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Subject: Applicability of VAT exemptions for health services on fertility treatments

Ref: Your letter sent by email of 19 September 2016 (Ref. no. 16-0831147)

Dear Ms Hansen,

We thank you for the above mentioned letter by which you ask for the Commission's assessment of the extent to which fertility treatments are covered by the VAT exemption for medical services.

Our preliminary view on the issues raised by you is as follows:

Fertility treatments could be covered by the VAT exemptions pursuant to Articles 132(1)(b) and (c) of the VAT Directive according to which Member States shall exempt hospital and/or medical care from VAT, dependent on the further requirements stipulated in the said provisions.

1. The interpretation of exemptions in the VAT Directive in general

According to the case-law of the Court of Justice of the European Union (CJEU) the exemptions in Article 132 of the VAT Directive are independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another¹. The CJEU has consistently held that the exemptions are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person². Nevertheless, the interpretation 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 exemptions should be construed in such a way as to deprive the exemptions of their intended effect³.

¹ See, *inter alia*, case C-349/96, *CPP*, paragraph 15.

² See, *inter alia*, case C-2/95, *SDC*, paragraph 20, and case C-141/00, *Kügler*, paragraph 28.

³ See, *inter alia*, case C-86/09, *Future Health Technologies*, paragraph 30.

2. The objective of the exemptions pursuant to Articles 132(1)(b) and (c) and the scope of the term 'medical care'

The objective of the exemptions in Article 132(1)(b) and (c) is to reduce the cost of medical care and to make that care more accessible to individuals⁴. The concept of 'hospital and medical care' in Article 132(1)(b) and of 'medical care' according to Article 132(1)(c) of the VAT Directive cover services that are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health⁵. The therapeutic purpose of the medical care should not necessarily be interpreted narrowly. The CJEU has in that regard held that it is consistent with the aim of reducing healthcare costs to include examinations or preventive medical treatment even when it is clear that the person concerned is not suffering from any disease or health disorder⁶.

3. Fertility treatment and medical care

On the basis of the definition mentioned before fertility treatments are covered by the VAT exemptions in question if, for instance, they are intended to treat or cure health disorders. This can be answered in the affirmative if the fertility treatment is intended to overcome an organic infertility/reduced fertility with the therapeutic aim of bringing about a wanted pregnancy. An organic infertility/reduced fertility would qualify as a health disorder.

In order for an organic infertility/reduced fertility to qualify as health disorder it is not necessarily needed to meet the WHO criteria as mentioned in your letter. The determination of whether or not there is an infertility/reduced fertility for which a fertility treatment is indicated is a medical assessment which must be finally based on findings of a medical nature made by a person qualified for that purpose.⁷ Thus, crucial is the medical diagnosis of a medical practitioner.

4. Causality

You have, furthermore, raised the question of whether the fertility treatment can be covered by the relevant VAT exemptions if only the 'healthy' partner in a relationship is treated whereas the partner whose infertility/reduced fertility have caused the treatment to be necessary is not.

Decisive is that there is a causal connection according to which the treatment is carried out in order to overcome infertility/reduced fertility so as to enable a wanted pregnancy. According to our preliminary assessment it does not follow from the case law of the CJEU that the VAT exemption can only be granted if there is a particularly narrow causal relationship. The CJEU has ruled, for instance, that the removal of joint cartilage cells from cartilage material taken from a human being and the subsequent multiplication of those cells for reimplantation for therapeutic purposes can constitute 'provision of medical care' even if the multiplied cells are not reimplanted into the patient from whom they were originally removed but into another patient.⁸ Furthermore, it must be recalled that according to the CJEU case law mentioned above under point 2 the therapeutic aim of 'medical care' should not necessarily be interpreted narrowly.

⁴ Case C-45/01, *Dornier*, paragraph 43, and *Kügler*, paragraph 29.

⁵ Case C-91/12, *PFC*, paragraph 28, and case C-106/05, *L.u.P.*, paragraph 27.

⁶ Case C-212/01, *Unterpertinger*, paragraph 40.

⁷ See for instance case C-91/12, *PFC Clinic AB*, paragraph 35, as regards the differentiation between medically indicated and cosmetic procedures in the context of plastic surgery

⁸ Case C-156/09, *Verigen Transplantation Service International AG*, paragraph 29

Thus, we think that – dependent on the facts of the individual case – there can be a sufficient link between fertility treatment and a health disorder even if the infertility/reduced fertility is tried to overcome by treating the 'healthy' partner. In such a case the treatment is carried out because one of the partners who want to have a child together suffers from infertility/reduced fertility. The unfulfilled wish for a child of the couple is the result of this health disorder/disease. This negative consequence can be alleviated by the fertility treatment of one of the partners.

5. Treatment of Singles and homosexual couples

On the basis of our preliminary assessment, we have doubts whether a fertility treatment is covered by one of the relevant VAT exemptions if the treatment is performed on single women or women living in a homosexual relationship, where the woman receiving the treatment has no indication of a disease or health disorder.

The CJEU has clarified that medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not benefit from the exemptions under Article 132(1)(b) and (c).⁹ The fertility treatment of a single woman or a woman in a homosexual relationship would not be connected to a disease/health disorder or to the protection of human health (preventive measures) within this meaning. A causal connection in this regard would be missing. On the other hand, the CJEU has clarified – as said before – that the therapeutic purpose of the medical care should not necessarily be interpreted narrowly. However, we have doubts whether the therapeutic purpose of enabling a pregnancy without any connection to a disease/health disorder or the protection of health is sufficient for treatment to be covered by the VAT exemptions in question. The requirement of strict interpretation (see above point 1) could speak against this.

Clarity does not derive from the rules on equality and human rights (referred to in your letter). Of course, there should be no discrimination of single women or homosexual couples. However, a different treatment would not follow from a person being a woman or a homosexual but from the fact that the treatment would not be connected to a disease/health disorder or to the protection of human health.

In case you so wish, the issue could be raised at a next VAT Committee meeting so that allow for a formal consultation of all Member States to be organised on this issue. We think that this could be helpful given the uncertainties expressed before and the fact that Denmark – as mentioned in your letter – has been informed that there is an uneven practice among Member States.

I would lastly like to stress that the comments before only reflect the view of DG TAXUD's services and that our comments have been based exclusively on the facts provided by you in your letter.

I hope that these comments are helpful. We are available for further discussions.

Yours sincerely,

e-signed
Donato Raponi
Head of Unit

⁹ Case C-212/01, *Margarete Unterpertinger*, paragraph 41