EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
**Value added tax**

**taxud.c.1(2022)9305226 – EN**

Brussels, 2 December 2022

# VALUE ADDED TAX COMMITTEE
## (ARTICLE 398 OF DIRECTIVE 2006/112/EC)
## WORKING PAPER NO 1054 FINAL

## MINUTES

## 120TH MEETING
## – 28 MARCH 2022 –

The Chair welcomed the delegations to the non-public 120th meeting of the VAT Committee that took place in the form of a videoconference.

Next meeting: the 121st meeting is likely to take place in October 2022. Whether or not in-person, will depend on the evolution of the Covid-19 pandemic.

**Agenda**

The Chair announced that before the discussion on the Agenda points, two members of the VAT Expert Group (VEG) would give a presentation on "CJEU case C-235/18 *Vega International*: Fuel cards".

The presentation was given by Messrs Duffy and Marden representing respectively KPMG and the International Chamber of Commerce in the VEG. As a background, it was recalled that the *Vega International* case had already been discussed and that the Commission services had invited the VEG to prepare a paper outlining the main business models relating to the operation of fuel cards and the differences caused by that case, that could be discussed during a subsequent meeting of the VAT Committee. In this context, the VEG established a subgroup, consulted with stakeholders in the fuel card sector and considered also the submissions to the Commission services made available to the subgroup. The presented paper focused on i) the importance of the fuel card sector, ii) the main fuel card business models, iii) the unique fact pattern of *Vega International*, and iv) the suggested way forward.

The overall conclusion was that, based on existing models and how they stand out compared with that of *Vega International*, fuel card transactions should continue to be treated as chain transactions for VAT purposes.

It was explained that a consistent VAT treatment in the EU is important given the relevance of the fuel card sector in the EU (the market accounted for over EUR 221 billion in 2017 and was projected to reach over EUR 322 billion by 2025). Treating fuel card transactions as chain transactions was presented as crucial both for fuel card users (e.g. it ensures VAT neutrality for business) and for tax administrations (it follows the underlying legal framework thus facilitating tracking the transactions and the parties involved). It was also stressed that the VAT treatment of fuel cards should be aligned with that of the e-mobility sector (whose treatment as chain transactions was agreed by unanimity with VAT Committee guidelines from the 118th meeting).

Two main models were identified as to how fuel cards typically operate: (1) buy/sell model, and (2) commissionaire model. These models' common features were also outlined: regulatory requirements, pricing, limitations on the use of fuel cards, nature being as a means of authorisation rather than a means of payment, liability in the event of payment or performance default, authorisation process and invoicing procedure. It was in particular stressed that in these models the fuel card issuer steps into the chain from a regulatory, price setting and invoicing perspective and also authorises each transaction.

These generally accepted and applied fuel card business models differ from that of the *Vega International* case whose conclusions should thus not apply to them. First, as regards the contractual arrangements, it was underlined that Vega International provided a range

of different services to Vega Poland. Thus, the agreement was not about a purchase and resale of fuel nor was Vega International acting explicitly as a commissionaire on behalf of Vega Poland. Second, Vega International did not VAT register in Poland but it invoiced Vega Poland from its Austrian VAT number (i.e. transaction treated as a supply of service) while normally the issuer of a fuel card would register in the country where the fuel is provided. Third, Vega International did not play any role in authorising the transactions. It only passed on the charges plus a margin, disclosing the price of the fuel, and did not apply for a licence for petrol trading in Poland.

As to the proposed way forward, it was indicated that both the buy/sell and the commissionaire models give rise to a purchase and resale of the fuel for VAT purposes. Where the features mentioned before are present (i.e. clear legal framework, authorisation of transactions, setting of prices, invoicing and liability), the VAT treatment of a chain transaction should thus be maintained. This also to ensure consistency with the VAT treatment of the e-mobility and of the chain transactions in general.

The Chair opened the floor for comments.

No delegation asked for the floor.

The Commission services thanked for the clear presentation and pointed to the difficulty in ascertaining the limited scope of the *Vega International* judgment on the basis of the different business models at stake. It was then asked, how the criteria used by the CJEU should be applied to the described business models and, in particular, how to support that the fuel card issuer is supplying goods (i.e. fuel) and under which circumstances.

The VEG representatives confirmed that the transfer of the right of disposal as owner is the right test to be conducted and noted that in order to have a chain transaction for VAT purposes, there is no requirement for the intermediate party in the chain to take physical possession of the goods. It was recalled that for each transaction the issuer makes sure that the agreed conditions are met (e.g. the type of fuel) thus playing a role in authorising the transaction (although in an automatic way). The issuer also sets the prices and is liable in case of problems. All these elements taken together concur to prove the existence of a transfer of right of disposal as owner.

The Commission services added that the VAT Committee would continue discussions on this topic taking into account the presentation delivered.

The VEG representatives thanked for the opportunity to present their views and expressed interest in the outcome of the discussions.

The Chair thanked for the presentation (to be published with the paper after the meeting) and underlined the economic importance of the topic and the need to support with solid arguments the limited scope of application of *Vega International*. Member States were encouraged to wait until a common interpretation would be agreed at EU level, before adapting their practice. The Chair thanked the VEG members and upon disconnection, noted that the Commission services would prepare a new Working paper for further discussions at the next VAT Committee meeting taking into account the agreed guidelines on e-mobility and the VEG presentation.

With that in mind, the Commission services invited written comments from Member States after the circulation of the VEG presentation.

**Update on proposals by the Commission**

The Chair informed delegations about the following:

- VAT e-commerce: results from the first 6 months following the entry into application of the VAT e-commerce package indicate a total of almost EUR 2 billion in estimated VAT collected on low value consignments for distance sales of imported goods. A comprehensive evaluation of the whole package has been launched in the form of an EU survey. Figures on the revenue from the Union and non-Union schemes will then also be available. A communication campaign will also be relaunched.

- “VAT in the Digital Age” initiative: the Public Consultation would be open for feedback until 5 May, with the Impact Assessment to be submitted to the Regulatory Scrutiny Board on 25 May. The GFV would meet again to discuss technical issues (i.e. the platform economy and the Single VAT Registration, including securing the IOSS numbers and transfers of own goods).

- Electronic exemption certificate/procedure: Member States which had not yet replied were asked to provide data. The matter was expected to be brought to the SCIT meeting of 11-12 May.

- VAT Committee Proposal: contributions have been received from 13 Member States. The other Member States were invited to provide their contribution in view of the proposal.

- VAT Refund Statistics for 2021: it was reminded that the deadline for Member States to send their VAT refund statistics for 2021 was 31 March 2022.

- SME scheme – Implementing measures: the work on drawing up IT specifications had started and results of the first iteration of the ‘Elaboration’ phase would be presented in a workshop on 30 March 2022.

- New study on VAT rules applicable to travel and tourism: a new study to collect data on travel and tourism sector and assess the relevant VAT rules had just started.

- Extension of Commission Decision 2020/491 (Covid Decision): a Commission Decision for extension was adopted and would be in force until the end of June 2022.

- Support to Member States in the field of VAT and customs duty in order to help mitigate the humanitarian impacts of the Ukraine crisis: Member States had been consulted on their needs and almost all of those having replied asked for the import VAT and duty relief. The new Article 101a of the VAT rates proposal, to be adopted in April 2022, would allow Member States authorised by the Commission to apply an exemption from VAT on goods imported for the benefit of disaster victims to also apply an exemption with deductibility of VAT paid at the preceding stage in respect of

the intra-EU acquisitions and domestic supplies of those goods and of services related to such goods.

**Topical issues in the Council**

The Chair briefly mentioned the latest developments in Council: the 2018 Proposal on VAT rates, the update of the VAT and/or excise exemption certificate (the Amending Regulation was adopted on 15 March 2022 and entered into force upon publication) and the proposal prolonging Articles 199a and 199b on the optional domestic reverse charge and the Quick Reaction Mechanism (the next step being Coreper for a political agreement and the Parliament opinion but no delays were expected).

**Other topical issues – Follow-up of the last meetings**

Guidelines from the last meetings. The Chair noted that: i) on vouchers guidelines had not yet been drawn up, with the Commission services being in contact with Belgium, ii) on the place of supply of liquefied natural gas, a written procedure was ongoing.

## 1. ADOPTION OF THE AGENDA

(Document taxud.c.1(2022)1800323)

The agenda was adopted with no comments from delegations.

## 2. REPORT ON THE RESULTS OF THE WRITTEN PROCEDURES

### 2.1. Minutes of the 119th meeting

The Chair stated that the written procedure for the approval of the minutes from the 119th meeting would end on 1 April.

### 2.2. Guidelines from the previous meetings

The Chair indicated that since the previous meeting the following guidelines had been successfully concluded:

- The **almost unanimous/unanimous** guideline on the **Return of goods placed under call-off stock arrangements**.
- The **almost unanimous/by large majority** guideline on the **Calculation of the EU place-of-supply threshold**.
- The **unanimous/almost unanimous** guideline on **Dietary recommendations administered by a medical treatment institution within a medical treatment process.**
- The **unanimous** guideline on the **Proposed solution to regularise double taxation in the IOSS VAT return.**

- The **almost unanimous** guideline on the **Case C-812/19, *Danske Bank*, Principal establishment and branch of a company situated in two different Member States.**

### 2.3. Member States consultations by written procedure

The Chair referred to the upcoming adoption of the VAT rates proposal after which the obligation to consult the VAT Committee pursuant to Article 102 of the VAT Directive would cease to exist and stated that since the previous meeting, the VAT Committee had taken formally note of the following consultations:

- Poland – Temporary application of a reduced VAT rate to supplies of electricity and district heating.

- Spain – Prolongation of a reduced VAT rate of 10% to certain supplies of electricity.

- Romania – Temporary extension of the scope of customers who could benefit from of the reduced VAT rate of 5% for supplies of district heating.

- Belgium – Temporary application of a reduced VAT rate of 6% for certain supplies of electricity.

## 3. CONSULTATIONS PROVIDED FOR UNDER DIRECTIVE 2006/112/EC

As regards late consultations pertaining to Article 102 of the VAT Directive, the Chair gave the floor to the respective delegations to present them orally, as an exception to the rule in light of the upcoming adoption of the VAT rates proposal after which the obligation to consult the VAT Committee would cease to exist.

- Croatia communicated the following reduced VAT rates:

  - supply of natural gas: from 1 April 2022 until 31 March 2023 a reduced VAT rate of 5% and from 1 April 2023 a reduced VAT rate of 13%;
  - supply of district heating: from 1 April 2022 a reduced VAT rate of 13%.

- Belgium communicated the application of a reduced VAT rate of 6% for supplies of natural gas and district heating and the extension until 30 September 2022 of the reduced VAT rate of 6% on certain supplies of electricity, already meant to apply until 30 June 2022 based on a prior consultation.

- Cyprus already consulted the VAT Committee on the application of the reduced VAT rate on the supply of electricity during the previous meeting (5% VAT rate on electricity consumption by vulnerable households for a maximum period of 6 months starting as of 1 November 2021 and 9% VAT rate on electricity consumption for other households for a maximum period of 3 months starting as of 1 November 2021). Cyprus communicated the following prolongations:

  - Extension of the application of the 5% VAT rate on the supply of electricity to vulnerable households for another two months until the end of June 2022.

  - o Application of the 9% VAT rate on the supply of electricity to the rest of households for the period of March-April 2022.

  Cyprus expected a revenue impact of around EUR 5 million.

- Spain communicated a prolongation from 30 April to end of June 2022 of a reduced VAT rate (10%) to certain supplies of electricity on which Spain already consulted the VAT Committee in June 2021 and then asked for extension in December 2021.

- The Netherlands informed of the application of a temporary reduced VAT rate from 1 July until 31 December 2022 for the supply of natural gas, district heating and electricity. The Netherlands expected around EUR 1.1 billion of budget impact.

As no delegation asked for the floor, the Chair thanked and took note of the consultations made.

## 4. QUESTIONS CONCERNING THE APPLICATION OF EU VAT PROVISIONS

### 4.1 Origin: Slovakia

**References:** **Article 98(2), point (15) of Annex III of the VAT Directive**
**Subject:** **Reduced rate for supplies of goods and services in the context of social wellbeing, welfare or social security work**
**(Document taxud.c.1(2022)1569537 – Working paper No 1029)**

The Commission services presented their Working paper on a question by Slovakia on the application of a reduced VAT rate to supplies of goods and services in the context of social wellbeing, welfare or social security work. The question related, in particular, to whether it is sufficient to have regard to the supplier only or if also the perspective of the final recipient matters. In Slovakia, the supplier needs to be a registered social enterprise, while the recipient must be an eligible authorised customer, and in addition there must be no distortion of competition.

In their presentation, the Commission services noted that the reduced rate under point (15) of Annex III of the VAT Directive differs substantially from other reduced rates with a social reference, such as that under point (10), in that it contains specific conditions without, however, narrowing down the goods and services eligible. Point (15) only requires that the supplier is: (i) recognised as being devoted to social wellbeing by the Member State of taxation, and (ii) engaged in welfare or social security work. In addition, it was noted that in compliance with the principle of fiscal neutrality, it is for the Member States to set out the criteria under which organisations engaged in welfare or social security work can be recognised as being devoted to social wellbeing.

The Commission services took the view that the requirement applied by Slovakia for the supplier to be a registered social enterprise could be appropriate for recognising him as an organisation devoted to social wellbeing. It would then be for Slovakia to ensure that eligible organisations are actually engaged in welfare or social security work as required under point (15) of Annex III. It was also noted that this criterion is sufficient to comply with the conditions in point (15), while the second requirement on the eligible authorised customer goes beyond what is strictly necessary.

However, it was pointed out that Member States applying a reduced rate to a particular category in Annex III may restrict its use and are not required to cover that entire category. Pursuant to the case law of the Court of Justice of the European Union (CJEU), in doing so Member States must however comply with the principle of fiscal neutrality inherent in the common system of VAT, which is a matter for national courts to ascertain.

It was finally stressed that the considerations set out refer exclusively to point (15) and cannot be referred to or relied upon for the interpretation of other points of Annex III due to specific conditions laid down in point (15).

The Chair gave the floor to the Slovak delegation.

The Slovak delegation thanked the Commission services and recalled that the reduced rate under point (15) applies when the supplier is: (i) recognised as being devoted to social wellbeing by the Member State of taxation and (ii) engaged in welfare or social security work. In the Slovakia's opinion, while registered social enterprises can meet the first condition, the second condition should be seen as referring to the context of the taxable activity performed by the eligible entrepreneur. Slovakia sought more clarity on the meaning of that second condition and on whether point (15) would only cover activities having a similar nature to those covered by Articles 132, 135 and 136 of the VAT Directive but with the social entrepreneurs not meeting all the required conditions for exemption. The perception by the recipient of the taxable activity as being social should in their view be considered. This would also be in line with the objective of reduced rates making goods more affordable for final consumers. It was noted that in Slovakia many social enterprises, although registered as such, conduct ordinary economic activities, thus requiring the social context also to be considered for the application of the reduced rate. Finally, they expressed interest in the interpretation of point (15) as amended by the upcoming VAT Rates Directive whereby "engaged in welfare or social security work" is defined by Member States and whether in particular the scope of the activities covered could be wider under the new rules.

The Chair noted that point (15) of Annex III as amended could be the subject of a new Working paper if a Member State were to submit a question together with its analysis and then opened the floor to the other delegations.

No delegation asked for the floor.

The Commission services on the other hand found the remarks made by Slovakia very interesting and invited others to be sure always to mention the underlying reasons when submitting a question to the VAT Committee since such is useful for the analysis. It was added that the analysis was based on the law applicable at the time the question was submitted.

The Chair underlined that given the subject and the latitude for Member States to set their rules, there should be no need for guidelines.

**4.2 Origin: Commission**
**References: Articles 2(1) and 135(1)(d) and (e) of the VAT Directive**
**Subject: VAT treatment of crypto-assets**
**(Document taxud.c.1(2022)1585400 – Working paper No 1037)**

The Commission services presented the Working paper dealing with crypto-assets, in particular those with payment functions, i.e. crypto-currencies. It was recalled that these assets, whose importance increased in the last years, are characterised by technological features evolving rapidly, lack of centralised control, perceived anonymity, evaluation difficulties and hybrid nature that pose challenges to their VAT treatment. The topic had been at the centre of previous discussions: i) in the context of the VAT Committee, most notably based on Working paper No 892 discussed in 2016 (following the CJEU ruling in case C 264/14 *Hedqvist*); ii) by the OECD in its 2020 report on the taxation of virtual currencies which quoted various VAT Committee papers and also provided general concepts and definitions useful for their VAT analysis; and iii) finally, by the Commission services currently looking into tax policy challenges relating to crypto-assets in a broader context (direct and indirect taxation).

The Commission services pointed out that the aim was to: (i) recap the conclusions reached so far, (ii) provide an update on the various transactions linked to crypto-assets, and (iii) launch discussions with a view to agreeing on a common approach and possibly guidelines.

It was first recalled that the Commission's MiCa (Regulation on Markets in Crypto-assets) proposal provides for a definition of crypto-assets as *a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology* and the distributed ledger technology (DLT) as a *type of technology that supports the distributed recording of encrypted data*. It was explained that crypto-assets are usually seen to cover three types of digital financial assets (payment tokens, security tokens and utility tokens). A token's character may however evolve over time and individual tokens may feature different characteristics, thus the analysis was to be taken by way of simplification since just focused on the payment functions of a token, i.e. on crypto-currencies.

It was then recalled that for an analysis of the VAT treatment of supplies relating to crypto-assets, these are the steps always to be taken: (i) assessment as to whether the supply falls within the scope of VAT, i.e. a) whether it is a supply of goods or services for consideration, and b) if it is made by a taxable person acting as such; (ii) if within the scope, whether the supply is: a) taxed, or b) exempt. According to settled case-law, a supply of services is effected for consideration only a direct link can be established between the services supplied and the consideration received, i.e. if there is a legal relationship between the provider and the recipient pursuant to which there is a reciprocal performance, the remuneration received by the provider constituting the actual consideration given in return for the service supplied to the recipient.

As regards the **supply of crypto-assets following their creation**, three modalities were considered: airdrop, mining and forging. Since **airdrop** is the distribution of tokens without compensation, it was noted that this would fall outside the scope of VAT.

As regards **mining**, a process by which transactions in crypto-assets are verified and added to the blockchain-based ledger (the record of transactions), it was noted that miners

should in principle qualify as taxable persons as in order to perform the mining it is necessary to operate powerful hardware capable of solving complex mathematical problems (proof of work protocol). Miners can be rewarded by transaction fees or by crypto-assets generated automatically by the system. Although transaction fees are not obligatory, in reality they are often paid as an incentive to verify transactions more quickly and in the near future, when such creation of virtual currency halts, the miners would be supported exclusively by these fees. On this basis, the Commission services took the view that mining could fall within the scope of the VAT in which case it could be exempt either under Article 135(1)(e) on currency, since it covers services concerning means of payment, or under Article 135(1)(d) concerning payments or transfers, since miners are not merely transmitting information, but also perform activities arguably constituting the actual transfer of funds.

**Forging (or staking)**, unlike mining, is based on a proof of stake consensus mechanism where forgers only receive rewards in respect of (and in proportion to) their prior holdings of a given type of crypto-assets. The difference with the proof of work mechanism was, however, not necessarily considered significant in terms of VAT since the nature of the services supplied in both cases consists in verification and validation of transactions. Therefore, the Commission services took the view that the VAT assessment of forging services should be the same as that of mining.

As regards **storage and transfer**, it was explained that in order to hold crypto-asset accounts, keep records of balance and carry out transactions linked to these assets, users need **digital wallets**. With four main types identified by the 2020 OECD report, from a VAT perspective it is still important to assess whether such digital wallet services are provided for a fee. The Commission services took the view that if free of charge, such transactions would fall outside the scope of VAT, while digital wallet providers perceiving a consideration with there being a direct link between that consideration and services provided, in principle could be considered to be taxable persons and their transactions would fall within the scope of VAT. If that were to be the case, the exemption under Article 135(1)(e) could apply since the services in question directly concern means of payment, while the exemption under Article 135(1)(d) should not apply since, according to the CJEU case-law on payments and transfers, the supplier's responsibility cannot be limited to mere technical aspects and for a service to be exempt, it is not sufficient that it constitutes an input to another exempt service. Indeed, digital wallet platforms connect crypto-asset users and the miners, but supplying this service does not in itself entail any change in the ownership of funds, no matter how necessary the service may be for crypto-asset transactions to take place.

As regards the **exchange** of crypto-assets, it was recalled that in *Hedqvist* the CJEU qualified the exchange of bitcoins for a traditional currency as a taxable supply of services exempt from VAT under Article 135(1)(e), thus treating crypto-assets for the purposes of VAT in the same way as traditional currencies. The Commission services took the view that also exchanges of crypto-assets for other crypto-assets should be considered taxable, but exempt from VAT under Article 135(1)(e).

As regards **supplies of goods and services remunerated in crypto-currencies**, the Commission services took the view that any supply subject to VAT, the consideration of which is paid in crypto-assets, should be treated in the same way as any other supply for VAT purposes, in line with *Hedqvist*.

As regards **modifications of a token**, it was explained that any change in the underlying protocol of a token is known as **fork** in the chain, with a new token being created alongside the original one (hard fork) or the protocol being updated without creating a new token (soft fork). The Commission services took the view that from a VAT perspective, modifications are relevant being treated similarly to mining/forging. Supplies which lead to the improvement of an existing token or to the creation of a new token would fall within the scope of VAT and could possibly be exempt under Article 135(1)(e) as services concerning means of payment.

With a view to ensuring coherent treatment across the EU, the following **principles** could serve as useful guidance:

1. General principle: crypto-assets are treated as a currency.
2. Supply of crypto-assets following their creation:
    a. Free of charge (e.g. airdrop): in principle, out of scope,
    b. For consideration (e.g. in principle mining/forging): taxable, but exempt (Article 135(1)(e) or (d)).
3. Storage and transfer – digital wallets: taxable, but exempt (Article 135(1)(e)).
4. Exchange (crypto-assets for fiat currency or for other crypto-assets): taxable, but exempt (Article 135(1)(e)).
5. Supply of goods or services remunerated in crypto-assets: the same treatment as any other supply for VAT purposes.
6. Modification of a token: the same treatment as that of mining/forging.
7. Mining, forging, modification of a token for own use: out of scope.

The Chair opened the floor, pointing at the importance of reaching a common interpretation of the basic principles outlined.

One delegation thanked the Commission services and found the conclusions logical since the *Hedqvist* judgment assimilated cryptocurrency to a traditional currency. However, other types of tokens (e.g. security, utility or non-fungible tokens (NFT)) would also need to be addressed since these will not necessarily fall under the currency definition with a view to see whether the same VAT principles would apply.

A second delegation expressed an overall support for the suggested principles and informed to adhere to the *Hedqvist* judgment and to the criteria laid down therein. However, the modification of a token could not be considered a taxable transaction by itself (only when the new token is later subject to a transaction, instead the principles of mining activity would apply) and, contrary to point 7 of the conclusions, mining, forging and modification of a token for own use would be treated as a supply of service for consideration under Article 26 of the VAT Directive. This delegation confirmed the accuracy of the table.

Another delegation agreed on the need to also assess other types of token: although use of "crypto-asset" could be confusing, only payment tokens could be seen as addressed by the paper. According to this delegation, mining has to be treated as out of scope of VAT absent a counterpart, but when in the scope with a counterpart paid, it doubted that mining should be seen as giving rise to changes in the legal and financial situation of the parties

involved unless the provider is liable for the full amount of tokens being validated if anything goes wrong.

A delegation agreed in principle with both the analysis and the conclusions but reserved its final position as more time was needed to analyse the topic. This delegation asked to update the table since the exchange of cryptocurrencies was treated as exempt under Article 135(1)(e), following the *Hedqvist* judgment, while mining without consideration as out of scope of VAT (pointing out that mining against consideration had not yet been experienced).

Another delegation agreed in principle with all the conclusions, while noting that given the complexity of this topic an internal analysis was ongoing with an administrative regulation in the pipeline and this could result in a different outcome. This delegation confirmed the accuracy of the table.

A delegation pointed to central banks reflecting on issuing cryptocurrencies. In this context, if a blockchain were to be developed by a central bank with a built-in system to reward miners to attract them, mining could be said to be a supply for consideration with a direct link, which would be in scope of VAT, despite the reward being automatic.

The Commission services explained that mining with automatic reward and the issue of its qualification as a taxable transaction had been analysed but further examination was possible, noting that in reality mining rewarded by transaction fees was becoming more and more widespread. It was also clarified that although the assessment might vary depending on their design, central bank digital currencies would not necessarily qualify as crypto-currencies but likely rather as legal means of payment. As regards other types of token not being covered by the paper, these would have to be addressed in a separate paper although a partial analysis had previously been made (e.g. on utility tokens in the Working paper on vouchers). As to the use of terminology, it was clarified that the general term "crypto-assets" was considered more appropriate as this reflected the reality of tokens rarely having one single function, but rather having a mix of features.

Another delegation was still analysing the topic but at this point in time agreed with the conclusions. This delegation found that as the paper only analysed tokens with a payment function although being about crypto-assets, any guidelines should be explicit in addressing only crypto-assets used as means of payment. As regards mining, it did not consider the miner to be a taxable person since i) the reward is generated by a system instead of being given by a party to the transaction, and ii) the transaction fee is optional and at the discretion of the other party to give. When transaction fees become the rule, the miner will be regarded as a taxable person, but the recipient of the service would still need to be identifiable. As to the analysis made on the VAT treatment of the modification of a crypto-asset, this was not found sufficiently clear.

A delegation stated that obtaining crypto-assets by mining in practice is random and as such there is no direct link between the payment made and the service provided. Thus, it recommended to assess situations on a case-by-case basis.

Another delegation underlined that when the reward for mining is automatic, there is a consideration but not an identifiable customer, so the transaction would be treated as out of scope of VAT. It also stated that crypto-assets can be qualified as traditional currencies and qualify for the exemption only if the conditions set out in *Hedqvist* are met.

A delegation proposed to use the term "crypto-asset/token with payment functions" and added that when mining is remunerated, it might happen that the client would pay to the system and the system would then pay the miner. In this case, the client would be unknown in which case the activity of mining should be treated as mining without a counterpart.

Finally, a delegation reiterated that also other tokens such as NFTs should be analysed, and as others noted that the term crypto-assets was too broad so the conclusions in the paper should only cover crypto-assets acting as a currency. This delegation also noted that digital wallets should not be exempted in general, but rather assessed on a case-by-case basis.

The Commission services thanked for the remarks made and noted that on technical issues, e.g. identification of the counterpart in mining, the assessment of internal experts in other specialised Directorate Generals might have to be requested. As regards guidelines, the scope would be clearly identified and as types of different instruments are expected to continuously evolve over time, focus would be on agreeing basic principles. Although a case-by-case analysis would always be needed, there is a value in setting out such principles both for tax administrations relying on them and for stakeholders otherwise facing differences in VAT treatment.

A delegation came in to express its agreement with the analysis made but had doubts on the issue of taxation of mining as this was still being analysed.

The Commission services added that as regards the relationship between the miner and the client where tokens are triggered by the system, it should be taken into account that there are always rules set behind any system triggering tokens to be produced and those would need to be assessed.

A last delegation thanked the Commission services whose conclusions correspond to its approach while stating that more time would be needed to assess the accuracy of the table.

The Chair announced that his services would prepare guidelines on the topic and wished unanimity could be reached. In the meantime, Member States were invited to provide any written comments they might have within a month.

**4.3 Origin: Commission**
**References: Article 135(1)(d) of the VAT Directive**
**Subject: Digital payment services – Selected issues in e-commerce (e-wallets, marketplaces and "Buy Now, Pay Later" offerings)**
**(Document taxud.c.1(2022)1614863 – Working paper No 1038)**

The Commission services presented the Working paper on the VAT implications of certain selected issues in e-commerce payments, reminding delegations that technology has enabled unprecedented innovation in the financial sector, especially as regards payment services where a broad variety of payment solutions and operators have emerged. The trend of so-called "Banking-as-a-Service" (BaaS) has seen non-financial companies provide payment and other financial services without becoming a bank and banks build partnerships with financial technology companies to improve their capabilities and their services. All this has in terms of activities and operators further increased fragmentation of the payment supply chain leading to questions on applicability of Article 135(1)(d) of the

VAT Directive, pursuant to which Member States shall exempt, inter alia, *transactions concerning payments and transfers*.

After having outlined the main principles laid down by the CJEU in its case-law, especially on payments and transfers, the Commission services presented the different topics: E-wallets, marketplaces and "Buy now, pay later" offerings.

On **e-wallets**, it was explained that these are a popular e-commerce payment solution, serving both customers of a merchant (payers) and merchants (payees), both having to be registered and to hold an account in the e-wallet provider's system. The e-wallet enables merchants to accept a variety of payment methods and customers to pay their merchant using any of the different funding sources (such as bank accounts, credit or debit cards) stored in their e-wallet as payment methods. In order to execute payments within the e-wallet provider's system, funds must be first transferred to the customer's e-wallet account from the pre-saved funding source.

Reference was made to a graphic example of an e-wallet payment process whereby the payer initiates a transaction by selecting its e-wallet as checkout option on the merchant's webpage. If the payer's account has not been pre-funded, the e-wallet provider requests the transfer of funds from funding sources already indicated by the payer. The e-wallet provider, once having verified the received details of the transaction, transfers the funds from the customer's e-account to the merchant's e-account. Both customers and merchants can at any time withdraw funds from their e-accounts. It was also recalled that e-wallets are based on electronic money, defined by the E-money Directive as *electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions [...], and which is accepted by a natural or legal person other than the electronic money issuer*. These should not be confused with other types of digital wallets used as a crypto-asset account for carrying out transactions linked to these assets (see Working paper No 1037 "VAT treatment of crypto-assets").

**Services provided by an e-wallet against payment of a fee** in the context of payment transactions have to be seen as taxable within the meaning of Article 2(1)(c). An e-money provider is a legal entity authorised and regulated under the e-money Directive which defines an electronic money institution as a "*legal person that has been granted authorisation [...] to issue electronic money*". Even if not necessarily entering into a legal contract, both merchants and their customers usually need to register with the e-wallet provider and open an e-account in order to benefit from its services. Subject to a case-by-case analysis, the e-wallet provider thus would be seen as a taxable person acting as such when providing services in payment transactions and a direct link should exist between the services supplied and the consideration received. Although electronic money institutions are qualified as payment service providers under the Payment Service Directive 2 (PSD2), their services must be looked at purely from a VAT perspective since the exemptions provided for under Article 135 constitute independent concepts of EU law.

With regard to services **provided by the e-wallet to merchants in the context of a transfer of funds** from the e-money account of a customer to the e-money account of the merchant, the e-wallet fully manages the transfer through its e-money infrastructure, and it is the only actor involved in this payment transaction so no settlement is needed. Although not (yet) reflected in the bank accounts of the parties involved, the transfer certainly

produces a change in the parties' legal and financial situation. In a similar way as in *ATP PensionServices*, the transfer has the effect of establishing the rights of merchants vis-à-vis the e-wallet provider by transforming the claim held by a merchant vis-à-vis its customer into a claim held by that merchant vis-à-vis the e-wallet provider. The fact that the transfer occurs within the same e-wallet provider system is immaterial as no particular method is required for effecting transfers which may be done also using accounting entries. The Commission services concluded that the e-wallet provider does not limit its activity to technical aspects of the transaction but performs the actual transfer of funds. This service forms a distinct whole, fulfilling in effect the specific, essential functions of an exempt transaction concerning payments having the effect of transferring funds and entailing changes in the legal and financial situation of the parties concerned.

With regard to **other services** which may be provided alongside payment services, **management dashboard services** give merchants insights into the financial health of their business, and **site integration services through direct Application Programming Interfaces** (API) enable applications to exchange data and functionality easily and securely so that people can pay for products online without exposing any sensitive data or granting access to unauthorised individuals. These are administrative or technical services supplied not only by e-wallets but also by providers of other services subject to VAT (such as marketplaces) or by specialised operators (e.g. providers of account information services who, although qualified as payment service providers under PSD2, just provide aggregated online information on one or more payment accounts held with other providers). Unless ancillary to a principal payment service exempt of VAT, these services should not, according to the Commission services, fall within the exemption for transactions concerning payments and transfers.

E-wallet services such as transfers from the e-account of a customer upon instruction to the respective bank account may be **provided to the merchant's customers for consideration** (or withdrawals by a merchant from its e-account). In each case, the e-wallet provider directly debits (or credits) the e-account with the effect of transferring funds and entailing changes in the legal and financial situation of the parties. As stated in *Cardpoint, the fact that the service provider may itself directly debit and/or credit an account allows, in principle, the conclusion that that condition* [for the exemption] *is met and that the service in question is exempted*. The fact that transfer occurs between accounts of an individual acting as both the person giving the order and the recipient of the funds is immaterial, as set out in *ATP PensionServices.* This led the Commission services to conclude that the service should be treated as an exempt service concerning payments and transfers. If the withdrawal is qualified as a redemption of electronic money for consideration, the service could however be treated as an exempt service concerning currencies.

E-wallets had to be distinguished from so-called **pass-through wallets** which usually allow customers to just store their payment (e.g. credit or debit cards) and shipping information so that their details are auto-populated when paying by choosing that wallet as checkout option, but without allowing the customer to hold a balance. The Commission services concluded that pass-through wallets merely provide a service of administrative nature consisting in information exchange not falling within the exemption for transactions concerning payments and transfers.

With regard to **e-wallets**, it was thus concluded that:

- The service performed by an e-wallet provider by which e-money funds are transferred from the e-account of a merchant's customer to the e-money account of the merchant using its infrastructure and remunerated by way of a fee charged to the merchant, constitutes a supply of a service within the meaning of Article 2 which is exempt from VAT pursuant to Article 135(1)(d).

- Services consisting in offering management dashboard services, advisory services or API services, against payment of a fee, merely constitute administrative or technical services which do not fulfil the specific, essential functions of an exempt transaction concerning payments and transfers, not having the effect of transferring funds and entailing changes in the legal and financial situation of the parties concerned. Only if ancillary to a principal exempt payment supply, or so closely linked to it that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, these services could be covered by the exemption for transactions concerning payments and transfers under Article 135(1)(d).

- A service pursuant to which an e-wallet provider transfers funds from the e-account of a merchant's customer (or of a merchant) to the same customer's (or merchant's) bank account in exchange of the payment of a fee, should be treated as an exempt service concerning payments and transfers pursuant to Article 135(1)(d). Should the withdrawal from an e-account would be qualified rather as a redemption of electronic money made for consideration, the service could be treated as an exempt service concerning currencies pursuant to Article 135(1)(e).

- A service provided by a pass-through wallet provider consisting in storing payment information making it easily available to customers at the time of payment, so that the merchant can offer to its client base a wider range of payment solutions, is a service of administrative nature consisting in information exchange which should not fall within the exemption for transactions concerning payments and transfers under Article 135(1)(d).

**Marketplaces and intermediaries collect funds in their own name**. With the so-called *Banking-as-a-Service*, operators are partnering with financial institutions to embed financial products directly within their offering, often aggregating several standalone applications into one solution, supplied by one provider only. It sees marketplaces and fintech companies contract with providers of different payment methods (such as credit cards) on behalf of the merchant to enable it to accept and offer these payment methods to its clients. They frequently interpose themselves in the payment transaction by collecting funds in their own name from the customer's funding sources and keeping those funds before transmitting a consolidated amount to the merchants against payment of a fee as consideration for the service provided. As shown by the graphic example, the key difference compared to a standard card payment is that both the acquirer and the issuer will see a payment transaction going to the marketplace itself and not to the merchant (the final payee).

The **service provided to the merchant** consists in a transfer of payment data whereby the marketplace (or intermediary) obtains authorisation, receives funds in its own name, consolidates them in a dedicated account and gives instruction to the merchant's bank to transfer the funds to the merchant after deduction of a fee.

Subject to a case-by-case assessment, the assumption is that this constitutes a taxable supply of services pursuant to Article 2(1)(c). If the service provided to the merchant is ancillary to a principal supply subject to VAT, such as platform services provided by the marketplace to the merchant, the ancillary service must also be subject to VAT. In this regard in *Everything Everywhere*, the CJEU held that making available to customers an infrastructure enabling them to pay bills by certain payment methods (e.g. by credit card) did not constitute for those customers an aim in itself and thus the additional charges, invoiced for it by a provider of telecommunications services, did not constitute consideration for a supply of services distinct and independent from the principal supply of telecommunications services. Although a case-by-case analysis has to be made, the supply from a marketplace enabling the merchant to receive and manage payments from different sources would normally constitute for the merchant an aim in itself, separate from other ordinary services purchased from the marketplace. Merchants would normally intend to purchase a distinct supply that should thus be treated separately for VAT purposes.

In *Bookit*, the CJEU held that the exemption for transactions concerning payments and transfers was not applicable to a ‘card handling’ service supplied to an individual who purchased, via a service provider, a cinema ticket sold for and on behalf of another entity, and used a card for payment. The service provider obtained data pertaining to the payment card that the purchaser wished to use; transmitted that data to the merchant acquirer; received the authorisation code from the card issuer; and retransmitted the end of day settlement file, including inter alia the authorisation codes relating to the sales effected, to the merchant acquirer. According to the Commission services, the marketplace (or the intermediary), although providing services to merchants and not to merchant’s clients, performs activities which, in terms of exchange of information, are similar to those subject to the *Bookit* ruling. These were qualified by the CJEU as *mere technical and administrative assistance consisting in exchange of information between a trader and its merchant acquirer, with a view to receiving payment for a product or service offered for sale*. Such activities were in *DPAS* seen as *consisting in submitting to the financial institutions requests for payment [...] which constituted a preparatory stage to carrying out transactions concerning payments and transfers effected by those establishments.* Although potentially essential for the execution of the payment, activities of this nature do not fulfil by themselves a specific function that is essential to the transfer of ownership of the funds concerned and they do not change by themselves the legal and financial situation of the parties involved.

The Commission services took the view that it is immaterial whether the provider receives the funds in its own name from the acquirer and, after consolidation, gives instructions to the merchant’s bank for their transfer. This was confirmed in *DPAS* where the CJEU held that the VAT exemption does not apply to a supply of services consisting in a provider requesting from the relevant financial institutions, first, that a sum of money be transferred from a patient’s bank account to that of the provider and, second, that this sum, after deduction of the remuneration, be transferred from the provider’s bank account to the bank accounts of that patient’s dentist and insurer. As in *DPAS*, a marketplace/ intermediary, by asking the relevant financial institutions to carry out those transfers, just performs an activity which is a step prior to the transactions concerning payments and transfers covered by Article 135(1)(d). That is so even though under PSD2, the marketplace (or intermediary) has to be registered as a payment service provider (given that it is collecting and keeping funds in its own name before distributing them).

Lastly, in the *AXA* ruling the CJEU held that this exemption did not cover a service comprising, in essence, the collection, processing and onward payment of sums of money due from patients to dentists. That service benefitted the provider's clients, namely dentists, by payment of the sums of money due to them from their patients and therefore served to obtain payment of debts, covered by the term 'debt collection and factoring' in Article 13B(d)(3) of the Sixth VAT Directive, now "debt collection" in Article 135(1)(d) of the VAT Directive. The Commission services noted that the marketplace (or intermediary), by requesting for transfer to be made of the sums due to merchants, may be seen as recovering debts on behalf of the merchant. It could thus be seen as carrying out debt collection which, as stated in *AXA*, refers to transactions designed to obtain payment of a pecuniary debt, having as their object also debts to be paid by a certain date but not yet due.

With regard to **marketplaces** (and intermediaries) collecting funds in their own name, it was thus concluded that:

- A service performed for consideration either by a marketplace or by an intermediary consisting in contracting with multiple providers of payment methods on behalf of a merchant, processing and transmitting customer's payment data, receiving funds in its own name and instructing their subsequent transfer to a merchant cannot be qualified as a transaction concerning payments and transfers within the meaning of Article 135(1)(d).

- In particular if, having regard to the provider's responsibility towards the merchant, the service provided in return for remuneration is designed to obtain payment of a pecuniary debt from the merchant's clients, the service should be qualified as debt collection, expressly excluded from the exemption provided under Article 135(1)(d).

**Buy now, pay later (BNPL) offering** is a payment solution that customers can choose upon checkout to make their purchase immediately while deferring the payment at no additional cost. The BNPL provider usually enters into an agreement with the merchant's customer pursuant to which the customer borrows the full amount of purchase and instructs the provider to pay that amount to the merchant on its behalf to cover the purchase made. The customer commits to pay the provider the amount of the purchase, namely the loan, on deferred payment terms and is to this end required to identify and store its preferred payment source (e.g. credit card) and, usually, to authorise the provider to initiate payments from the source identified. The merchant receives the amount of full payment upfront, less the fee to be paid for the service supplied by the BNPL provider.

Looking at the **service provided by the BNPL provider to the merchant**, it was noted that *Primback* dealt with a similar situation, whereby a customer had the option to pay for goods by way of an interest-free credit concluding with a finance house a loan agreement for an amount equivalent to the cash sales price. The finance house undertook to pay that amount directly to the seller, on behalf of the purchaser, in settlement of the price advertised and invoiced by that seller and was repaid by the customer. Although not the focus of that ruling, the service supplied by the finance house to the retailer was incidentally qualified as consisting in granting a loan to the customer, increasing the retailer's sales volume, relieving it from having to accept instalments and guaranteeing payment for the goods sold. In *Bally*, the service supplied to a merchant by the issuer of a credit card, pursuant to which the customer, the credit card holder, made a purchase using

the card with the issuer paying the price to the merchant retaining a commission, was held to be *guaranteeing payment for the goods purchased by means of the card, the promotion of the supplier's business by enabling him to acquire new customers, possible publicity on his behalf or the like*. Without qualifying it for VAT purposes, reference was made to that service as exempt from VAT *pursuant to Article 13(B)(d) of the 6th Directive on transactions relating to the granting and negotiation of credit and the management of credit by the person granting it, the negotiation of or any dealings in credit guarantees or any other security or guarantee*.

The function of guaranteeing payment and the VAT-exempt nature of the service provided by the credit card issuer was also confirmed in *Primback* where the CJEU pointed to the similarities with the case in *Bally*, especially *the fact that the customer in each case concluded a contract with a third party, a finance house, which, after deducting commission, paid directly to the seller the price of the goods purchased, thereby guaranteeing to the seller payment for those goods.* In light of this, the Commission services took the view that the service provided by a BNPL provider could be seen as comparable to that provided by the issuer of a credit card to a retailer, having as its essential aim the guarantee of payment for the goods sold, exempt from VAT under Article 135(1)(c).

Indeed, although by granting loans to a merchant's customers and by paying the merchant the price of the purchase the provider is *also* promoting the merchant's business and potentially increasing its sales, the BNPL provider could not be seen as supplying a mere advertising service subject to VAT. Similarily, although not recently, the VAT Committee with an almost unanimous guideline from the 14th meeting in 1982 took the view that the service between a [credit] card company and a retailer should be exempt under what is now Article 135(1)(c) and (d), since the principal activity is a financial one, all other aspects being of secondary nature.

Finally, it was recalled that in *MGK*, the services which a company engaging in true factoring supplied to its client were considered comparable in nature to those rendered by an organisation issuing a credit card. The Commission services thus took the view that in a BNPL offering, the arrangement between the BNPL provider and the merchant could be seen as constituting true factoring, pursuant to which the provider purchases debts owed to the merchant by its customers, assuming the risk of the debtor's default. If so, the provider could be seen as relieving the merchant from debt recovery and collection, by managing recovery of the claims assuming the solvency risk of the debtor, but could also be seen as financing the merchant, by anticipating payment. Despite the multiple elements, this transaction should be treated as a single supply for VAT purposes, since all the elements are closely linked and objectively form a single, indivisible economic supply, which would be artificial to split. Its predominant element and essential aim, keeping in mind the economic purpose, will determine the VAT treatment.

In *MGK*, the CJEU held that debt collection should be interpreted broadly to include all forms of factoring since the essential aim of factoring is the recovery and collection of debts owed to a third party and that factoring must be regarded as constituting merely a variant of the more general concept of debt collection, whatever the manner in which it is carried out. If, by looking at the economic purpose of the transaction, its predominant element and essential aim is the recovery and collection of debts owed to a third party, the Commission services found that the service should be qualified as debt collection, which

comprises factoring services, expressly excluded from the exemption in Article 135(1)(d). However, should it rather be seen as advance funding by the provider to the merchant, the service could be qualified as a financial service of granting of credit exempt from VAT under Article 135(1)(b).

With regard to "**buy now, pay later**" offerings, it was thus concluded that:

- A service provided by a BNPL provider to a merchant pursuant to which the merchant's customers can make their purchases immediately while deferring their payment at no additional cost, the sales price being paid to the merchant by the provider against a fee, could be seen as comparable to that provided by the issuer of a credit card to a retailer, having as its aim to guarantee payment for the goods. It would see the service exempt from VAT as falling within Article 135(1)(c).

- If the BNPL offering is structured in such a way that the financing is granted to the customer not by the BNPL provider but by the merchant and the provider instead purchases the merchant's credits, assuming the risk of the debtors' default in return of a fee, with the essential aim being recovery and collection of debts owed to a third party, the service should be subject to VAT pursuant to the exception laid down in Article 135(1)(d) for debt collection services, which comprises factoring services.

- However if, by looking at the economic nature of the transaction, the essential aim of the service for which a fee is paid can be found in funding being advanced by the BNPL provider to the merchant rather than providing for recovery and collection of debts owed to a third party, the supply could be qualified as a financial service exempt from VAT under Article 135(1)(b).

The Chair opened the floor for comments on the first part **on e-wallets**.

Five delegations took the floor and expressed their general agreement with the analysis on e-wallets: one of them asked for clarification on the difference in VAT treatment of e-wallets and digital wallets used for crypto-assets; two of them supported that the transfer of funds from an e-money account to a bank account would fall under point (d) rather than point (e) of Article 135(1); one of these delegations added that the contracts should be thoroughly assessed on a case-by-case basis.

With regard to the different types of wallets, the Commission services clarified that the analysis had in each case been conducted taking into account the actual functions performed by the wallet and, as regards Article 135(1)(d), in particular whether this results in any change in the legal and financial situation of the parties involved. It was reiterated that digital wallets used for crypto-assets just connect users and the miners without entailing any change in ownership of the funds. Their services could thus not fall within the exemption pursuant to Article 135(1)(d).

The Chair opened the floor for comments on the second part **on marketplaces and intermediaries collecting funds in their own name**.

Two delegations shared the view that the service provided by the marketplace could rather be seen as ancillary to a principal service. One of them agreed that, if not ancillary, the service should not be exempt as was the case in *Bookit*.

A delegation, although agreeing that in the specific case dealt with the exemption does not apply, stressed that a case-by-case analysis is always needed so any guidelines should focus on setting out basic principles and added that without a clear definition of debt collection there is a risk in its interpretation to go too far.

Given that the transfer is made by the marketplace in its own name and a fee is charged to the merchant, another delegation would see the transaction qualifying as a payment service under PSD2, and also see it affecting the legal and financial situation of the parties. This delegation would thus see the service as an exempt payment service.

According to yet another delegation, the supplier could also be considered to provide an exempt payment service since in the context of PSD2 an intermediary receiving funds in its own name is seen as providing payment services.

The Commission services, in reply to some of the comments, noted that although PSD2 requires the provider to be registered as a payment service provider when collecting and keeping funds in its own name, the services supplied must be looked at purely from a VAT perspective since, according to the CJEU, the exemptions under Article 135 constitute independent concepts of EU law. With focus having been on a standard business model with other configurations being possible, any guidelines should aim to set out basic principles. On debt collection, it was mentioned that the CJEU had in fact provided a definition (e.g. in *AXA* and *MGK*). On the fact that the marketplace acts in its own name, it was recalled that as in *DPAS*, by asking the relevant financial institutions to carry out the transfers, the marketplace just performs an activity which is a step prior to the transactions concerning payments and transfers covered by Article 135(1)(d).

The Chair opened the floor for comments on the part **on "buy now, pay later"** offerings.

One delegation expressed doubts on the qualification of this service as debt collection.

Another delegation stated that the essential aim of such a service is difficult to ascertain, thus common criteria should be laid down.

A third delegation stated that the service would qualify as debt collection if the risk of non-payment is transferred, otherwise it would be a credit service.

One delegation found the topic interesting but thought the timing for guidelines inappropriate since a review of the VAT rules on financial services had been announced.

The Chair thanked the delegations and invited comments in writing in view of the drafting of the guidelines. He also explained that a consistent interpretation of the rules, especially as regards emerging services, is needed regardless of the ongoing review of financial services.

**4.4 Origin: Poland**
**References: Articles 146(1) and 147(2) of the VAT Directive**
**Subject: Permanent address or habitual residence of non-EU travellers**
**(Document taxud.c.1(2022)1769871 – Working paper No 1039)**

The Commission services presented the Working paper triggered by a question from Poland on the exemption for supplies of goods exported in the personal luggage of non-EU travellers. In particular, Poland had raised the following issues: (i) whether a traveller's status as not established within the EU should be linked to nationality or only to the actual place of residence of the traveller; (ii) the documents on the basis of which the status should be ascertained; (iii) the treatment of travellers established in Norway or the United Kingdom.

In their presentation, the Commission services noted that: (i) the permanent address or habitual residence is usually shown in identity documents (which must be ascertained by the Member State certifying the address/residence) and does not necessarily reflect the citizenship of a natural person; (ii) any document considered reliable by the Member State to certify the permanent address or habitual residence can be used as proof of status of the traveller whose identification is also usually needed, so a combination of documents is also possible and ultimately in the interest of the traveller to provide; (iii) travellers established in Norway or the United Kingdom should be treated as being established in a third country. However, persons residing in Northern Ireland cannot be considered to be established outside the EU, since EU VAT rules apply to Northern Ireland as regards goods, thus such persons do not fulfil the condition for the exemption granted to non-EU travellers.

Finally, it was recalled that a study for the review of the VAT rules applicable to the travel and tourism sector had been launched and this would also assess the functioning of the procedures for VAT refund to travellers currently in place in each Member State. With that in mind, it was explained that four questions were listed at the end of the Working paper to collect information on the Member States' current practices.

The Commission services gave the floor to the Polish delegation.

Poland thanked for the Working paper and generally shared the Commission services' opinion but also asked for the opinion of other Member States (i.e. on the documents required by the tax authorities) in light of the practical difficulties in verifying travellers' status. On the first question, they expressed doubts on the 5-year period for the permanent address and wondered whether this could be shorter. On the second question, they noted that Article 147(2) of the VAT Directive refers to other document recognised as an identity document by the Member State within whose territory the supply takes place. On the third question, they noted the difficulties in distinguishing based on the passport whether a traveller has his/her permanent address in the United Kingdom or in Northern Ireland and asked which other document could be seen as sufficient to prove the status in this situation.

The Chair opened the floor to the other delegations for comments on the analysis while also welcoming written comments on the questions listed at the end of the Working paper.

One delegation recognised the difficulties expressed by Poland and pointed out that while the passport does not always reflect the permanent address of the traveller, it is nevertheless accepted as proof in line with common practice and would seem sufficient to comply with Article 147. It was noted that travel agents are unlikely to be consulted since it is the supplier and not the traveller that ultimately has to prove to the tax authority the application of the exemption.

Another delegation confirmed that relevance is given to the place where the traveller actually lives/is established and not to his/her nationality. It was noted that proof can be provided by other credible documents e.g. residence visa, driving licence, identity card or residence card and that it is in the person's interest to provide adequate non-contradictive proof. This delegation agreed that if the place of residence is in Northern Ireland, the exemption does not apply, although it recognised the difficulty in assessing whether that place is in Northern Ireland or in the United Kingdom. It added that detailed answers would be sent in writing.

Ten delegations agreed with the Commission services' analysis. Three of them also added that written comments would be sent while one asked an additional question on the possibility to consider diplomats as non-EU travellers and, if so, which documents should then be provided. One delegation shared its positive experience with the electronic procedure for travellers' refund whereby upon purchase, the retailer provides the form to the traveller and sends by electronic means the information to the tax authority which automatically checks the data on the traveller's residence. When the traveller leaves the EU, he/she must validate the form at an exit point using terminals without having to go to the customs office. If the form is validated at the airport, VAT can be refunded, otherwise the traveller may need to provide further explanations to the customs.

The Commission services explained that the 5-year rule is a general rule so Member States may set different terms and stressed that the concept of residence is different from that of nationality (e.g. a non-EU citizen with permanent EU address must be seen as established in the EU while an EU citizen shown to be established in a third country should be treated as a non-EU traveller). It was added that the documents listed in Article 147(2) should not be considered as belonging to a strict and closed list. Should difficulties in checking documents arise, authorities may require additional information to be provided by the traveller. With regard to diplomats, it was noted that the exemption for non-EU travellers could in principle apply if it is proven that their establishment is outside the EU and clarified that this exemption is different from the special regime normally applicable to diplomats. Finally, the Commission services, also in view of the future review of the rules, appreciated the example given of an electronic form for travellers' refund.

The Chair invited delegations to provide any additional comments and replies to the questions in writing within a month. A decision on whether to draft guidelines would then be taken, although the issues raised are more to do with the practical application of existing rules than with legal interpretation and a general review of the rules is in any event foreseen.

## 5. NEW LEGISLATION – MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED EU VAT PROVISIONS

### 5.1 Origin: Austria

**References:** **Articles 14(4), 33, 36a, 365, 369g, 369n and 369t of the VAT Directive**

**Subject:** **Scope of the One-Stop-Shop (OSS) with regard to intra-Community distance sales of goods, relevant VAT return period and amendments of previous VAT returns**

**(Document taxud.c.1(2022)1785494 – Working paper No 1040)**

The Commission services presented the Working paper dealing with questions raised by Austria as regards the VAT e-commerce package which had amended the rules on taxation of cross-border B2C e-commerce activity within the EU as of 1 July 2021. In their presentation, delegations were reminded that a common understanding of these rules is essential for the proper functioning of the VAT system.

With regard to the first question on a potential B2B2C chain transaction involving the successive supply of the same good with only one intra-Community transport, with the intermediary operator not registered in the Member State from which the goods are dispatched, the Commission services pointed out that the transport should be ascribed to the supply made by the first supplier in the chain to that intermediary operator and not to that made by the intermediary to the consumer (Article 36a(1) of the VAT Directive). Thus, the intermediary operator cannot declare the supply made to the consumer via the Union scheme since it cannot be considered an intra-Community distance sale of goods but instead is a domestic supply in the Member State of the consumer. It was recalled that Article 36a(1), which ascribes the dispatch or transport to a particular transaction in a chain, is a mandatory provision. It was concluded that solution 2 put forward by Austria on the concept of intra-Community distance sales of goods being independent from the place-of-supply rules is not viable, as the rules of the VAT Directive cannot be read as stand-alone provisions.

Finally, it was noted that an intra-Community distance sale of goods could still occur where the transport is made by or on behalf of the intermediary and that intermediary: (i) is VAT registered in the Member State from which the goods are dispatched or transported, and (ii) does not communicate to his supplier the VAT number assigned to him by a Member State other than that from which the goods are dispatched or transported. In that case, the supply between the first supplier and the intermediary operator would be a domestic transaction taking place in Member State 1 followed by an intra-Community distance sale of goods which the intermediary must declare in the Union One-Stop Shop (OSS) if he has opted to register for that scheme.

It was also noted that within the Single VAT Registration pillar of the VAT in the Digital Age initiative, policy options were being examined to further extend the scope of the Union scheme to include such types of transaction.

On the second question, the content of Article 369g was recalled, as to the interpretation of the term ‘carried out’ and its implications. The Commission services agreed with Austria that it is correct to declare intra-Community distance sales of goods in the OSS VAT return for the period in which the payment for those sales has been accepted. Both the Union and the non-Union OSS VAT return must show details of all of the supplies

covered by each respective scheme. The VAT Directive requires that, for each Member State of consumption in which VAT is due, details must be provided for supplies covered by each scheme that are "carried out during the tax period". In the absence of further details regarding the moment when a supply is 'carried out', VAT must be seen as becoming chargeable at the time when the payment has been accepted, similar to the chargeable event rule in Article 66a for deemed suppliers. This conclusion was also supported by Article 369n whereby the VAT due on distance sales of imported goods declared through the Import scheme becomes chargeable at the time of the supply which, as a rule, is the time when the payment has been accepted.

As regards the third question, it was noted that Articles 365, 369g(1) and (4) and 369t(2) provide for the VAT return under the Union, non-Union and Import schemes also to include amendments of previous VAT returns. The Commission services took the view that the term "amendment", which is also used in the VAT Implementing Regulation, should be interpreted in line with the term "corrections" as used in Commission Implementing Regulation (EU) 2020/194. In particular, even though Annex III of Commission Implementing Regulation 2020/194 does not mention 'amendments' but rather refers to 'corrections', Article 4 thereof refers directly to 'Articles 365, 369g or 369t of Directive 2006/112/EC' which in turn are making reference to these amendments. Therefore, the term 'corrections' should be taken to mean 'amendments'.

The Chair gave the floor to the Austrian delegation.

Austria agreed with the importance of reaching a common understanding, and welcomed the thought given to legislative changes to extend the scope of the OSS and to include drop-shipping. It was noted that as a transfer may also start from a third country, also such transactions should be considered in any future legislative change. As regards the second question, they pointed out that a transfer of goods can start in one quarter but finish in another one, thus it could be difficult to determine which is the relevant period. They did support that the time of acceptance of payment to define the relevant tax period could be a good solution, also for practical reasons. This would bring two advantages: (i) the determination of the relevant period would be the same for the IOSS and OSS and (ii) the acceptance of payment is earlier in time than the transport. It was also added that this would then not differentiate between intra-Community distance sales made by the platform itself and deemed supplies under Article 14a. As regards the term "amendment", they agreed that it should be interpreted in line with the term "correction" and include returns of goods and discounts. This would be a practical solution for taxpayers (i.e. no need to register in each Member State of consumption to correct the VAT return).

The Chair opened the floor to the other delegations.

One delegation shared the Commission services' views on the three questions and would also appreciate an analysis of drop-shipping when the first supplier in the chain has goods stored outside the EU.

One delegation shared the Commission services' view as regards the second and third questions. On the first question, however, it supported Austria's solution 2. In its view, Article 14 in itself includes allocation of the transport. Since this is a specific rule, this delegation did not see how the general provision of Article 36a could interfere with this and thus narrow the scope of that rule.

A delegation agreed with the Commission services' view as regards the first and third questions but did not share Austria's position on the second question regarding payment acceptance as the period to declare intra-Community distance sales of goods in the OSS VAT return. In the case of platforms or electronic interfaces and the IOSS scheme, specific provisions in the VAT Directive define the chargeable event to be when the payment is accepted but for intra-EU distance sales of goods supplied directly by a taxable person who is not a deemed supplier there is not a special provision in the VAT Directive so the general rules on chargeability should apply. This delegation agreed that in most cases the chargeable event would occur when the payment is accepted, based on Article 65, but pointed out that this could also be otherwise. A more detailed explanation was asked from the Commission services on the fact that in the absence of further details as to when a supply is carried out, VAT must be seen as becoming chargeable at the time when the payment has been accepted, similar to the chargeable event rule in Article 66a for deemed suppliers. In that regard, it wanted to know whether this would only apply under the Union scheme or also if the taxable person applies the normal VAT rules.

Some delegations expressly agreed with the above position on the second question. In particular, one of them, although still investigating the issue, found that the term "carried out" to be found in Article 369g(1) indicates that the Union OSS VAT return should include transactions actually made in the tax period, regardless of the payment data. In the case of intra-Community distance sales of goods, VAT becomes chargeable at the time when the goods are delivered. The adoption of the interpretation as proposed by the Commission services would certainly simplify the submission of the Union OSS VAT return but could perhaps be inconsistent with the VAT Directive. It is essential that all Member States apply a uniform approach on this issue.

One delegation agreed with the Commission services' analysis on the first question and with the solution on the second question. As regards the third question, this delegation considered that the answer should be affirmative, although the Working paper did not directly address the Austrian issue, and that the term 'amendment' would cover corrections of previous VAT returns resulting from returns of goods or from discounts.

Another delegation found the issue of drop-shipping important and agreed with the Commission services that it does not correspond to an intra-Community distance sale so this could not be declared in the OSS. In its view, if the intermediate supplier (the drop-shipper) communicates its VAT number, Article 41 should apply. On the second question, this delegation stated that there is not a legal provision to take the acceptance of payment as the taxable moment for intra-Community distance sales, thus Articles 63-67 should apply (any derogations from this could only stem from legal amendments and not from guidelines). Agreement was expressed with regard to the meaning of amendments as covering corrections and it was pointed out that material errors should be accounted for in the following VAT return which may however have important cash-flow impacts for a company.

Another delegation agreed that the proposed solution to the second question was practical but stated that in the absence of a special provision in the VAT Directive concerning intra-Community distance sales of goods (such as for example Article 369g for distance sales of imported goods), the general rules should apply.

Yet another delegation agreed with the Commission services on the first and third questions but expressed doubts that the proposed solution to the second question would be supported by the VAT Directive.

One delegation also agreed with the Commission services on the first question (although further analysis would be needed especially in the case of non-EU suppliers), expressed no issues with the third question but did not fully agree with the solution proposed for the second question, as stated by other delegations, since in the absence of a specific rule in the VAT Directive general rules should apply.

A couple of delegations agreed with the Commission services, with one finding that the proposed solution to the second question was acceptable but would require a legislative amendment.

Finally, one delegation, in light of the analysis of the first question, sought clarification on the exact scope of Article 14 and in particular, if priority is to be given to Article 36a, on the extent of the former's simplification, especially for small operators. This delegation would welcome guidelines which should however also cover other situations (e.g. where there is an involvement of several platforms and where goods are situated in third countries). Ultimately, a revision of the provisions of the VAT Directive and the VAT Implementing Regulation would be useful and consideration should be given to extending the rule of deemed supplier under Article 14a. As regards the supplies to be reflected in the VAT returns, it wished to obtain the VAT Committee's view on the frequent case of suppliers that, although late in applying for registration under the Union scheme, wish to declare in their first VAT return under that scheme supplies carried out before the first supply declared pursuant to Article 57d of the VAT Implementing Regulation.

The Commission services assured that various drop-shipping models, including extra-EU ones were being looked at in follow-up to the e-commerce package together with customs colleagues with a view to producing further papers. On the second question, they explained that the analysis was meant to clarify the expression "carried out" in Article 369g. In light of the different views and disagreements expressed by Member States on this, thought will be given on exploring the possibility of legislative changes as part of the upcoming proposal on VAT in the Digital Age.

The Austrian delegation thanked for the comments and added on the second question that even if the general rules apply in the absence of a specific provision in the VAT Directive, there would still be a need to define whether to focus on the beginning or the end of a transport linked to intra-Community distance sales where the transport starts in one period and terminates in another. In particular, the end of the transport could be difficult to determine where delays in deliveries would occur. They thus reiterated that the time of acceptance of payment could be a good solution.

The Chair underlined the importance of the issues discussed and encouraged Member States to implement the solutions as outlined in the Working paper. As to the way forward, further reflection is needed. In particular, on the second question there might be a need for legislative change rather than guidelines while on the first question the Commission services are already in contact with customs.

## 6. CASE LAW – ISSUES ARISING FROM RECENT JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

### 6.1 Origin: Commission
**Subject: Case-law – Recent Judgments of the Court of Justice of the European Union**
**(Document taxud.c.1(2022)1696672 – Information paper)**

The Commission services drew delegations' attention to the Information paper with an overview of judgments handed down since the cut-off date for the previous meeting's overview paper (15 cases of VAT related rulings covering the period from 22 October 2021 up until 28 February 2022). They also reminded that requests for discussion of a case in a future meeting need to be accompanied by the interested delegation's own analysis of the matter on the basis of which the Commission services will then establish a Working paper.

With no delegation asking for the floor, the Chair concluded the discussion.

## 7. ANY OTHER BUSINESS

The Commission services drew delegations' attention to the note sent on VAT rate derogations to be communicated by Member States to the VAT Committee within 3 months of the entry into force of the new Directive on VAT rates. Delegates were informed that the new Directive would enter into force on the day of publication in the Official Journal, with the exact date to be provided through a formal note.

### Conclusion

The Chair closed the meeting by thanking the delegations for their participation in the discussions. He announced that the 121st meeting would probably take place in October 2022 but that it was not possible at this point of time to say whether or not that would be a physical meeting.

* *
*

**ANNEX**

## LIST OF PARTICIPANTS

| | |
|---|---|
| **BELGIQUE/BELGIË/BELGIUM** | Federal Public Service Finance |
| **БЪЛГАРИЯ/BULGARIA** | Ministry of Finance<br>National Revenue Agency |
| **ČESKO/CZECHIA** | Ministry of Finance |
| **DANMARK/DENMARK** | Ministry of Taxation<br>Tax Agency |
| **DEUTSCHLAND/GERMANY** | Federal Ministry of Finance<br>Länder Representative |
| **EESTI/ESTONIA** | Ministry of Finance |
| **ÉIRE/IRELAND** | Revenue Commissioners |
| **ΕΛΛΆΔΑ/GREECE** | Independent Authority for Public Revenues |
| **ESPAÑA/SPAIN** | Ministry of Finance<br>Permanent Representation |
| **FRANCE** | Ministry of Finance |
| **HRVATSKA/CROATIA** | Tax Administration<br>Permanent Representation |
| **ITALIA/ITALY** | Ministry of Economy and Finance<br>Revenue Agency |
| **ΚΥΠΡΟΣ/CYPRUS** | Ministry of Finance |
| **LATVIJA/LATVIA** | Ministry of Finance<br>State Revenue Service |
| **LIETUVA/LITHUANIA** | Ministry of Finance<br>Tax Administration |
| **LUXEMBOURG** | Administration de l'enregistrement, des domaines et de la TVA |
| **MAGYARORSZÁG/HUNGARY** | Ministry of Finance |
| **MALTA** | Office of the Commissioner for Revenue |

| | |
|---|---|
| **NEDERLAND/NETHERLANDS** | Ministry of Finance |
| **ÖSTERREICH/AUSTRIA** | Federal Ministry of Finance |
| **POLSKA/POLAND** | Ministry of Finance<br>Permanent representation |
| **PORTUGAL** | Ministry of Finance<br>VAT department |
| **ROMÂNIA/ROMANIA** | Ministry of Finance |
| **SLOVENIJA/SLOVENIA** | Ministry of Finance<br>Financial administration |
| **SLOVENSKO/SLOVAKIA** | Ministry of Finance |
| **SUOMI/FINLAND** | Ministry of Finance<br>Tax Administration |
| **SVERIGE/SWEDEN** | Ministry of Finance<br>Tax Authority |

**EUROPEAN COMMISSION**