 14 February 2019, the General Court annulled the 2016 Commission's decision in the Belgian excess profits State aid case mainly on the ground that the Commission was wrong to identify an aid scheme[7] under Article 1(d) of the Procedural Regulation 2015/1589.[8] In particular, the General Court considered that the conditions to evidence the existence of an aid scheme[9] were not met, namely (i) the absence of need for implementing measures because the aid scheme contains all essential constituting elements,[10] (ii) the absence of need for implementing measures or margin of discretion regarding the essential elements of the aid and whether it should be granted or not,[11] and (iii) a definition of the beneficiaries in a general and abstract manner, even without time or amount limitations.[12]

The Commission filed an appeal against the General Court's decision before the Court of Justice.

2.2. The judgment of the CJEU

The Court of Justice, in line with the opinion of Advocate General Kokott,[13] reversed the ruling of the general Court and concluded that the measure at stake constituted an "aid scheme" under Article 1(d) of the Procedural Regulation 2015/1589.[14]

According to the Court, "the General Court failed to take account of the fact that (…) one of the essential characteristics of the scheme at issue, as identified by the Commission in the decision at issue, lay in the fact that the Belgian tax authorities had systematically granted the excess profit exemption".[15] Therefore, the

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4 The law of 24 December 2002 amending the corporate income tax system and establishing an advance tax ruling system, published in the State Gazette of 31 December 2002, p. 58817.

5 Case SA.37667, *Belgium – Excess Profit Tax Ruling System*, Negative decision with recovery, 11 January 2016, (OJ L 260, 27 September 2016), (hereafter the "Commission Decision").

6 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19 July 2016.

7 GC, 14 February 2019, T-131/16 and T-263/16, *Belgium, supported by Ireland and Magnetrol International c/European Commission*, EU:T:2019:91; Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) implemented by Belgium (OJ 2016 L 260, p. 61).

8 GC, 14 February 2019 T-131/16 and T-263/16, *Belgium, supported by Ireland and Magnetrol International c/European Commission*, EU:T:2019:91.

9 Ibid., paras. 70–135.

10 Ibid., para. 86.

11 Ibid., para. 87.

12 Ibid., para. 88.

13 Opinion of Adv.-Gen. Kokott delivered on 3 December 2020.

14 CJEU, 16 September 2021, C-337/19 P, *Commission v. Belgium (Magnetrol International)*, ECLI:EU:C:2021:741.

15 Ibid., para. 95.

contested tax rulings are part of the "acts" constituting the scheme and are not merely implementation instruments.
Moreover, the Court also stated that even if "the Commission considered that it was the *contra legem* application of Article 185(2)(b) of the CIR 92 in the context of a consistent administrative practice on the part of the Belgian tax authorities which formed the basis of the scheme at issue", "that finding cannot be called into question by the mere fact that those tax authorities also applied that provision in situations which did actually fall within its scope.".[16]
Finally, the CJEU considered that the Commission had correctly established that the beneficiaries of the scheme had been defined in a "general and abstract manner".[17]
However, the Court also admitted that "the state of the proceedings does not permit final judgment to be given as regards the pleas alleging, in essence, the incorrect classification of the excess profit exemption as State aid within the meaning of Article 107(1) TFEU", in particular as regards the existence of a selective advantage. Therefore, it decided to refer the case back to the General Court.
From a pure tax perspective, the Court's judgment does not allow any conclusions to be drawn as regards the final outcome of the case, even if there are elements in the Court's approach that show a more sympathetical stance towards the Commission's position. The long saga of fiscal State aid cases is thus far from over.[18]

3. BJ (C-241/20)

3.1. Facts and legal background

On 15 July 2021, the CJEU decided on the *BJ* case, on a preliminary question by the Tribunal of first instance of the Province of Luxembourg (Belgium). This case dealt with the application of the Belgian-Luxembourg tax treaty and the Belgian Income Tax code articles providing for the exemption method for foreign sourced income.[19]
BJ was a Belgian resident, employed in the Grand Duchy of Luxembourg from 2006 to 2010. His salary was taxed in Luxembourg according to article 15, § 1 of the Belgian-Luxembourg tax treaty (DTT). He also owned real estate in both States, which was rented out, giving rise to rental income taxable in Belgium and Luxembourg depending on the location of the immovable property (article 6, § 1 of the DTT). Most of his income was sourced in Luxembourg (only 6 %–8 % of the total income originated from Belgium).
According to article 23, § 2, 1 of the DTT, Belgium had to apply an exemption of the Luxembourg sourced income with progression. Article 155 BITC provides that income exempted under international conventions for the avoidance of double taxation is to be taken into account for the purposes of calculating the domestic tax, but the tax is to be reduced according to the proportion of the exempted foreign income to the overall income.
The Belgian Tax Authorities therefore included the exempted income in the taxpayer's overall income to calculate the progressive tax rate and then decreased the tax due by a reduction for foreign sourced income pursuant to article 155 BITC. However, the tax authorities first applied other tax reductions such as the tax reductions for the tax-free bracket (Art. 131 BITC) and in respect of premiums for long-term savings and of costs incurred for energy savings (Art. 145 BITC). Referring to the *Jacob and Lennertz* case,[20] BJ considered that this method of calculation led him to lose part of the tax advantages that he would have received if he had only obtained Belgian sourced income.

3.2. The judgment of the CJEU

The CJEU predictably, in accordance with previous case law (ECJ 14 March 2019, C-174/18, *Jacob et Lennertz*), ruled that the free movement of workers precludes the application of domestic tax provisions that result in a taxpayer resident in that Member State losing, in the context of the calculation of his income tax

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[16] Ibid., para. 115.
[17] Ibid., para. 123seq.
[18] See J. Luts & P. M. Sabbadini, Evaluation institutionnelle des actions de la Commission en matière d'aide d'Etat contre la concurrence fiscale, *Revue des affaires européennes*, vol 2018, n° 4, 2019; pp. 627-653. For an account of the evolution of the approach of the European Union to tax competition, see E. Traversa & P. M. Sabbadini, *State-Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax Policy in Disguise?* In: *EU Tax Law and Policy in the 21st Century*, Werner Haslehner, Georg Kofler, Alexander Rust: Kluwer Law International 2017, pp. 107-134.
[19] CJEU, 15 July 2021, C-241/20, BJ, ECLI:EU:C:2021:605 (English version not available on www.curia.europa.eu – last accessed 17 January 2022).
[20] CJEU, 14 March 2019, C-174/18, *Jacob and Lennertz*, ECLI:EU:C:2019:205.

in that Member State, part of the benefit of the tax advantages granted by that State, on the ground that that taxpayer receives remuneration for the exercise of an employed professional activity in another Member State, which is taxable in the latter and exempt from taxation in the former Member State by virtue of a bilateral convention for the avoidance of double taxation.[21]The Court, in addition, considered that the free movement of capital was also violated because of the existence of real estate income exempted by the treaty. According to the Court, it is for the State of residence to grant all the tax advantages linked to the personal and family situation of the taxpayer. That obligation may be shifted to the State of employment only if insufficient income is earned in the State of residence to grant the tax benefits in question. In other circumstances, that obligation may be waived for the State of residence only if it is ensured that the whole of the personal and family situation is finally and properly taken into account. The Court added that the granting of (equivalent) tax advantages in the country of activity is irrelevant, except if DTC/domestic law explicitly provide for taking them into account.

A voluntary or treaty-based equivalent advantage by the State of employment can relieve the State of residence of its own obligation only if it ensures that the whole situation is finally and properly taken into account. That is not the case where the loss of benefits is automatic or where the benefits granted in the State of employment do not include part of the benefits granted in the State of residence. Nor is it sufficient that the amount of the benefits granted in the State of employment exceeds the amount of the advantages lost in the State of residence (see CJEU, 12 December 2013, C-303/12, *Imfeld et Garcet*, ECLI:EU:C:2013:822).

In this respect, it is worth mentioning that Article 24(4) of the DTT expressly provided that "a natural person resident in Belgium who, in accordance with Articles 7 and 14 to 19, is taxable in Luxembourg on more than 50 p.c. of his professional income shall, at his request, be taxed in Luxembourg, in respect of his income taxable there in accordance with Articles 6, 7 and 13 to 19 of the Convention, at the average rate of tax which, having regard to his situation and family responsibilities and the total of his income generally whatever, would be applicable to him if he were a resident of Luxembourg". However, this provision was not applicable.

4. Ordre van Vlaamse Balies (C-694/20)

4.1. Facts and legal background

The *Ordre van Vlaamse Balies* case concerns the implementation of the DAC 6 Directive[22] into the Belgian federal and regional legislation. Different claims have been lodged with the Belgian Constitutional Court (acting as referring Court), seeking the suspension or annulment, in whole or in part, of the Flemish Decree of 26 June 2020 amending the Decree of 21 June 2013 on administrative cooperation in the field of taxation as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

More precisely, the applicants submit that article 14[23] of the Flemish Decree, transposing Directive (EU) 2018/822, which requires any intermediary bound by professional secrecy to notify any other intermediary or his client, giving reasons that he is unable to comply with the reporting obligation, infringes articles 22 (right to respect for private life) and 29 (secret of correspondence) of the Constitution, whether or not read in conjunction with articles 6 and 8 of the European Convention on Human Rights and with articles 7, 8, 20, 21, 47, 48, 49 and 51 of the Charter of Fundamental Rights of the European Union.

4.2. Preliminary ruling

The request for a preliminary ruling made by the Belgian Constitutional Court raises the question of the compatibility of article 8ab(5)[24] of the DAC 6 Directive with article 7 (right to respect for private life) and

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[21] Authors' own translation from the French version of the judgment.

[22] Council Directive (EU) 2018/822 of 25th May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJEU, 5th June 2018, L.139/1.

[23] Article 14 of the Flemish Decree reads as follows:

§ 1. When an intermediary is bound by professional secrecy, he is required:

1° to notify any other intermediary or intermediaries in writing, giving reasons, that he is unable to comply with the reporting obligation, as a result of which that reporting obligation automatically rests with the other intermediary or intermediaries; 2° in the absence of any other intermediary, to notify the relevant taxpayer or taxpayers of their reporting obligation, in writing, giving reasons. […]"

[24] Article 8ab(5) of the Council Directive of 25th May 2018 states as follows:

article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union, insofar as the directive obliges a lawyer acting as an intermediary to share with another intermediary, not being his client, information which he obtains in the course of the essential activities of his profession, namely representing or defending clients in legal proceedings and giving legal advice, even in the absence of pending legal proceedings.

In its judgement dated 17 December 2020, the Belgian Constitutional Court reminds that the attorney-at-law client privilege constitutes an "*essential component of the right to respect for private life and the right to a fair trial*[25]*"* as well as a fundamental element of the rights of the defence, as the professional secrecy of the attorney-at-law is in fact mainly aimed at protecting the fundamental right of the person, sometimes confiding what he holds most personal, to respect for his private life. For that reason, and even if exceptions exist, the professional secrecy of the attorney-at-law constitutes therefore one of the fundamental pillars on which rests the organization of justice in a democratic society.

As a result, the Belgian Constitutional Court considers that the rules derogating from said professional secrecy must be of *strict interpretation:* it should only be possible to derogate from such principle of professional secrecy in the case of an overriding reason of general interest and which is proportionate.[26]

It is worth noting that the Belgian Constitutional Court has already ruled in previous cases on the constitutionality of reporting obligations imposed on lawyers. By its judgement no.10/2008 of 23 January 2008, the Belgian Constitutional Court ruled on the constitutionality of the obligation, for attorneys-at-law, to transmit information to the Belgian authorities within the framework of the fight against money laundering. The Belgian Constitutional Court held then that the information brought to the attention of the attorney-at-law, on the one hand, in the context of its defense and legal representation activity and, on the other hand, during the assessment of his client's legal situation (which also includes legal advice, as the CJEU acknowledged[27]), is covered by professional secrecy.[28]

The Belgian Constitutional Court also ruled that the information known to the lawyer during the exercise of the essential activities of its profession, namely the defense or legal representation of the client and legal advice, even outside any legal proceedings, remains covered by its professional secrecy and cannot, therefore, be brought to the attention of the authorities. In fact, it is only in case a lawyer exercises an activity that goes beyond his specific mission of defence or representation in court and legal advice that he may be subject to the obligation to communicate to the authorities information of which he is aware[29] (B.9.6). The Constitutional Court confirmed its restrictive interpretation in a more recent judgement of 24 September 2020.[30]

However, in its judgement no43/2019 of 14 March 2019, the Belgian Constitutional Court ruled on the tax obligation, for attorneys-at-law, to send each year to the Belgian tax authorities a list containing various information regarding customers subject to VAT to whom they provided services. According to the Belgian Constitutional Court, such obligation did not violate the professional secrecy of attorneys-at-law, as such a reporting measure appears justified to ensure a proper recovery of VAT and to fight against tax evasion.[31]

In order to reconcile professional secrecy with the effectiveness of the reporting mechanism, it appears difficult to interpret the Directive as forcing lawyers to notify other intermediaries that they should report arrangements made by the client if this notification entails information covered by the client-attorney privilege. A notification to the client should suffice. A question remains as to the lawyer's information duty toward his client: independent of a personal existing obligation directly stemming from the directive, informing the client about the existence and content of such reporting obligations seems to be a matter of professional conscience.

"Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions."

25 Belgian Constitutional Court, 17 December 2020, n° 168/2020, www.const-court.be, para. B.5.5.

26 Belgian Constitutional Court, 17 December 2020, n° 168/2020, para. B.5.7.

27 CJEU, 26 June 2007, C-305/05, *Ordre des barreaux francophones et germanophones,* ECLI:EU:C:2007:383, para.23.

28 Belgian Constitutional Court, 23 January, 2008, n° 10/2008, para. B.9.2 and B.9.3.

29 Belgian Constitutional Court, 23 January 2008, n° 10/2008, para. B.9.6.

30 Belgian Constitutional Court, 24 September 2020, n. 114/2020. The Court ruled that an attorney-at-law cannot be obliged to transmit to the 'Financial Intelligence Processing Unit' (shortly, 'FIPU') a declaration of suspicion, when its client, on its advice, waives a suspicious transaction. Neither may a third party in the relationship of trust between the attorney-at-law and its client, even a lawyer, be allowed to communicate to 'FIPU' information covered by professional secrecy.

31 Belgian Constitutional Court, 14 March 2019, n°43/2019, para. B.9.1 & B.9.3.

5. Pharmacie Populaire (C-52/21 & C-53/21)

5.1. Facts and legal background

The *Pharmacie Populaire* case concerns the freedom to provide services (article 56 TFEU) in a situation where, as regards the deductibility of business expenses, different standards apply for domestic and cross-border situations and their justification.
According to article 57(1)[32] BITC, expenses that constitute for the recipients professional income (whether or not taxable in Belgium) need to be evidenced by the production of individual fee forms and a summary statement, in order to be regarded as deductible business expenses.
According to article 219 BITC,

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a separate levy is provided for in respect of the expenses referred to in Article 57 […] which are not evidenced by the production of individual fee forms and a summary statement […]. That levy is equal to 100 % of those expenses, […] unless it can be shown that the recipient of those expenses, […] is a legal person [or that these sums have been declared by the recipient], in which case the rate is set at 50 %.

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The separate levy is not applicable if (i) the taxpayer shows that the amount of the expenses, referred to in Article 57, […] is included in a tax return filed in accordance with Article 305 BITC or in a similar tax return filed abroad by the recipient or (ii) – wherethe requirement mentioned previously is not met (i.e. inclusion of said expenses in a tax return) – if the recipient has been clearly identified at the latest within two years and six months of 1 January in the tax year concerned.
Article 57(1) BITC requirements are, however, subject to a certain administrative"tolerance",[33] at least for recipients subject to the Belgian Law on business accounting, i.e. most Belgian resident companies, as well as companies having a permanent establishment ("PE") in Belgium. Such administrative tolerance does not apply in the case of a payment made to a non-resident without a PE.
In the case at hand, *Pharmacie Populaire* a company operating in the pharmaceutical market, entrusted a Luxembourg company, Sarl LAD, with the task of carrying out transport schedules for medicinal products. For such services, Sarl LAD invoiced Pharmacie Populaire EUR 21,000, EUR 3,000 and EUR 17,000 respectively for the years 2010, 2011 and 2012. These costs are governed by articles 57(1) and 219 BITC.
The amounts paid by Pharmacie Populaire to Sarl LAD did not comply with the legal requirements of article 57(1) BITC, i.e. neither individual forms nor a summary statement were established and produced. As a consequence, the Belgian tax authorities sent a "correction notice", informing Pharmacie Populaire that it intended to make the sums in question subject to the separate levy, in accordance with article 219 BITC.
The Belgian tax authorities motivated its decision of 23 November 2015 as follows:

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the reason for the planned corrections is not based on the fact that the transactions were not carried out in good faith or that the corresponding services were not actually provided, but on the fact that Pharmacie populaire has not completed individual fee forms 281.50 relating to the sums paid to the LAD Sarl and that it also has not established that the amount of the expenses, covered by Article 57, is included in a tax return filed by the recipient in accordance with Article 305 or in a similar return filed abroad by the recipient.

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[32] Article 57(1) BITC provides that expenses (such as fees, commissions, advantages of any kind, etc. that constitute for the recipients professional income, whether or not taxable in Belgium) are only regarded as deductible business expenses, if they are evidenced by the production of individual fee forms and a summary statement drawn up in the form and within the time limits determined by the government.

[33] This administrative' tolerance results from the *travaux préparatoires* (See: Sénat, Session 1979-1980, doc.483/9, 34) and is confirmed in the administrative comment on the BITC, 57/62.

5.2. Preliminary ruling

Pharmacie Populaire lodged an administrative complaint, which was declared unfounded and, therefore, rejected. A legal action was brought before the Tribunal of first instance of Liège and based on the mere argument that said administrative "tolerance", by not benefiting non-resident companies, could constitute an infringement of article 56 TFEU, as the combination of articles 57 and 219 BITC creates an additional administrative burden for recipients of non-resident companies. Said legal action was also declared unfounded.

An appeal was filed with the Court of Appeal of Liège, which addressed to CJEU the following preliminary request:

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Is Article 56 of the Treaty on the Functioning of the European Union to be interpreted as precluding legislation, or a national practice, under which companies established in one Member State which use services of companies established in another Member State are required, in order to avoid a corporation tax levy of 100 % or 50 % of the sums invoiced by the latter, to complete and submit to the tax authorities individual fee forms and summary statements relating to those expenses whereas, if they use the services of resident companies, they are under no such obligation in order to avoid that levy?

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To a very limited extent, the *Pharmacie Populaire* case is reminiscent of the Belgian *SIAT*[34] case, as both cases examine the legal conditions to be met in order to have expenses incurred as payment (made to non-residents in both cases) for the provision of services regarded as deductible business expenses and, as a consequence, the compatibility of the Belgian legal provisions, establishing such conditions, with article 56 TFEU. In the *SIAT* case, the Belgian legal provision in dispute was article 54[35] BITC (and not article 57(1) BITC, as in the case at hand), which subjects the deductibility (as business expenses) of payments for services made to a non-resident (or a foreign PE) to the evidence that such payments "*relate to a genuine and proper transactions and does not exceed the normal limits.*"[36]

In contrast, in the *Pharmacie Populaire* case, the special provision in dispute is article 57(1) BITC, which subjects the deductibility of business expenses (that constitute for the non-resident recipients professional income) to the mere production of individual fee forms and a summary statement. In other words, in the *Pharmacie Populaire* case, the *good faith* of the payments in dispute or, more precisely, the circumstance that such transactions were eventually not "genuine", "proper" or were eventually "exceeding the normal limits" was neither questioned nor a legal issue to be examined in order to establish the deductibility of said expenses. This is at least one of the reasons why the *Pharmacie Populaire* case must be distinguished from the *SIAT* case.

In the present case, the non-compliance with the formal requirements set forth in article 57(1) BITC led to the application of above-mentioned separate levy (article 219 BITC), without the possibility for non-resident recipients to benefit from the administrative tolerance (said "tolerance" only applies for resident recipients subject to the Belgian Law on business accounting). According to Pharmacie Populaire such *difference in treatment* constitutes a violation of article 56 TFEU, as the combination of articles 57(1) and 219 BITC creates an additional administrative burden for recipients of non-resident companies.

Thus, according to Pharmacie Populaire the potential violation of article 56 TFEU results not from the legal provision itself (particularly, as article 57(1) BITC expressly states that it applies to professional income of recipients, "*whether or not taxable in Belgium*"), but from the mere circumstance that said administrative "tolerance" does not benefit recipients of non-resident companies.

The Minister of Finance expressly acknowledged that there might be an issue of compatibility with EU law, in an answer to a parliamentary question of 22 October 2014 where he declared that "my administration is

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34 CJEU, 5 July 2012, C-318/10, *SIAT*, ECLI:EU:C:2012:415.

35 Article 54 BITC reads as follows: "*Interest, fees for granting use of patents, manufacturing processes and other similar rights or payments for supplies or services shall not be regarded as business expenses where they are made or attributed, directly or indirectly, to a taxpayer as referred to in Article 227, or to a foreign establishment, which, by virtue of the legislation of the country of establishment, is not subject there to a tax on income or is subject there to a tax regime which is appreciably more advantageous than the applicable tax regime in Belgium, unless the taxpayer proves, by any legal means, that such payments relate to genuine and proper transactions and do not exceed the normal limits.*"

36 CJEU, 5 July 2012, C-318/10, *SIAT*, ECLI:EU:C:2012:415, para.22 and 23.

currently examining to what extent administrative tolerance should be reviewed in the context of a possible barrier to the freedom to provide services and to the EU directive on exchange of information".[37]
According to that provision, the separate levy is not applicable if (i) the taxpayer shows that the amount of the expenses, referred to in Article 57, […] is included in a tax return filed in accordance with Article 305 BITC or in a similar tax return filed abroad by the recipient or (ii) – where the requirement mentioned previously is not met (i.e., inclusion of said expenses in a tax return) – if the recipient has been clearly identified at the latest within two years and six months of 1 January in the tax year concerned.
As regards the condition of [establishing and] keeping business accounts, the CJEU has already ruled that such condition "*may constitute a restriction on the freedom of establishment*[38]*"* and is in principle 'prohibited',[39] unless such a measure pursues "*a legitimate aim compatible with the Treaty and justified by pressing reasons of public interest.*[40]" In the present case, it is noteworthy that the sole condition to be met in order to avoid the application of the separate levy is the establishment and production of individual fee forms and a summary statement, formalities that may be regarded by the Belgian tax authorities as absolutely necessary to ascertain clearly and precisely the determination of the income/profits/expenditure and, therefore, the correct calculation of the taxable income.[41] In other words, such formalities can be justified "*by the need to ensure the effectiveness of fiscal supervision.*[42]"
In the *Persche* case, which examined the conditions to be met in order to have gifts made to bodies recognised as charitable and situated in another Member State deductible, the CJEU also admitted that "*Nothing would prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested*[43]*"* and therefore authorising a Member State "*to apply measures enabling it to ascertain in a clear and precise manner whether the body meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report.*"[44]
However, in the latter case, the CJEU also clearly stated that "any administrative disadvantages arising from the fact that such bodies may be established in another Member State are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such bodies the same tax exemptions as are granted to national bodies of the same kind.[45]"
Considering those previous cases, it would not be surprising if the Court would consider that Belgian legislation violates EU law, in particular where the taxpayer manages to establish that expenses fulfil the substantial conditions under domestic law to be considered as deductible business expenses.

6. VP Capital (C-414/21)

6.1. Facts and legal background

The *VP Capital* case relates to the freedom of establishment (article 49 TFEU) and concerns a dispute with the Belgian tax authorities regarding the tax treatment in Belgium of the write-back of write-downs on shares recorded in Luxembourg before the company transferred its registered office to Belgium.
VP Capital is a company incorporated and having its registered office in Luxembourg. It held 100 % participation in a Dutch company and recorded a series of write-downs on shares of that company and other unrelated companies. Theoretically, VP Capital could deduct these write-downs from its taxable income in Luxembourg, but in practice was unable to benefit from such deduction due to a tax loss carryforward for an amount of EUR 89,587,962. (recorded on 30 April 2009).

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37 Anwer to a Parliamentary question n° 8 by Mrs Veerle Wouters of 22 October 2014 Belgian House of Representatives, Questions and Answers, 2014-2O15, QRVA 54/003, 8 December 2014, p. 168 available on www.lachambre.be.
38 CJUE, 15th May 1997, C-250/95, *Futura Participations SA*, ECLI:EU:C:1997:239, para. 24.
39 CJUE, 15th May 1997, C-250/95, *Futura Participations SA*, ECLI:EU:C:1997:239, para. 26.
40 CJUE, 15th May 1997, C-250/95, *Futura Participations SA*, ECLI:EU:C:1997:239, para. 26.
41 See also CJEU, 8th July 1999, C-254/97, *Baxter & Co.*, ECLI:EU:C:1999:368, para. 18 ("*The Court has repeatedly held that effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty […]. A Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely.")*; CJEU, 10th March 2005, C-39/04, *Laboratoires Fournier SA*, ECLI:EU:C:2005:161, para. 24.
42 CJEU, 5 July 2012, C-318/10, *SIAT*, ECLI:EU:C:2012:415, para. 43.
43 CJUE, 14th October 2008, C-318/07, *Persche*, ECLI:EU:C:2009:33, para. 54.
44 CJUE, 14th October 2008, C-318/07, *Persche*, ECLI:EU:C:2009:33, para.55.
45 CJUE, 14th October 2008, C-318/07, *Persche*, ECLI:EU:C:2009:33, para.55.

On 1 May 2009, the company transferred its registered office to Belgium without maintaining a PE in Luxembourg, thereby being converted into a company governed by Belgian law. After said transfer, the company made a write-back of certain write-downs.
In 2011, the Belgian tax authorities sent 'VP Capital' an adjustment notice (Corporate Tax Return) for the 2010 assessment year, informing the company that the increase in the opening balance of the reserves due to the write-backs would be cancelled and the write-backs would be taxed. As a result, the Belgian tax authorities issued in 2012 a supplementary Corporate Tax Assessment for an amount of EUR 15,965,680.
The position of the Belgian tax authorities is based on article 206 BITC, which excludes the deductibility of previous professional losses incurred either through foreign assets or in a foreign PE (article 206(1) BITC), when a foreign company (in the case at hand, Luxembourg) transfers its registered office (or its principal place of business or its effective place of management) in Belgium (article 206(3) BITC). In the case of such a transfer [of a registered office] to Belgium, the gains and losses subsequently realized in respect of the assets attached to a foreign establishment or the assets located abroad and held by that company must be determined on the basis of their book value at the time of the transfer (article 184*ter*, § 2, al.2 BITC, provision which establishes the principle of tax 'discontinuity').
As a consequence, according to the Belgian tax authorities, the write-back in Belgium of the write-downs previously recorded in Luxembourg should not be considered as such, but rather, as an "*expressed but unrealised capital gain*", according to article 44, §1, 1 BITC. Such type of capital gain may be exempt from tax provided a so-called "intangibility condition" (the respect of which implies that the capital gain must be allocated to a separate liability account, and therefore not available for distribution in any form whatsoever) is fulfilled (see article 190(2) BITC).
VP Capital challenged Belgian tax authorities' view, and argued that the above-mentioned "intangibility condition" constitutes a restriction for non-Belgian companies, which recorded write-downs on shares outside Belgium but which ultimately could not actually deduct them from their taxable income either in Belgium or in the State of departure because of both the loss position it was in and the impossibility of transferring the losses to Belgium.
In comparison, according to Belgian tax law, Belgian companies are able to record write-downs without facing any such obstacle, and may subsequently make write-backs, which are tax free, provided the write-downs had not been previously deducted from their taxable income. There is, therefore, an objective difference in treatment which is not justified.

6.2. Preliminary ruling

As a consequence, VP Capital addressed to the Belgian *Cour de Cassation* the following preliminary request:

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Does freedom of establishment, as guaranteed by Article 49 TFEU, preclude national legislation, such as that at issue here, where it results in a Luxembourg company which records write-downs on shares in Luxembourg and which, although deducting those write-downs in principle from its taxable income, cannot actually deduct them from its taxable income because of the existence of a tax loss position, being taxed on the write-back of those write-downs in Belgium following the transfer of its registered office to Belgium, unless the increases in value masked by that write-back are allocated to a liability account not available for distribution, whereas a Belgian company which has recorded write-downs on shares in Belgium is not taxed on the write-back of those write-downs, provided that the write-downs had not been previously deducted from its Belgian taxable income, without needing to allocate the increases in value masked by that writeback to a liability account not available for distribution?

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In the case at hand, the referring court – the Belgian *Cour de cassation* – refers to the *Aures Holdings*[46] case but expressly questions the relevance of said case law to the tax issues in dispute. In the *Aures Holdings* case, concerning a Czech tax provision not allowing a tax loss incurred in the Member State of incorporation (e.g. the Netherlands) *before* the transfer of the tax residency in the Member State of destination (and, therefore, also relating to the freedom of establishment), the CJEU ruled that:

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[46] CJEU, 27th February 2020, C-405/18, *Aures Holdings*, ECLI:EU:C:2020:127.

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1. Article 49 TFEU must be interpreted as meaning that a company incorporated under the law of a Member State, which transfers its place of effective management to another Member State without that transfer affecting its status as a company incorporated under the law of the first Member State, may rely on that article for the purposes of contesting a refusal in the second Member State to defer losses prior to that transfer.
2. Article 49 TFEU must be interpreted as not precluding legislation of a Member State which excludes the possibility for a company, which has transferred its place of effective management and, as a result, its tax residency to that Member State, from claiming a tax loss incurred, prior to that transfer, in another Member State, in which it has retained its registered seat.

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There are, however, significant differences between the *Aures Holdings* case and the present case.
Firstly, in the *Aures Holdings* case, the company – despite the constitution in the State of destination (e.g. Czech Republic) of a permanent establishment carrying out all company's activities – remained governed by the law of the State of incorporation/State of origin (e.g. Netherlands law), as it retained its registered seat and its entry in the commercial register in Amsterdam, whilst in the case at hand, VP Capital becomes governed by the law of the State of destination (e.g. Belgium).
Secondly, in the present case, VP Capital did not maintain a PE in the State of origin/State of incorporation, being converted into a company governed by Belgian law, whilst in the *Aures Holdings* case, a *new branch/PE* carrying out all companies' activities was created in the State of destination.
Thirdly, in the *Aures Holdings* case, the company applied to the Czech tax authorities for deduction of tax losses incurred *before* the transfer of its tax residency[47] (by transfer of its place of "effective management", instead of the transfer of its "registered office", as in the present case), whilst in the present case, VP Capital applied to the Belgian tax authorities for an exemption on profits registered *after* its "full" transfer to Belgium.
In the light of above-mentioned differences, the doubts expressed by the Belgian *Cour de Cassation* as regards the relevance of the *Aures Holdings* case to the tax issues in dispute appear justified.
The starting point should be that EU law does not protect the taxpayer against disparities in corporate tax laws of the Member States in all circumstances. EU law does not automatically imply that "*a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules*[48]*"*.
In the present case, the combination of article 184*ter*, §2, al. 2 and 206 BITC has as consequence that the assets transferred from the State of origin (e.g. Luxembourg) to the State of destination (e.g. Belgium) are regarded as *new assets* that need to be determined on the basis of their book value at the time of the transfer. In other words, the transfer of the registered office from Luxembourg to Belgium '*cancels*' the 'tax history' of the transferred assets.
The question that therefore arises in this context is whether, in order to guarantee/preserve a *full respect* of the freedom of establishment, the Belgian tax authorities have the 'obligation' to recognize previous actions undertaken by the taxpayer in the State of origin,[49] or whether the applicable Belgian tax provisions might be regarded as necessary and justified in order to preserve the '*fiscal coherence'*[50] and '*the allocation of tax powers between two Member States*'[51] and, more particularly, are designed "*to avoid losses being taken into account twice*[52]"?
The Belgian *Cour de Cassation* refers to the *Bevola* case, where the CJEU ruled that a national (e.g. Danish) legislation that excludes any possibility to deduct *definitive losses* incurred by a foreign PE in the State of

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[47] In the *Aures Holdings* case, the company applied for deduction of tax losses incurred in the Netherlands on the basis of the 2007 tax year, whilst the transfer of its place of effective management took place on 1st January 2009 (See: CJEU, 27th February 2020, C-405/18, *Aures Holdings*, ECLI:EU:C:2020:127, para. 10).
[48] CJEU, 29th November 2011, C-371/10, *National Grid Indus*, ECLI:EU:C:2011:785, para. 62; CJEU, 28th February 2008, C-293/06, *Deutsche Shell GmbH*, ECLI:EU:C:2008:129, para. 43.
[49] *Contra*: CJEU, 23rd October 2008, C-157/07, *Krankenheim*, ECLI:EU:C:2008:588, para. 49 & 50.
[50] The maintenance of the coherence of the tax system can constitute a *convincing justification* for a difference in tax treatment (See: CJEU, 12th June 2018, C-650/16, A/S *Bevola,* ECLI:EU:C:2018:424, para. 51).
[51] CJEU, 28th February 2008, C-293/06, *Deutsche Shell GmbH*, ECLI:EU:C:2008:129, para. 48.
[52] CJEU, 28th February 2008, C-293/06, *Deutsche Shell GmbH*, ECLI:EU:C:2008:129, para.49.

residence violates the freedom of establishment. Although in the case at hand[53] – contrary to the *Bevola* case – no business activities were simultaneously carried out in different Member States (for example, through a branch or subsidiary), both question the issue of '*definitive losses*'. According to CJEU's case law, losses attributable to a non-resident PE become '*definitive*',

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when, first, the company possessing the establishment has exhausted all the possibilities of deducting those losses available under the law of the Member State in which the establishment is situated and, second, it has ceased to receive any income from that establishment, so that there is no longer any possibility of the losses being taken into account in that Member State".[54]

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In the case at hand, it is true that the taxpayer was ultimately unable to deduct the write-downs from its taxable income in the State of origin (e.g. Luxembourg) due to a tax loss carryforward and had ceased to receive any income there. However, the impossibility to deduct the write-downs in the State of origin does not result from Luxembourg law as such, but from the fact that due to the transfer or residence, the taxpayer ceased to be subject to Luxembourg tax sovereignty. Moreover, what is at stake here is less the issue of the deduction of previous losses incurred in another MS than the tax consequences of a write-back which has occurred in Belgium.

Beyond the issue of the taking into account of losses, the impossibility for VP Capital to comply with Belgian formal requirements for the exemption of write-backs of write-downs (intangibility condition), due to the fact that at the time the company was not subject to Belgian law but to that of another Member State, could be considered as discriminatory if the taxpayer is able to prove that the substantial conditions for the granting of the exemption under Belgian law are met (absence of distribution, absence of prior effective deduction of write-downs).

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[53] The 'VP Capital' case is featured by a *new start* of the business activities in the host State/State of destination and, therefore, by a clear cut with the State of origin, within the territory of which no PE is maintained.

[54] CJEU, 12th June 2018, C-650/16, *A/S Bevola*, ECLI:EU:C:2018:424, para.64; CJEU, 3rd February 2015, C-172/13, *European Commission v. United Kingdom*, ECLI:EU:C:2015:50, para. 36.