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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1049**

NEW LEGISLATION

**MATTERS CONCERNING THE IMPLEMENTATION
OF RECENTLY ADOPTED EU VAT PROVISIONS**

ORIGIN: Netherlands

REFERENCES: New Articles 284, 284b, 284e and 288a of the VAT Directive
Article 37b of Council Regulation (EU) 904/2010
Articles 41 and 47 of the Charter of Fundamental Rights of
the European Union

SUBJECT: The new special scheme for small enterprises: legal protection

1. INTRODUCTION

In the face of new legislation to update its special scheme for small enterprises ('SME scheme') following changes to that scheme introduced by Council Directive (EU) 2020/285¹, the Netherlands is encountering an issue on legal protection. As it is not an issue settled with the changes adopted, the Dutch delegation has submitted a question to the VAT Committee with a view to clarify which Member State is to ensure the legal protection of a taxable person availing of exemption under the scheme as it will apply from 1 January 2025.

The text of that question can be found in Annex.

2. SUBJECT MATTER

With the Treaty on the European Union (TEU), the Charter of Fundamental Rights of the European Union (the Charter)² became legally binding. It follows from Article 6(1) TEU that '[t]he Union recognises the rights, freedoms and principles set out in the Charter [...], which shall have the same legal value as the Treaties'.

This entails that when the rules laid down in the VAT Directive³ are applied, it is necessary for Member States to ensure the protection of the fundamental rights of taxable persons. Those include, amongst other, the right to an effective remedy and to a fair trial⁴ and the right of anyone to have his or her affairs handled impartially, fairly and within a reasonable time⁵.

During its preparation of legislation for the implementation of Directive 2020/285, the Netherlands has been faced with questions on how to protect those rights, where a taxable person is looking to avail itself of the exemption under the SME scheme in a Member State where he is not established. As part of the process of granting exemption, not only the Member State of establishment but also the Member State of exemption is attributed a role. The question is therefore who, in respect of this exemption, is to take the steps necessary to ensure the protection of the fundamental rights of the taxable person.

3. BACKGROUND

The question put forward by the Dutch delegation is linked to upcoming changes to the SME scheme. That scheme can be found in Chapter 1 of Title XII of the VAT Directive and according to the current rules allows Member States to (i) provide for simplified procedures for charging and collecting VAT; and (ii) exempt SMEs with an annual turnover below a certain threshold from charging and deducting VAT ('the SME

¹ Council Directive (EU) 2020/285 of 18 February 2020 amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises and Regulation (EU) No 904/2010 as regards the administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises (OJ L 62, 2.3.2020, p. 13).

² [Charter of Fundamental Rights of the European Union](#)

³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

⁴ Article 47(1) of the Charter.

⁵ Article 41(1) in conjunction with Article 51 of the Charter.

exemption’) or grant graduated tax relief. As the rules currently stand, only small enterprises established in the Member State in which the VAT is due are eligible for exemption (‘domestic SME exemption’).

From 1 January 2025, with updates made to the SME scheme, a small enterprise established in one Member State will also, if eligible and below the respective domestic threshold, be able to benefit from exemption in other Member States (‘cross-border SME exemption’). Any Member State applying an exemption to the supply of goods and services made within its territory by a small enterprise established there⁶ must also grant access to that exemption where the small enterprise making the supply is established in another Member State⁷.

For access to the cross-border SME exemption, the following process has been put in place with a view to verifying that all conditions of exemption are met:

Firstly, the small enterprise needs to give prior notification to its Member State of establishment (MSEST) of its intention to avail itself of the exemption in a Member State other than the one of its establishment⁸.

The MSEST as a second step must verify that the total annual value of the small enterprise’s supplies of goods and services, exclusive of VAT, made within the EU (Union annual turnover) is below EUR 100 000⁹. The Union annual turnover threshold operates as a safeguard to avoid that an enterprise, not established in the Member State granting exemption (MSEX), could benefit from such an exemption regardless of the turnover generated in other Member States.

The calculation in respect of the Union annual turnover made by the MSEST is based on the total value of supplies as reported by the small enterprise in its prior notification¹⁰. Insofar as the Union annual turnover threshold is not exceeded, the MSEST must within 15 working days of the prior notification by electronic means notify the MSEX¹¹.

As a third step, the MSEX must on the basis of information made available by the MSEST through automated access¹² verify that the supplies made in the territory of the MSEX are eligible for exemption and that the total value of supplies, as reported by the small enterprise, does not exceed the national annual threshold, which can be set at up to EUR 85 000¹³. It needs to transmit, within another 15 working days, by electronic means the result of this assessment to the MSEST¹⁴.

If the outcome of the assessment is positive, the MSEST identifies the small enterprise for the application of the exemption by an individual number, including the suffix ‘EX’¹⁵. That decision should, in principle, be communicated to the small enterprise no later than

⁶ See new Article 284(1) of the VAT Directive.

⁷ See new Article 284(2) of the VAT Directive.

⁸ See new Articles 284(3)(a) and 284a(1) of the VAT Directive.

⁹ See new Article 284(2)(a) of the VAT Directive.

¹⁰ See new Article 37b(1) of the VAT Administrative Cooperation Regulation.

¹¹ See new Article 37a of the VAT Administrative Cooperation Regulation in conjunction with Article 4(2)(a) of Commission Implementing Regulation (EU) 2021/2007.

¹² See new Article 21(2b) of the VAT Administrative Cooperation Regulation.

¹³ See new Article 284(2)(b) of the VAT Directive.

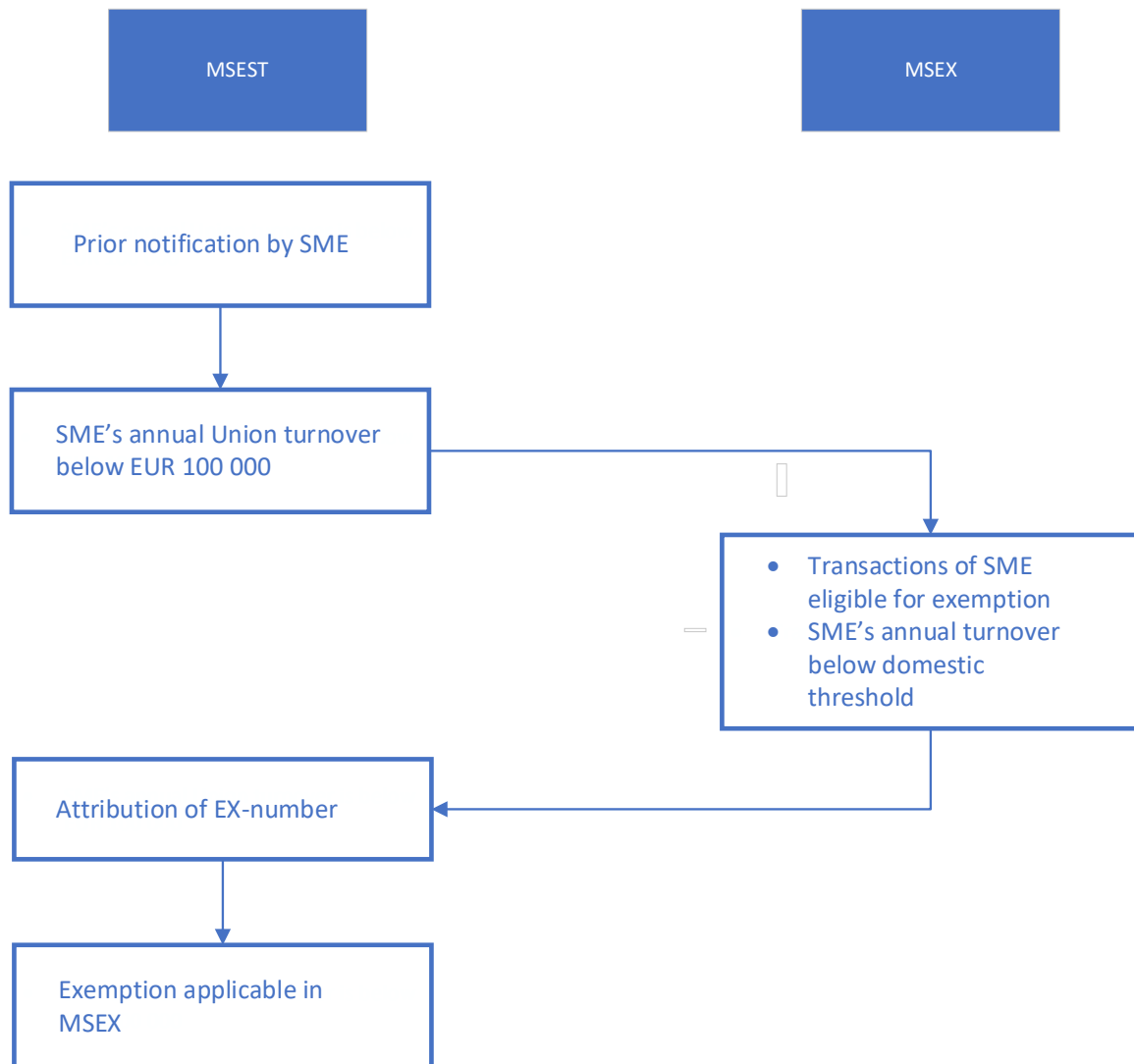
¹⁴ See new Article 37b of the VAT Administrative Cooperation Regulation.

¹⁵ See new Article 284(3) of the VAT Directive.

35 days after submission of the notification¹⁶. Only once the taxable person is informed of its individual identification number by the MSEST, the exemption will apply¹⁷. Within 15 working days, the MSEST must transmit the assigned individual number and the date of commencement of the exemption to the MSEX concerned¹⁸.

The process of interaction between the Member States prior to granting the cross-border SME exemption, which indeed can be considered rather circular than linear, is illustrated below.

Figure 1: Access to cross-border SME exemption



Having gained access to the cross-border SME exemption, the small enterprise is obliged to report to the MEST, for each calendar quarter ('reporting period') and this within one month of the reporting period, the total value of supplies carried out (i) in the MEST and (ii) in each of the Member States other than the MEST¹⁹. If reporting requirements are

¹⁶ See new Article 284(5), second subparagraph, of the VAT Directive.

¹⁷ See new Article 284(5), first subparagraph, of the VAT Directive.

¹⁸ See new Article 37a of the VAT Administrative Cooperation Regulation read in conjunction with Article 4(2)(b) of Commission Implementing Regulation (EU) 2021/2007.

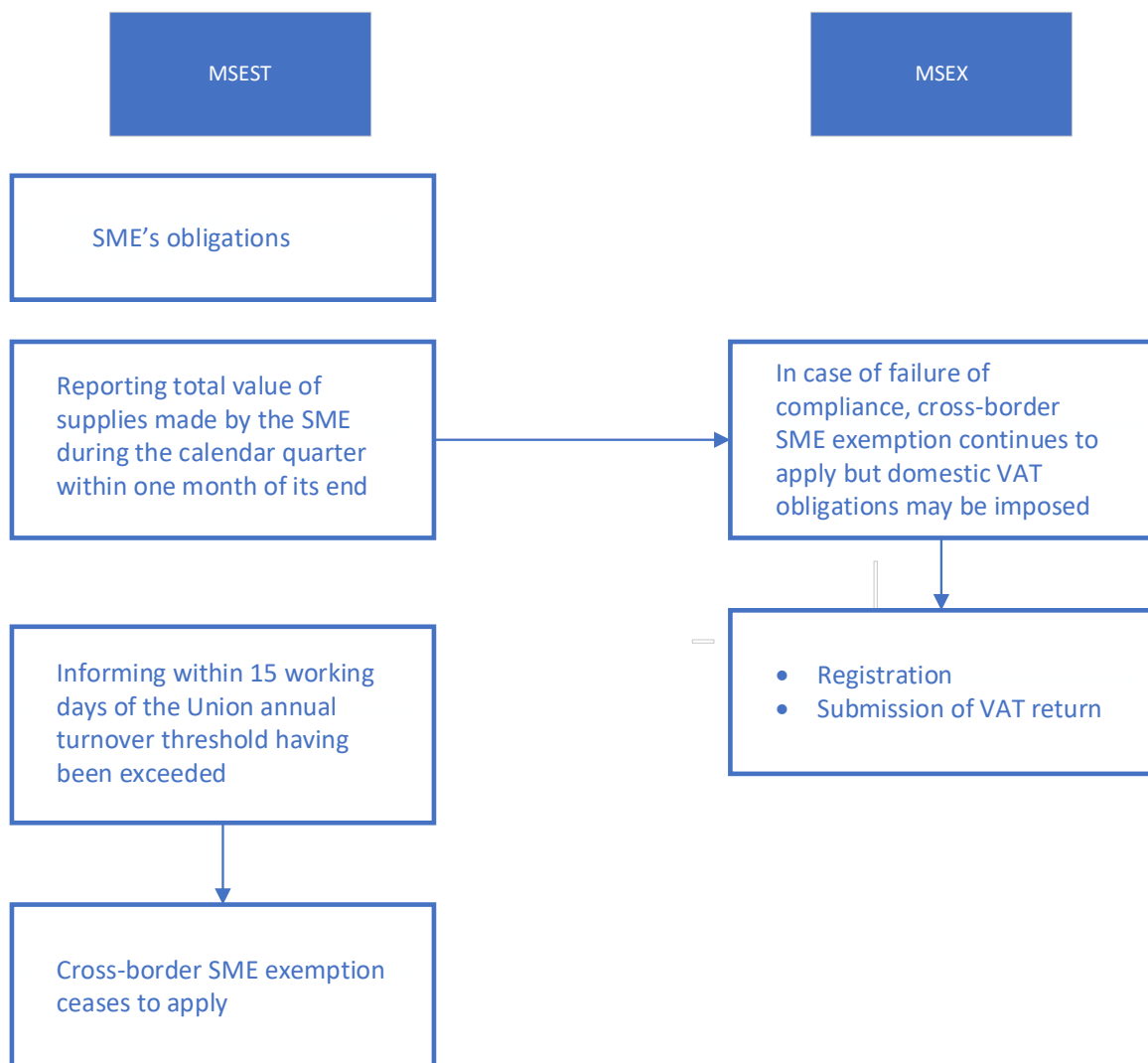
¹⁹ See new Article 284b of the VAT Directive.

not adhered to, the MSEX (and the MSEST) may impose national VAT obligations on the small enterprise²⁰.

Where, at any point in time, the Union annual turnover threshold is exceeded, the small enterprise is obliged to inform the MSEST within 15 working days of this fact. Any such exceedance entails that the small enterprise becomes liable for VAT under the normal VAT rules.

These are processes illustrated below.

Figure 2: Reporting by the small enterprise



4. THE COMMISSION SERVICES' OPINION

The question submitted relates to the SME scheme in view of the changes introduced by Directive 2020/285 and applicable as of 1 January 2025. As a result of these changes, the exemption, currently available only to small enterprises established within the Member State where the supply takes place (domestic exemption), will be opened to other small

²⁰ See new Article 284d(3) of the VAT Directive.

enterprises established within the European Union. If eligible, a small enterprise established in one Member State may also benefit from exemption in another (cross-border exemption), subject to meeting the conditions for exemption in that other Member State.

To avail of the cross-border exemption, the small enterprise must give prior notification to and be identified for the application of this exemption by an individual number in its MSEST. Before being able to allocate such a number, the MSEST must be assured that the small enterprise is eligible for and meets all the conditions for exemption. Verifying this is part of a process that involves not only the MSEST itself but also the MSEX concerned. Only based on the outcome of that process, it will be possible for the MSEST to conclude on this matter.

With that in mind, the Dutch delegation is uncertain on whom it falls to ensure the legal protection of a small enterprise seeking to gain access to the cross-border exemption. It is an issue on which a common approach is indispensable for the smooth operation of the SME scheme as updated.

4.1. Taxpayers' rights

The European Union is founded on the rule of law which relies on law to ensure that its policies are implemented and that fundamental rights are protected. The rule of law is essential for the proper functioning of the internal market and for the respect of the rights of taxpayers. With that in mind, the Commission is intent on taking stock of taxpayers' existing rights under EU law and making recommendations to Member States to facilitate the implementation of taxpayers' rights²¹.

These rights arise from the EU Treaties, the Charter and EU secondary legislation (directives and regulations). As VAT falls within the scope of application of EU law, taxpayers can also rely on the Charter to enforce their rights flowing therefrom such as the right to an effective remedy and to a fair trial (Article 47(1)) and the right of anyone to have his or her affairs handled impartially, fairly and within a reasonable time (Article 41(1) read in conjunction with Article 51).

Ensuring a common approach as to those particular rights is particularly relevant when it comes to the access to the cross-border exemption given the involvement of several Member States.

4.2. Upcoming changes to the SME scheme

Opening the exemption to small enterprises established in another Member State is the main novelty of the update to the SME scheme brought about by Directive 2020/285. Inspired by the One Stop Shop, the MSEST acts as the focal point for any small enterprise seeking to access the cross-border exemption. It is only after receiving the notification from the small enterprise and processing the information contained therein that the MSEST is able to assess the condition of eligibility and, in the case of a positive outcome, also following the confirmation received from the MSEX concerned, allocate the individual number that gives the small enterprise access to the cross-border exemption.

²¹ This is among the actions set out by the Commission in its Communication to the European Parliament and the Council on an Action Plan for fair and simple taxation supporting the recovery strategy ([COM\(2020\) 312 final](#)), action 17 (p. 14).

As correctly pointed out by the Dutch delegation, the update made to the SME scheme set to apply as from 1 January 2025, albeit extending the exemption to Member States other than the one of establishment, does not contain any explicit provisions as to which Member State the small enterprise could address in case it would wish to initiate legal proceedings against an administrative decision taken during this process. Still, some guidance can be taken from the rules on administrative cooperation between Member States²² put in place to determine who is responsible, the MSEST or the MSEX, for which part of the verification process.

4.3. Alternatives put forward for consideration

In its submission, the Dutch delegation outlines various alternatives for consideration and also includes an indication of whether, in its view, the alternative chosen would carry risks with regard to the Charter itself:

	MSEST	MSEX	Risk?
1	One-sided legal protection, solely Union threshold	No legal protection, national threshold of MSEX	Yes
2	One-sided legal protection, solely Union threshold	One-sided legal protection, solely national threshold of MSEX	No
3	Two-sided legal protection, both Union threshold and national threshold of MSEX	One-sided legal protection, solely national threshold of MSEX	Yes
4	Two-sided legal protection, both Union threshold and national threshold of MSEX	No legal protection, national threshold of MSEX	No

- *General remarks*

In looking at the various alternatives put forward, it seems clear that alternative 1 would need to be disregarded as it fails to fully ensure legal protection. While the small enterprise would have an avenue for legal redress when it comes to the Union annual threshold, there would be no such access with regard to the national threshold.

Also alternative 3 should better be set aside as it is not reasonable to imagine that on the same matter, in this case the national threshold, a small enterprise should be able to seek legal redress from both the MSEST and the MSEX. That could give rise to conflicts and result in legal uncertainty as the outcome of such redress may diverge.

That leaves the focus on two alternatives: alternative 2 where responsibility for ensuring legal protection is distributed between the MSEST and the MSEX respectively and alternative 4 where responsibility remains with the MSEST only.

²² Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) (OJ L 268, 12.10.2010, p. 1).

- *Alternatives considered*

In the view of the Commission services, as a rule legal redress is to be addressed to the legal entity that has issued the relevant administrative decision.

During the process laid out above, the MSEST is responsible for the verification of the Union annual threshold, while the MSEX is responsible for the verification of its national threshold.

The decision on whether or not the small enterprise can be issued with an ‘EX’ identification number is for the MSEST to take, subject, however, to confirmation by the MSEX that the value of the supplies made within its territory does not exceed its national threshold.

With regard to the administrative decision concerning the Union annual threshold, it is undoubtedly the MSEST that should be addressed in case the small enterprise intends to initiate legal redress.

With regard to the administrative decision concerning the national threshold, although the MSEST is the only point of communication from the perspective of the small enterprise, it is the Commission services' view that legal redress due to a potentially wrongful assessment of the total value of supplies carried out during the previous or current calendar year in the MSEX should be sought only in the MSEX.

As indicated by the Dutch delegation, there are several arguments why this solution is preferable rather than the MSEST being the addressee of the legal redress.

Indeed, by addressing the MSEX, the fiscal sovereignty of that Member State is respected and it would be avoided that the administrative authorities or courts of the MSEST decide over national provisions of or an administrative assessment made by the MSEX. This is also in line with the procedure regarding the refund of VAT in the VAT Refund Directive²³, which also entails cross-border procedures and therefore allows for a parallel to be drawn.

But mostly the Commission services consider it adequate that a taxable person, allegedly having exceeded the national threshold (it being the substantive reason for the legal redress), is treated as if it were established in the MSEX and thus needs to seek legal protection in that Member State.

It should be recalled that the special scheme for small enterprises represents an exception to the general VAT rules and has been introduced for reasons of simplification and in order not to burden SMEs with compliance costs. A small enterprise which generates so much annual turnover in order to potentially exceed the national threshold in MSEX can reasonably be expected to lead legal proceedings in that Member State, albeit not being established there.

The Commission services are therefore of the opinion that, in the context of the cross-border SME scheme, legal proceedings are to be initiated in the Member State whose tax

²³ Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ L 44, 20.02.2008, p. 23).

authorities have issued the administrative decision in question (i.e. the MEST concerning the Union annual threshold and the MSEX concerning the national threshold).

- *Conclusion*

To conclude, the Commission services believe that while alternative 4 may have its benefits as it offers facilities for a small enterprise seeking legal protection, it must be so that alternative 2, whereby responsibility is distributed between the MEST and the MSEX to reflect their part of the decision, prevails.

5. DELEGATIONS' OPINION

Delegations are invited to give their opinion on this question.

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QUESTION FROM THE NETHERLANDS

1. Background and issue

The Netherlands is currently preparing the implementation of Council Directive (EU) 2020/285 regarding the new SME scheme. During the preparation of our implementation Act, we encountered an issue regarding legal protection. We noticed that the directive does not regulate which Member State should provide the taxable person with an opportunity to bring legal proceedings. Normally, these issues might fall within the scope of procedural autonomy of Member States, but considering the interdependence of Member States in the cross-border application of the new SME scheme and the possibility that a taxable person might enjoy double legal protection or – by contrast – does not have the opportunity to bring legal proceedings, we believe that it is necessary to discuss this issue at Community level.

2. Questions

We therefore wish to draw your attention to the following question:

1. Which Member State should provide the opportunity to bring legal proceedings in the cross-border application of the new SME scheme?

3. Risks

A taxable person should have the right to an effective remedy before a tribunal when his rights are violated.¹ Furthermore, a taxable person should also have the right to have his affairs handled impartially, fairly and within a reasonable time.² The abovementioned right also includes the right of the taxable person to be heard before the measure would affect him and the obligation of the administration to give a reason for its decision.

The new SME scheme might be on strained terms with the abovementioned rights if Member States do not coordinate with one another. The new SME scheme seems to contain the risk, for example, that a taxable person does not have an opportunity to bring proceedings, that a taxable person can enjoy double legal protection, or that a Member State takes a decision to reject the application of the new SME scheme without being able to give a proper substantiation.

On the one hand, no legal protection might occur in the case the Member State of establishment (hereafter: “MS EST”) only provides legal protection regarding the Union turnover threshold, but the Member State of exemption (hereafter: “MS EX”) does not provide legal protection regarding its national turnover threshold. A taxable person who does not fulfill the requirements of the national turnover threshold, because, for instance, MS EX corrects the information that results in the exceeding of its national turnover threshold, will not have an opportunity to bring legal proceedings.

¹ Article 47(1) of the Charter of Fundamental Rights of the European Union (hereafter: the Charter).

² Article 41(1) in conjunction with Article 51 of the Charter or the unwritten general principle of respect for the rights of the defense.

On the other hand, double legal protection might occur in the case MS EST provides legal protection regarding both the Union turnover threshold and the national turnover threshold (of MS EX), but MS EX also provides legal protection regarding its national turnover threshold.

MS EST	MS EX	Risk?
One-sided legal protection, solely Union threshold	No legal protection, national threshold of MS EX	Yes
One-sided legal protection, solely Union threshold	One-sided legal protection, solely national threshold of MS EX	No
Two-sided legal protection, both Union threshold and national threshold of MS EX	One-sided legal protection, solely national threshold of MS EX	Yes
Two-sided legal protection, both Union threshold and national threshold of MS EX	No legal protection, national threshold of MS EX	No

4. Causes

The risks mentioned in paragraph 3 are primarily caused by the fact that the Directive does not specify which Member State should provide the opportunity to bring legal proceedings. Secondly, the new SME scheme differs from other cross-border schemes. Other cross-border schemes can be considered linear, that is to say the application of these schemes start in MS EST and end in the other Member State. The new SME scheme, however, can be regarded as a circular procedure. In concrete terms, this means the procedure of the cross-border scheme commences in MS EST and concludes there as well.

4.1. Application by a prior notification

A taxable person has the right to apply the exemption in MS EX, on the condition that he fulfills two material and two formal requirements.³ The two material requirements regard the Union annual turnover threshold and national annual turnover threshold.⁴ The two formal requirements are the prior notification to MS EST and identification for the application of the exemption by an individual number in MS EST.⁵ In the event a taxable person fulfills the abovementioned requirements, the exemption shall apply from the date of informing the taxable person of the individual number.⁶ The abovementioned process shows that MS EST takes the decision to identify the taxable person for the purposes of the exemption, and therefore, the taxable person is only entitled to apply the exemption in MS EX after MS EST has identified him.

³ Article 284(1)(2) of Directive 2006/112/EC (hereafter: ‘VAT Directive’).

⁴ Article 284(2) of the VAT Directive.

⁵ Article 284(3) of the VAT Directive.

⁶ Article 284(5) of the VAT Directive.

The allocation of duties between Member States follow from Regulation (EU) 904/2010. After receiving the prior notification containing all the necessary information, MS EST calculates, before identifying the taxable person, whether the taxable person has exceeded the Union turnover threshold.⁷ Subsequently, MS EX confirms to MS EST whether the taxable person has or has not exceeded the national annual turnover threshold.⁸

In our view, this process shows that the decision to identify the taxable person consists of two components, namely an assessment by MS EST and an assessment by MS EX. However, the decision to identify the taxable person is only taken formally by MS EST.

4.2. Deactivation of the individual number or adaption of the information

A taxable person cannot benefit from the exemption when his turnover exceeds the Union turnover threshold or the national turnover threshold.⁹ Concerning the national turnover threshold, MS EX will likely notice an overrun as the result of an update of the prior notification or a periodic report.¹⁰ Subsequently, MS EX will have to notify MS EST of the date on which the taxable person has ceased to be eligible for the exemption.¹¹ MS EST will then either deactivate the individual number or adapt the information.¹²

In the event the turnover of the taxable person exceeds the Union turnover threshold, MS EST will likely notice the overrun as result of an update of the prior notification, a periodic report or in case the taxable person informs MS EST.¹³ Subsequently, MS EST deactivates the individual number of the taxable person.¹⁴

In our view, in contrast with the application procedure, it seems that the termination of the exemption does not depend on the deactivation of the individual number. The expiration of the exemption is merely based on whether a taxable person exceeds a threshold.

5. Possible solutions

The risks might be mitigated in the event that Member States opt in for a common framework regarding legal protection. Such a framework might take two forms, namely (1) MS EST provides legal protection regarding the Union turnover threshold and MS EX provides legal protection regarding its national turnover threshold, or (2) MS EST provides legal protection regarding both the Union turnover threshold and the national turnover threshold of MS EX.

5.1. MS EST and MS EX provide both legal protection

In this situation, a taxable person only enjoys legal protection in MS EST when the decision to refuse, revoke or deactivate identification is merely based on the assessment by MS EST. This will be the case when the MS EST refuses or deactivates the individual number if the taxable person exceeded the Union turnover threshold. In the situation that the decision of MS EST to refuse or deactivate the individual number of the taxable

⁷ Article 37b(1) of Regulation (EU) 904/2010.

⁸ Article 37b(2) of Regulation (EU) 904/2010.

⁹ Article 288a(1)(2) of the VAT Directive.

¹⁰ Article 284(5) and Article 284b(3) of the VAT Directive.

¹¹ Article 37b(3) of Regulation (EU) 904/2010).

¹² Article 284e(b) of VAT Directive.

¹³ Article 284b(3) of the VAT Directive.

¹⁴ Article 284e(a) of the VAT Directive.

person is merely based on the assessment of MS EX (national turnover threshold), the taxable person will not have the opportunity to bring proceedings in MS EST. It is however crucial that the taxable person has the opportunity to bring proceedings in MS EX if the refusal or deactivation of the identification is merely based on the assessment by MS EX.

In our opinion, this should be the preferred solution. Firstly, because this solution conforms to the fiscal sovereignty of Member States. In doing so, Member States prevent discussions regarding the application of specific provisions that might have an impact on the calculation of the turnover, such as the place of supply or the date a supply has occurred. Furthermore, this solution prevents that an administrative authority or a court in MS EST decides respectively rules on the application of the provisions in MS EX. Finally, this solution is, in spite of the differences between these procedures, in accordance with other existing cross-border procedures, such as the procedure regarding the refund of VAT in Directive 2008/9/EC.

However, it should be noted that this solution, in isolation, gives rise to other risks. For example, a process-based problem might occur, as the Directive requires that the taxable person can only use the exemption after MS EST has identified him. The decision of MS EST to refuse or issue the individual number of the taxable person in MS EST might therefore depend on a legal procedure in MS EX. This will probably entail one of the following: (1) MS EST has to wait until the outcome of the decision in MS EX is final (*res judicata*) or (2) the taxable person has to submit a new prior notification after the procedure in MS EX is final. Neither the Directive, nor the Regulation contains a provision to facilitate this process. Furthermore, this solution might create barriers for the taxable person to exercise his rights.

5.2. MS EST provides legal protection

In this situation, MS EST takes a formal decision and provides the opportunity to bring legal proceedings to decisions regarding both the Union turnover threshold and the national turnover threshold. Although we do not prefer this solution, we acknowledge that this solution also consists of a couple of advantages. Primarily, one might argue that this option is in accordance with the objectives and target group of Directive 2020/285, namely simplification and small businesses, respectively. Secondly, this solution is in line with the structure of the procedure of the new SME scheme. After all, the taxable person will still only communicate through and with MS EST, as intended by Directive 2020/285. Finally, this solution can also remove any barriers for the taxable person to exercise his rights.

On the other hand, this may lead to a peculiar situation in which an administrative authority or a court in MS EST decides on the application of the exemption in MS EX. Furthermore, MS EST does not necessarily possess the required information to take a substantiated administrative decision. Neither the Directive, nor the Regulation provides a provision for MS EX to specify the reasons.

6. Conclusion

We trust that this is in accordance with your requirements and look forward to receiving the opinions of the VAT Committee. If you require further information or clarification, please do not hesitate to contact us.