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TAXATION AND CUSTOMS UNION
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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1058

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Poland**
REFERENCES:	**Articles 132(1)(i) and 132(1)(j)**
SUBJECT:	**Application of the VAT exemption to educational services**

1. INTRODUCTION

The Polish delegation wishes to consult the VAT Committee on the application of the VAT exemption to transfer of knowledge services provided by lecturers under contracts concluded with higher education institutions, such as universities.

The question and analysis submitted by Poland are attached in the annex.

2. SUBJECT MATTER

2.1. General description of the matter put forward

The Polish authorities seek to clarify the application of the exemptions provided for in Articles 132(1)(i) and (j) of the VAT Directive[1] to a scenario, in which higher education institutions, such as public universities, conclude contracts, against payment of a remuneration, with lecturers in order for the latter to provide knowledge transfer services to students at those institutions.

In particular, the Polish authorities seek to clarify, whether the services provided by the lecturers, who are natural persons and active VAT taxable persons, fall under the VAT exemption provided for in Articles 132(1)(i) and (j) and if so, under which one of these two provisions.

In addition, the Polish authorities seek to establish whether in the scenario, as described above, the lecturers could qualify as "other organisations recognised by the Member State concerned as having similar objects" within the meaning of Article 132(1)(i).

2.2. Further details with regard to the scenario described

With regard to the **status of the higher education institutions**, the Law on Higher Education and Science[2] governs the rules for the functioning of the higher education system and science in Poland and stipulates in its Article 9(1) that higher education institutions, such as universities, possess legal personality. The Polish authorities further stated that these entities are registered active taxable persons.

The **tasks of higher education institutions** include pursuant to Article 11 of the Law on Higher Education and Sciences, *i.a.*, the provision of education as part of studies, the provision of education as part of post-graduate studies or other forms of education, the provision of education to doctoral students, and the education and promotion of the staff of higher education institutions[3].

In order to provide the educational services as outlined in the Law on Higher Education and Sciences, **higher education institutions, such as public universities, enter into contractual relations with lecturers**, who possess the required knowledge in a particular field with the purpose of the latter to carry out transfer of knowledge services to students,

1 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended (OJ L 347, 11.12.2006, p. 1). All references to articles in this document relate to the VAT Directive, unless otherwise specified.

2 Act of 20th July 2018 - Law on Higher Education and Science (Dz. U. no 1669).

3 Article 11 item 1, 2, 4 and 5 of the Law on Higher Education and Sciences.

doctoral students, trainees, or participants in training courses, workshops, seminars, or conferences at those higher education institutions. There are no contractual relations between the lecturers and the students. It is only the higher education institution that maintains contractual relations with the students.

The contracts are concluded in the form of **contracts of mandate (Polish "*umowa zlecenia*")** instead of contracts of employment. The contracts of mandate govern the concrete tasks to be carried out by the lecturers and the payment of remuneration for the services provided. The lecturers' tasks primarily consist of holding classes at the higher education institution and may, in addition, also include other tasks, such as developing the teaching programme in parts or in its entirety, prepare course materials or administer exams to test the knowledge of the students.

It is assumed that the **contracting parties are entirely free in governing the content of the contracts of mandate**, in particular as regards the scope and duration of the mandate, the modalities for the remuneration to be paid, insurance coverage or compensations, if any, in the event of sickness, cancellations or other hindrances.

The Polish authorities are of the opinion that the abovementioned services provided by lecturers under a contract with the higher education institution, such as a university, constitute services strictly related to school or university education. The Polish authorities contend, that despite the fact that the transfer of knowledge at school or university level is provided by a lecturer based on a contract of mandate, such services cannot be covered by the exemption on the basis of Article 132(1)(j), on the grounds that they cannot be regarded as tuition given privately. By contrast, the services in question could fall within the ambit of the exemption under Article 132(1)(i).

3. COMMISSION SERVICES' OPINION

3.1. General remarks

The VAT Directive provides in Article 132(1)(i) for an exemption from VAT of "*the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects*".

Similarly, Article 132(1)(j) of the VAT Directive stipulates that "*tuition given privately by teachers and covering school or university education*" shall be exempted from VAT.

The VAT Committee dealt with questions related to the exemption of school and university education at the 97th and 117th meetings. However, the present question put forward by Poland has not been elaborated yet.

3.2. Does the scenario under discussion fall under the exemption provided for in Article 132(1)(i)?

Article 132 provides for exemptions which are intended to encourage certain activities in the public interest. However, those exemptions do not cover every activity performed in

the public interest, but only those listed in that provision and described in detail.[4]

According to the case-law of the Court of Justice of the European Union (CJEU), those exemptions constitute autonomous concepts of EU law that need to be construed as such so as to avoid divergences in the application of the VAT system from one Member State to another[5].

The terms used to specify the exemptions referred to in Article 132 are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2, that VAT is to be levied on all services supplied for consideration by a taxable person. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive them of their intended effect[6].

The CJEU held that the same must be also true of the specific conditions concerning the status or identity of the economic agent, such as the lecturers, performing the services covered by the exemption[7].

With regard to Article 132(1)(i), the exemption referred to in that provision is subject to two cumulative conditions[8]. First, regarding the nature of the service provided, it must concern the provision of school or university education or services closely related thereto, and secondly, as regards the supplier of the services provided, those services must be provided by bodies governed by public law or by other organisations recognised by the Member State concerned as having similar objects[9].

3.2.1. Do the services provided qualify as "school or university education" within the meaning of Article 132(1)(i)?

With regard to the first condition, the VAT Directive does not provide for a definition of the concept "school or university education".

Although, as outlined above, the terms used to specify the exemption envisaged in Article 132(1)(i) are to be interpreted strictly, a particularly narrow interpretation would, given the differences in the organisation of the education systems in the Member States, risk creating divergences in the application of the VAT system from one Member State to another. This however would be incompatible with the nature of the exemptions provided for in Article 132 as independent concepts of Union law whose purpose it is to avoid such divergences[10].

Thus, the CJEU understands the scope of the concept of "school or university education" broadly, stating that it is not limited solely to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity but includes other activities which are taught

4 CJEU, judgment of 4 May 2017 in case C-699/15, *Brockenhurst College* (EU:C:2017:344) paragraph 22 and the case-law cited.
5 CJEU, judgment of 26 October 2017 in case C-90/16, *The English Bridge Union* (EU:C:2017:814), paragraph 17 and the case-law cited.
6 *Brockenhurst College*, paragraph 23 and the case-law cited.
7 CJEU, judgment of 14 June 2007 in case C-445/05, *Haderer* (EU:C:2007:344), paragraph 19.
8 CJEU, judgment of 28 April 2022 in case C-612/20, *Happy Education* (EU:C:2022:314), paragraph 29.
9 Ibid.
10 *Haderer*, paragraph 17 et sqq.

in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational[11].

Although the transfer of knowledge and skills between a teacher and students – such as in the scenario under discussion – is a particularly important element of educational activity, it remains that such activity consists of a combination of elements, which also include those that make up the organisational framework of the educational institution concerned, *e.g.* the university[12].

Activities which are hence not purely recreational are likely to be covered by the concept of "school or university education", as long as the activities are provided in schools or universities[13].

In the scenario under discussion, the lecturers hold classes at public universities as part of the curricula of those universities, and may, in addition, also develop teaching programmes, prepare course materials or administer exams to test the knowledge of the students. This particularly encompasses the transfer of knowledge between a teacher and pupils or students covering a wide and diversified set of subjects to their furthering and development which is characteristic of school or university education. The first condition is hence fulfilled[14].

3.2.2. Could lecturers be considered as "other organisations recognised by the Member State concerned as having similar objects" within the meaning of Article 132(1)(i)?

The second condition of Article 132(1)(i) states that the services must be provided by bodies governed by public law or by other organisations recognised by the Member State concerned as having similar objects.

The lecturers are not public universities. Hence, it is necessary to ask whether they could qualify as "other organisations recognised by the Member State concerned as having similar objects" within the meaning of Article 132(1)(i).

To that end, the CJEU held that the expression "organisation" does not call for a particularly narrow construction and is sufficiently broad such as to include *e.g.* private profit-making entities within the scope of exemption under Article 132[15]. Although it is true that the term "organisation" suggests the existence of an individualised entity performing a particular function, that condition can be satisfied not only by legal persons, but also by one or more natural persons running a business. Consequently, the CJEU held that this term does not exclude natural persons from the scope of the exemption envisaged in Article 132[16].

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11 CJEU, judgment of 28 January 2010 in case C-473/08, *Eulitz*, C-473/08 (EU:C:2010:47), paragraph 29 and the case-law cited.

12 *Horizon College*, paragraph 18.

13 *Eulitz*, paragraph 38.

14 Ibid. paragraph 33.

15 CJEU, judgment of 26 May 2005 in case C-498/03, *Kingscrest and Montecello* (EU:C:2005:322), paragraphs 32 and 35 (in relation to welfare and social security work point (g) and protection of children and young persons (point h)).

16 Ibid., paragraph 36. CJEU, judgment of 7 September 1999 in case C-216/97, *Gregg* (EU:C:1999:390), paragraph 21.

The CJEU particularly stressed in that context that the principle of fiscal neutrality precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. That principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the establishments or organisations referred to in Article 132 was dependent on the legal form in which the taxable person carried on his activity[17].

With regard to the recognition, Article 132(1)(i) does not specify the conditions or procedures under which those similar objects may be recognised. It is hence, as the CJEU outlined, in principle, for the national law of each Member State to lay down the rules according to which that recognition may be granted to such organisations[18]. Such recognition needs to be, in any case, in place and granted to the organisation in order for it to benefit from the exemption under Article 132(1)(i)[19].

It is however not required that the recognition follows a formal national procedure or that it is provided for expressly in national tax provisions[20]. The recognition, thus, does not depend on a particular procedure to be followed but may be established on the basis of other circumstances. The Member States have a certain discretion to that end[21].

Accordingly, the CJEU stated that aspects, such as the existence of specific provisions, be they legislative or administrative or tax or social security, governing the conditions and procedures of the recognition, the general interest of the activities of the taxable person concerned, the fact that other taxable persons carrying out the same activities already have a similar recognition, or the fact that the costs of the supplies in question are met by health insurance schemes or other social security bodies (thus pursuing a public interest), may indicate that the recognition complies with the prerequisites of Article 132(1)(i)[22].

However, Member States are not entirely free in exercising their discretion. Article 132(1)(i) demands that the other – *i.e.* private – organisations need to pursue similar objects as bodies governed by public law. The CJEU particularly stressed that an exemption from VAT, which applies generally to all supplies of educational services, whatever aim pursued by the private organisations, would be incompatible with Article 132(1)(i)[23].

Moreover, it must be recalled that the principle of fiscal neutrality precludes treating similar supplies of services, which are in competition with each other, differently for VAT purposes.

Accordingly, to determine whether the Member States acted within their discretion, the CJEU outlined that account should be taken of whether the national legislation envisages the entitlement to the exemption for all such private organisations registered for that purpose, that legislation defines the scope and content of the educational services to be provided, it governs the conditions for providing such supplies, or it provides for the existence of restrictions and checks by national authorities in terms of registration,

17 *Gregg*, paragraph 20.
18 *Happy Education*, paragraph 31 and the jurisprudence cited.
19 *Happy Education*, paragraph 37.
20 CJEU, judgment of 6 November 2003 in case C-45/01, *Dornier* (EU:C:2003:595), paragraph 67.
21 CJEU, judgment of 26 May 2005 in case C-498/03, *Kingscrest and Montecello* (EU:C:2005:322), paragraph 51.
22 *Kingscrest and Montecello*, paragraph 53.
23 CJEU, judgment of 28 November 2013 in case C-319/12, *MDDP* (EU:C:2013:778), paragraph 36.

inspection and rules concerning both, buildings and equipment, and the qualifications of the persons authorised to manage them[24].

It is doubtful that these conditions are fulfilled for the lecturers in the scenario under discussion.

In the present scenario, the lecturers provide transfer of knowledge services solely based on contracts of mandate ("*umowa zlecenia*") to students enrolled at public universities. Thereby, the lecturers directly contribute to the fulfilment of the universities' educational mandate as envisaged in the Law on Higher Education and Science.

This contribution alone cannot be considered as pursuing an object similar to that of the university at which the lecturers provide their services.

Public universities, based on the Law on Higher Education and Sciences, are entrusted with an educational mandate to ensure the functioning of the higher education system and science in Poland. This law contains a wide range of tasks, duties and obligations. It also states that it is the public university that, at the end of the educational curriculum, awards a final degree or diploma to the students enrolled at that university.

By contrast, the lecturers contribute only with their specific skills and knowledge to the overall curriculum of the university they teach at. The purpose of their services is directed at the provision for consideration of their specific knowledge at that university and not at carrying out or even complementing the educational mandate or parts thereof as entrusted to the university. Their object is to provide their services for and at the public bodies they are teaching and not to provide school and university education in a way similar to that of the public bodies they are teaching at.

Although, as outlined above, it is irrelevant that the lecturers operate in their capacity as natural persons and that they may also, directly and in parallel, pursue economic interests when providing their transfer of knowledge services, it is doubtful that in providing their transfer of knowledge services the lecturers pursue an object similar that of bodies governed by public law, within the meaning of Article 132(1)(i)[25].

It is of note in this context that the scenario under discussion differs from that in the *Horizon College* case decided by the CJEU[26]. The *Horizon College* case concerned the making available or lending of teaching staff employed at one educational institution ("Horizon College") to another educational institution, where the lecturers were to hold lectures. That case did not concern the transfer of knowledge services provided by the lecturers themselves to the students at the educational institution but merely the lending of teaching staff by one educational institution to another, something that may be compared to a commercial staff placement agency. This is different in the present scenario, where it is not about the lending of available lecturers from one educational institution to another. The matter in the scenario under discussion concerns the provision of specific skills and knowledge to students enrolled at a public university, *i.e.* the very act of provision of educational services. The services provided by the lecturers for which the consideration is paid are not limited to making themselves available at the disposal of a public university

[24] *Kingscrest and Montecello*, paragraph 57.
[25] Cf. to that end also the findings in *Haderer*, paragraph 20.
[26] *Horizon College*.

but concerns the very act of providing educational services to the students enrolled at that university[27].

Irrespective of that and despite the fact that the term "organisation" may also include natural persons, it is overall doubtful that lecturers may be considered to be an organisation recognised by Member States as having similar objects as bodies governed by public law, within the meaning of Article 132(1)(i).

3.2.3. Interim result on a possible exemption under Article 132(1)(i)?

In view of the aforesaid, the Commission services are of the opinion that the services provided in the scenario under discussion **do not fall within the scope of the exemption provided for in Article 132(1)(i).**

3.3. Does the provision of transfer of knowledge services by lecturers fall under Article 132(1)(j) – Tuition given *privately* by teachers covering school and university education?

In view of the aforesaid, it is necessary to ask whether the services provided by lecturers in the scenario under discussion may not rather qualify as tuition given privately by teachers covering school and university education, within the meaning of Article 132(1)(j).

As outlined above, the lecturers provide services that fall under school and university education. The CJEU held that the term "tuition" is understood as encompassing the transfer of knowledge and skills between a teacher and pupils and students, such as in the scenario under discussion[28].

However, that tuition needs to be also given "privately". The term "privately" sets the boundary for the services supplied by bodies mentioned in Article 132(1)(i) on the one hand and those referred to in Article 132(1)(j), which are provided by teachers **on their own account and at their own risk**, on the other[29].

For the tuition to qualify as being given privately it does not require that there be a direct contractual link between the recipients of the tuition and the teacher who provides it[30]. The CJEU states in this context that the contractual link may also exist, and often does so, with persons other than the recipients, such as the parents of the pupils or the students[31]. However, in the scenario described, the university does not enter into contractual relations with the lecturers for or on behalf of the students in the same way as parents or representatives, with the aim of paying for the services in question.

It is also questionable whether the lecturers provide their services on their own account and at their own risk.

Admittedly, the services are provided on the basis of "contracts of mandate" (Polish *umowy zlecenia*) concluded with the public universities. This choice of contract of

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27 Cf. however Opinion of AG Sharpston provided on 8 March 2007 on *Horizon College* and *Haderer* (EU:C:2007:149), paragraph 44.
28 *Eulitz*, paragraph 32.
29 *Haderer*, paragraph 30.
30 Ibid. paragraph 32.
31 Ibid.

mandate aims at avoiding a permanent employment of the lecturer and instead at obtaining flexibility with regard to the scope of the tasks, the duration of the mandate, or the remuneration to be paid, including the possibility for supplementary payments.

At the same time, it would appear from the scenario under discussion that the lecturers are to carry out their activities for a continuous period of time and not on an *ad hoc* or on a short-term basis only, such as to temporarily replace an employed but absent permanent lecturer. This is also manifested by the fact that the lecturers may take up additional tasks, such as to prepare curricula, develop teaching plans and materials and organise tests. These activities aim at the provision of transfer of knowledge services during the regular university term, such as a semester or an academic year.

Furthermore, the tuition given is held at the premises of the university, using the facilities of the university, at which the students are enrolled.

There is however no information about whether the remuneration is paid per hour, per semester or in another way. In the same direction, it is assumed that the lecturers are paid irrespective of the number of students present at a particular course, unless a course has to be cancelled. Indeed, it is doubtful that the lecturers are remunerated under their contract of mandate in the event of a cancellation of a particular course or lecture.

Moreover, it remains unclear whether and if so to what extent the university covers any health and social security contributions, at least by way of a supplementary payment to that end. Similarly, it remains unclear, whether the lecturers are entitled to any right of leave of absence. Overall, it is doubtful that under their contract of mandate the lecturers are granted any health insurance or social security contributions and afforded the right of leave of absence.

In addition, it is unclear whether the contracts of mandate provide for the possibility for the universities to exercise supervision powers over the work of the lecturers and in particular to give instructions on the teaching methods and/or the concrete content to be lectured.

As it would appear, the assessment whether the transfer of knowledge services provided by the lecturers can be considered as being provided privately – *i.e.* on the account and at the risk of the lecturers – depends on how the contracts of mandate are designed, and in particular on the question, whether they shift the risks for the provision of the services upon the lecturers so that the lecturers have to be considered as providing the services on their own risk and on their own account. This question would need to be answered in each individual case.

Nevertheless, the CJEU held in a similar scenario ("*Haderer*")[32], in which a lecturer was holding classes in his freelance capacity at an education institute on the basis of consecutive contracts concluded with the public entity responsible for that institute, that in view of the fact that the lecturer was paid on an hourly basis and received a financial assistance towards the payment of pension contributions and health insurance, as well as a proportional leave allowance, this was **an indication** that the lecturer was providing his services *for* the public entity responsible for the educational institution rather than in his private capacity on his own behalf[33]. However, the CJEU sent the matter back to the

[32] *Haderer.*
[33] *Haderer*, paragraphs 34-35.

referring competent national court in order to make such an assessment taking account of the guidance provided by the CJEU.

In another case ("*Eulitz*")[34], however, the CJEU held that services provided by lecturers within the framework of a public university in charge of the educational mandate cannot be considered as having been provided "privately" by the lecturers on their own behalf. According to the CJEU in that case, the fact alone that the lecturer was holding lectures at the public university rules out the possibility that the lecturers could be regarded as giving tuition privately within the meaning of Article 132(1)(j)[35].

Accordingly, taking account of the CJEU findings in the *Eulitz* case, the Commission services are of the opinion that on such interpretation of Article 132(1)(j) the services provided by lecturers in the scenario under discussion would not fall within the exemption provided for in Article 132(1)(j).

3.4. Consequences of an overly strict application of the jurisprudence of the CJEU

The outcome of an overly strict interpretation of Articles 132(1)(i) and (j) by the CJEU would leave the lecturers in a situation, in which they provide their services at their own risk but not at their own account. One could also say that they would fall between two stools.

Irrespective of this outcome, the CJEU dismissed the view that the two categories of exemption in Articles 132(1)(i) and (j) created a system capable of exempting from VAT activities which do not satisfy the conditions of one or other of them, so as to avoid that a *lacuna* be created in the system established under the exemptions of Article 132[36]. The CJEU maintained its line of argument stating that the requirements of Article 132 are to be interpreted strictly and that the exemptions cover only the activities which are listed therein and described in detail[37].

A categorical exclusion of the possibility for lecturers to provide their services privately within the meaning of Article 132(1)(j) for the sole reason that the lecture was held at the premises and within the framework of a public university might, however, run counter to the very purpose of the exemptions provided in Article 132 as developed by the CJEU in the context of educational services.

As the CJEU continuously stressed, the purpose of treating the supply of educational services more favourably for VAT purposes intends to facilitate access to those services by avoiding the increased costs that would result if the services were subject to VAT. The CJEU particularly stressed that the exemptions provided for in Article 132 should not be construed in such a way as to deprive them of their intended effect[38]. As the CJEU outlined, the same must be also true of the specific conditions laid down for those exemptions to apply, and in particular of those conditions concerning the status or identity of the economic agent, such as the lecturers, performing the services covered by the exemption[39].

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34 *Eulitz*.
35 *Eulitz*, paragraph 53.
36 *Haderer*, paragraphs 36.
37 Ibid, paragraph 37.
38 *Brockenhurst College*, paragraph 23 and the case-law cited.
39 *Haderer*, paragraph 19.

To assess, hence, whether the lecturers may be considered as providing the tuition privately on their own account and at their own risk or whether they have to be considered as providing the services *for* the public entity, it is required according to the CJEU to scrutinise the contractual relations entered into by the parties[40]. In the same way as there might be indications in favour of the latter scenario, there might be also strong indications for the former.

As outlined above, it is doubtful that under their contract of mandate the lecturers are granted any health insurance or social security contributions and afforded the right of leave of absence. Nor can it be assumed that lecturers are remunerated in the event of a cancellation of a course or lecture, no matter if the cancellation results from a lack of students or whether the lecturer simply falls sick. There is nothing in the Polish civil law governing the contract of mandate that would suggest that the lecturers would have a right to any entitlements of the kind as described above.

Furthermore, it is also assumed that the contracts of mandate did not prevent the lecturers from providing their services also at other educational institutions at the same time. Depending on the demand and availability, the lecturers could provide their services at several universities at the same time at their own risk and in their capacity as experts in their particular field. The mere location of the provision of the services cannot be the decisive factor for the assessment as to whether the exemption under Article 132(1)(j) applies[41].

The conclusion of contracts of mandate, as in the scenario under discussion, allows, unlike the conclusion of employment contracts, the universities to obtain a wide level of flexibility in terms of availability of the services to be provided by the lecturers as well as the specific field of expertise required. The wider that flexibility is sought, the more the risks and responsibilities could be shifted away from the university and placed upon the lecturers. This is reflected in the contractual modalities related to the type and content of educational services to be provided, the duration of the services required, the remuneration to be paid, including the non-payment of remuneration in the event of a cancellation of the lectures, as well as the absence of the obligation to pay health insurance and social contributions or grant leave of absence.

These considerations, which closely follow the developed jurisprudence by the CJEU, cannot be simply wiped away by stating that the determining factor is and remains alone the circumstance that the services were provided at the premises and within the educational mandate of a public university.

This view is also supported by taking account of the principle of fiscal neutrality.

For, an overly rigid interpretation would lead to an application of the exemption depending on the organisational form of the transfer of knowledge services. If the lecturer enters into a contractual relationship with an intermediary of the students, such as the parents or legal representatives regulating the contractual relationship, he or she enjoys the exemption. While, if, on the other hand, the lecturer uses the intermediary of an educational institution, which regulates the contractual relationships with the students instead of him, the tax exemption would not apply, although the transfer of knowledge service to the students is identical in both cases. This would run counter to the principle of

[40] *Haderer*, paragraph 30.
[41] Opinion of AG Sharpston in *Horizon College* and *Haderer*, paragraph 55.

fiscal neutrality, which guarantees that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their operations excluded from the exemption under Article 132(1)[42].

This must be taken into account when interpreting the term "privately" within the meaning of Article 132(1)(j). "Tuition given privately" does not necessarily have to manifest itself in direct contractual relationships with the students or their parents but can also be given if a third party intervenes. The type of service – transfer of knowledge – must be decisive for the application of the exemption, and not the organisational form alone in which the transfer of knowledge services is given.

The assessment whether the transfer of knowledge services provided by the lecturers can be considered as being provided privately – *i.e.* on the account and at the risk of the lecturers – requires an assessment in each individual case, whereby one would have to ask as did the CJEU in the *Haderer* case whether the services were supplied by the lecturers at their own risk and on their own account.

3.5. Conclusion

Based on the scenario under discussion and in view of the jurisprudence by the CJEU, it is possible to conclude that, subject to a case-by-case analysis:

1) the services provided by lecturers as described in the scenario under discussion **do not fall within the scope of the exemption provided for in Article 132(1)(i)**, as the lecturers cannot be considered to be an organisation recognised by Member States as having similar objects as bodies governed by public law, within the meaning of Article 132(1)(i), despite the fact that the term "organisation" may also include natural persons.

2) the services provided by lecturers as described in the scenario under discussion **could fall within the scope of the exemption provided for in Article 132(1)(j).** This depends on the interpretation of the term "privately", whereby one would have to ask as did the CJEU in the *Haderer* case whether the services were supplied by the lecturers at their own risk and on their own account. Indications in order to ascertain whether the services were supplied by the lecturers at their own risk and on their own account, may be derived from the scope and content of the contractual relations entered into by the lecturers and the public universities.

4. DELEGATIONS' OPINION

Delegations are asked to express their opinion on the Commission services' opinion.

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[42] CJEU, judgment of 4 May 2005 in case C-169/04, *Abbey National* (EU:C:2006:289), paragraph 68.

ANNEX

Question from Poland

Due to some doubts regarding the application of VAT exemption to knowledge transfer services provided by lecturers under contracts concluded with higher education institutions, as universities, we would kindly like to draw your attention to the issues below and ask of your standpoint on the matter.

1. SUBJECT MATTERS

Public universities in Poland operate under the Law on Higher Education and Science[1]. These entities have legal personality and are registered active taxable persons of goods and services tax (VAT). Primary tasks of universities are as follows:

- providing education as part of studies;
- providing education as part of post-graduate studies or other forms of education;
- providing education to doctoral students;
- educating and promoting the staff of higher education institutions[2].

In order to perform the educational services (of all kinds), universities cooperate with persons who have knowledge in a particular field and who can transfer this knowledge to students, doctoral students, trainees, participants in training courses, workshops, seminars, conferences, etc., respectively.

The university's cooperation with knowledge providers may take place under a contract of mandate (umowa zlecenie), where the contractor (lecturer, person conducting the course or training) is pursuing business activity within the meaning of VAT legislation. By virtue of such contracts, a university commissions from a knowledge holder services consisting in holding classes in a specific field to convey knowledge in the given area. In addition to holding classes, such a contractor may also:

- develop all or part of the teaching programme they will use to convey knowledge to students / learners / trainees;
- prepare materials related to education (class / lecture / series of lectures / course held by the contractor);
- administer exams to test the level of knowledge acquired.

Contracts for the provision of such educational services are concluded between the lecturers and the universities. It is the students (that is the persons who have a relationship under civil law with the university, not with the lecturer) who are direct beneficiaries of the services provided by such persons. It is the university that pays remuneration for the provision of services to lecturers.

The question is whether the services provided by lecturers (natural persons who are active VAT taxable persons) who in particular hold classes comprising a part of the curriculum of the study programme run by the universities, may, in the light of EU regulations, enjoy

[1] Act of 20 July 2018 – Law on Higher Education and Science (consolidated text: Dz.U. (Polish Journal of Laws) of 2020, item 85 with subsequent amendments).

[2] Article 11 items 1, 2, 4 and 5 of the Law on Higher Education and Science.

exemption from VAT, and if so, under which provision of Directive 2006/112/EC[3] (Article 132(1)(i) or (j)).

The doubts that arise in relation to the issue presented relate to the possibility of lecturers being considered as "other organisations recognised by the Member State concerned as having similar objects". These doubts arise, inter alia, from the use of the term "other organisations" in Article 132(1)(i) of Directive 2006/112/EC, in a situation where other exemption provisions contained in Article 132(1) of the Directive use the term "other bodies". In other words – can a lecturer/teacher (a natural person) be considered an organisation?

2. POLISH OPINION

In our opinion:

- above mentioned services provided by lecturers under a contract with the university/school constitute services strictly related to school or university education;

- despite the fact that, in the context of the services provided under a contract referred to in the question, transfer of knowledge at school or university level is effected by the lecturer, the services to which the question relates cannot, in our view, be covered by the exemption on the basis of Article 132(1)(j) of Directive 2006/112/EC, on the grounds that they cannot be regarded as tuition given privately.

3. GENERAL COMMENTS

In the light of the established jurisprudence of the Court of Justice of the European Union (CJEU), Article 132(1) of Directive 2006/112/EC provides for the exemption from VAT of certain activities in the public interest. However, the subject exemption does not apply to all activities carried out in the public interest, but only to those activities listed and described in great detail in the said provision. The exemptions provided for in Article 132(1) of Directive 2006/112/EC, by providing more favourable VAT treatment to providing certain services for the public interest, serve to reduce the costs of such services and thereby make them more accessible to those who would benefit from them.

The terms used to describe the exemptions listed in Article 132 of Directive 2006/112/EC should be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services and goods supplied by a taxable person for consideration. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect.

[3] Directive 2006/112/EC Council of 28 November 2006 on the common system of value added tax (OJ EU L 347 of 11/12/2006 p. 1, with subsequent amendments).

3.1 Meaning of the term "school and university education"

Exemptions in the area of educational services are laid down in Directive 2006/112/EC in its Article 132(1)(i) and (j), according to which Member States shall exempt the following transactions:

i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;

j) tuition given privately by teachers and covering school or university education.

As regards the phrase "school or university education" as used in Article 132(1)(i) of Directive 2006/112/EC it must be pointed out that the phrase is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational[4].

Although the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity within the meaning of Article 132(1)(i) and (j) of Directive 2006/112/EC, it remains the case that that activity consists of a combination of elements which include, along with those relating to the teacher-student relationship, also those which make up the organisational framework of the establishment concerned[5].

3.2 Possibility of applying the exemption provided for in Article 132(1)(j) of Directive 2006/112/EC

In order for the exemption under Article 132(1)(j) of Directive 2006/112/EC to apply to the activities described in the question, it must be pointed out that it is not sufficient for the tuition to cover school or university education; it must also be "given privately by teachers"[6].

The term "privately" enables the services supplied by the bodies mentioned in Article 132(1)(i) of Directive 2006/112/EC to be distinguished from those referred to in (1)(j), which are provided by teachers on their own account and at their own risk[7].

Private tuition does not include the situation where a teacher makes themselves available as a teacher to another entity, which pays them consideration as a provider of services to the education system administered by that body[8].

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4 Judgment of 28 January 2010 in the case C-473/08 Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz, paragraph 29.

5 Judgment of 28 January 2010 in the case C-473/08 Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz, paragraphs 30 and 31.

6 Judgment of 28 January 2010 in the case C-473/08 Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz, paragraph 41.

7 Judgement of 14 June 2007 in the case C-445/05 Werner Haderer, paragraph 30.

3.3 Possibility of applying the exemption provided for in Article 132(1)(i) of Directive 2006/112/EC

As regards the educational activity referred to in Article 132(1)(i) of Directive 2006/112/EC it must be pointed out that such activity consists of a combination of elements which include, along with those relating to the teacher/student relationship, also those which make up the organisational framework of the establishment concerned[9].

Bearing in mind paragraph 22 of the Judgment in the case C-434/05 Horizon College, it must be assumed that the contract between the university and the teacher for holding lectures is intended to facilitate the provision of teaching by that university. In addition, it must be pointed out that teaching by a teacher is carried out at the risk of the university. Therefore, the possibility of exempting the services in question, in our view, should be considered at the level of recognising the services in question as closely related to school or university education.

It must be pointed out that the exemption provided for in Article 132(1)(i) of Directive 2006/112/EC is in principle subject to 2 cumulative conditions concerning:

- the nature of the service provided – the service must involve provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto;
- the status of the provider of the service provided – the service must be provided "by bodies governed by public law [...] or by other organisations recognised by the Member State concerned as having similar objects"[10].

In the case of an academic lecturer providing the services in question to a university, in our view, the first condition remains fulfilled. As regards the second condition, paragraph 30 of the judgment in case C-612/20 - Happy Education SRL indicated that "... where an entity is not a body governed by public law within the meaning of Article 132(1)(i) of Directive 2006/112/EC (...) its services may be exempted from VAT under that provision only in so far as it falls within the concept of "other organisations recognised by the Member State concerned as having similar objects" (...). With regard to the meaning of the term "other organisations recognised by the Member State concerned as having similar objects", CJEU emphasised that, in so far as Article 132(1)(i) of Directive 2006/112/EC does not specify the conditions or procedures under which those similar objects may be recognised, it is, in principle, for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such organisations. The Member States have a discretion in that respect, which is however limited by the principle of fiscal neutrality[11].

Observing the principle of fiscal neutrality, which is expressly laid down in Article 134(b) of Directive 2006/112/EC precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes[12].

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8 Judgment of 28 January 2010 in the case C-473/08 Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz, paragraph 54.

9 Judgement in the case C-434/05 Horizon College, paragraph 20.

10 Judgement of 28 April 2022 in the case C-612/20 - Happy Education SRL, paragraph 29.

11 Judgement in the case C-612/20 Happy Education SRL, paragraphs 31 and 32.

12 Judgement of 15 April 2021 in the case C-846/19 EQ, paragraph 67.

Following CJEU jurisprudence, it can be assumed that the scope of "recognition" does not require the application of a particularly strict interpretation. Also, commercial nature of an activity (with the aim of making profit) does not preclude application of the exemption to the activity of the given body, as long as it pursues certain objectives[13]. The provision of Article 133(a) of Directive 2006/112/EC, which refers to bodies that systematically aim to make profit, is an optional condition which the Member States may lay down in addition for the purposes of granting certain exemptions - this provision authorises, but does not oblige, the Member States to limit the possibility of benefiting from the exemptions set out therein (including the one provided for in Article 132(1)(i) of Directive 2006/112/EC) to bodies that are not bodies governed by public law and that do not systematically.

[13] Judgement of 26 May 2005 in the case C-498/03 *Kingscrest and Montecello*, paragraphs 31, 32, 35, and 36.