CMS Rodríguez-Azuero

Tax Bulletin No. 61

March – April 2024

2024

Content

Tax Rulings, Resolutions and Newsletters of the Colombian Tax Authority

1. The DIAN considers that the withdrawal of inventories for self-consumption should not be invoiced.

The Colombian Tax Authority-("DIAN" for its Spanish acronym)- points out that based on Articles 616-1 and 617 of the Colombian Tax Code ("C.T.C") the obligation to issue an invoice implies the existence of two subjects: (i) the party obliged to invoice is, the party who must issue the invoice; and (ii) on the other hand, the purchaser of goods and/or services must demand the invoice.

The DIAN argues that, since in inventory withdrawal operations for self-consumption only the owner of the goods is involved, which for the purposes of the invoice would be the seller, reason why, in these cases the formal duty to issue invoice is not trigger.

Thus, the Tax Authority concludes that the withdrawal of inventories for self-consumption should not be invoiced. The above, bear in mind that the subject must demonstrate the inventory movement.

2. Application of the Audit Benefit for Tax Returns.

In Tax Ruling No 001709, the DIAN analyzes the possibility of applying the audit benefit for the tax return when the taxpayer has used the mechanism "Public Works Tax Deduction" provided in Article 238 of Law 1819 of 2016.

It should be recalled that the audit benefit of Article 689-3 of C.T.C establishes the reduction of the status of limitations of the Income Tax return, subject to compliance with certain requirements. On the other hand, the mechanism of works for taxes allows income taxpayers to pay Income Tax through the execution of public works or public investment projects.

In the first payment modality provided for in Article 238 of Law 1819 of 2016, the obligation is extinguished with the delivery of the project. Therefore, considering that this administrative act takes place at a different time than the filing of the tax return, one of the requirements of the audit benefit is not met, and therefore, it cannot be applied.

For the provisions of the second mode of payment, it is possible to deduct the investment as an effective payment of 50% of the Income Tax. Consequently, in this case, it will be possible to apply the audit benefit, provided that all the requirements established in Article 689-3 of the C.T.C are met.

3. The DIAN clarifies that taxpayers applying the Collective Environmental Plan are not exempt from other taxes.

DIAN points out that, based on the provisions of Article 5 of Resolution No. 1407 of 2018 issued by the Government, it determines who may opt for the Collective Environmental Management Plan for Packaging Waste.

It also clarifies that the Resolution has no relation with the National Consumption Tax on Plastic Bags provided in Article 512-15 of the C.T.C or with the National Tax on Single Use Plastic Products, since the Law did not foresee any mechanism of exemption of such taxes for the companies that are under the collective plan.

Regarding the Value Added Tax ("VAT"), the accounting treatment must be evaluated, considering that, if it decides to sell plastic bags, this sale triggers the collection of VAT together with the National Consumption Tax on plastic bags.

Therefore, it is concluded that the Collective Plan provided in Article 5 of Resolution No. 1407 of 2018 does not exempt the taxpayer from the payment of the National Consumption Tax, VAT, or the National Tax on Single-Use Plastic Products.

4. DIAN clarifies the National Consumption Tax on Plastic Bags ("INCBP" for its Spanish acronym) vis-à-vis Law 2232: What happens with plastic bags in Colombia?

According to the DIAN, the INCBP is generated by the delivery of plastic bags whose purpose is to carry products sold by commercial establishments that deliver them, in accordance with the provisions of Article 512-15 of the C.T.C.

On the other hand, Law 2232 of 2022 established the prohibition on the introduction to the market, commercialization, and distribution, in the national territory, of products that are totally or partially manufactured with single-use plastics, including those produced with oxo-degradable plastic.

Therefore, the prohibition established by Law 2232 of 2022 does not affect the INCBP. In this sense, the INCBP will continue to apply to any type of plastic bag distributed in commercial establishments that is not covered by the bans.

5. DIAN points out that third-party goods entering through an authorized public port are not subject to the provisions of the Free Trade Zone Regime

The DIAN analyzes whether third-party goods entering through an authorized public port are subject to the provisions of the Free Trade Zone Regime.

First, DIAN points out that, from the scope of the Free Trade Zone Regime, the requirements to obtain the declaration of a Special Permanent Free Trade Zone ("SPFTZ") for Port Services are established in Article 38 of Decree 2147 of 2016.

According to the above, it infers that, to the port that operates simultaneously as SPFTZ, two types of goods can enter: (i) those that are necessary for its operation, so the consignee is the same port and (ii) those that are consigned to third parties that enter the port as a primary zone since these are not necessary for the operation of the port.

Therefore, the goods of third parties that enter through the authorized public port, which in turn has been declared as a Port (SPFTZ), are not subject to the provisions of the Free Trade Zone Regime, since they are goods of the public, which enter the country through an authorized place to carry out the corresponding customs procedures.

Consequently, only the goods and infrastructure equipment necessary for the proper functioning of the Special Permanent Free Trade Zone of Port Services will be subject to the treatment of the Free Trade Regime and, therefore legal business may be entered into with other PFTZ or Permanent Free Trade Zones within the framework of Article 492 of Decree 1165 of 2019.

For this purpose, their entry must be made with the presentation of the Goods Movement Form and the documents required by the customs regulations for the areas enabled for the entry and exit of goods to be used by the port companies in the development of activities as a port declared as an FTZ.

Case Law of the Constitutional Court and the Council of State

1. The Council of State, in a significant legal decision, has ruled that municipalities are not entitled to demand payment of the Public Lighting Tax from taxpayers when they are the ones responsible for its collection.

The Council of State studies the legality of the administrative acts by which the Treasury Department of Nobsa (Boyacá) determined the value of the Public Lighting Tax that a taxpayer would have to pay for three taxable periods.

The Council of State's analysis reveals that, as per the regulations in force at the time, the electric energy commercialization and distribution companies were designated as withholding agents. Their duty was to include the Public Lighting Tax in the energy service invoice to their users, without the need for a separate contract. Subsequently, they were required to transfer the tax withheld to the Municipality in the prescribed manner.

As a result, the Court has unequivocally declared null and void the administrative acts in which the Municipality directly determined the value of the tax. It firmly held that in cases such as this one, where the withholding agent assumes responsibility for collecting the tax, the tax authority cannot act directly against the taxpayer.

Therefore, the Municipality could only demand compliance with the obligation from the company providing the public electric energy service, which acted as the withholding agent, not the taxpayer.

2. The Council of State determines that the method used by the taxpayer was appropriate.

In this ruling, the Council of State analyzes whether the modification of the Income Tax return by the tax authority determined that from the use of the Added Cost ("AC") method -different to the one applied by the taxpayer (Transactional Profit Margin ("TPM") method)-, there was an increase in the gross operating income from sales made to its related companies in Peru and Venezuela.

The Council of State pointed out that the AC method is a traditional method that, in terms of Article 260-2 of the C.T.C, consists of "Multiplying the cost of goods or services by the result of adding to the unit the percentage of gross profit obtained between independent parties in comparable operations". For this purpose, the gross profit percentage is calculated by dividing the gross profit by the net cost of sales.

On the other hand, the method of transactional operating profit margins (TPM) -used by the plaintiff in its transfer pricing study consists of "Determining, in transactions between related parties, the operating profit that independent parties would have obtained in comparable operations, based on profitability factors that take into account variables such as assets, sales, costs, expenses or cash flows". In this regard, the Council of State, specified that, under this method, special emphasis is placed on the functions performed by the parties, and the profit indicators may be less affected by the differences in the goods and conditions of the transaction.

In addition to the above, to determine the taxation in accordance with the arm's length principle, it is necessary to perform a comparability analysis between the controlled transactions and those carried out by independent parties that are comparable and to determine the required adjustments.

Based on the above, the Council of State concludes that the TPM method applied by the plaintiff in its transfer pricing study was the appropriate one, considering the characteristics of the transactions analyzed, the different functions and risks assumed by the company in the operations carried out with related parties and independent third parties. Consequently, the addition of income derived from adjusting the transfer prices in the sales operations carried out by the plaintiff was not appropriate.

3. The Council of State annuls the expression "ordinary", which allowed access to the VAT discount only the case of "ordinary" importation of tangible productive fixed assets.

The Council of State analyzes whether the term "ordinary" included in the first paragraph of Article 1.2.1.1.27.6. of Decree 1089 of 2020 is null as it restricts the application of the tax benefit to imports, without being considered as such by Article 258-1 of the C.T.C.

The Court specifies that according to Article 172 of Decree 1165 of 2019, the import regime can include, among other modalities of import, the ordinary and temporary for re-export in the same state, which, in turn, consist of a kind of import called long-term.

Subsequently, it points out that, in Article 258-1 of the C.T.C, the Legislator established that those responsible for the VAT might deduct from the Income Tax payable, corresponding to the year in which its payment is made, or in any of the following taxable periods, the VAT paid, among other events, in the "import of real productive fixed assets", without limiting it to one or another type of import of those provided for in the Customs Regime, since the determining factor is that the assets are considered real productive fixed assets.

Thus, the Corporation finds that the Government exceeded its regulatory authority by limiting the benefit to ordinary imports and excluding other types, such as long-term temporary imports. Therefore, the expression "ordinary" included in the first paragraph of Article 1.2.1.1.27.6. of Decree 1089 of 2020 is declared null.

4. The Council of State analyzes the use of the Most Favored Nation ("MFN") clause of the Double Taxation Agreements ("DTA") of Spain, Switzerland, and Chile.

The recent ruling of the Council of State, issued on April 4, 2024, analyzes the legality of the DIAN Opinion No. 0191 of February 17, 2020, in relation to the Most Favored Nation ("MFN") clause of the Double Taxation Agreements ("DTA").

This analysis is since Colombia has included in its DTAs special withholding rates for services classified as royalties which refer among others to technical services, technical assistance, and consulting services.

In some of these agreements, the Most Favored Nation clause was stipulated, which provides that any advantage or privilege granted to a third state in a subsequent agreement must be adopted in the agreements previously signed by the same state.

In 2020 the DTA signed with Great Britain and entered into force, which grants more beneficial treatment to the parties. The above, insofar as technical services, technical assistance and consulting services are not included within the provisions of royalties; could be classified as business profits and taxed in the state of residence.

The DIAN clarified that the clause would be activated only when the condition to access it has been established in each agreement. Based on this, the DIAN concluded that in the agreements with Spain and Switzerland, the MFN clauses were not triggered because in the agreement with the United Kingdom, Colombia had not granted a "lower tax rate", and therefore, the original treatment was maintained.

The Court establishes that the protocols of the DTA with Spain and Switzerland only provide for the automatic application of the new tax rates on lower royalties or royalties agreed with third states, which does not allow access to preferential treatment. This is so, because the DTA with the United Kingdom did not provide for a lower tax rate but changed the legal qualification of "Royalties" with respect to the mentioned services, for that of "business profits".

Therefore, this change is not a reason to extend the tax treatment provided in said DTA with respect to the services rendered for technical assistance, technical services, and consulting services.

The Court concludes that the DTA with the United Kingdom, as approved by Law 1939 of 2008, does not trigger the MFN clause in the DTA with Spain, Switzerland, and Chile.

Projects of Decrees and Resolutions

1. DIAN publishes a draft resolution to prescribe Form No. 2593 under the SIMPLE Taxation Regime

The DIAN publishes the resolution decree, "Whereby Form No. 2593 and its instructions are prescribed for compliance with the tax obligations of taxpayers of the simple taxation regime -SIMPLE for the taxable year 2024 and subsequent years".

Taxpayers obliged to file Form No. 2593 "SIMPLE Electronic Receipt" can now do so conveniently through the computer services provided by the DIAN. This electronic filing system is designed to empower taxpayers, making the process more efficient and less time-consuming. The payment of the advance payment must be made through form No. 490 "Official Receipt of Payment of National Taxes" once the Form No. 2593 is filed.

Various Matters

1. The Superintendence of Companies makes clarifications about foreign companies with shares in Colombian companies.

The Superintendence of Corporations points out that a foreign company can be a shareholder of a Colombian company in any percentage, and this does not affect the nationality, which is determined by the constitution. The corporate domicile is what determines whether it is considered Colombian. Thus, a Colombian company may have 100% foreign investment and still be considered a Colombian company.

On the other hand, it is reported that the capital contributions made by a foreign company in a Colombian company have the character of direct foreign investment and therefore must comply with the applicable regulations in the Exchange Regime, especially the Circular DCIP 83.

It is clarified that it is not necessary for foreign companies that have shareholdings in Colombian companies to establish themselves as a company in Colombia. What is necessary is that they appoint an attorney in Colombia to represent them in relation to the investment.

On the contrary, if a foreign company wishes to develop permanent business in Colombia, it must establish a branch in Colombia in accordance with Article 471 of the Commerce Code.

2. PRESS RELEASE of the DIAN regarding the new Customs Decree.

Last November 2023, the Government published for comments the draft decree that modifies the current customs regulations, with the purpose of increasing actions to prevent smuggling and strengthen security at the borders.

In the press release of April 18, the DIAN points out that one of the changes of the new Customs Statute is that the import declaration of goods entering the country must be made in advance and mandatory in all cases.

In addition, the DIAN will track goods under customs control circulating in our territory by satellite, with devices that are also capable of detecting if containers of unnationalized goods are opened without the presence of the tax authorities.

3. The DIAN prescribed Form 260 of the annual return corresponding to the taxable year 2023 for the Simple Taxation Regime.

To comply with Ruling C-540 of 2023, in which the Constitutional Court declared illegal some sections of Articles 905 and 908 of the Tax Code, as amended by Law 2277 of 2022, the DIAN through Resolution 000061 of April 8, 2024, prescribed Form 260 "consolidated annual return" corresponding to the Simple Taxation Regime for the taxable year 2023.

Taxpayers obliged to file it must do so through the IT services, using the electronic signature authorized by the DIAN. This form will be available virtually on Dian's website, in the registered user's service.

4. The Bogota legal authority suspends the deadline for the adoption and presentation of the Transparency and Business Ethics Program for Non-Profit Entities

By means of Circular 13 of 2024, the Legal authority of Bogota has not issued the minimum guidelines that the Transparency and Business Ethics Programs contemplated in Article 9 of Law 2195 of 2022 must include.

By virtue of the foregoing, the authority considers it necessary to modify numeral 8 of Circular 058 of November 18, 2022, to modify the form and deadline for the Transparency and Business Ethics Programs.

5. Dian published ad-valorem levies applicable to agricultural products.

Through Circular 12757000005242 of April 01, 2024, the DIAN informed that the total tariffs for marker products, their substitutes, agro-industrial products or by-products in accordance with the regulations issued by the Commission of the Cartagena Agreement and the Board of the Andean Community.

The values indicated correspond to the total tariff applicable to imports from third countries, in accordance with Decree 547 of 1995 within the

framework of the Andean System of Agricultural Price Bands.

6. OECD publishes Minimum Tax Implementation Manual (Second Pillar)

The Organization for Economic Cooperation and Development ("OECD") with the Inter-American Development Bank ("IDB") recently published the "Minimum Tax (Pillar 2) Implementation Manual", which is related to the Base Erosion and Profit Shifting Project ("BEPS").

The Global Minimum Tax is the second pillar of the Two-Pillar Solution to address the tax challenges arising from globalization and digitalization of the economy.

If a multinational group is within the scope of the rules, it must calculate its Effective Tax Rate ("ETR") to determine whether it is right at, below or above the 15% minimum rate. This ETR calculation is performed separately for each jurisdiction.

This handbook provides an overview of the most important provisions and considerations for Finance Ministry and tax administration officials to consider when evaluating their implementation options.

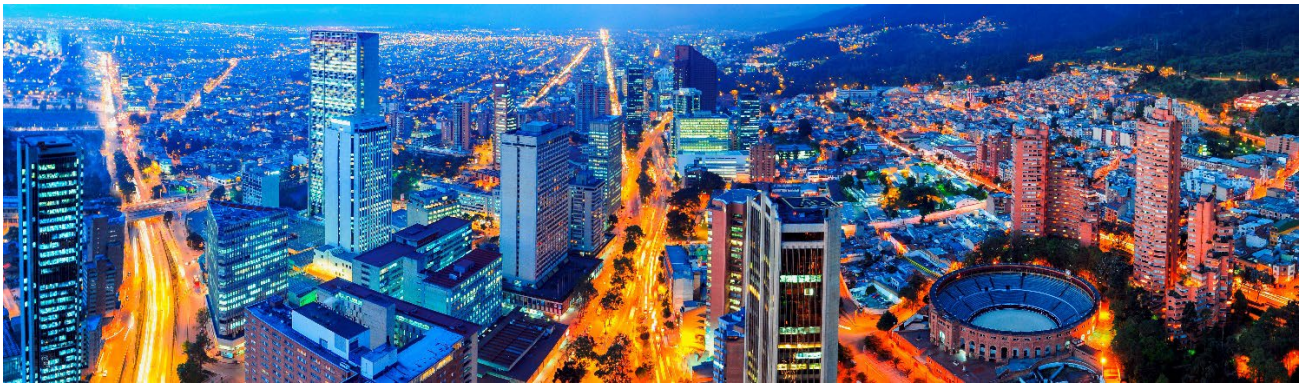
CMS Rodríguez-Azuero

CMS Rodriguez-Azuero is a global law firm built on deep local roots with more than 40 years of experience advising local and multinational clients.

We provide specialized legal advice with high managerial capabilities and a strategic approach, from a team of close to 100 local lawyers, experts in diverse practice areas, who have a deep knowledge of the industries in which their clients operate.
All of our lawyers' efforts and work are client-focused, providing business-focused advice in the local market or globally across multiple jurisdictions.

The Firm offers a unique combination of in-depth knowledge, practice and experience in almost all areas of law including Banking & Finance Law, Commercial Law, Antitrust, Competition & Trade, Corporate Law / Mergers & Acquisitions, Labor & Pensions, Environmental Law, Dispute Resolution, Public Procurement, Real Estate Law, Tax Law, Compliance, Corporate Criminal Law, Intellectual Property, Healthcare & Pharmaceutical Law, Technology, Media & Communications, Insolvency, Restructuring & Liquidation, Customs & Foreign Trade, Consumer Products, Energy & Climate Change, Funds, Hotels & Resorts, Infrastructure & Projects, Insurance, and Private Equity.

> We are very pleased and grateful for the service we received at the Firm. They have been very helpful to us throughout the process in understanding how state-controlled facilities operate. They have helped us with a great deal of dedication and guidance.
>
> *Chambers Latin America*



Tax

The tax and foreign team advise local and international clients, both globally and locally, with the assistance of more than 470 lawyers belonging to the areas of Tax Law and Foreign Exchange matters, with a presence in more than 40 countries.

As members of the global tax practice, we actively participate in the projects developed by our clients within different countries, which allows us to guarantee a coordinated and efficient execution of the tax and exchange issues.

We have a wide and well-known experience advising clients on foreign investment operations in Colombia, Colombian investments abroad, mergers and acquisitions. As well as reliable legal representation against national and local tax authorities and contentious administrative jurisdiction.

Our services include:

Local and international tax advice and planning.

- Advice and representation in tax and exchange litigation.
- Due diligence on tax and exchange issues.
- Advice on transfer pricing procedures
- Tax planning and execution of tax structures for the globalization and expansion of projects
- Accompaniment against tax and exchange authorities
- Advice to non-profit entities in aspects related to their establishment and audit.

Contacts

Santiago Arbouin
Partner

T +57 1 321 8910 x100
E santiago.arbouin@cms-ra.com

Santiago is a Partner and leads the Customs Law & Trade and Tax practices for the Firm. He has more than 15 years of experience advising national and international clients on local tax, international tax, customs tax, foreign trade, and customs law from the strategic planning perspective. He has experience in the application of free trade agreements and multilateral and binational foreign trade agreements, as well as in treaties to avoid double taxation and in the creation and negotiation of Free Zones and special customs areas. He has been a promoter of foreign trade forums and Foreign Investments.
He has more than 10 years as a professor of international taxation, Tax Planning, and foreign direct investment at the Universidad de La Sabana, and corporate taxation and foreign investment at the Pontificia Universidad Javeriana. He has been a guest speaker at various national and international tax events.

Nicole Ríos
Associate Director

T +57 1 321 8910
E nicole.rios@cms-ra.com

Nicole is an Associate Director for the Firm in Tax and Customs Law & Trade practices. She has focused her professional practice on providing specialized legal services in tax matters.
She advises local and international companies and business groups on tax planning matters, tax structuring in the execution of transactions, tax due diligence services, and tax consulting in general.
Nicole advises in the application of double taxation treaties signed by Colombia, advises on transfer pricing matters, advises on BEPS (Based Erosion and Profit Shifting), and advises in tax matters related to labor consultancy.
Likewise, she advises individuals and family groups in the design, structuring, and tax planning for the efficient management of their net worth, protection of family assets, the anticipation of succession events, transfer of assets to family members and third parties, incorporation of special purpose vehicles, foundations, trusts and other corporate structures that combine both personal and business assets.

Natalia Recio
Coordinator

T +57 1 321 8910
E natalia.recio@cms-ra.com

Natalia is an Associate for the Firm in Customs Law & Trade and Tax practices. She is a lawyer with a specialization from Universidad de Los Andes in Business Law. She has experience in projects on tax consultancy, tax planning, business restructuring, mergers and acquisitions, and due diligence, among others.

Juanita De Francisco
Associate

T +57 1 321 8910
E juanita.defrancisco@cms-ra.com

Juanita is an Associate of the Firm in Tax and Customs Law & Trade practices.

She is an attorney from Pontificia Universidad Javeriana with a specialization in Tax Law from Universidad Externado de Colombia and Business Law from Universidad de los Andes. She has more than 4 years of experience in her practice areas and her experience includes litigation, tax consulting, and tax planning, among others.

María García-Herreros
Associate

T +57 1 321 8910
E maría.garciaherreros@cms-ra.com

María is an Associate for the Firm in Tax and Customs Law & Trade practices.

She is a lawyer from Colegio Mayor Nuestra Señora del Rosario, with an emphasis on private law, and a member of the tax law and public finance research group. She has one year of experience before graduating from the undergraduate program, in multidisciplinary matters within the areas of foreign trade, investigations, and customs.

María Camila Domínguez
Associate

T +57 1 321 8910
E mariacamila.dominguez@cms-ra.com

María Camila is an Associate of the Firm in the areas of Tax Law and Customs & Foreign Trade.

She is a lawyer graduated from Universidad Externado de Colombia, with experience in Tax Law in research in tax matters, advisory support, drafting, litigation, response to requirements, processing of appeals in territorial and national tax matters.

Paola Andrea Quimbayo
Associate

T +57 1 321 8910
E paola.quimbayo@cms-ra.com

Paola is an Associate for the Tax and Customs Law & Trade practice areas in the Firms. She is a lawyer and has two specializations from the Externado University of Colombia, Tax Law and International Tax Law.

The Americas

Bogotá
Cúcuta
Lima
Mexico City
Rio de Janeiro
Santiago de Chile
São Paulo

Europe

Aberdeen
Amsterdam
Antwerp
Barcelona
Belgrade
Bergen
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Cologne
Dublin
Duesseldorf
Edinburgh
Frankfurt
Funchal
Geneva
Glasgow
Hamburg
Istanbul
Kyiv
Leipzig
Lisbon
Liverpool
Ljubljana
London
Luxembourg
Lyon
Madrid
Manchester
Milan
Monaco
Munich
Oslo
Paris
Podgorica
Poznan
Prague
Reading
Rome
Sarajevo
Sheffield
Skopje
Sofia
Stavanger
Strasbourg
Stuttgart
Tirana
Vienna
Warsaw
Zagreb
Zurich

Africa

Casablanca
Johannesburg
Luanda
Maputo
Mombasa
Nairobi

Middle East

Abu Dhabi
Dubai
Muscat
Riyadh
Tel Aviv

Asia-Pacific

Beijing
Brisbane
Hong Kong
Shanghai
Singapore

Staff
> 9,000
59,8% female

Lawyers
> 5,800
51,5% female

EUR 1.862bn
turnover for 2022

62 new partners in 2022, taking the total to over **1,250**

79 cities

47 countries

19 Practice and Sector Groups working across offices

@cms_colombia

CMS Rodríguez-Azuero

@CMSRodriguezAzuero

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
cms-lawnow.com

CMS locations:
Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

---

cms.law