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TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1008

CASE LAW

ISSUES ARISING FROM RECENT JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

ORIGIN:	**Commission**
REFERENCES:	**Title X, in particular Articles 167 to 169 and 178**
SUBJECT:	**Selected CJEU cases with impacts on businesses operating in the EU Single Market – issues evoked by the VAT Expert Group – right of deduction and supply chains**

1. INTRODUCTION

The number of VAT-related cases dealt with by the Court of Justice of the European Union (CJEU) has been steadily increasing over the years and has now reached more than 1 000 cases. In many of those cases, focus is on the input VAT deduction mechanism, which is a central feature of the EU VAT system.

When it comes to the right to deduct, the VAT Expert Group (VEG), a body set up to assist and to advise the Commission on VAT matters[1], has undertaken work on the particular issue of economic vs. formalistic/legalistic approach in triangular cases with spill over effects. The VEG has also undertaken work regarding certain rulings of the CJEU dealing with supply chains which, according to its understanding, if applied in a legalistic rather than in a commercial/economic way, would lead to unintended consequences regarding business models and commercial activities.

The Commission services now wish to hold an exchange of views within the VAT Committee, on the basis of a paper prepared by the VEG on the two aforementioned issues.

2. DELEGATIONS' OPINION

Delegations are invited to express their views on the matters as outlined in the contribution prepared by the VEG.

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1 http://ec.europa.eu/taxation_customs/taxation/vat/key_documents/expert_group/index_en.htm

ANNEX

Contribution of the VAT Expert Group

Selected CJEU Cases with impacts on businesses operating in the EU Single Market – strengthening the EU harmonized VAT system with consistently applied rules on input VAT deduction across the 27 Member States – particularly important for business in the post Covid-19 recovery process – since it is of utmost importance to ensure VAT neutrality, to create a level playing field and to provide legal certainty for both businesses as tax collectors and MS tax administrations

I. Input VAT deduction

Input VAT deduction is a central feature of all VAT systems, in that it ensures VAT neutrality for business, as collector of the tax, and results in the VAT being borne by the final consumer. Looking at the input VAT deduction mechanism in further detail, there are two key issues to consider – the right to deduct – and – the execution of the right to deduct. When it comes to the right to deduct, this document just seeks to focus on the topic: "economic vs. formalistic/legalistic approach in triangular cases with spillover effects" in reaction to recent CJEU case law. We would like stress that there are other areas where it is equally important to ensure the neutrality of the tax, these include research and development costs, IP Sharing Pools, acquisition costs, and business gifts. Another important example is VAT deduction of import VAT, where some Member States only permit an input VAT deduction of import VAT by the legal owner, even though the import VAT is paid by others who have a bona fide case for viewing the import VAT as a cost of making their supplies giving rise to the right to deduct. We consider that such a restrictive approach is not in line with the principle of neutrality. If there is interest from the Commission and the VAT Committee, VEG would be very happy to look at these issues in more detail in follow-up work. As we are about to enter into a post-Covid recovery period, we consider that it becomes all the more important to ensure a smooth recovery of input tax for business.

The other aspect which we cover in this document is the "execution of the right to deduct" where we are concerned that formality is too often allowed to take precedence over neutrality. This part of the paper is of a more general nature.

- Right to deduct – economic vs. formalistic/legalistic approach in triangular cases with spillover effects

What is the problem?

Several Member States still apply a very strict formalistic/legalistic approach in dealing with the right to deduct in triangular scenarios where input supplies used for business purposes generate spillover effects for third parties. They are thereby generating undeductible VAT in the hands of taxable persons exercising taxable activities. This is frequently occurring in situations that are not apt to give rise to untaxed final consumption or in situations that result in a breach of the principle of equal treatment.

There are various situations where taxpayers are engaged in transactions that do not only benefit the recipient of a service or the purchaser of goods but also, free of charge, a third

party to the transaction. One might find examples of this in the case law of the Court of Justice, with respect to:

a) The costs for transport services, work clothing, protective gear and business trips for staff working for that taxable person but employed by another entity[1] [2],

b) the lawyers' fees incurred by a business to defend its majority shareholder and managing[3],

c) director, who was accused of bribery or aiding and abetting[4],

d) the costs incurred in respect of the extension of a municipality road necessary for a taxpayer to exploit a limestone quarry[5],

e) the costs incurred in respect of the reconstruction of a pump station that benefits a municipality where a taxpayer intends to construct a holiday village[6],

f) the advertising and administrative costs, or real estate agent´s commissions incurred by a taxpayer in respect of the sale of apartment buildings when the taxpayer receives payments linked to sales of pieces of lands by landowners.

How to resolve?

To support VAT neutrality rather than primarily seeking to safeguard the VAT revenues of Member States, it should be considered a failure of the EU harmonized VAT system that VAT should remain a cost to a taxpayer engaged in taxable activities in cases where there is no fraud. This is especially true in the current Covid-19 driven environment where businesses are trying their utmost to survive and where ensuring VAT neutrality is all the more important for that reason.

Having analyzed the CJEU judgements mentioned above, which have further clarified the scope and application of the right to deduct, from a VEG point of view, the key criteria carved out from these cases and to be further discussed in order to ensure a consistent application of them across EU 27 are as follows:

1. Taxpayers, acting as such at the time when they acquire goods or receive services, are entitled to deduct the VAT paid or payable in respect of those goods or services when used for the purposes of their taxed transactions (article 168 of Directive 2006/112).

2. To exercise their right to deduct and determine the extent of this right, taxpayers should:

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[1] CJEU 18 July 2013 – C-124/12 AES-3C Maritza East 1 EOOD, ECLI:EU:C:2013:488

[2] CJEU 16 October 1997 –- 258/95 Julius Fillibeck Söhne GmbH &Co. KG ECLI:EU:C:1997:491

[3] CJEU 21 February 2013 – C-104/12 Wolfram Becker, ECLI:EU:C:2013:99

[4] CJEU 16 September 2020 – C-528/19 Mitteldeutsche Hartstein-Industrie AG, ECLI:EU:C:2020:712

[5] CJEU 14 September 2017 – C-132/16 Iberdrola Inmobiliara Real Estate Investments´ EOOD, ECLI:EU:C:2017:683, paras. 28 et seq.

[6] CJUE 1 October 2020 – C-405/19 Vos Aannemingen BVBA, ECLI:EU:C:2020:785

a. either demonstrate the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct. In that situation, the cost incurred in acquiring the goods or services are supposed to be a component of the cost of the output transactions that give rise to the right to deduct.

b. Or, when such a link does not exist, the costs of services should be part of their general expenditures, and as such, components of the price of goods or services supplied by those taxpayers.

3. To apply the "direct link" test, all the circumstances surrounding the transactions should be considered. A direct and immediate link can only be assessed by having regard to the objective content of the transactions carried out by the taxpayer. Of particular relevance are the contracts for the provision of services as well as the economic and commercial realities.

4. As illustrated in the cases mentioned above, the mere fact that the transaction does not only benefit the recipient of a service or the purchaser of goods but also, free of charge, a third party to the transaction, does not in itself prevent this direct link test being met.

5. Even when the transaction partially benefits a third party, the input VAT remains recoverable to the extent that:

a. the costs have been incurred for the purposes of the taxpayers' business activities

b. the costs incurred by the taxpayers are "essential for" but "limited to" what is "objectively necessary" to allow the taxpayers to carry out those taxed transactions[7], or, the benefit to the third-party is ancillary to the taxable person's business purposes[8]. In cases where the costs incurred by the taxpayers exceed this limit, the existence of a direct and immediate link between the costs and the taxed output transaction would be partially broken, and the input VAT recovery of the taxpayer only partially recognized.

6. Within the limits discussed at 5., services or goods provided to the taxpayer which partially benefit a third party for free do not constitute a taxable supply performed free of charge by the taxpayer to the third party.

7. When the taxpayer is entitled to pass on, to the third-party, a part of the expenditure he has incurred in respect of services supplied to him, that circumstance might be indicative (but not decisive) of the fact that it is the third party, rather than the taxpayer, who commissioned the service, and is the direct beneficiary, and hence does not merely enjoy an ancillary benefit.

[7] CJUE 1 October 2020 – C-405/19 Vos Aannemingen BVBA, ECLI:EU:C:2020:785
[8] CJUE 1 October 2020 – C-405/19 Vos Aannemingen BVBA, ECLI:EU:C:2020:785

The VEG considers it necessary to still clarify the following points that have not as yet been decided upon by the CJEU:

- In cases where the costs incurred by the taxpayer exceed what is "essential for" and "objectively necessary" to allow the taxpayers to carry out those taxed transactions, the CJEU considers that the direct and immediate link between those costs and the output transaction is partially broken. As a result, the input VAT incurred by the taxpayer is not fully recoverable but is only recoverable to the extent of what is objectively necessary to carry out its taxed transactions. The Court did not take any position on whether, and under which conditions, the VAT incurred in excess of this "objectively necessary" test, can be recovered by the third party that also benefits from those costs, when that third party is entitled to a VAT recovery for its own taxed activities. The VEG considers that this should at least be the case to the extent that the cost is also passed on to this third party.

- As regards the necessity link test described at (5) in case of spill-over effects to the benefit of third parties, the VEG considers that it only requires an analysis as to whether the goods or services received by the taxable person who claims the input tax are clearly in excess of his or her business needs, and merely serve the interests of a third party. It should not imply any reasonableness test. The VEG considers that in principle, it is for the entrepreneur and not the tax authorities upfront[9], to decide which goods and services are the most appropriate ones as input supplies to carry out the taxed activities, including in situations where they also imply benefits to third parties.

Our request:

As there are different VAT treatments on this topic across the EU, a discussion in the VAT Committee on this topic based on the above mentioned cases might be very helpful in order to come to a common approach across the EU, strengthening the EU harmonized VAT system with consistently applied rules on input VAT deduction across the 27 Member States. This is, particularly important for business in the post Covid-19 recovery process.

- Execution of the right to deduct – in practice "form over substance" instead of "substance over form" – formality often takes precedence over neutrality

What is the problem?

Despite respective CJEU cases (such as those quoted below) several Member States still apply a very strict formalistic/legalistic and often disproportionate approach in dealing with the execution of the right to deduct (i.e. evidence requirements, such as 100% proper "formalistic" VAT invoices – not allowing or restricting alternative evidence in practice) despite there being no risk of loss of VAT revenues, because the transactions are clearly legitimate.

The CJEU judgements mentioned below, have further clarified the scope of the application of the execution of the right to deduct on the basis of a less formalistic/legalistic approach,

[9] As reiterated recently by the Court in CJEU 12 November 2020 – C-734/19 ITH Comercial Timișoara SRL, ECLI:EU:C:2020:919, paras. 28 et seq.

looking more at the overall picture of the transaction, considering also alternative evidence at hand.

Evidence requirements can and should never undermine the right to deduct itself (the substantive law), particularly when it comes to legitimate transactions carried out by honest business, otherwise VAT neutrality is undermined.

It is very often forgotten in practice that an invoice is only one document of a set of documents related to a specific transaction (such as purchase order, delivery notes, proof of payment, etc.) on the basis of which the right to deduct input VAT can be granted in combination with a VAT invoice that does not comply with all the formal requirements, provided the evidence makes it clear that the transaction took place and was legitimate.

How to resolve?

To support VAT neutrality - in cases where the transactions are legitimate – an approach of "form over substance" is not in line with the EU harmonized VAT system and should not be allowed to increase VAT revenues for Member States, by making VAT a cost to businesses that should be entitled to deduct it. This is particularly the position in the current Covid-19 driven environment where businesses try their utmost to survive and where ensuring VAT neutrality is more important than ever.

Having analyzed the CJEU judgements mentioned above, which have further clarified the scope of the application of the execution of the right to deduct, it is clear that the Court has adopted a less formalistic/legalistic approach, looking at the overall picture of the transaction and considering all the alternative evidence. VEG considers that it would be desirable if the key criteria identified from these cases could be further discussed in order to ensure a consistent application of them across EU 27 are as follows:

1. The exercise of the right to deduct input VAT is normally dependent on possession of the original invoice for the transaction in respect of which the deduction is claimed[10].

    a. According to Article 219 of Directive 2006/112, 'any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.'

    b. Also an electronic invoice should be equivalent to a paper invoice as per article 218 of Directive 2006/112.

2. Holding an invoice showing all the details mentioned in Article 226 of Directive 2006/112 permits a taxpayer to exercise the right to deduct if all substantive requirements are also met. Member States must not make the exercise of the right to deduct VAT dependent on additional content of invoices which are not expressly laid down by the provisions of Directive 2006/112[11].

[10] See, e.g., CJEU 29 April 2004 – C-152/02, Terra Baubedarf, ECLI:EU:C:2004:268, para. 32; 12 April 2018 – C-8/17, Biosafe, ECLI:EU:C:2018:249, para. 33.

[11] See, e.g., CJEU 1 March 2012 – C-280/10, Polski Trawertyn, ECLI:EU:C:2012:107, para. 42.

3. A Member State may require the production of the original invoice or an equivalent document when tax inspections are carried out. However, an input VAT deduction must not be denied where the original invoice or equivalent document has been lost, but the taxpayer can produce other cogent evidence that the transaction in respect of which the deduction is claimed actually took place[12].

4. Holding an invoice showing the details mentioned in Article 226 of Directive 2006/112 is a formal condition, not a substantive condition, of the right to deduct VAT[13].

5. Consequently, Member States must allow taxpayers to subsequently correct an invoice from which certain mandatory details have been omitted[14].

    a. An eventual correction of an invoice in relation to a mandatory detail must have retroactive effect[15] and must therefore not give rise to interest payments.

    b. Member States may lay down a limitation period after which the taxpayer can no longer rectify incorrect or incomplete invoices for the purposes of exercising the right to deduct input VAT, provided that, first, that procedure applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of that right (principle of effectiveness)[16].

6. Moreover, the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person does not hold an (original or rectified) invoice that is in full conformity with the provisions of Directive 2006/112[17].

    a. In particular, tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not correctly show all the mandatory details mentioned in Article 226 of Directive 2006/112 if they have available all the information to ascertain whether the substantive conditions for that right are satisfied[18].

    b. In this respect, the authorities cannot restrict themselves to examining the invoice itself. They must also take account of any additional information provided by the taxable person[19].

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12 CJEU 5 December 1996 – C-85/95, Reisdorf, ECLI:EU:C:1996:466, paras. 28 et seq.
13 See, e.g., CJEU 15 November 2017 – Joined Cases C-374/16 and C-375/16, Geissel and Butin, ECLI:EU:C:2017:867, para. 40.
14 See, e.g., CJEU 15 July 2010 – C-368/09, Pannon Gép, ECLI:EU:C:2010:441, para. 43.
15 CJEU 15 September 2016 – C-518/14, Senatex, ECLI:EU:C:2016:691, para. 43.
16 CJEU 14 February 2019 – C-562/17, Nestrade, ECLI:EU:C:2019:115, para. 35.
17 See, e.g., CJEU 19 October 2017 – C-101/16, Paper Consult, ECLI:EU:C:2017:775, para. 41.
18 See, e.g., CJEU 13 December 2018 – C-491/18, Mennica Wrocławska, ECLI:EU:C:2018:1042, para. 38.
19 CJEU 15 September 2016 – C-516/14, Barlis 06, ECLI:EU:C:2016:690, para. 44.

7. Finally, on an exceptional basis, an input VAT deduction must also be granted if the taxpayer never had possession of an invoice for the transaction in respect of which the deduction is claimed, provided that the following two conditions are met[20]:

   a. The taxpayer can provide objective evidence that the goods and services for which the deduction is claimed were actually provided as inputs by taxable persons for the purposes of the taxpayer's own transactions subject to VAT. That evidence may include, inter alia, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which he has paid VAT;

   b. and the taxpayer has actually paid VAT for the respective input supplies.

8. There are only two scenarios in which the tax administration may refuse the deduction of input tax on grounds of the lack of an invoice drawn up in accordance with Article 226 of Directive 2006/112:

   a. Where this effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied[21];

   b. Where it is shown, in the light of objective factors, that the lack of a proper invoice is due to the involvement of the taxpayer in VAT fraud or abuse[22]. It is incumbent upon the competent tax authorities to establish, to the requisite legal standard, that the objective evidence establishing the existence of a fraud or abuse is present[23].

9. All of the above applies also with regard to the right to a refund of VAT[24].

10. Moreover, for a VAT refund request following the 13th EU VAT Directive or Directive 2008/09/EC (former 8th Directive), missing supportive documentation or invoice details must not lead to a systematic refusal of claims to refund VAT in cases where the tax authority did not request the missing documents and/or the taxpayer did not have the chance to supplement the refund application[25].

The VEG considers it necessary to still clarify the following points that have not as yet been decided upon by the CJEU:

- Is the alternative evidence that the taxpayer must be allowed to produce in support of a claim for input VAT deduction (see above at [3], [6(b)] and [7(a)]) confined to documentary evidence, or is other evidence also admissible? So far, the CJEU has

[20] CJEU 21 November 2018 – C-664/16, Vădan, ECLI:EU:C:2018:933, paras. 40-45.
[21] See, e.g., CJEU 8 January 2021 – C-371/19, Commission vs. Germany, ECLI:EU:C:2020:936, para. 81.
[22] See, e.g., CJEU 28 July 2016 – C-332/15, Astone, ECLI:EU:C:2016:614, para. 50.
[23] See, e.g., CJEU 13 February 2014 – C-18/13, Maks Pen, ECLI:EU:C:2014:69, para. 29.
[24] CJEU 14 February 2019, C-562/17, Nestrade, ECLI:EU:C:2019:115, para. 46.
[25] CJEU 18 November 2020 – C-371/19, Commission vs. Germany, ECLI:EU:C:2020:936, para. 88; CJEU 17 December 2020, C-346/19, Y-GmbH, ECLI:EU:C:2020:1050, paras. 50 et seq.

only ruled that tax administrations need not accept mere estimates based on expert reports[26].

- When can the right to deduct input VAT be exercised in the exceptional case where the taxpayer never obtained possession of an invoice (see above at [7])? At the time of payment of the input VAT?

- The concept of an invoice, Article 219 of the Directive 2006/112 mentions that ''Any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice''. In this regard, many Member States require that debit or credit notes correcting/adjusting an initial invoice, need to be issued by the same party that issued the invoice. Business practice is often that it is the customer who issues the debit or credit note leading to non-acceptance of this document. It should therefore be clarified that the aforementioned business practice constitutes an acceptable amendment of the invoice.

Our request:

As there are different approaches by Member States when it comes to the execution of the right to deduct input VAT across the EU in daily practice, a discussion in the VAT Committee on this topic based on the above mentioned aspects might be very helpful in order to come to a common approach across the EU, strengthening the EU harmonized VAT system with consistently applied rules on the execution of the right to deduct input VAT across the 27 Member States. This is particularly important for business in the post Covid-19 recovery process.

Therefore, short term further clarification on this topic is urgently required and would be very helpful to support legitimate business. Longer term another aspect to be explored is, looking into the future and the increased use of modern technology, do we all need these formalities, if we better and more consistently use modern technology going forward across the 27 EU Member States?

II. Legal uncertainty caused by CJEU cases themselves often having both unintended consequences and impacts on business such as on commercial supply chains and also causing implementation issues for MS in practice – economic approach vs. strict legalistic interpretation of CJEU judgements

What is the problem?

In some cases what is done commercially in practice (particularly in new and fast evolving business models) is not mirrored 1:1 in the agreed legal set up, with no negative impacts on the VAT revenues collected from the final consumer but rather impacting on the commercial supply chain of the businesses involved in the transaction chain. Applying such cases in a legalistic rather than a commercial/economic way does not only destroy the business models in the supply chain but if these cases are applied more broadly they have wider unintended consequences also on other business models and commercial activities (which are arguably on the increase in the digitalizing economy, for example of EV

[26] CJEU 21 November 2018 – C-664/16, Vădan, ECLI:EU:C:2018:933, para. 45.

charging business models, cross-border software development projects, etc.), despite having no negative impacts on VAT revenues.

These cases also cause implementation issues for the MS leading to legal uncertainty for both business and MS.

The CJEU judgements C-185/01 Auto Lease Holland and C-235/18 Vega International are examples that, if implemented in practice in a legalistic way, showcase, how commercially sound and efficiently set up supply chains between businesses can be destroyed by a legalistic approach without any VAT revenues being negatively impacted. In these cases the CJEU ruled that fuel is supplied for VAT purposes directly from the owner of the petrol station to the lessee (driver) or the group company respectively, though the commercial relationship is between the owner of the petrol station and the leasing company or the procurement company within a group of companies respectively who sells the petrol on to the lessee or the group company respectively. The result of these decisions is that the leasing company or procurement company cannot deduct the VAT, because it is not the person acquiring the petrol for VAT purposes and it is also not seen as the supplier of the petrol to the lessee for VAT purposes. This means the VAT charged to the lessee is owed by the leasing company and cannot be deducted by the lessee, as was the case in Auto Lease Holland. This issue can only be solved by businesses changing the essence of their business model, which means away from a commercial buy – sell model (ABC transaction) to a business model where the lessee is seen as agent. This is, however, not the right solution, since VAT should not influence or even force businesses to make changes to legitimate and commercially sound set ups of their existing supply chains.

How to resolve?

Some Member States issued implementation guidance in secondary legislation which was very helpful and ensured legal certainty for both sides – keeping in mind that VAT is sitting on top of commercial/economic transactions and should not destroy them, solutions were found that safeguard VAT revenues while enabling business to continue with their commercial practices by aligning the legal set up with the commercial set up in order for business to be able to continue its commercial activities based on their business models, and not vice versa (legal set up should not destroy commercial set up). A couple of EU Member States have unilaterally resolved the issue by implementing VAT policy. We will address these solutions just to illustrate how the problems can be solved. In the view of the VEG a common approach across the EU is to be preferred to provide a solution to this issue.

One EU Member State describes under which conditions there is a chain transaction (a supply from the owner of the petrol station to the leasing company and from the leasing company to the lessee) and in which cases there is a financing transaction. There is a chain transaction in cases where there is no separate agreement on the management of fuel or contractual relations on the granting of credit, the lessee refuels the vehicle in the name and for the account of the lessor (e.g. using a fuel credit card) and the lessor has not prohibited the lessee from doing so (e.g. by blocking its fuel card) and this includes that each party in the chain can determine its own prices and each party bears the risk of non-payment. If these conditions are not met there is a financing transaction. This is in particular the case if an agreement on the management of fuel or the granting of credit has been entered into,

the lessee refuels the vehicle in his own name and/or for his own account (regardless of whether the lessee is later reimbursed by the lessor).

In the other EU Member State the costs for the supply of energy for land vehicles by the station operator which are paid for by the issuer of a fuel card in the name and on behalf of the fuel card holder are considered costs in transit. A cost in transit is a payment made to a third party by the taxable person in the name and on behalf of his customer.

A cost in transit is not part of the consideration for the supply made by the taxable person. The payment by the taxable person to a third party is based on a direct legal relationship between the third party and the customer. These costs must in that case be individualized, for example on the basis of fuel card numbers and registrations. It is also agreed that a taxable person can treat the costs paid in the name and on behalf of a customer as his own costs and deduct the VAT charged as input tax subject to the following conditions: the taxpayer passes the costs on to his customer for the same amount and under the same VAT regime and pays the VAT due on these costs, the taxable person states the costs separately on the invoice to the customer, and the taxable person charges the costs to the customer and the taxpayer does not include the amount of these costs in his determination of the right of deduction on his general costs. Under this approval the same result is achieved as in the other EU Member State.

Another way to deal with this issue can be found in the response to the Fast Bunkering Klaipeda case, C-526/13. In respect of that case the VAT committee adopted a guideline (Guidelines resulting from the 107th meeting of July 8th 2016 document B – taxud.c.1(2016)7297391 – 911) where it was stated that: '(…) insofar as the qualification of transactions involving goods supplied through intermediaries is concerned, the decision shall be seen as predicated on the specific facts of the case in question. The VAT Committee therefore unanimously agreed that this decision must be construed narrowly'. It should however be stressed that this solution does not deal with the practical difficulties of that particular situation, but prevents the undesired outcome of the judgment extending to other business areas, thereby requiring changes to legitimately set up commercial supply chains.

Suggestions for the future – can the VEG play a role in helping to attain legal certainty in such circumstances, and if so, how?

To deal with specific cases decided by the CJEU that cause legal uncertainty for both business and MS and have wider impact on commercial reality, often having both unintended consequences and impacts on business such as on their commercial supply chains and also causing implementation issues for MS in practice, the VEG could identify such specific cases, explain why they cause legal uncertainty for both business and MS from a broader commercial perspective and could address them to the Commission to explore whether they should be discussed in the VAT Committee.

If it is decided by the Commission and MS that they could be discussed, and if helpful for the Commission and MS, the VEG could then prepare an analytical paper (sharing the broader commercial consequences and impacts for business) with the Commission, for the Commission and MS to take into consideration when these specific cases are discussed in the VAT Committee.

Clearly the decision on all of this is with the Commission and the MS and not the VEG. The VEG should only be seen as an antenna to the outside world to connect the broader commercial world and the issues that are arising for it due to a specific CJEU decision, with the decision makers in the Commission and the VAT Committee.

Our request:

To ensure legal certainty for both business and tax administrations it is important that specific cases decided by the CJEU that cause legal uncertainty for both business and MS and have wider impact on the commercial reality are identified, addressed and discussed by the VAT Committee with an understanding of the wider commercial impacts and the commercial background when these discussions take place. Having discussions in the manner may help to ensure that legitimately set up business models do not have to be changed merely for VAT purposes, particularly if there is no loss of VAT revenues at stake. The VEG is very happy to assist the Commission and the VAT Committee in building up a process over time through which this support can be channeled (establish an ongoing exchange of information and communication process via the Commission) to ensure the broader commercial impacts are understood and considered, so that the discussions fall on good ground and allow decisions to be made by MS in the VAT Committee having a clear understanding about the broader commercial situation so that unintended consequences for both business and governments are reduced to a minimum and so as to increase legal certainty for business and tax authorities by building a uniform understanding across the 27 EU Member States.