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The CJEU rules on insurance premium taxation: a guide for group insurance taxation?

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On 17 January 2019 the Court of Justice of the European Union (CJEU) issued its decision on case C-74/18, following a reference for a preliminary ruling from the Finnish Supreme Administrative Court. The ruling concerns the definition of the “*Member State in which the risk is situated*” under Article 13(13) of the Solvency II Directive, and aims at determining in which member state insurance premiums shall be taxed.

The facts of the case

The CJEU’s preliminary ruling was issued in the context of a case referring to insurance cover provided via the freedom of services (FoS) regime in Finland by an insurer based in the UK. The insurance products in question provided cover in the context of acquisitions for the loss sustained by the buyer, as a result of the breach of the representations given by the seller (“*warranty and indemnity insurance*”), or in the event that the target company became liable to tax in respect of the period it was owned by the seller (“*tax liability insurance*”). The issue that came up concerned the cases where the policyholder (either the buyer or the seller) was a Finnish entity, while the target company was established abroad; and, in reverse, where the policyholder was a foreign entity and the target company was established in Finland. In such cases the need arose, to determine in which state the relevant premiums would be taxed.

The insurer applied for a tax ruling to the Finnish Central Tax Board (Board), which stated that if the insurance is provided to a Finnish company and the target company is established in another Member State, the insurance premiums are not subject to tax in Finland. By contrast, if the insurance is provided to a foreign company and the target company is established in Finland, the insurance premiums will be subject to tax in Finland. The insurer brought an action against said tax ruling before the Finnish Supreme Administrative Court (Court), which in turn decided to refer the issue to the CJEU for a preliminary ruling on the interpretation of the first subparagraph of Article 157(1) of Solvency II Directive, read in conjunction with Article 13(13) thereof.

The CJEU’s ruling

The Court of Justice ruled that, when an insurance company established in a Member State offers insurance against the contractual risks that relate to the value of the shares of the target company and the fairness of the price paid for the acquisition by the buyer, said insurance, according to the meaning of the above mentioned provisions of the Solvency II Directive, shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State where the policyholder is established, regardless of whether the

target company is established in the same Member State or not.

Apart from the provisions of Article 13(13) and 157(1) of the Solvency II Directive, the Court also took into account the aim of said provisions to propose for all types of insurance a solution making it possible to determine the Member State of the risk on the basis of objective, and not legal, criteria; particularly for risks not related to a building, a vehicle or travel, the EU law provisions aimed to establish a residual rule for this determination. The CJEU also noted that it is important to identify the particular activity, whose risks are covered by the specific insurance, which in the case in question aims to protect either the seller or the buyer against any liability incurred by the target company in relation to the time before its acquisition or, in other words, against a reduction of the shares' value caused by a misrepresentation of the seller.

Potential impact on group insurance premiums taxation?

Taking this CJEU ruling into consideration, it would be interesting to consider whether and on what grounds its reasoning could extend and apply to group insurance taxation, for which, at the moment, there is little to no specific regulation or regulatory guidance. In the case of the main proceedings in C-74/18, the policyholder (i.e. the buyer or the seller of the target company) is also the person bearing the insured risk. However, in group insurance the insurer covers a risk relating to a defined group of people (such as the employees of a particular employer), different from the policyholder. In this sense it is quite common in group insurances for an insurer having its registered seat in a Member State, to enter into a group insurance contract with a company – the policyholder - having its registered seat in the same Member State, which shall cover a risk relating to the policyholder's employees who are located (reside) in another Member State.

In this relevance, it would be interesting to examine if the same reasoning could be followed in group covers, stating that when an insurer established in a Member State provides insurance cover to a policyholder established in the same Member State, but for insureds situated in another Member State, the relevant premiums shall be subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State where the policyholder is established. If the ruling of the CJEU on the above described case is taken into account, Articles 157(1) first subparagraph, read in conjunction with Article 13(13) of the Solvency II Directive, should be interpreted as meaning that the Member State of the policyholder shall be the one where group insurance premiums must be taxed.

Nevertheless, the CJEU, in order to reach its conclusion in the case discussed, took also into account the types of insurance contracts at issue in the main proceedings, in the light of the protection objectives set out by the EU legislator, and noted that said insurance contracts are intended to protect exclusively the policyholder. This however is not literally the case in group insurances which aim to protect the insureds, and not directly the policyholder. In such a case, would the CJEU, looking at the issue from an insurance point of view, abide strictly by the wording of the above Solvency II provisions and rule that the group insurance premiums must be taxed in the policyholder's Member State, or would the protective objective of the relevant provisions be considered to be more crucial and result in the taxation in the insureds' Member State of residence?

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