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

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1057

MINUTES

121ST MEETING
– 21 OCTOBER 2022 –

The Chair welcomed the delegations to the non-public 121st meeting of the VAT Committee, which is the first physical meeting taking place since 2020.

Next meeting: the 122nd meeting is likely to take place in March 2023.

Procedural and housekeeping points

Language regime: It was possible to speak and listen in DE-EN-ES-FR-IT-PL.

Update on proposals by the Commission

The Chair informed delegations about the following:

- VAT e-commerce:
  - A communication campaign was relaunched in June 2022. The Commission services thanked the Member States that had actively taken part in the communication campaign.
  - Delegates will be requested shortly to provide the name(s) of the officials that will be responsible for the update of contact-by-country information in the new OSS web portal that is available on the TAXUD website.
  - Annex IV of Commission Implementing Regulation 79/2012 laying down detailed rules for implementing certain provisions of Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax is currently under revision with the aim to include some statistics for the OSS and IOSS to be provided by Member States on a yearly basis.
  - A double check of all language versions of Article 59c of the VAT Directive, which is part of the VAT e-commerce package is being carried out with errors detected in the translation of several language versions (LV, DE, HU, IT). The Council will be informed and is expected to issue the necessary corrigenda would.
  - The ex-post evaluation of the e-commerce package carried out six months after its entry into application confirmed its success and the good functioning of the system.
  - Attention was drawn to a few IT implementation issues of which the Directors General of Tax administrations had already been informed. To stabilise the system, it is of utmost importance that all Member States take the necessary steps to solve all the reported errors, in conformity with functional and technical specifications.

- “VAT in the Digital Age” initiative:
  - The legislative proposal is currently being finalised and is expected to be adopted by the Commission on 16 November 2022. Two meetings in Council are expected to be organised by the Czech Presidency in November and December 2022 to present and discuss the proposal. Discussions on the proposal will resume under the Swedish Presidency.

- Electronic exemption certificate/procedure:
  - This issue was discussed in detail at the meeting of the Group on the Future of VAT (GFV) held on 6 December 2021. Member States showed openness to the possibility of transforming the VAT and/or excise duty exemption certificate into an electronic form and putting in place an electronic procedure, and asked the Commission services to look into feasibility and cost. To that end, SCIT has been mandated to follow up on this matter. Data collected on the approximate number of entities eligible for exemption and of certificates issued on an annual basis will inform that work.

- VAT Refund Statistics for 2022:
  - Delegates were reminded that the deadline to send VAT refund statistics for 2021 is 31 March 2023. It was also recalled that the heads of CLO had expressed their agreement to create a legal basis for the submission of such statistics. This will be done with the upcoming revision of Commission Implementing Regulation 79/2012 by including a reference to VAT refund in the list of VAT cooperation statistical data that has to be provided to the Commission by Member States in accordance with Article 49(3) of Regulation 904/2010.

- SME scheme – Implementing measures:
  - Council Directive (EU) 2020/285, which introduces changes to the current SME scheme, will enter into application on 1 January 2025. The Commission services are currently preparing the functional specifications of the trans-European System for the SME special scheme (i.e., a description of processes and data to be exchanged). The results of the last iteration were presented in the FPG002/005 workshop held on 12 October 2022. A SCIT meeting is planned for 15 November 2022 and the next workshop for 14 December 2022.

- New study on VAT rules applicable to travel and tourism:
  - The aim of the study is to assess the functioning of the rules applicable to travel and tourism sector. It covers three interlinked set of VAT provisions:
    - Special VAT scheme for travel agents,
    - VAT rules on passenger transport,
    - VAT refund to non-EU travellers and duty-free shop.
  - The interim report of the study prepared by the contractor and the options for review under consideration were presented at the GFV meeting on 14 October 2022. In a follow up to that, written comments and relevant data are currently being collected.
  - A meeting with relevant stakeholders in the sector will take place on 26 October 2022.
  - A public consultation is foreseen for the end of 2022, while a conference is likely to be organised between January and February 2023 to discuss the final report of the study and the revised options. A possible legislative proposal is expected for the end of 2023.

- Extension of Commission Decision 2020/491 (Covid Decision):
  - It was recalled that with the adoption of Commission Decision (EU) 2022/1511 of 7 September 2022 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2022, the Covid Decision has been prolonged for the 5th time until 31 December 2022 upon request of 5 Member States.
  - Delegations were reminded that any further requests for prolongation must be submitted as soon as possible in order to have it adopted before the current measure expires.

- Support to Member States in the field of VAT and customs duty in order to help mitigate the humanitarian impacts of the Ukraine crisis:
  - Commission Decision (EU) 2022/1108 of 1 July 2022 on relief from import duties and VAT exemption on importation granted for goods to be distributed or made available free of charge to persons fleeing the war in Ukraine and to persons in need in Ukraine provides support to Member States. This measure is being applied by 18 Member States and will also be in force until 31 December 2022.
  - The new Article 101a of the VAT Directive, introduced by Council Directive (EU) 2022/542 entering into force on 6 April 2022, allows the Member States authorised to apply an exemption from VAT on goods imported for the benefit of disaster victims, to exempt with deductibility the intra-Community acquisition of goods and the supply of those goods and 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:
  - After the adoption of the VAT rates Directive (Council Directive (EU) 2022/542) on 5 April 2022, Member States had three months to communicate the main provisions and conditions of rates derogations under their national law. Based on the measures communicated by the 15 Member States that responded, the Commission services established a list of derogations and circulated it to the VAT Committee delegations. In accordance with the equal treatment clause, other Member States may apply those derogations under the same conditions, but adoption must take place within 18 months of entry into force of the new rules, so by 7 October 2023, and be communicated to the VAT Committee.
  - Steps are being taken to adapt the Taxes in Europe database (TEDB) to accommodate for this reform of VAT rates. Delegations were reminded of the importance of keeping the content of the TEDB updated at all times, in particular, in view of the smooth application of the e-commerce rules.

- Proposal prolonging Articles 199a and 199b on the optional domestic reverse charge and the Quick Reaction Mechanism
  - On 3 June 2022, a directive amending the VAT Directive (Council Directive (EU) 2022/890) was adopted to extend the current application period (30 June 2022) of the optional domestic VAT reverse charge mechanism until 31 December 2026.

- The extension will also apply to the Quick Reaction Mechanism (QRM) that allows Member States, under strict conditions, to quickly introduce a temporary reverse charge mechanism for the supply of goods and services in particular sectors if sudden and massive fraud occurs.

Other topical issues – Follow-up of the last meetings

Guidelines from the last meetings. The Chair noted that Belgium had not yet submitted their analysis on vouchers (in follow-up to Working paper No 1001) and their interaction with exemptions (like that under Article 138 of the VAT Directive) and examples. In the meantime, guidelines on vouchers are in the process of being agreed.

1. ADOPTION OF THE AGENDA

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

The agenda was adopted with no comments from delegations.

One delegation drew the attention of other delegates to some concern raised by business representatives as to reasons why the VAT treatment of imports of aircraft and the right of deduction had not yet been discussed by the VAT Committee, to which the Commission services replied that it was a question of timing and reassured that this issue would be submitted for discussion at the VAT Committee in due course.

2. REPORT ON THE RESULTS OF THE WRITTEN PROCEDURES

2.1. Minutes of the 120th meeting

The Chair informed that the minutes from the 120th meeting were still under preparation and the written procedure for the approval of the minutes would be launched shortly.

2.2. Guidelines from previous meetings

The Chair indicated that no guidelines had been concluded since the last meeting of 28 March 2022 but those on the VAT treatment of crypto-assets and digital payment services are likely to be concluded at the next VAT Committee meeting.

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

3.1 Origin: France
Reference: Article 11
Subject: VAT grouping – follow-up
(Document taxud.c.1(2022)6973217– Working paper No 1048)

The Commission services presented their Working paper and recalled that the French delegation had already consulted the VAT Committee on the introduction of the VAT grouping scheme into French legislation, in accordance with Article 11 of the VAT Directive (at the 117th meeting, 16 November 2020). The new French rules on VAT grouping are expected to enter into force on 1 January 2023.

This new consultation concerns two specific aspects of the rules: (a) the right of deduction for mixed-use expenditures, and (b) invoicing arrangements for a VAT group.

As regards **mixed-use expenditures**, France considers that for the purposes of calculating the deductible amount, each member of the group is deemed to constitute a separate sector of activity within the meaning of Article 173(2) of the VAT Directive. Therefore, where only one member uses the inputs, the deduction will be determined by using the pro-rata of that member (i.e., sectoral pro-rata), which can be broken down to the level of a sub-sector of the member of the VAT group concerned.

As general rule, France applies the simplified method under Article 173(2)(d) of the VAT Directive, whereby taxable persons can be authorised to apply a deductible proportion to all goods and services acquired by them (i.e., single pro-rata). Under the new rules, that provision will also be applicable to the VAT group, but only for a distinct sector of activity, that is, per member of the VAT group. Moreover, in order to prevent abuse or avoidance, France considers that the intra-group transactions carried out by a specific group member must be taken into account in the calculation of the pro-rata.

In their analysis, the Commission services made the following remarks on the consultation submitted by France:

i. VAT groups are entitled to deduct VAT only on inputs supplied by other taxable persons that are used for the purposes of supplies giving rise to the right to deduction which, in the case of a VAT group, are inevitably supplies to third parties. If inputs are used both for taxable and non-taxable supplies (out of scope of VAT), Article 173 cannot be applied. The pro-rata should apply only where the VAT group incurs expenditure for the purposes of both taxed transactions and VAT-exempt transactions carried out with third parties.

ii. Article 173(2)(d) does not allow the partial and sectoral application of the general pro-rata as envisaged by France. The possibility to determine a deductible proportion for each sector of business of a taxable person is foreseen in Article 173(2)(a) and (b) of the VAT Directive, and in any case, that method must apply to all sectors of the taxable person.

iii. The interpretation given by France to Article 173 of the VAT Directive can result in inconsistencies where a member of the VAT group does not incur any mixed-use expenditures within the meaning of that Article. Under those circumstances, the conditions to enable application of the pro-rata are not fulfilled.

iv. The French method for calculation of the single pro-rata itself, which takes into account the intra-supplies of the VAT group, is not consistent with Articles 11, 173 and 174 of the VAT Directive and is contrary to the principle of VAT neutrality. This method appears prone to abuses as it allows businesses to determine a pro-rata that is more favourable than the general VAT group pro-rata.

As regards **invoicing arrangements**, the French legislation provides that invoices issued by the VAT group must mention the VAT number, name, and address of the VAT group. For monitoring purposes and to control the exercise of the right of deduction, the new rules to be adopted in France envisage that the invoice should also mention the name, address, and the old VAT number of the member, together with the mention ‘member of a VAT group’.

The Commission services, however, took the view that such mention does not seem consistent with the interpretation given of Article 11 of the VAT Directive by the Court of Justice of the European Union (CJEU) in the cases *Ampliscientifica* (C-162/07, paragraphs 19 and 23), *Skandia America* (C-7/13, paragraphs 28 and 29) and *Danske Bank* (C-812/19, paragraph 25), in which the CJEU held that the members of a VAT group cannot be treated as separate taxable persons and hence cannot be identified, within and outside the group, as individual taxable persons. Moreover, the invoice arrangements envisaged by France do not seem compatible with Article 273(2) of the VAT Directive and, therefore, the monitoring of the exercise of the right of deduction should be addressed in a different way.

The Chair invited the French delegation to provide explanations on the points raised in the Working paper.

The French delegation thanked the Commission services for the preparation of the Working paper and for the analysis made. As regards the option taken up under point (d) of Article 173(2) of the VAT Directive, the French delegation clarified that this option will apply to all expenditure of the VAT group, whether it is mixed use or not, and the application of the pro-rata will take place within a sector of activity under Article 173(2)(a) and (b). The French delegation based their analysis on the decision of the CJEU in the *Mercedes Benz Italia* case (C-378/15), where the CJEU held that the single proportional deduction applied to all goods and services acquired by a taxable person. In addition, this approach was, according to the French delegation, compatible with the VAT Directive and it did not contravene the principle of neutrality, since the pro-rata would apply to all expenditure and would be calculated taking into account all the transactions carried out in the sector of activity. This, according to France, would allow for a more precise calculation of the proportional amount giving rise to the right of deduction. Finally, the French delegation pointed out that this approach was consistent with Article 11(2) of the VAT Directive, which allows Member States to take appropriate measures to prevent tax evasion or avoidance.

As regards the invoicing arrangements and, in particular, the mentioning in the invoice of the VAT numbers of the members of the VAT group, the French delegation reiterated their intention to maintain this requirement for monitoring and follow-up reasons, given that the VAT group is a fiscal fiction where all the invoices are ultimately issued by the members of the group.

The Chair thanked the French delegation for their clarifications and gave the floor to other delegations for comments.

One delegation stated the need for having greater harmonisation in this matter and asked the Commission services whether there was any intention in the near future to work on this issue. The Commission services replied that they were fully aware of the divergent approaches being taken in this matter by Member States and reassured that this issue will be dealt with in due course.

The Chair thanked delegates and officially took note of the consultation made by the French delegation.

3.2 Origin: Denmark
Reference: Article 318
Subject: Global margin scheme
(Document taxud.c.1(2022)6899341– Working paper No 1047)

The Commission services presented their Working paper on a question submitted by Denmark on the amendments introduced to their national legislation on the global margin scheme in accordance with Article 318 of the VAT Directive. Under Danish legislation, the global margin scheme is already in place but only applies to items for which the purchase or the selling price is unknown. To reduce the administrative burden and minimise costs, Denmark has introduced an option for the calculation of the total profit margin, whereby taxable dealers may choose between a method of aggregation (based on items sold) or a periodic tax assessment method (item by item), irrespective of whether the purchase and selling price of individual items are known. The choice does noy apply to taxable dealers selling second-hand cars, for which the calculation of VAT is not based on the margin.

In their analysis, the Commission services recalled that the option envisaged in Article 318 of the VAT Directive is an option intended for Member States, not for taxable persons and therefore, once applied by Member States, it must be seen as binding on all the taxable dealers concerned. Member States cannot hand over this option to taxable dealers. Furthermore, the Commission services highlighted that the global margin scheme provided in Article 318 of the VAT Directive is restricted to certain transactions or to certain taxable dealers, whereas the proposed Danish legislation amendment seems to envisage that it is an option granted to all taxable dealers, except those selling second-hand cars. In the Commission services' view, this undermines the purpose of the scheme, which should be put in place on a transaction-by-transaction basis.

In addition, Danish legislation envisages that any losses (excess arising from the value of purchases exceeding the value of sales) made during a tax period may be included in the value of purchases for the calculation of the taxable amount in the subsequent tax period, without setting up a limitation in time for the carry forward of such losses. In this regard, the Commission services took the view that a procedure where negative margins can be carried forward indefinitely is fundamentally incompatible with the nature of the scheme, and hence, the only possible way forward would be to include a time limit, beyond which, the carry-forward would no longer be possible.

Finally, the Commission services noted that Denmark had not foreseen the introduction of safeguard measures to ensure that taxable dealers do not enjoy any unjustified advantage or sustain unjustified harm as a result of the application of the global margin scheme.

The Chair invited the Danish delegation to provide their views.

The Danish delegation thanked the Commission services for including this item in the agenda and underlined that the rules currently in force in Denmark provide that the global margin scheme applies when the sale or purchase price is not known. The proposed amendments are intended to create a level playing field for taxable dealers so they can choose the global margin scheme if it is more convenient for them, the only limitation being taxable dealers selling second-hand cars. The Danish delegation also indicated that, in their view, the scope of their proposal is compatible with the VAT Directive and the proposed simplification is appropriate, both as regards its scope as well as the possibility to carry forward the losses to subsequent tax periods. The proposed changes have already been adopted by the Danish Parliament and the Danish tax authorities have not yet encountered any problems with the rules as already applied, which is the reason why they have not with these changes set any limits.

The Commission services asked the Danish delegation if they had envisaged any measure to prevent the possible financial impact arising in case of losses being offset, which could create an unjustified advantage for certain taxable dealers which would be incompatible with Article 318(3) of the VAT Directive. The Danish delegation replied that in the estimations made before presenting the proposal to the Danish parliament, they had not identified any financial implications, so no measure was envisaged in that direction.

The Chair thanked the Danish delegation and officially took note of their consultation.

4. Questions concerning the application of EU VAT provisions

4.1 Origin: Lithuania
References: Articles 73 and 90(1)
Subject: Application of VAT on medicinal products sold by pharmaceutical companies
(Document taxud.c.1(2022)7253417 – Working paper No 1053)

The Commission services briefly presented their Working paper on a question submitted by Lithuania on the application of VAT on medicinal products sold by pharmaceutical companies in view of the CJEU decisions in *Boehringer Ingelheim* (C-717/19) and *Boehringer Ingelheim Pharma* (C-462/16). In particular, Lithuania wants to consult the VAT Committee on the possibility to refund the VAT incurred by a pharmaceutical company established in a Member State on a compensation paid for the supply of medicinal products to a health insurance institution established in another Member State.

Firstly, the Commission services recalled that the *Boehringer Ingelheim and Boehringer Ingelheim Pharma* cases concern the supply chain of a medicinal product where the manufacturer (pharmaceutical company), wholesaler (distributor), retailer (pharmacy) and end user (patient) were all located in the same Member State. In both cases, the CJEU held that, in accordance with Articles 73 and 90(1) of the VAT Directive, the taxable amount of the pharmaceutical company could be reduced by the compensation paid to the health insurer.

The Commission services noted that the situation raised by Lithuania entails a cross-border transaction, where the pharmaceutical company is located in a different Member State and is making intra-Community supplies, which are exempt from VAT in accordance with Article 138(1) of the VAT Directive.

Therefore, the situation in both cases is similar but not identical. Indeed, the *Boehringer* cases concern purely domestic situations, whereas the case put forward by the Lithuanian delegation concerns a cross-border situation. Consequently, the Commission services took the view that making a distinction between pharmaceutical companies based on their place of establishment, when considering the opportunity to reduce the tax base, does not infringe the principle of equal treatment.

The Commission services also recalled in their analysis that according to the CJEU the rationale behind Article 90(1) of the VAT Directive is that the taxable amount should be equal to the consideration actually received and consequently, that the tax authorities may not collect an amount of VAT exceeding the VAT which the taxable person receives as part of the payment.

The Commission services concluded that a pharmaceutical company should not be given the right to be refunded for the VAT incurred on a compensation paid for an exempt intra-Community supply of medicinal products to a health insurance institution established in a different Member State.

Finally, the Commission services referred to the CJEU *Firma Z* case, which concerns a similar cross-border situation where a pharmacy established in one Member State was making (exempt intra-Community) supplies to a health insurance fund established in another Member State and granting discounts to end consumers. The CJEU reached a similar conclusion here and held that the taxable amount could not be reduced by those discounts as there was no tax base capable of being reduced (since the transaction was VAT exempt). However, noting that the circumstances of the *Firma Z.* case are not identical to the situation put forward by the Lithuanian delegation, the Commission services concluded that there could possibly be scope to envisage the reduction to be computed at the level of the intra-Community acquisition taking place in that situation.

The Chair thanked the Lithuanian delegation for having submitted the request and invited them to comment before opening the floor to other delegations for discussion

The Lithuanian delegation expressed their agreement with the Commission services' analysis and conclusions.

A couple of delegations expressed their doubts as to the assertion that VAT exempt transactions do not have a tax base. In addition, they pointed out that there is not enough information in the paper to enable them to make an informed assessment.

Some delegations expressed their support for the Commission services' analysis. One of those delegations was in favour of applying the *Firma Z.* case to the situation at hand since, according to the CJEU reasoning in that case, the calculation of the taxable amount of one transaction cannot be affected or reduced by a different transaction. A second delegation agreed with this view, underlining that intra-Community supplies and intra-Community acquisitions of goods seem to be separate transactions and, hence, lowering the taxable amount of the intra-Community acquisition has no economic justification and no economic benefit, as the acquirer still has the right to deduct in respect of this transaction. A third delegation indicated that they shared the same concerns raised by other delegations as regards the tax base of VAT exempt transactions. Lastly, this delegation stated that in their view, the intra-Community acquisition in the case at hand should not be adjusted by way of the intra-Community supply of goods, and so the compensation paid by the pharmaceutical company should not affect the payment made by the acquirer making the intra-Community acquisition.

Since no other delegation asked for the floor, the Commission services pointed out that they took note of the remarks made and will reflect further on the issues raised.

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

5.1

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**

(Document taxud.c.1(2022)7047962 – Working paper No 1049)

The Commission services presented their Working paper on a question by the Netherlands on the fundamental right of legal protection of SMEs facing issues in other Member States in view of the new special scheme for small enterprises that will apply from January 2025, and in particular, on which Member State should take the necessary steps to safeguard the legal protection of SMEs.

In their presentation, the Commission services briefly summarised the procedure put in place by the amendment to the VAT Directive for granting access to the SME exemption in another Member State (MSEX) different to that of the SME's Member State of establishment (MSEST), and the different tasks allocated to both MSEST and MSEX in the process, such as:

- The verification by the MSEST that the SME's Union annual turnover is below EUR 100 000, in which case, the MSEST will have to notify the MSEX;
- The verification by the MSEX that the SME's supplies are below its national annual threshold, in which case, the MSEX will have to notify the MSEST;
- If the above requirements are met, the MSEST will identify the SME with an individual number with the suffix 'EX' and communicate the decision and identification number to the SME in question;
- The MSEST must also transmit the identification number and the date of commencement of the exemption to the MSEX concerned.

The Commission services also mentioned SMEs' reporting obligations in their MSEST as regards the total value of their supplies carried out in each calendar quarter, as well as SMEs' obligation to notify the MSEST if their Union annual turnover exceeds the EUR 100 000 threshold.

In their analysis, the Commission services recalled that the European Union is founded on the rule of law, which is essential for the proper functioning of the internal market and for the respect of the rights of taxpayers, which arise from the EU Treaties, the EU Charter of Fundamental Rights and EU secondary legislation (directives and regulations). As VAT falls withing the scope of application of EU law, taxpayers can also rely on the Charter to enforce their rights.

The Commission services briefly recalled the alternatives put forward by the Dutch delegation to determine which Member State should be responsible for the safeguard of the legal protection of SMEs, as illustrated in the below table:

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

The Commission services explained that in their view Alternative 1 should be discarded as it fails to ensure legal protection as regards the national threshold. Alternative 3 should also be discarded as it does not seem reasonable that an SME should seek legal redress from both MSEST and MSEX as far as the national threshold is concerned.

The Commission services took the view that legal redress should generally be addressed to the legal entity issuing the relevant administrative decision for which the redress is sought In this respect, they agreed with the Dutch delegation that legal redress due to a potential wrongful assessment of the total value of supplies made in the MSEX should be sought only in the MSEX, and noted that this is also in line with the procedure laid down in the VAT Refund Directive for the refund of VAT. On that basis, the Commission services concluded that, while Alternative 4 might have some benefits as it facilitates the tasks of an SME seeking legal protection, the preferred option is **Alternative 2**, whereby legal proceedings should be initiated in the Member State whose tax authorities have issued the administrative decision in question (i.e., the MSEST for matters concerning the Union annual threshold and the MSEX for matters concerning the national threshold). In this regard, the Commission services underlined the importance for Member States to include in a decision denying access to the exemption the specific reasons why the exemption has been denied, so that the concerned SME knows where to address its complaint.

The Chair gave the floor to the Dutch delegation for comments.

The Dutch delegation thanked the Commission for the preparation of the Working paper and for the presentation and drew the attention of delegates to a practical issue that might arise in a situation where a MSEX changes their national turnover threshold after the SME has submitted the prior notification to its MSEST, and this results in the Union annual turnover threshold being exceeded as a consequence. The Commission services pointed out that, in that case the MSEST should revert its decision to grant the exemption as the SME would no longer be eligible.

The Chair opened the floor to the other delegations.

One delegation thanked the Dutch delegation for the question submitted and expressed their agreement with the analysis and solution proposed.

Another delegation expressed their agreement on certain points of the analysis (i.e., SMEs must be given the opportunity to contest the decisions affecting their access to the exemption and a common approach on this matter is necessary). However, in their view, SMEs should be able to appeal the decision solely before their MSEST, which is the Member State adopting the decision and the only contact point for the SME wishing to avail of the cross-border exemption. Therefore, from a legal point of view Alternative 4 was seen by this delegation as the preferred option. It was also pointed out that guidelines on this matter might not be enough and that an additional amendment of the rules would be needed.

The Commission services took note of all the interventions and stressed that, while Alternative 4 might indeed seem more favourable for taxable persons, it does not however seem appropriate that one Member State be held responsible for decisions taken by another Member State. It was recalled that the same approach had been successfully applied in other areas involving cross-border situations such as the One-Stop Shop (OSS) or the VAT Refund Directive. In addition, it was underlined that SMEs must be given the opportunity to seek redress where necessary.

One delegation intervened to express their agreement with the Commission services' analysis.

Alternative 4 was also supported by another delegation, which pointed out that taxable persons should not be denied access to justice based on some artificial distinctions and therefore SMEs should be able to contest the decisions of the MSEX in their MSEST.

The Chair stressed the need to adopt a common approach in this matter to ensure the smooth operation of the new SME scheme and concluded that since most delegations seemed to agree on the analysis carried out by the Dutch delegation and endorsed by the Commission services, guidelines will be prepared on this issue.

5.2 Origin: Netherlands
Reference: New Article 284(1)
Subject: The new special scheme for small enterprises and fixed establishments
(Document taxud.c.1(2022)7157727 – Working paper No 1051)

The Commission services presented the Working paper on another question submitted by the Dutch delegation on the notion of taxable person established in a certain Member State and how it should be interpreted in relation to the new special scheme for small enterprises that will enter ino application in 2025.

The Commission services recalled that the new SME special scheme opened the exemption to SMEs not established in that Member State (MSEX) provided that two conditions are met: (i) the value of the SME's supplies in the MSEX does not exceed the national threshold and (ii) the SME's total annual turnover does not exceed the Union annual turnover threshold of EUR 100 000. Therefore, the understanding of the notion of 'established SME' is be crucial to determine the eligibility conditions giving access to the exemption.

The Commission services recalled that the only legal definition of the fixed establishment concept in the VAT area can be found in Article 11 of the VAT Implementing Regulation, which applies to the supply of services but not to the supply of goods. According to Article 11, a fixed permanent is characterised by '*the existence of a sufficient degree of* *permanence and a suitable structure in terms of human and technical resources'* to deliver, supply and receive services.

In their analysis, the Commission services referred to the arguments provided by the Dutch delegation in favour and against using the notion of fixed establishment as defined by Article 11 of the VAT Implementing Regulation for the purposes of determining if an SME is established in a Member State.

Among the reasons in favour of the inclusion, the Dutch delegation included:

- ✓ Coherence with wording of Article 11 of the VAT Directive regarding VAT groups.
- ✓ Coherence with the interpretation of Article 59c of the VAT Directive regarding the place-of-supply threshold.
- ✓ Coherence with Article 369a of the VAT Directive concerning the e-commerce Union scheme, under which the notion of "established" includes both the business seat of economic activity and fixed establishments.

Among the reasons to exclude fixed establishments, the Dutch delegation included the following:

- ✓ Risk of tax avoidance: A taxable person with a business seat in Member State A and a fixed establishment in Member State B would be able to escape taxation of its activities thanks to the exemption in both Member States, as the availability of the exemption would be independent of the size of the Union annual turnover threshold.
- ✓ It would be compatible with Article 44 of the VAT Directive, which only includes the business seat of economic activity.
- ✓ No obvious justification for the inclusion.

The Commission services took the view that priority should be given to a teleological and systemic interpretation of the new Article 284(1) of the VAT to ensure an effective implementation of the new SME scheme, as well as to the ultimate purpose behind the SMS scheme, which is the simplification of VAT obligations for small enterprises. In addition, it should be noted that the Union annual turnover threshold was introduced as an anti-abuse mechanism to prevent circumvention of the rules by SMEs artificially splitting up their turnovers in order to benefit from the exemption in several Member States.

On this basis, the Commission services concluded that an effective implementation of the new provisions of the VAT Directive governing the SME scheme requires the **exclusion of fixed establishments** from the notion of SME established.

The only exception to this rule concerns SMEs established outside the EU that have a fixed establishment in an EU Member State as defined by Article 11 of the VAT Implementing Regulation. In that case, the Commission services took the view that the non-EU SME should be considered to be established in the Member State where its fixed establishment is located and, therefore, that non-EU SME should be granted access to the exemption provided that all the conditions for there to be a fixed establishment are met and that the supplies are made from that fixed establishment. Finally, in the hypothetical case that a non-EU SME had more than one fixed establishment in the EU, the

Commission services proposed that the SME would have to designate the Member State that would serve as its MSEST, similar to the solution applied under the non-Union One-Stop Shop (OSS) scheme.

The Chair invited the Dutch delegation to express their views.

The Dutch delegation thanked the Commission services for the preparation of the paper and expressed their agreement with their analysis and views. Furthermore, as regards non-EU established SMEs having a fixed establishment in the EU, the Dutch delegation raised two additional questions concerning, on the one hand, the legal basis under which such non-EU SME would have access to the exemption and, on the other hand, the analogy made by the Commission services with the e-commerce package and the non-Union OSS scheme under which the designation of a MSEST is indeed envisaged, whereas the new rules on the special SME scheme do not specifically provide for this possibility.

In reply to the Dutch delegation, the Commission services clarified that their conclusions were based upon the background leading up to the adoption of the new rules and the discussions in Council and stressed that, legally speaking, an SME not established in the EU but having a fixed establishment in the EU cannot be denied access to the exemption as long as it complies with the other eligibility conditions.

The Chair opened the floor to other delegations for comments.

One delegation expressed their agreement with the Commission services' conclusions and stated that, in their view, a non-EU SME having a fixed establishment in the EU should be considered as having a business seat in the EU and should be treated as an SME established in the EU.

Another delegation expressed their overall support for the analysis and the conclusions reached by the Commission services in relation to fixed establishments and EU-established SMEs. However, in their view, there could also be room for other plausible interpretations whereby SMEs could argue that they are 'established' in a Member State where they have a fixed establishment. In addition, concern was expressed about the impacts that this solution could have in the rights (such as for example the right to legal protection or the right to VAT register) of SMEs having a fixed establishment in a certain Member State but not being considered as 'established' there for the purposes of the new SME scheme. It was suggested by this delegation that to enhance legal certainty in this area, this issue should be regulated by means of an amendment to the VAT Implementing Regulation. As for non-EU established SMEs, the same delegation expressed their reluctancy to support the solution proposed by the Commission services, as it could imply unequal treatment between fixed establishments of EU taxable persons and non-EU taxable persons. In addition, it could in their view create difficulties for Member States in controlling the application of the scheme and give rise to abuse (e.g., a non-EU SMEs having fixed establishments in different Member States and using the domestic exemption in all those Member States). A question was asked as to whether it was envisaged for the technical specifications of the SME Directive to provide measures facilitating communications in this regard between Member States. Lastly, as for the application of the same solution as that used in the non-Union OSS scheme, this option merited in their view further analysis and, if accepted, it should be specifically regulated by either the VAT Directive or the VAT Implementing Regulation to avoid misuse of the scheme, similarly to what was done for the non-Union scheme in the e-commerce package.

A third delegation agreed with the Commission services as regards EU established SMEs but expressed major reservations with the solution proposed regarding non-EU established SMEs. In their view, the new Article 284(1) of the VAT Directive does not distinguish between EU SMEs and non-EU SMEs. Similarly, the SME Directive (2020/285) does not contain a provision requiring non-EU SMEs to designate their Member State of establishment, as is the case in the e-commerce package for the non-Union OSS scheme. The difficulties that Member States would have to control what is happening in other Member States and prevent misuse of the scheme by non-EU SMEs having several fixed establishments in various Member States was also pointed out by this delegation.

One delegation shared most of the concerns expressed. In their opinion, the issue at hand results from the legal uncertainty caused by the lack of harmonisation throughout the VAT Directive in how the notion ‘establishment’ is defined and the lack of a legal provision similar to that in the e-commerce package. This delegation also pointed out that guidelines on this matter would not be enough and that a legal basis would be needed.

Another delegation, however, underlined the importance of reaching a common position on this matter in the form of guidelines. They indicated their readiness to agree with the non-inclusion of fixed establishment in the notion of establishment provided there is unanimity among all delegations on this point. In their view, the guidelines should clearly state the practical solutions proposed to all the concerns raised as well as the internal procedures that should be followed. Moreover, this delegation noted that it would be useful to have explanatory notes on this matter to clarify practical aspects relating to the implementation of the scheme (e.g., possibility for Member States to introduce additional conditions other than the thresholds, invoicing obligations that the SME must comply with in the MSEX etc.).

Three more delegations shared the concerns with regard to non-EU SMEs and the different treatment proposed to be given with respect to EU established SMEs. One delegation underlined that a distinction must be made between EU established SMEs and non-EU SMEs, and it should be up to Member States to decide how to draw that distinction given that the VAT Implementing Regulation does not specifically regulate so. Another delegation pointed to the problems that might arise from a linguistic point of view with the definition of small and medium size enterprises used under the VAT Directive and suggested that perhaps a more updated definition should be used. Furthermore, one delegation reiterated that it is crucial to ensure legal certainty for which a legal basis was needed.

Finally, a last delegation noted that the term ‘established’ is only referred to in the new Article 284 of the VAT Directive. In their view, it could be possible to interpret Article 284 differently depending on whether the SME is established in the EU or not, so that a more restrictive interpretation of this provision could be used for EU SMEs whereas a wider interpretation could be used for non-EU SMEs.

The Commission services, thanking delegates for their contributions, recapped that there seemed to be a general consensus among delegations on the first part of the analysis with regard to the non-inclusion of fixed establishments in the notion ‘established’. However, it was noted that further reflection and consideration needed to be given to the second part of the analysis as regard non-EU established SMEs having one or more fixed establishments in the different EU Member States.

The Chair concluded that the Commission services will prepare guidelines for the first part of the analysis and will reflect further on the second part. As to the preparation of explanatory notes suggested by one delegation, the Chair indicated that they would also reflect further into this possibility.

5.3 Origin: Belgium
Reference: New Article 284(3)(b)
Subject: The new special scheme for small enterprises: interaction with rules on intra-Community acquisitions
(Document taxud.c.1(2022)7158574 – Working paper No 1052)

The Commission services presented their Working paper on a question submitted by the Belgian delegation on the interaction of the new SME scheme and the rules on intra-Community acquisitions by SMEs applying that special scheme. In particular, Belgium wants to know whether the requirement laid down in Article 214 of the VAT Directive to be identified in a Member State for intra-Community acquisitions made there could see an SME barred from the exemption under the new SME scheme.

Firstly, the Commission services set out the context of the question and briefly outlined the changes to be made in the SME scheme as of 1 January 2025, focusing on the procedure that must be followed under the new Article 284 of the VAT Directive, whereby eligible SMEs wanting to avail of the SME exemption will ***only*** be required to register in their Member State of establishment (MSEST) and not in the Member State of exemption (MSEX), even though they might be making supplies there. On the other hand, the Commission services recalled the obligation laid down in Article 214 of the VAT Directive for intra-Community acquisition of goods, whereby Member States are required to take the necessary measures to ensure that taxable persons making intra-Community transactions are identified for VAT purposes.

The Commission services pointed out that a distinction must be made between the identification of a taxable person in respect of their input transactions and the identification required in respect of their output transactions. It was further underlined that the new Article 284(3) of the VAT Directive refers to **output transactions** carried out by an SME, whereas Article 214(1)(b) of the VAT Directive refers to **input transactions** carried out by taxable persons such as an SME in a Member State whether or not it is established there.

Moreover, the Commission services noted that not all supplies might be covered by the exemption. This would be the case, for instance, of an SME making supplies in a particular Member State of a value exceeding the domestic annual turnover threshold of that Member State. In such case, the SME would not have access to the exemption in that Member State. However, this would not prevent the SME from availing of the exemption in other Member States. For the same reason, the obligation to register in a given Member State triggered by the SME's making intra-Community acquisitions in that Member State under Article 214(1)(b) of the VAT Directive should not take away that SME's right to benefit from the exemption in that Member State or elsewhere.

On that basis, the Commission services concluded that for input transactions in the form of intra-Community acquisitions of goods, in respect of which an SME may be required under Article 214(1)(b) of the VAT Directive to be identified in a MSEX, the new Article 284(3)(b) of the VAT Directive does not entail that the SME will no longer be able to benefit from the exemption granted under the SME scheme in that MSEX. Furthermore, the new Article 284(3)(b) of the VAT Directive, which refers to output transactions, cannot be taken to impact the entitlement of the SME to avail of the exemption for the supplies made in other Member States.

The Chair invited the Belgian delegation to express their views on the Commission services' analysis.

The Belgian delegation thanked the Commission services for the preparation of the paper and expressed their overall support to their analysis and conclusions. Furthermore, they indicated that agreeing on guidelines on this issue might not be enough for the purposes of achieving greater legal certainty and suggested that this issue should be regulated by the VAT Implementing Regulation.

Four delegations asked for the floor and expressed their agreement with the Commission services' analysis. One of them stated that they did not see the need for this issue to be regulated by an amendment to the VAT Implementing Regulation. Two of them expressed their support for the preparation of guidelines with a view to arrive at a common approach on this matter. Finally, one delegation expressed concern about some practical issues that could arise as regards, for example, the type of registration number allocated to the SME doing the intra-Community acquisition, and suggested that this issue could be addressed by way of functional and technical specifications.

The Chair, thanking delegations for their contributions, concluded that there seemed to be a convergence of views on this matter and guidelines will therefore be proposed.

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

6.1 Origin: Croatia
References: Articles 66(b) and 167
Subject: Implications of the CJEU's judgment in Case C-9/20 *Grundstücksgemeinschaft Kollaustraße 136*
(Document taxud.c.1(2022)7048727 – Working paper No 1050)

The Commission services presented their Working paper based on questions submitted by the Croatian delegation on the implications of the CJEU ruling in case C-9/20 *Grundstücksgemeinschaft Kollaustraße 136*, in relation to the cash-accounting scheme provided for in Article 66(b) of the VAT Directive and its interaction with Article 167 of the VAT Directive. In particular, the Croatian delegation asked for clarification as to whether the postponement of the right to deduct VAT until the moment of payment of the supply when the supplier is under cash accounting could be seen as contrary to the principle of neutrality and have negative effects from a market competition point of view.

In their analysis, the Commission services briefly recalled Sections 2, 3 and 4 of the Working paper, which outline the circumstances of the *Kollaustraße* case, the questions referred to the CJEU and the judgment delivered.

Firstly, the Commission services underlined that, as stated by the CJEU (in paragraph 40 of *Kollaustraße*) and the Advocate General, the wording of Article 167 of the VAT

Directive is "*clear and unambiguous*" and leaves no room for interpretation. In accordance with this Article, the right to deduct arises at the moment the deductible VAT becomes chargeable (chargeability of the tax) and not at the moment at which the chargeable event occurs. Usually, these two events occur at the same time (when the goods or services are supplied), and hence, the cash-accounting scheme is an exception to this general rule that is specifically provided for by the VAT Directive. Therefore, in accordance with the *Kollaustraße* case, if a Member States makes use of the option in Article 66b, the right of deduction will arise at the point in time when the payment is received, which is the moment at which VAT becomes chargeable.

On that basis, the Commission services took the view that if a taxable person is under the cash-accounting scheme, the right to deduct for their customers only arises when the VAT is paid, even if the customer is not applying the cash-accounting scheme itself. Exceptions to the general rule laid down in Article 167 of the VAT Directive must be expressly set out elsewhere in the VAT Directive. This is the case for instance of Article 167a of the VAT Directive, which allows Member States to postpone deduction of the VAT on the goods or services supplied to taxable persons under the cash-accounting scheme until the moment VAT has been paid by them to their suppliers. Therefore, the right to deduct will be disconnected from the chargeability of the VAT, and it is linked instead to the moment at which payment is made.

On the other hand, where a taxable person who is not under the cash-accounting scheme supplies goods or services to another taxable person also under the cash-accounting scheme, VAT will become due at the time the goods or services are supplied. In this case, the moment at which the taxable person under the cash-accounting scheme is allowed to exercise its right of deduction will depend on whether the Member State has made use of the option in Article 167a of the VAT Directive. Indeed, if the Member State has not made use of the option, the taxable person will be able to deduct that VAT already when the goods or services are supplied. If, however, the Member State has made use of the option, the right to deduct will be postponed until payment is made by the taxable person.

The last set of issues addressed in the Working paper concern the possible impact pointed out by the Croatian delegation in their question, that a strict interpretation of the rules could have on the principle of neutrality and on the market position of the taxable person making use of the cash-accounting scheme.

First, as regards the impact on the principle of neutrality, the Commission services took the view that even if there could be a possible impact on the cash-flow of the taxable person due to the postponement of the exercise of the right of deduction, it does not have any implications on the principle of fiscal neutrality. The objective of the principle of fiscal neutrality is to relieve taxable persons from the burden of VAT, which is a tax on consumption, and this objective is achieved in this case as the right of deduction can still be exercised. In any event, as stated by the CJEU case law, the principle of neutrality is not a rule of primary law and can only be used to interpret rules, not to circumvent them.

Secondly, as to the possible impact on the market position of the taxable person using the scheme, the Commission services noted that the-cash accounting scheme could have an impact on customers' decision to do business with taxable persons under this scheme due to the administrative burdens that it entails, as the customer needs to differentiate these invoices and treat them separately for the deduction. To facilitate this task, suppliers under the cash-accounting scheme must mention in their invoices this circumstance. However, the Commission services took the view that since the cash-accounting scheme is not compulsory, the taxable person is able to decide whether to make use of the option and take advantage of the benefits that the scheme provides.

The Chair gave the floor the Croatian delegation to express their views on the Commission analysis.

The Croatian delegation thanked the Commission services for the preparation of the paper and reiterated their concern on the impact that the CJEU decision in the *Kollaustraße* case has on the principle of neutrality, since in their view, it entails the imposition of additional conditions for the exercise of a taxable person's right of deduction. They further indicated that Article 167a was introduced as a simplification measure to help SMEs and in their view, it is not fulfilling this purpose as the principle of neutrality is being compromised.

The Chair thanked the Croatian delegation and opened the floor to other delegations for comments.

Four delegations expressed their full support with the Commission services' analysis.

One delegation shared the view that the aim of Directive 2009/49/EC was to assist SMEs and not to create disadvantages for them. As regards Articles 167 and 168 of the VAT Directive, their aim was, according to this delegation, to provide a standard as far as eligibility is concerned, whereas Article 167a might give rise to a different interpretation that could result in a different application. Lastly, this delegation wondered whether the conclusion reached by the Commission services would be different in a case where both taxable persons are applying the cash-accounting scheme, as it was the case in the *Kollaustraße* case. The Commission services replied that in a case where both the supplier and its customer are under the cash-accounting scheme, the chargeability, and the right to deduct arise at the moment of payment, regardless of whether or not the Member State concerned has made use of the option of Article 167a. Therefore, this situation does not change the conclusion reached in the Working paper.

The Commission services reiterated the views expressed in their Working paper. Article 66b, 167 and Article 167a of the VAT Directive are sufficiently clear and self-explanatory and thus leave no room for interpretation. Article 167 links the right to deduct VAT with the moment of the chargeability of that VAT. This implies that the VAT charged on supplies of goods and services made by taxable persons under the cash-accounting scheme can only be deducted by their customers when that VAT is received from them as part of the payment for the supplies made. Further, allowing them to do otherwise would open the door to VAT fraud.

Since no other delegation asked for the floor, the Chair concluded the agenda point by stating that there seemed to be a consensus on the analysis made by the Commission services and noted that no delegation expressed the need to draft guidelines.

6.2 Origin: Commission
References: Articles 2(1) and 135(1)(b)
Subject: CJEU Case C-235/18 *Vega International*: Fuel cards – follow-up
(Document taxud.c.1(2022)6857780 – Working paper No 1046)

The Commission services presented the Working paper on "CJEU case C-235/18 *Vega International*" which is an initial analysis carried out as a follow-up to previous discussions at the VAT Committee (118th and 119th meetings) on the implications of the *Vega International* case on the VAT treatment of the provision of fuel cards.

The Commission services briefly recalled the background and the CJEU judgment in the *Vega International* case, which concerns the supply of fuel by an Austrian company, Vega International, through a fuel card system to several subsidiraires and whether the former was entitled to a refund of the VAT it had incurred on the purchase of fuel. The starting point of the CJEU's analysis was the notion of supply of goods under Article 14(1) of the VAT Directive which, according to settled CJEU case-law, covers the transfer of the right to dispose of tangible property by one party empowering the party to dispose of it as an owner. In this regard, the CJEU noted that Vega International did not dispose of the fuel as the owner, and concluded that the supply made by Vega International to its Polish subsidiary did not constitute a supply of goods in the sense of Article 14(1) of the VAT Directive, but a **supply of services** within the meaning of Article 24(1) of the VAT Directive. On that basis, the CJEU found that Vega International was acting as an ordinary financial or credit institution and the supply of fuel cards to its subsidiaries qualified as a financial transaction, which was akin to the granting of credit for the purposes of Article 135(1)(b) of the VAT Directive and hence eligible for exemption.

The Commission services also recalled the outcome of the work of the VAT Expert Group (VEG) on the various business models for the supply of fuel cards currently existing in the sector, which was presented at the 120th meeting of the VAT Committee on 28 March 2022. According to the VEG, the business model in the *Vega International* case is very particular and, therefore, the conclusions of that case should not be applied to the most commonly used fuel card business models. Moreover, the VEG considered that fuel card transactions should be treated as chain transactions and their VAT treatment should be aligned with that of the e-mobility sector. Finally, the VEG identified two main business models in the sector: (i) the *buy/sell model* and (ii) the *commissionaire model*.

In their analysis, the Commission services took the view that these two different business models identified by the VEG do not seem to diverge substantially from the business model found in the *Vega International* case, with the exception of the element of intra-group supplies between Vega International and Vega Poland. It was further noted that in the *Vega International* case, the CJEU focused on the transfer made to the fuel card issuer of the right to dispose of the fuel as owner. The Commission services stressed that the decision of the CJEU cannot be disregarded and the approach taken by the CJEU in that case is coherent with the position taken in the *Fast Bunkering* case (C-526/13). Furthermore, in the *buy/sell model* described by the VEG, the fuel card issuer does not dispose of the fuel as owner, as it is in fact being purchased by the fuel card users at their discretion directly from the mineral oil companies. Consequently, in accordance with the *Vega International* case, the supply of fuel cards under the *buy/sell model* constitutes a supply of financial services consisting in financing of the purchase of fuel.

As to the commissionaire model described by the VEG, the Commission services underlined that the purely factual assessment of the circumstances would lead to a similar conclusion. However, it was recalled that as regards the transfer of goods pursuant to a contract under which commission is payable on purchase or sale, Article 14(2)(c) of the VAT Directive introduces a fiction that such transfer constitutes a supply of goods. This implies that when a sale or purchase is effected through an intermediary acting in its own name but on behalf of the principal (its client), there are two taxable supplies from a VAT point of view, even if the goods are handed over directly by the first supplier to the last buyer. Consequently, the Commission services took the view that in a commissionaire business model whereby the commissionaire acts in its own name but on behalf of a principal, and the commission is payable upon purchase or sale, the supplies to and from the commissionaire (fuel card supplier) qualify as **supplies of goods** (fuel) and not as supply of services.

On that basis, the Commission services concluded in accordance with the CJEU’s *Vega International* case, that in order to determine the legal nature of a supply in the case of transactions relating to supply of fuel through the use of fuel cards, it is necessary to look at whom the right to dispose of the fuel as owner is transferred to. In that respect:

a) if it can be established that the right to dispose of the fuel as owner is transferred to the issuer or supplier of a fuel card, the latter may be considered as supplying the goods concerned (fuel) and the transaction as a suppply of goods. Such a transfer of the right to dispose of the fuel as owner does not seem to take place under the *buy/sell model* for the supply of fuel cards, as described by the VEG, so the transactions taken place under this model qualify as a **supply of (financial) services**. However, it was noted that depending on the circumstances linked to individual business models in the sector, a different interpretation and a different VAT assessment may be required;

b) where the fuel card constitutes a mere instrument to structure the fuel supply under a purchase or sales *commissionaire contract* whereby the commissionaire acts in its own name but on behalf of its principal, the supplies received and delivered by the commissionaire should in principle qualify as a **supply of goods** (fuel) in accordance with the fiction introduced by Article 14(2)(c) of the VAT Directive.

The Commission services finally stressed that the purpose of the discussion was to agree on a common approach on the issues stemming from the *Vega International* ruling for the application of the VAT Directive to the supply of fuel cards. The Commission services also stressed that this issue has a high impact on an important economic sector and that it should be dealt with carefully so as to come up with what will be the optimal solution.

The Chair opened the floor for comments.

One delegation indicated that in their Member State the *buy/sell model* was the most predominant business model used. They however had no evidence on the use of the *commissionaire model*, which in their opinion was rather a theoretical model presented by the VEG that is it not being used in practice. This delegation expressed their overall support to the Commission services’ conclusions and the need to adopt a common position in the form of clear guidelines establishing specific criteria, which should be analysed also in connection with the charging of electric cars in the e-mobility sector.

Another delegation expressed their overall support for the Commission services' analysis and conclusions but noted that further reflection was needed on the use of the fiction laid down in Article 14(2)(c) of the VAT Directive which, in any case, should be applied within the limits set out in the Directive. Furthermore, it was underlined that a common approach on this issue was necessary to clearly set out the application scope of the CJEU's case law and to ensure legal certainity for operators as to the legal and commercial situations in which the fiction of Article 14(2)(c) of the VAT Directive may apply.

A third delegation expressed their doubts as to the qualification of fuel cards as a financial transaction, as was held by the CJEU in the *Vega International* case. In their view, other alternatives and options should also be considered and operators should be allowed to apply other business models that seem more attractive for their commercial interests. The *commissionaire model* was seen as an acceptable model.

A delegation agreed with the Commission services' analysis as regards the *commissionaire model*. However, some concerns were expressed as to the *buy/sell model*. In their view, fuel cards do not constitute a paying intrument and should not be qualified as a financial transaction. Therefore, they should be considered as a taxable event giving rise to the right of deduction. Furthermore, in their opinion, the business model in the *Vega International* case was a chain transaction and should receive the same treatment as other chain transactions having similar elements, like the supply of electricity by charging stations. This opinion by also shared by another delegation. Finally, this delegation identified a third business model which involves an outsourcing situation whereby only the card issuer purchases the fuel and the subcontractors deduct the amount of the fuel used by them from the amount they are charging to the card issuer for their services. When confronted with this business model, their national supreme court considered that the fuel had been bought by the card issuer and, hence, it was entitled to the right to deduct. This delegation suggested to include this third business model if guidelines are to be prepared.

The Commission services replied that they would complement their analysis with the inclusion of the third business model and invited this delegation to provide further information in writing.

Some delegations expressed their support for the Commission services' analysis as regards the *commissionnaire model*, which in their view could work in practice provided that there is a pre-existing contract between the suppliers of the fuel and the fuel card issuer. A couple of these delegations also shared the concerns expressed above as regards the *buy/sell model*.

One delegation shared the opinion of the Commission services in this matter. In their view, each transaction should be considered individually in order to determine whether the right to dispose of the goods is present or not.

Some delegations shared the view that the factual circumstances of the *Vega International* case were quite speficic and special and, hence, the decision of the CJEU should not apply to all the transactions involving the use of fuel cards. Consequently, the VAT Committee should, in their view, unanimously agree that the *Vega International* case has a restrictive scope that is only relevant to the specific factual circumstances of that case and, hence, should not be applied to the generality of transactions involving fuel cards, which might have elements different to those present in the Vega case.

As to the *commissionaire model*, a few delegations agreed with the Commission services' proposed solution, which could work in practice to minimise the financial impact caused by the *Vega International* case.

Lastly, one delegation suggested to look into the similarities that can be found in the Voucher Directive in this context and committed to send their reflections in that regard in writing.

The Chair invited delegations to provide their views on the criteria that could be used to make the widest possible interpretation to justify that certain buy and sell situations could fall within the category of the *commisionnaire model*. Delegations kindly asked to send their contributions in writing by 25 November 2022. Based on the contributions received, the Commission services will prepare guidelines.

6.3 Origin: Commission
Subject: Case-law – Recent Judgments of the Court of Justice of the European Union
(Document taxud.c.1(2022)7283093 – 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 (23 cases of VAT related rulings covering the period from 8 March 2022 up until 22 September 2022). Delegates were also reminded that requests for discussion of a case in a future meeting need to be accompanied by the interested delegation's own preliminary 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 Chair invited the Greek delegation to present the content of a question raised by them on the provision of services to non-EU companies not having a VAT number. In particular, the Greek delegation wanted to hear other delegations' views on whether the fact of a company not having a VAT number could be enough to make it not subject to VAT for the supplies made in another Member State. This is the case for instance, of companies which under the national legislation of their country of establishment are not required to have a VAT number in accordance with Articles 272(1)(b) and Article 239 of the VAT Directive. Alternatively, the Greek delegation wanted to know if an alternative procedure can be followed to establish whether or not the company is subject to VAT, in accordance with Article 18(2) of the VAT Implementing Regulation.

The Chair invited delegations to make comments on the questions raised by the Greek delegation.

One delegation pointed out that under their national legislation any company established in their territory is required to be registered and obtain a VAT identification number. Therefore, in their view, Article 18(2) of the VAT Implementing Regulation may be applied to companies established in their territory. This delegation invited the Greek delegation to share more information on this issue with them in a bilateral way. Lastly, a question was raised by this delegation as to the interpretation of the first sentence in Article 18(1) and (2) of the VAT Implementing Regulation: "*unless he* [the supplier] *has information to the contrary*…".

A second delegation indicated that their tax administration do not prevent businesses established in their territory from obtaining a VAT number. If a company is not disclosing their VAT number to its suppliers established in other Member States, these suppliers can in their view treat them as non-taxable persons and charge VAT.

As no other delegation asked for the floor, the Chair closed the discussion and invited the Greek delegation to submit their question in writing together with a preliminary analysis and their proposed solution to the question raised. On that basis, the Commission services will prepare a Working paper and submit it for discussion to the VAT Committee.

Conclusion

The Chair closed the meeting by thanking the delegations for their participation in the discussions. He announced that the 122nd meeting would probably take place in March 2023.

ANNEX

LIST OF PARTICIPANTS

BELGIQUE/BELGIË/BELGIUM	Federal Public Service Finance
БЪЛГАРИЯ/BULGARIA	Ministry of Finance National Revenue Agency
ČESKO/CZECHIA	Ministry of Finance
DANMARK/DENMARK	Ministry of Taxation Tax Agency
DEUTSCHLAND/GERMANY	Federal Ministry of Finance Länder Representative
EESTI/ESTONIA	Ministry of Finance
ÉIRE/IRELAND	Revenue Commissioners
ΕΛΛΆΔΑ/GREECE	Independent Authority for Public Revenues
ESPAÑA/SPAIN	Ministry of Finance Permanent Representation
FRANCE	Ministry of Finance
HRVATSKA/CROATIA	Tax Administration Permanent Representation
ITALIA/ITALY	Ministry of Economy and Finance Revenue Agency
ΚΥΠΡΟΣ/CYPRUS	Ministry of Finance
LATVIJA/LATVIA	Ministry of Finance State Revenue Service
LIETUVA/LITHUANIA	Ministry of Finance 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 Permanent representation
PORTUGAL	Ministry of Finance VAT department
ROMÂNIA/ROMANIA	Ministry of Finance
SLOVENIJA/SLOVENIA	Ministry of Finance Financial administration
SLOVENSKO/SLOVAKIA	Ministry of Finance
SUOMI/FINLAND	Ministry of Finance Tax Administration
SVERIGE/SWEDEN	Ministry of Finance Tax Authority

EUROPEAN COMMISSION