



The CJEU clarifies the application of fundamental freedoms to transfer pricing adjustments concerning permanent establishments

On 8 October 2020, the Court of Justice of the European Union (“CJEU”) issued its judgment in case C-558/19, *Impresa Pizzarotti (Avantage anormal consenti à une société non-résidente)*. The Court concluded that Article 49 TFEU must be interpreted as not precluding, in principle, the transfer pricing legislation of a Member State under which the transfer of money from a local branch (permanent establishment) to its head office established in another Member State may be regarded as a taxable “revenue-generating transaction”, whereas, if the same transaction had been put in place between a branch and its head office both established in the same Member State, that transaction would have not been regarded as a taxable transaction.

The CJEU argued that the difference in the tax treatment of branches based on the place where their head offices are located is liable to constitute a restriction on the freedom of establishment (see, to a similar extent, CJEU, 31 May 2018, case C-382/16, *Hornbach-Baumarkt*, par. 35). Nevertheless, in the case at hand, the CJEU found that the transfer pricing adjustments were justified by overriding reasons in the public interest, as they ensured the balanced allocation of taxing rights between Member States by preventing profits generated in the Member State concerned from being transferred outside the tax jurisdiction of that Member State via transactions not in accordance with market conditions. The Court also found, subject to verification by the national court, that the domestic legislation at stake did not exceed what is necessary to attain the legitimate objective underlying that legislation, since (i) the taxpayer is given the opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification for the relevant transactions and (ii) the income adjustment concerns only the difference between the market price of the transactions and the price actually applied by the parties (see CJEU, 21 January 2010, case C-311/08, *SGI*, par. 71-72).

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