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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 901

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Commission**
REFERENCES:	**Articles 2(1), 9 and 135(1)**
SUBJECT:	**VAT treatment of greenhouse gas emission allowances**

1. INTRODUCTION

The VAT treatment of various activities carried out in respect of greenhouse gas emission allowances (hereinafter "emission allowances"[1]), as defined in Article 3 of Directive 2003/87/EC establishing an EU Emissions Trading Scheme[2], has been discussed several times in the VAT Committee: firstly, at the initiative of France during the 72nd, 74th, and 75th meetings of the VAT Committee in 2004[3]; and yet again at the initiative of the Commission during the 88th and 91st meetings of the VAT Committee in 2009 and 2010[4].

Those discussions led to the agreement of guidelines[5] on two points: (i) the VAT treatment of the transfer of emission allowances; and (ii) the VAT treatment of the auctioning of emission allowances by Member States.

A legislative change to the nature of emission allowances applied for regulatory purposes is due in the near future, whereby they will be classified as financial instruments according to the revised Markets in Financial Instruments Directive[6] (usually referred to as MiFID II). This change is expected to come into force in January 2018[7].

Therefore, the Commission services have considered that it would be useful to revisit the issue involving the VAT treatment of emission allowances in the light of the new MiFID II rules, and to examine whether this legislative change could have an impact on the existing guidelines.

2. SUBJECT MATTER

2.1. Functioning of the EU Emissions Trading Scheme[8]

The cornerstone of the European Union's strategy for cost-effective reduction of emissions of carbon dioxide and other greenhouse gases is the Emissions Trading Scheme provided for under Directive 2003/87/EC, in force since 2005 and which is based on the 'cap and trade' principle.

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1 Emission allowances may also be referred to as EU Allowances (EUA), notably in secondary markets.

2 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ L 275, 25.10.2003, p. 32).

3 See Working papers No 443 and No 443 REV 1.

4 See Working papers No 629 and No 665.

5 http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf: Guidelines resulting from the 75th meeting of 14 October 2004 – Document TAXUD/1607/05 – 480 (p. 109); and guidelines resulting from the 91st meeting of 10-12 May 2010 – Document D – taxud.c.1(2011)280394 – 678 (p. 140).

6 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (OJ L 173, 12.6.2014, p. 349).

7 The original entry into force of most of the measures laid down in MiFID II was 3 January 2017, but the Commission recently proposed a one year extension: see Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments as regards certain dates (COM(2016) 56 final).

8 For more information on the EU Emissions Trading Scheme (also referred to as EU Emissions Trading System), see http://ec.europa.eu/clima/policies/ets/index_en.htm.

In brief, a 'cap' or limit is set on the total amount of certain greenhouse gases that can be emitted by factories, power plants and other installations covered by the scheme. Within that cap, a fixed number of emission allowances are issued, which are legal instruments giving companies under the scheme the right to emit one tonne of carbon dioxide or the equivalent amount of another greenhouse gas during a specific period.

Companies must hold enough emission allowances to cover their gas emissions, risking to face significant fines otherwise. In general terms, such emission allowances can be bought[9] or are received freely[10], and can be traded between companies if need be (*i.e.*, companies with gas emission needs higher than the amounts to which they are entitled can buy emission allowances from companies emitting gases below their permitted quota).

2.2. The VAT treatment of emission allowances: state of play

Past discussions on the VAT treatment of emission allowances have led to the agreement by the VAT Committee of guidelines[11] on the following points:

i. The VAT treatment of the transfer of emission allowances:

*"The delegations agreed **unanimously** that the transfer of greenhouse gas emission allowances as described in Article 12 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, when made for consideration by a taxable person is a taxable supply of services falling within the scope of Article 9(2)(e) of Directive 77/388/EEC* [present Articles 44 and 59(a) of the VAT Directive[12]]. *None of the exemptions provided for in Article 13 of Directive 77/388/EEC* [present Articles 132 and 135 of the VAT Directive] *can be applied to these transfers of allowances".*

ii. The VAT treatment of the auctioning of emission allowances by Member States:

*"The VAT Committee **almost unanimously** agrees that the auctioning of allowances by Member States under the revised EU Emission Trading Scheme shall constitute an economic activity within the meaning of Article 9 of the VAT Directive and that the supply of such allowances shall be regarded as a supply of services.*

*The VAT Committee **almost unanimously** agrees that where a public body is acting as the seller (auctioneer) in an auction, such an activity shall, given the risk of significant distortion of competition, fall under the second subparagraph of Article 13(1) of the VAT Directive and the supply of allowances shall therefore be subject to VAT".*

9 Through the auctioning of emission allowances by Member States to the operators, or through the purchase from other operators.

10 Although auctioning is the default method for allocating emission allowances, the manufacturing industry continues to receive a share of allowances for free.

11 See footnote 5 for a reference to the guidelines in question.

12 The content of Article 9(2)(e) of Directive 77/388/EC is now to be found in two different provisions of the VAT Directive: Article 44, which is the general rule for B2B services; and Article 59(a), concerning certain B2C services supplied to customers outside the Community.

2.3. Legislative changes and scope of this discussion

Emission allowances will be classified as financial instruments under MiFID II, in principle coming into force in January 2018[13]. More specifically, point 11 of Section C of Annex I of MiFID II, read in conjunction with Article 4(1), point (15), thereof, defines *"Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (ETS)"* as financial instruments, for the purposes of MiFID II.

Hence, it is worth examining whether this legislative development could have an impact on the existing VAT Committee guidelines. Notably, it will be analysed if this change could render some of the exemptions available in the VAT Directive[14] for financial transactions applicable. In this regard, the relevant provisions of the VAT Directive concerning exemptions are the following:

"Article 135

1. Member States shall exempt the following transactions:

[…]

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

[…]"

3. THE COMMISSION SERVICES' OPINION

3.1. Previous discussions in the VAT Committee

Emission allowances are a relatively new instrument created in 2005 under Directive 2003/87/EC and their treatment for VAT purposes was not foreseen in the existing legislation. Hence, previous discussions in the VAT Committee on this subject had to take into account the characteristics of emission allowances and the circumstances under which they are transferred or auctioned, in order to determine whether such transfers would fall

[13] See footnote 7.

[14] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

within the scope of VAT and whether any of the exemptions laid down in Article 135(1) of the VAT Directive could apply.

According to Article 2(1)(a) and (c) of the VAT Directive, a supply of goods or services is subject to VAT where it is made for consideration, within the territory of a Member State, by a taxable person acting as such. In turn, Article 9 of the VAT Directive defines the concept of taxable person as any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

With that in mind, the VAT Committee agreed[15] that: (i) the transfer of emission allowances made for consideration by a taxable person is a taxable supply of services and no exemption pursuant to Article 135(1) of the VAT Directive applies; and (ii) the auctioning of such allowances by Member States under the revised EU Emissions Trading Scheme constitutes an economic activity, and that the supply of such allowances is regarded as a supply of services. Where a public body is acting as the auctioneer of such allowances, the VAT Committee also agreed that such an activity falls under the second subparagraph of Article 13(1) of the VAT Directive, given the risk of significant distortion of competition, and therefore it is subject to VAT.

Transfers of emission allowances were also agreed to fall within the scope of what is now Article 59(a) of the VAT Directive, which refers to the place of supply of *"transfers and assignments of copyrights, patents, licences, trade marks and similar rights"* supplied to a non-taxable person who is established outside the Community. From this, it can be drawn that the supply of an emission allowance is seen as an "assignment of intangible property", classified as a service pursuant to Article 25(a) of the VAT Directive[16].

As regards the application of the exemptions pursuant to Article 135(1) and the potential qualification of transfers of emission allowances as exempt financial transactions, the Commission services in its first analysis expressed the view that an operator's resale of allowances purchased as a financial investment (*e.g.*, if the operator does not exercise or plan to exercise a polluting activity), *"might be exempt from VAT"*[17].

However, from the context and the case-law referred to[18], it seems that what was actually meant is that such transactions could be seen as being out of the scope of VAT in some circumstances, on the basis that the seller of such emission allowances would not qualify as a taxable person or would be a taxable person not acting as such: *"As regards operators which purchase greenhouse gas emission allowances as a financial investment rather than with a view to trading them (…) everything depends on whether they are exercising an economic activity within the meaning of Article 4(2) of the Sixth Directive* [present Article 9 of the VAT Directive]*, and there is no general answer"*[19].

The Commission services in their subsequent analysis were more clear in their opinion on this issue: *"Exemptions under Article 13* [present Article 135(1) of the VAT Directive] *must be interpreted restrictively. Their scope cannot therefore be extended by analogy. Firstly, it is not at all clear that the transfer of allowances can be described as a financial*

15 See footnote 5 for a reference to the guidelines in question.
16 In the same sense, see Working paper No 443 (section 2.2).
17 Working paper No 443 (section 2.3).
18 CJEU, judgment of 6 February 1997 in case C-80/95 *Harnas and Helm*.
19 Working paper No 443 (section 2.3). See also Working paper No 443 REV 1 (section 3).

transaction. Apart from the situation of operators engaging in the purchase and resale of allowances, those most concerned are industrial companies which, because of either reduced production or improved anti-pollution materials, have unused allowances. Furthermore, even if the transfer of allowances are a financial transaction, the Commission does not see what provision of Article 13(B)(d) of the Sixth Directive would allow the transfer of greenhouse gas emission allowances to be exempted from VAT. The allowances would not appear to be neither 'debts' nor 'other securities'. As already pointed out, the scope of exemptions under the Sixth Directive cannot be extended, even if the situations are somewhat analogous"[20].

It seems that during the discussions reference was also made to the report by the International Financial Reporting Interpretations Committee (IFRIC), which concluded that emission allowances had to be treated as an intangible asset for accountancy purposes[21].

Almost all Member States agreed with the perspective expressed by the Commission services, although two delegations considered that given the similarities with other financial instruments the supply of emission allowances should be treated as an exempt financial transaction. It must be stressed, however, that in the end the guidelines excluding the possibility to apply any of the exemptions pursuant to Article 135(1) of the VAT Directive in transactions involving a taxable supply of emission allowances were agreed unanimously.

3.2. Potential impact of MiFID II on the existing VAT Committee guidelines

3.2.1. Preliminary remarks

It should be noted that although the guidelines that the VAT Committee agreed deal with two distinct transactions, the reflections presented below are valid for both guidelines.

Besides, it must be observed that the existing guidelines are structured in two parts: (i) setting out whether a certain activity is subject to VAT (*i.e.*, whether that activity consists in a supply of goods or services for consideration by a taxable person); and (ii) determining whether such activity can be exempted.

In this respect, it should be noticed that the classification of emission allowances as financial instruments under MiFID II could arguably have an impact on the applicability of the exemptions pursuant to Article 135(1) of the VAT Directive for certain financial services – which is the object of this discussion – but it could not affect the scope of VAT. Transactions fall within the scope of VAT and are therefore taxable, where provided for consideration by a taxable person; hence, they do not depend on the instrument supplied

[20] Working paper No 443 REV 1 (section 2).

[21] See International Financial Reporting Interpretations Committee (IFRIC), Interpretation IFRIC 3 *Emission Rights* (2004). Note, however, that this interpretation was withdrawn in 2005, and since then discussions have been ongoing intermittently. In February 2015, the project of re-assessment of the accounting treatment of emission allowances was renamed "Pollutant pricing mechanisms". To the best knowledge of the Commission services, no conclusion has yet been drawn. For more information, see http://www.ifrs.org/Current-Projects/IASB-Projects/Emission-Trading-Schemes/Pages/Emissions-Trading-Schemes.aspx; notably the International Accounting Standards Board (IASB) Agenda paper 6A: *Why do we need a fresh approach?* (2015) http://www.ifrs.org/IASB/2015/June/AP06A.pdf.

being classified as a financial service or not. This is the reason why the analysis below focuses on the applicability of the exemptions only.

3.2.2. Applicability of the exemptions pursuant to Article 135(1) of the VAT Directive?

The extent up to which the VAT Directive would be influenced by other EU legislation is unclear. Although there is no direct correlation between concepts used in the VAT Directive and definitions of similar concepts to be found in other EU legislation, it is not uncommon when concepts used in the VAT Directive are not defined to seek guidance in existing legal provisions outside the field of VAT.

Having said so, the Commission services will bring up some aspects which seem to suggest that the existing VAT Committee guidelines on this issue should not be affected by the entry into force of MiFID II.

- Firstly, the classification of emission allowances as financial instruments responds to the need to tackle some existing irregularities in certain markets of such allowances. The majority of transactions in emission allowances are in the form of derivatives (*e.g.*, futures, forwards, and options), which are already subject to EU financial markets regulations. However, transactions for immediate delivery of emission allowances (also called "spot" transactions) are currently not subject to equivalent rules at EU level and can therefore be carried out without supervision. It is to address this gap that the Commission decided to come forward with proposals for a suitable regulation of this segment of the carbon market[22].

  According to the explanatory memorandum, the proposal for the revision of MiFID was "*aimed at establishing a safer, sounder, more transparent and more responsible financial system working for the economy and society as a whole in the aftermath of the financial crisis, as well as to ensure a more integrated, efficient and competitive EU financial market*"[23].

  This rationale is captured in recital 11 of MiFID II according to which: *"A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading scheme (…), and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive (…) by classifying them as financial instruments"*[24].

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22 Review of the Markets in Financial Instruments Directive (MiFID) and Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse: Frequently Asked Questions on Emission Allowances (MEMO/11/719).

23 Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (recast) (COM(2011) 656 final).

24 For more information, see also the Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on Markets in financial instruments [recast] and the Proposal for a Regulation of the European Parliament and of the Council on Markets in financial instruments (SEC(2011) 1226 final), sections 3.6 and 5 (point 6.6). See also the Communication from the

In the same line, it should be noted that Article 4 of MiFID II lays down the definitions, among which that of a financial instrument, *"for the purposes of this Directive"*.

From the elements above, it seems clear that the legislator did not intend for such a measure to have an impact beyond the scope of MiFID II (that is, on VAT rules), but rather set out to extend the scope of the rules on financial markets so as to cover both spot and derivative markets of emission allowances. The main objective and subject-matter of MiFID II[25] is to harmonise national provisions governing the activity of investment firms, regulated markets, data service providers, and third country firms providing investment services or activities in the Union; and the adoption of such measures is based on Article 53(1) of the Treaty on the Functioning of the European Union[26] (TFEU).

- Secondly, even if it was accepted that emission allowances falling within the category of financial instruments would have an impact beyond MiFID II itself (*i.e.*, for example, being applicable also for VAT purposes, this would not grant automatic access to exemption under Article 135(1) of the VAT Directive.

  In this regard it must be noted that, while the exemptions in question refer to the sphere of financial transactions27, the VAT Directive only obliges Member States to exempt certain transactions carried out in respect of certain financial instruments, rather than granting an exemption for any financial transaction. The concept of "financial instrument" is very broad, and might include instruments not falling within the scope of Article 135(1) of the VAT Directive, as interpreted by the Court of Justice of the European Union (CJEU).

  Therefore, in order to determine whether the supply of emission allowances could be exempt, it is necessary to examine if they could qualify as any of the specific financial instruments for which an exemption is granted (*e.g.*, a negotiable instrument, or a security). Such an analysis was already undertaken by the VAT Committee prior to agreeing guidelines on this point.

- Thirdly, given that the characteristics of emission allowances remain unchanged, and that their classification as financial instruments under MiFID II is not linked to any alteration in the nature of the emission allowances but is rather made for regulatory purposes, there seems to be no reason for reviewing the position already taken by the VAT Committee.

- Fourthly, in relation to exemptions provided for under the VAT Directive, it is a well-established doctrine of the CJEU that they are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services

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Commission to the Parliament and the Council *"Towards an enhanced market oversight framework for the EU Emissions Trading Scheme"* (COM(2010) 796 final) which examined the level of oversight of the emission allowances markets and, as a way to enhance it, tabled the possibility of classifying emission allowances as financial instruments.

25 See recital 7 of MiFID II.

26 Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47).

27 Among others, CJEU, judgment of 12 June 2014 in case C-461/12 *Granton Advertising*, paragraph 29; and CJEU, judgment of 19 April 2007 in case C-455/05 *Velvet & Steel*, paragraph 22.

supplied for consideration by a taxable person[28]. For that reason, caution is required before extrapolating the application of exemptions to scenarios which may not clearly fall within the scope of Article 135(1) of the VAT Directive.

- Fifthly, the CJEU has also stated on several occasions that the exemptions of the VAT Directive are autonomous concepts of Union law which must be placed in the general context of the common system of VAT introduced by the VAT Directive[29]. In this regard, there have been a few cases before the CJEU where the question of whether the VAT Directive in its application would be influenced by other EU provisions has been examined.

  For instance, in *Arthur Andersen*[30] the Advocate General Poiares Maduro shed some light on this issue when examining *"whether the concepts of insurance broker and insurance agent should automatically be interpreted in the same way in the context of the Sixth Directive and in the context of Directives 77/92 and 2002/92, which are concerned not with VAT but with the freedom of establishment. The Court has preferred not to take an absolute position on this question. The Court has, however, taken the essential elements set out in Directive 77/92 into consideration in defining the concepts of 'insurance broker' and 'insurance agent' referred to in Article 13B(a) of the Sixth Directive* [present Article 135(1)(a) of the VAT Directive]. *Taking these elements into consideration does not amount, however, to an automatic cross-reference to the definition laid down in Directive 77/92. It is without doubt essential that Directive 77/92 is taken into consideration in order to avoid the development of a concept of 'insurance agent' under Article 13B(a) which would risk losing all contact with legal reality and practice in the area of insurance law. However, as the Court has stated on several occasions, the exemptions from VAT constitute independent concepts of Community law which should be placed in the context of the common system of VAT of the Sixth Directive and whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another"*[31].

  A similar dispute arose in *Taksatorringen,* where the company in the main proceedings argued that the concepts laid down in Article 135(1)(a) in the VAT Directive concerning the exemption for insurance services should be interpreted in light of certain provisions contained in Directive 77/92[32] concerning freedom of establishment. Although neither the CJEU nor Advocate General Mischo thought it necessary to reach a view on this point, it is interesting to see the reflections of the latter: *"It is not absolutely clear that a directive concerning VAT should necessarily be interpreted in the light of a directive relating to the free movement of persons"*[33].

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28 Among others, see CJEU, judgment of 20 November 2003 in case C-8/01 *Taksatorringen*, paragraph 36; and CJEU, judgment of 21 June 2007 in case C-453/05 *Ludwig*, paragraph 21.

29 Among others, see CJEU, judgment of 15 June 1989 in case 348/87 *Stichting Uitvoering Financiële Acties (SUFA)*, paragraph 11; and CJEU, judgment of 5 June 1997 in case C-2/95 *SDC*, paragraph 21.

30 CJEU, judgment of 3 March 2005 in case C-472/03 *Arthur Andersen.*

31 CJEU, opinion of Advocate General Poiares Maduro of 12 January 2005 in *Arthur Andersen*, point 22.

32 Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (OJ L 26, 31.1.1977, p. 14).

33 CJEU, opinion of Advocate General Mischo of 3 October 2002 in *Taksatorringen*, point 89.

In another case, *Saudaçor*[34], it was argued that the concept of "other bodies governed by public law" pursuant to Article 13(1) of the VAT Directive should be interpreted by way of reference to a definition given of the concept of "body governed by public law" by Article 1(9) of Directive 2004/18[35].

The CJEU, by making reference to the intentions of the legislator, concluded that *"Such an interpretation of Article 13(1) of the VAT Directive cannot be accepted. By defining in broad terms the concept of 'body governed by public law' (…) Article 1(9) of Directive 2004/18 seeks to define the scope of that directive in a sufficiently extensive manner so as to ensure that the rules on, in particular, transparency and non-discrimination which are required in connection with the award of public contracts (…) However, the context of the concept of 'other bodies governed by public law' referred to in Article 13(1) of Directive 2006/112 is fundamentally different. That concept is not intended to define the scope of VAT but, on the contrary, makes an exception to the general rule on which the common system of that tax is based, namely the rule that the scope of that tax is defined very broadly as covering all supplies of services for consideration…"*[36].

In particular, the case facts in *Saudaçor* could somehow remind of the circumstances examined here, where the question is whether certain concepts making an exception to the general rule of the VAT Directive would have to be interpreted according to the provisions of MiFID II which lay down the scope of that Directive. In that respect, it should be noted that by classifying emission allowances as financial instruments for regulatory purposes, the intention of the legislator is to expand the scope of MiFID II so as to ensure that it also covers spot secondary markets of such emission allowances. This would thus suggest that the context of financial instruments covered by MiFID II and that of the specific financial instruments exempted under Article 135(1) of the VAT Directive are fundamentally different.

As already pointed out, exemptions provided for under the VAT Directive constitute autonomous concepts of EU law which must be construed within the context of VAT. Hence there is a need to be prudent defining such concepts by way of reference to other provisions of EU law.

- And, finally, reference must be made to the principle of fiscal neutrality, which in relation to the application of exemptions precludes treating similar goods and services differently for VAT purposes.

  On the basis of this principle, some may argue that emission allowances should not be treated differently from other instruments with which they may bear some resemblance, and whose supply is exempt from VAT (*e.g.*, securities, exempt pursuant to Article 135(1)(f) of the VAT Directive).

[34] CJEU, judgment of 29 October 2015 in case C-174/14 *Saudaçor*.

[35] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

[36] *Saudaçor*, paragraphs 45-48.

At this point, however, the Commission services must recall that the principle of neutrality should not be used as a way to systematically broaden the scope of VAT exemptions, as the CJEU confirmed in *Deutsche Bank*: *"…it must be stated that that conclusion* [that a service is found not to be covered by Article 135(1)(f) of the VAT Directive] *is not called into question by the principle of fiscal neutrality. (…) That principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions"*[37].

3.3. Conclusion

The classification of emission allowances as financial instruments under MiFID II is unlikely to have an impact on the existing guidelines, with regard to whether the transactions fall within the scope of VAT and the applicable place of supply rules, given that these issues do not depend on the instrument supplied being classified as a financial service or not.

As to the question whether with the upcoming changes to MiFID II, exemptions pursuant to Article 135(1) of the VAT Directive could become applicable, this is perhaps less straightforward to answer. Although EU provisions outside the sphere of VAT may be used as guidance in particular as a way of ensuring that VAT concepts do not become detached from legal reality, there is no reason to think that the MiFID II rules would have any impact on the existing VAT Committee guidelines:

- the legal classification as financial instruments under MiFID II was made for the purposes of that Directive and its aim was to extend the regulatory rules to all existing emission allowances markets, rather than affecting areas of taxation, as also borne out by the recourse made to Article 53(1) of the TFEU as legal basis;

- even if emission allowances were accepted to be financial instruments for VAT purposes, they would not automatically be exempted as their characteristics would first have to be looked at, in order to see if they could fit into any of the specific financial instruments referred to in Article 135(1) of the VAT Directive (*e.g.*, a negotiable instrument, or a security) and this is an analysis already carried out by the VAT Committee in the past;

- since the characteristics of emission allowances themselves have remained unchanged, there seems to be no reason for reopening a debate already had in the VAT Committee;

- sticking by the position already taken is consistent with the view taken by the CJEU that exemptions provided for under the VAT Directive constitute autonomous concepts of Union law which must be placed in the general context of the common system of VAT, and are to be interpreted strictly; and

- it is not so that the principle of fiscal neutrality could lead to the scope of an exemption being extended in the absence of a clear wording to that effect.

[37] CJEU, judgment of 19 July 2012 in case C-44/11 *Deutsche Bank*, paragraphs 43-45.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the issues raised.

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