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Danish Ministry of Taxation

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Request for a written statement on the interpretation of article 28 of the VAT Directive

1. Background

In its judgment of 21 January 2021 in case C-501/19, UCMR-ADA, the ECJ dealt with the application of the VAT Directive[1] when collective management organisations collect, in their own name but on behalf of holders of copyright, royalties from end users.

In the answer to question 2, the ECJ concluded:

> "Article 28 of the [VAT Directive] must be interpreted as meaning that a collective management organisation which collects, in its own name but on behalf of holders of copyright in musical works, royalties due to them in consideration for the authorisation for the public performance of their protected works, acts as a 'taxable person' within the meaning of that provision and is therefore deemed to have received the services in question from those rights holders before providing them to the end user itself. In such a case, that organisation is required to issue invoices in its own name to the end user containing the royalties collected from the latter, including value added tax (VAT). The copyright holders are, in turn, required to issue to the collective management organisation invoices including VAT for the services supplied in respect of the royalties received."

The present note deals with the consequences of the judgment in a Danish context.

As regards the VAT treatment of copyright holders, Denmark applies the derogation in Annex X, Part B, which allows States which were members of the Community on 1 January 1978 to continue to exempt the supply of services[2] by authors, artists, and performers. The exemption is applicable, when authors, artists and performers supply rights to use copyrights on their artistic works directly to an end user. The judgment in case C-501/19, UCMR-ADA, clearly does not affect the right to continue applying this stand still-derogation to the services supplied by those persons.

Prior to the judgment in case C-501/19, UCMR-ADA, the Danish tax authorities considered the services provided by collective management organisations to end users not to have been provided by "taxable persons", and therefore did not require VAT to be charged on the royalties paid by the end users.

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1).

[2] With the exception of the specific services enumerated in Annex X, Part B (1)(a-i).

In Spring 2022, the Danish Government introduced a draft bill in the Danish Parliament, which contained, *inter alia*, certain provisions aiming at clarifying the VAT rules applying to artists. During the parliamentary debates on the bill, the question was raised whether it is – as it was indicated in the preparatory works – a consequence of the judgment in case C-501/19, UCMR-ADA, that, in a Danish context, the services provided by collective management organisations to end users must be taxed.

The Tax Committee of the Danish Parliament requested a legal opinion from a Danish law firm (Gorrissen Federspiel – hereinafter "GF"), which concluded that article 28 of the VAT Directive must be interpreted in such a way that since the services provided by the copyright holders to the collective management organisations are exempted, the services provided by the organisations to the end users are likewise exempt.[3]

The draft bill was not adopted by the Danish Parliament before the end of the parliamentary year.

The interpretation of the Danish authorities

In the opinion of the Danish authorities, the ECJ's judgment of 14 July 2011 in case C-464/10, Henfling and Others, is central as regards the interpretation of article 28 of the VAT Directive[4].

The Henfling judgment concerned a company (TFB) registered for VAT in Belgium whose business comprised taking bets, in particular, on horse races in Belgium and in other States. TFB used a network of local agents, called "buralistes", who were responsible for collecting betters' stakes on horse races or other sporting events, registering the bets, issuing betting slips or tickets for betters and paying out winnings.

On the basis of the questions referred by the national court, the ECJ answered those questions on the premiss that the buralistes acted in their own name but on behalf of TCB when accepting bets from the betters (points 32 and 39 of the judgment). In points 34-37 of the judgment, the Court stated:

> 34. As regards the treatment of such involvement from a VAT point of view, Article [28 of the VAT Directive] provides that, where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he is considered to have received and supplied those services himself.
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> 35. Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in

[3] The legal opinion as well as the Danish Ministry of Taxation's answer to a Parliamentary question requesting the Ministry's comments to the legal opinion are included, in the original Danish version, as annexes.

[4] The Henfling judgment actually concerned the predecessor of article 28 of the VAT Directive, namely Article 6(4) of the Sixth Directive. However, the two provisions are identical, and for the sake of convenience, the judgment is referred to as if it had in fact dealt with article 28 of the VAT Directive.

> the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT.
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> 36. Since Article [28 of the VAT Directive] comes under Title [IV] of that directive, headed 'Taxable transactions', and is couched in general terms, without containing restrictions as to its scope or its extent, the fiction created by that provision also concerns the application of VAT exemptions under the [VAT Directive]. It follows that, if the supply of services in which the commission agent takes part is exempt from VAT, that exemption applies likewise to the legal relationship between the principal and the commission agent.
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> 37. That conclusion applies also to the exemption under Article [135(1)(i) of the VAT Directive[5]], relating to the business of taking bets. Indeed, that exemption does not present – as compared with other exemptions – specific features which would justify limiting the scope of Article [28] of that directive and excluding bets from it. Furthermore, in the context of the application of Article [28], it is irrelevant that Article 135(1)(i) does not provide for exempting supplies by intermediaries or negotiation, whereas such an exemption is expressly provided for in Article [135(1)(a) and (d) of the VAT Directive].

In the view of the Danish authorities, the judgment basically states that Article 28 of the VAT Directive must be interpreted in accordance with its express wording:

Even if, objectively, there is only one delivery of betting services taking place, when those services are provided to the end user by a commission agent acting in his own name but on behalf of the principal, this must be treated as two successive deliveries of the same services. Furthermore, as betting services are exempted, this exemption applies to both sets of deliveries.

However, as expressly stated in point 37 of the judgment, as regards the application of exemptions, it must be examined whether the relevant exemption presents "specific features", which makes it inapplicable to both deliveries.

As regards collective management organisations which collect, in their own name but on behalf of holders of copyright, royalties from end users, the only possible exemption, namely the stand still-exemption applied in Denmark in accordance with Annex X, Part B, only allows for exempting the "supply of services by authors, artists, and performers".

[5] The judgment refers to the identical provision in Article 13(B)(a) and (d) of the Sixth Directive.

The exemption is not only defined according to the nature of the services supplied, but also according to the status of the supplier, who must be an author, artist or performer. In other words, the exemption is "personal".

Consequently, supplies of the right to use copyrights by an intermediary who does not have the status of author, artist, or performer cannot be covered by the exemption provided for in that provision. In this context, it should be underlined that exemptions from VAT are to be strictly interpreted. As the term "authors, artists, and performers" Annex X, Part B, of the VAT Directive is unambiguous, it clearly cannot be understood as including intermediaries who are not specifically either authors, artists, or performers[6].

Therefore, in the view of the Danish authorities, the exemption presents exactly such "specific features", which makes it inapplicable to the services provided by the collective management organisations to the end user in a situation covered by article 28 of the VAT Directive.

In the legal opinion submitted by GF, it is conceded that Annex X, Part B, only allows for exempting the "supply of services by authors, artists, and performers", and that the exemption is therefore "personal".

However, GF claims that the limitation regarding the status of the supplier cannot be considered as a "specific feature", which means that it cannot be applied to the services provided by the collective management organisations when they act in their own name but on behalf of authors, artists, or performers, cf. article 28 of the VAT Directive.

The reason given for this claim in GF's legal opinion is that the Danish Ministry of Taxation has itself defined what constitutes a specific feature in the sense of point 37 of the Henfling-judgment.

In the opinion of the Danish authorities, that statement is unfounded. The fact that Annex X, Part B, only allows for exempting the "supply of services by authors, artists, and performers", and that the exemption is therefore "personal" is undeniably a specific feature of that exemption. It is not a specific feature "defined" by the Danish Ministry of Taxation but, on the contrary, a specific feature which follows from the express wording of the provision.

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[6] See also the judgment in Case C-401/05, VPD, regarding an exemption covering the supply of dental prostheses made by dentists or dental technicians. The Court concluded that the exemption could not be applied to supplies of dental prostheses from intermediaries, who were not dentists of dental technicians, even if the protheses had been supplied to the intermediaries by a dentist or a dental technician. It is underlined that a rule similar to article 28 of the VAT Directive applies to commission services for goods, cf. article 14 (2)(c) of the VAT Directive. This provision stipulates that the transfer of goods pursuant to a commission agreement must be considered a taxable supply, so that there must be considered to be two successive deliveries of the same product, even if the intermediary acts in his own name but on account of the principal, cf. also the judgment in case C-274/15, Commission v Luxembourg, points 85-89.

It should be mentioned that, in footnote 8 of the legal opinion, GF refers to a judgment of the German Bundesfinanzhof of 25 April 2008 (case XI Rr6/r6).

The Danish authorities have noted that the German Ministry of Finance in its general VAT Guidelines – while acknowledging the result of the judgment in the context of the specific exemption that it dealt with – states in relation to commission services:

> "Personal characteristics of those involved are still relevant as each service in the chain of services within a service commission must be taken into consideration separately in the VAT assessment. This can for instance be important for the application of tax exemption rules".[7]

In the brackets following this statement, the Guidelines refer, as an example, to a specific German exemption regarding services from blind persons.

Without wishing to enter into a discussion of the interpretation of national German VAT rules, administrative practice and/or case law, the Danish authorities therefore have no reason to believe that the German tax authorities apply an interpretation of article 28 of the VAT Directive, which differs from that of the Danish authorities.

The request of the Danish authorities

For the reasons explained above, the Danish authorities continue to be of the opinion, that the exemption applying to the services of the copyright holders cannot be applied to the services provided by the collective management organisations.

Therefore, in order to get the Danish rules on VAT in line with EU Law as interpreted by the ECJ in case C-501/19, UCMR-ADA the Danish Government intends to present the draft bill, which was not adopted during the previous parliamentary year, in the Danish Parliament anew.

However, due to the uncertainties as regards the interpretation of the VAT Directive, which have been created by the legal opinion of GF, the Government has also decided that the Danish authorities should, before the bill is to be presented in Parliament at the beginning of April, request *the Commission's express written view on, whether the Commission shares the Danish authorities' interpretation of article 28 of the VAT Directive as presented above.*

As the view of the Commission might influence the decision on whether to present the bill in Parliament, the Danish authorities kindly ask for the Commission's answer before the end of March.

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[7] In the original German: "Personenbezogene Merkmale der an der Leistungskette Beteiligten sind weiterhin für jede Leistung innerhalb einer Dienstleistungskommission gesondert in die umsatzsteuerrechtliche Beurteilung einzubeziehen. Dies kann z. B. für die Anwendung von Steuerbefreiungsvorschriften von Bedeutung sein". The Guidelines can be found via this link: Umsatzsteuer-Anwendungserlass Stand 7. Februar 2023 (bundesfinanzministerium.de). The passage cited is on p. 117, point 3.15 (3).