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

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 941

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Romania**
REFERENCES:	**Articles 2(1)(c) and 135(1)(b) and (c)**
SUBJECT:	**VAT treatment of certain services provided in relation to syndicated loans**

1. INTRODUCTION

The Romanian delegation wishes to discuss with the VAT Committee the VAT treatment of certain services provided in respect of syndicated loans. In particular, it seeks to establish whether activities consisting in the management of a syndicated loan and of credit guarantees linked to that syndicated loan, which are carried out by banks participating in the syndicated loan agreement (such banks are also referred to as "credit agent" and "guarantees agent", depending on their role), would constitute taxable services in accordance with Article 2(1)(c) of the VAT Directive[1]; and, if so, whether the exemptions provided for under Article 135(1)(b) and (c) would apply.

The questions and the analysis submitted by the Romanian delegation are annexed to this document.

2. SUBJECT MATTER

Prior to examining the VAT treatment of syndicated loans, it is necessary to briefly outline what such lending agreements are all about. It should be noted that the description below is not comprehensive, but only summarises some of their basic characteristics for the purposes of our analysis.

2.1. What are syndicated loans?

A syndicated loan (or "syndicated bank facility") is a large loan for which a group of banks works together to provide funds for a borrower. There is usually one lead bank (the "agent" or "arranger") that takes a percentage of the loan and syndicates the rest to other banks, while there is still only one loan agreement[2] (i.e. between the borrower and the syndicated banks). A syndicated loan is thus the opposite of a bilateral loan, which only involves one borrower and one lender[3].

Sometimes a distinction is made between the "agent" and the "arranger" of a syndicated loan. For instance, according to a guide by the Loan Market Association (LMA)[4], the arranger would be the party responsible for the setting up of the syndicated agreement, while the agent would administer the loan on a daily basis, once constituted. In such circumstances, the arranger may be said to perceive an "arrangement fee", which technically speaking would be different from the fee perceived by the agent himself.

For the purposes of this document, however, it is assumed that the functions of agent and arranger lie with the same party to the transaction. Moreover, the question raised by Romania concerns the management of the syndicated loan rather than its constitution. Hence, aspects concerning the arrangement of the loan have not been dealt with.

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1 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).

2 See "syndicated bank facility" in J. Law and J. Smullen (Eds.), *A Dictionary of Finance and Banking* (online version), Oxford University Press, 2015.

3 As set out by the Commission services in a *Background paper requested by the Council Presidency on financial and insurance services* (TAXUD/2414/08**)**, 2008, p. 20.

4 Loan Market Association (LMA), *Guide to Syndicated Loans & Leveraged Finance Transactions*, 2013, p. 8.

As indicated by Romania, the main purpose of syndicated loans is to distribute the risk among several lenders, so as to allow funding of larger projects that otherwise could not be funded due to prudential rules applicable to the lenders (the risk associated with a large loan may be too high for a single bank to assume). Syndicated lending, besides allowing banks to share credit risk, also enables them to diversify portfolios geographically and across sectors and activity types[5].

According to Romania, banks that are party to the syndicated loan typically take care of the management of such loan (activity undertaken by the "credit agent", sometimes also referred to as "facility agent"), and of the management of the credit guarantees which could be linked to the syndicated loan (performed by the "guarantees agent", sometimes also referred to as "security agent"), for which they are remunerated. For the purposes of this document, it is assumed that such agents are one of the syndicated banks.

It seems that the credit agent and the guarantees agent could be one and the same bank or different banks. Although we have assumed for the purposes of this document that the same bank is acting both as credit agent and as guarantees agent, this aspect seems irrelevant for the purposes of determining the VAT treatment of such activities, which will be examined separately.

The following explanation provided by the European Central Bank (ECB) on this topic may also be useful to better understand the functioning of syndicated lending: *"Syndicated loans are loans granted to a borrower by a pool of banks, thereby spreading credit risk among several lenders. In a loan syndicate, the financing is typically arranged by one or more senior syndicate members acting as (mandated) arrangers. These senior banks act as investment managers and are in charge of bringing together a group of banks to participate in the transaction. They tend to keep a small fraction of the total financing (usually less than 10%) on their balance sheet and collect a loan origination fee (or arrangement fee) from the borrower for arranging the loan contract. The other members of the syndicate (a group of commercial investment banks typically called managers or participant banks) are the providers of the bulk of the loan. Each member of the pool has a separate claim on the debtor and they retain the corresponding market and credit risk. The providers receive a commitment fee, proportional to the amount of their loan commitment, and a utilisation fee as soon as the facility is drawn*"[6].

It should be noted that some of the concepts referred to by the ECB, such as the possible payment of "commitment fees"[7] or "utilisation fees"[8], have not been taken into account for the purposes of the present analysis, given that they are not essentially related to the question hereby examined.

Let us examine below the specific activities typically undertaken by the credit agent and by the guarantees agent.

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5 ECB, *EU Banking structures*, 2005, p. 22.

6 ECB, *Op. cit.*, p. 15.

7 Although they are usually confused with interests, commitment fees are the amounts charged by a bank to keep open a line of credit or to continue to make unused loan facilities available to the borrower. See "commitment fee" in J. Law (Ed.), *A Dictionary of Finance and Banking* (online version), Oxford University Press, 2015.

8 An amount paid to lenders often applied to drawdowns in excess of a predetermined percentage of the facility amount. See "utilization fee" in P. Moles and N. Terry, *The Handbook of International Financial Terms* (online version), Oxford University Press, 2015.

Management of the syndicated loan (by the credit agent)

The credit agent, which is usually one of the banks that are party to the syndicated loan agreement, typically manages the syndicated loan on behalf of the other lenders. That agent acts as the contact point between the borrower and the other syndicated banks, and notably takes care of the transfer of funds which constitute the loan by the other lenders to the borrower, the transfer of funds which constitute repayment of the principal of a loan by the borrower to the other lenders, as well as of the distribution of interests paid by the borrower to the other lenders.

According to the Romanian delegation, the activities undertaken by the credit agent can typically include some or all of the following:

- maintaining the communication between the syndicated banks and the borrower;
- processing payments (e.g. transfer of funds which constitute the loan by the other lenders to the borrower, the transfer of funds which constitute repayment of the principal of a loan by the borrower to the other lenders, as well as of the distribution of interests paid by the borrower to the other lenders, according to the contractual relationship);
- periodic monitoring of the borrower's financial situation and its compliance with the debt commitments;
- conducting possible amendments to be made to the debt agreement;
- cooperating with the guarantees agent, if necessary.

This is confirmed by the LMA, according to which "*the agent acts as the agent of the lenders, not the borrowers, and has a number of important functions: (i) point of contact – maintaining contact with the borrower and representing the views of the syndicate; (ii) monitor – monitoring the compliance of the borrower with certain identified terms of the loan agreement; (iii) postman and record-keeper – receiving all notices, compliance certificates, financial statements and other required information from the borrower and distribute them to the lenders; and (iv) paying agent – the borrower makes all payments of interest and repayments of principal and any other payments required under the loan agreement to the agent. The agent then passes these monies to the banks to whom they are due (…)*"[9].

For these activities, the credit agent receives a commission ("credit management fee") from the borrower, and not from the respective syndicated banks. In accordance with the description provided by Romania, this commission is not broken down by each bank participating in the syndicated agreement.

Management of the credit guarantees (by the guarantees agent)

The guarantees agent, which is usually one of the banks that are party to the syndicated agreement, mainly manages the guarantees that the borrower is obliged under the syndicated agreement to put on behalf of the lenders. One of his main responsibilities is to execute the credit guarantees, if necessary.

According to the Romanian delegation, the activities undertaken by the credit guarantees agent can typically include some or all of the following:

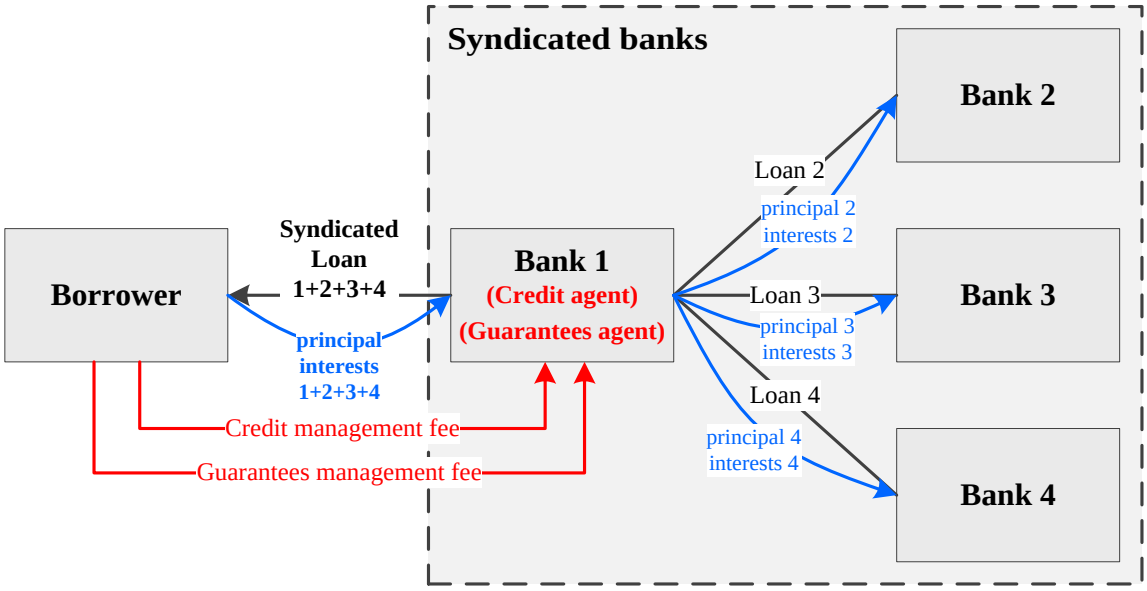
[9] LMA, *Op.cit.*, p. 8.

- recording the guarantees and taking care of notifications in their respect (e.g. assignment of claims);
- conducting or assisting the conclusion of insurance contracts, where appropriate;
- periodic monitoring of the value and integrity of the guarantees, as well as their possible revaluation;
- establishing additional guarantees, if necessary, depending on the contract;
- executing the guarantees, if necessary.

For these activities, the guarantees agent receives a commission ("guarantees management fee") from the borrower, and not from the respective syndicated banks. Again, this commission is not broken down by each bank participating in the syndicated agreement.

See below a diagram which summarises the main elements of a syndicated loan.

Figure 1: Simplified syndicated loan structure



Source: Commission services

2.2. The questions to be examined

The question raised by Romania concerns the VAT treatment of certain of the activities carried out in relation to syndicated loans. In particular, it is asked whether the activities consisting in the management of a syndicated loan (by a credit agent) and the management of credit guarantees (by the guarantees agent) as described above, for which both agents receive each their corresponding fees from the borrower, would constitute taxable services in accordance with Article 2(1)(c) of the VAT Directive.

If so, it is asked whether the exemptions provided for under Article 135(1)(b) and (c) would apply. Those provisions contain exemptions for services consisting in the management of credit and the management of credit guarantees insofar as such services are supplied by the person granting the credit. In this respect, it is necessary to examine in particular to which extent the agent of a syndicated loan (who is the party supplying the services) can be considered to qualify as the person granting the credit, given that other

banks are involved and that each and every one of them maintain a separate claim on the debtor.

In the opinion of the Romanian delegation, it seems that both the management of syndicated loans and the management of credit guarantees would constitute a taxable supply of services pursuant to Article 2(1)(c) of the VAT Directive, and that such services could not be exempt on the basis of Article 135(1)(b) or (c) of the VAT Directive. In particular, Romania mainly argues that a bank acting as an agent in a syndicated loan agreement cannot be considered to be the person granting the credit, which is the condition for the exemption to apply either in respect of the management of credit or the management of credit guarantees, given that it contributes only partially to that credit. According to their interpretation, in practice the management services provided in respect of loans or credit guarantees could be exempt only in cases of loans involving a single lender, where such management services are provided by the person granting the loan.

3. THE COMMISSION SERVICES' OPINION

A supply of services is subject to VAT when made for consideration by a taxable person acting as such, pursuant to Article 2(1)(c) of the VAT Directive.

Concerning the existence of consideration, from the settled case-law of the Court of Justice of the European Union (CJEU) it is clear that a supply of services is effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive, and hence is taxable, only if there is a direct link between the services supplied and the consideration received[10]. Such a direct link is established if there is a legal relationship between the provider of the services and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration given in return for the service supplied to the recipient[11].

A taxable person is defined as any person carrying out an economic activity, whatever the purpose or results of that activity under Article 9 of the VAT Directive.

A taxable supply of services can still be exempt depending on it falling within the scope of certain provisions. The relevant ones in the case at hand are those of Article 135(1) of the VAT Directive which refer to financial services supplied in connection with credit.

"Article 135

1. Member States shall exempt the following transactions:

(…)

(b) the granting and the negotiation of credit and the management of credit by the person granting it;

[10] Amongst others, judgment of 7 October 2010, *Loyalty Management UK*, C-53/09, EU:C:2010:590, paragraph 51; and judgment of 8 March 1988, *Apple and Pear Development Council*, C-102/86, EU:C:1988:120, paragraph 12.

[11] Amongst others, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 29; and judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, paragraph 14.

(c) the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

(...)"

At the outset it should be noted that the CJEU has repeatedly stressed that the exemptions provided for under Article 135 of the VAT Directive 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 person[12]. Furthermore, they constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another and which must be placed in the general context of the common system of VAT[13].

3.1. The management of the syndicated loan (by the credit agent)

3.1.1. Submission to VAT

The management of a syndicated loan by the bank acting as a credit agent in exchange for receiving a credit management fee would constitute a taxable supply of services in accordance with Article 2(1)(c) of the VAT Directive only if provided for consideration by a taxable person acting as such.

While it seems clear that the agent is carrying out an economic activity that qualifies him as a taxable person, the existence of consideration should be examined further.

It is clear that the management services are not supplied free of charge but in exchange for a commission which is paid by the borrower. However, it is not clear to which extent the borrower can be seen as the beneficiary of the management services, regardless of him paying the fees. In particular, the syndicated banks, which are party to the syndicated loan agreement, could be seen as beneficiaries of such services, partly or wholly.

Hence, it is worth to see whether this aspect (i.e. the identity of the beneficiary or beneficiaries) could have implications from the perspective of there being a consideration with a direct link with the services supplied. Prior to that, it should be examined whether there is a single service or two independent services supplied by the credit agent.

Single supply or two independent supplies

First of all, it must be recalled that the credit agent is the manager of the syndicated loan as a whole, but that the syndicated loan is made up by the financial contributions received from all the syndicated banks. Actually, in a syndicated loan each lender has a separate claim on the debtor and they retain the corresponding market and credit risk[14]. Since the credit agent himself is one of the syndicated banks, it follows that technically speaking the credit agent manages his own part of the syndicated loan, but also the parts of the syndicated loan funded by the other syndicated banks.

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12 Judgment of 19 July 2012, *Deutsche Bank*, C-44/11, EU:C:2012:484, paragraph 42 and case-law cited.

13 Judgment of 22 October 2009, *Swiss Re Germany Holding*, C- 242/08, EU:C:2009:647, paragraph 33 and case-law cited.

14 ECB, *Op.cit.*, p. 15.

The Romanian delegation suggests that the credit agent is actually involved in two independent transactions, namely the management of his own credit, and the management of the credit granted by the other syndicated banks. Romania considers that the commission received by the credit agent, while not being broken down by each syndicated participant, corresponds partly to the management of own credit and partly to the management of the credit of other banks.

Alternatively, one could consider whether the management by the credit agent of his own part of the syndicated loan and the management of the parts of the syndicated loan facilitated by the other banks constitute a single supply for VAT purposes.

In respect of the existence of a single supply, the CJEU has recalled that, for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive. Nevertheless, it is also clear from the case-law of the CJEU that, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent.

In particular, there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. Such is the case where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service[15]. Hence, this concept aims to consider as a single service several transactions carried out by a single taxable person when they are not independent.

Despite the identity of the beneficiary or beneficiaries of the services (management of one's own credit and management of someone else's) which will be examined below, it is clear that there is only one taxable person supplying such services, that is the credit agent[16].

Moreover, that person receives a single commission for the service consisting in the management of the syndicated loan, which includes both the management of his own part of the syndicated loan and also the management of the parts of the loan facilitated by other banks (i.e. it is not possible to split the consideration). The fact that both activities are remunerated by means of a single commission, with no correlation to the financial contributions made by each of the syndicated banks, already suggests that it is not straightforward to treat them separately for VAT purposes.

And finally, from a legal and an economic perspective there is only one syndicated loan agreement (between the borrower and the bulk of syndicated banks), as opposed to the case where a borrower establishes a bilateral relationship with each and every one of the lenders. That also indicates that, from the perspective of the borrower, the management of the syndicated loan (which is a single loan, despite the fact that the lenders keep separate

[15] CJEU, judgment of 17 January 2013, *BGZ Leasing*, C‑224/11, EU:C:2013:15, paragraphs 29 and 30, and the case-law cited.

[16] While a single service could not be formed by several transactions carried out by several taxable persons, in this case it is not disputed that there is only one taxable person.

records and claims) is perceived as a single service. In other words, the borrower is not interested in receiving only a service supplied by the credit agent consisting in the management of his own part of the syndicated loan, or only the management on behalf of the other syndicated banks, because such a service would be incomplete. The real value for the borrower is the management of the syndicated loan as a whole. In fact, even if the borrower wanted to receive only one of such "two" distinct services, that would not be possible (as the "management of syndicated loans" is provided only globally).

Therefore, it seems that the activities by the credit agent ought to be treated as a single service consisting in the management of the syndicated loan, involving the management of his own part of the syndicated loan, as well as the management on behalf of the other syndicated banks of their syndicated loan's parts. Based on the case-law of the CJEU, such activities seem to be so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

Beneficiary (or beneficiaries) of the service

Let us examine who could be seen as the beneficiary or beneficiaries of the management service and to which extent that could influence the direct link condition.

In order to determine who the beneficiary of the service is, it seems necessary to take into account the economic reality of the transaction, as well as the legal obligations of the parties, which may vary from case to case. It is also useful to keep in mind that, from the perspective of the supplier, services consisting in the management of credit can be supplied either by the person granting the credit (e.g. a financial institution), or by a third-party if the latter has outsourced the task.

As regards the service consisting in the management of the syndicated loan, it is not straightforward who the beneficiary of the services is. Hence, arguments are provided in respect of considering, at least as partly beneficiaries, both the syndicated banks and the borrower.

- *The syndicated banks*

On the one hand, several aspects point towards the syndicated banks being possibly seen, at least partly, as beneficiaries of the management service, as will be examined below.

Firstly, it seems that the management activity is partly provided for the benefit of the persons on whose behalf the credit agent is acting, that is, the syndicated banks.

As stated above, the credit agent is the manager of the syndicated loan as a whole, but that syndicated loan is made up by the financial contributions received from all the syndicated banks. Given that in a syndicated loan each lender has a separate claim on the debtor and they retain the corresponding market and credit risk, the credit agent manages his own part of the syndicated loan but also the parts of the syndicated loan funded by the other syndicated banks on their behalf. That aspect is confirmed in the LMA guidance[17]: *"the agent acts as the agent of the lenders, not the borrower…"*.

[17] LMA, *Op.cit.*, p. 8.

Because of that, the other syndicated banks could be seen as the main beneficiaries of the management service (the credit agent acts on their behalf), irrespective of them not making any payment to the bank acting as credit agent. It seems that this is the position of the Romanian delegation[18] according to which the service of managing the credit is made for the direct benefit of the syndicated banks and not that of the borrower, irrespective of who is paying the commission.

Secondly, a similar scenario involving the management of loans by a third party (that is, someone other than the creditor) was already examined by the VAT Committee[19] in respect of the management of non-performing loans (NPLs) by specialised companies (so-called "servicing companies"), where it was assumed that these companies supplied services to the creditors of NPLs and therefore managed the loans on their behalf.

And thirdly, the same conclusion can be derived from the nature of some of the management activities themselves as explained in section 2.1 which include, amongst others, monitoring the borrower's financial situation and its compliance with certain terms of the loan agreement. Such a monitoring activity, which aims at guaranteeing that the borrower will be able to repay the loan, seems to be undertaken for the benefit of the lenders.

- *The borrower*

On the other hand some could argue that the borrower also benefits, even if only partly, from there being one person acting as a contact point with all the syndicated banks and managing the credit on their behalf.

What is unique about syndicated loans is that several lenders operate under the same contract, as opposed to several bilateral borrower-lender relationships, and that is only possible thanks to the coordination and the centralised management carried out by the credit agent. Without such an element of simplification, it is unlikely that the borrower could be able to obtain the funds facilitated through a syndicated loan by means of a single credit (e.g. the risk associated with a large loan may be too high for a single bank to assume).

Furthermore, the scenario at hand is not necessarily uncommon. Other similar cases, for instance, concern notary fees to be paid upon a transfer of property and that are sometimes borne solely by the purchaser, although the conclusion of the transaction is made for the benefit of both the purchaser and the seller. Also sometimes banking fees linked to a transfer of funds between two different persons are only borne by one of the parties to the transaction, despite both of them benefiting from the service provided by the bank.

It seems common practice, according to the LMA guide[20], for the borrower to assume the costs stemming from the syndicated loan agreement being put in place (i.e. costs linked to the constitution of the loan, the daily management and the management of guarantees): "*In addition to paying interest on the loan and any related bank expenses, the borrower will usually pay fees to those banks in the syndicate which have performed additional work or*

[18] The Romanian delegation also considers that it may be that the services are provided partly for the benefit of the borrower and partly for the benefit of the syndicated banks.
[19] See Working paper No 917.
[20] LMA, *Op.cit.*, p. 11.

taken a greater responsibility in the loan process, primarily the arranger, the agent, and the security agent".

Therefore, it also seems reasonable to argue that it is in the interest of both parties to the transaction (the borrower and the syndicated banks) to conclude the syndicated loan agreement, while it is only the borrower paying the costs linked to the constitution of the loan.

Existence of a direct link

It is clear that there is a consideration paid by the borrower that the credit agent receives in exchange for his supply. The question is whether the direct link between the consideration and the services can be said to be broken where the payer and the beneficiary of the services are not the same person. That would be the case if the syndicated banks can be considered, at least partly, as beneficiaries of the management services. Although this point is left open above, we will assume for the purposes of examining the direct link that the beneficiaries of the services are the syndicated banks and not the borrower, which implies that the services are provided to the benefit of persons other than those paying the consideration for such services.

As regards the direct link, the CJEU stated in *Tolsma* that a supply of services is effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive, and hence is taxable, "*only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient*"[21].

Such a legal relationship and reciprocal performance seems to exist in the case at hand, given that the syndicated loan agreement is set up by means of a contractual arrangement which specifies the terms and conditions under which the supply of credit is to be provided. Such a document or set of documents regulates not only the relationships between the borrower and the bulk of syndicated banks, but also between the syndicated bank acting as agent and the rest of syndicated banks.

The fact that the payment is made by the borrower rather than the syndicated banks does not change the existence of a direct link, given that payments by third parties also constitute consideration and form part of the taxable amount, regardless of the person "consuming" or benefiting from the service. In this respect, Article 73 of the VAT Directive defines the taxable amount of a transaction as "*everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of such supply*".

Cases where the consideration is being paid by a party other than the recipient of the services are often referred to as "third-party consideration" and have been examined by the CJEU on several occasions.

For instance, in *Loyalty Management UK* the CJEU examined a loyalty rewards scheme, where customers earned points which they could redeem for loyalty rewards which consisted of goods or services and which were provided by certain other operators. Such

[21] CJEU, judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, paragraphs 13 and 14.

operators were remunerated by the sponsor of the loyalty rewards scheme, and the CJEU was asked whether that remuneration constituted consideration paid by a third party for the supply of goods or services to the customers. The CJEU answered in the affirmative, and concluded that payments made by the sponsor to the redeemers supplying goods or services to the customers must be regarded as being the consideration paid by a third party for such supplies.

This conclusion stems from the idea that "*it is not a requirement of the Sixth Directive that, for a supply of goods or services to be effected 'for consideration', within the meaning of Article 2.1 of that directive, the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied. Article 11.A(1)(a) of that directive* [equivalent of present Article 73 of the VAT Directive] *provides that the consideration may be obtained from a third party*"[22].

In relation to vouchers, where taxable persons supplying goods or services to consumers also get reimbursed by third parties, the CJEU has confirmed that such reimbursements constitute consideration: "*As regards (…) the supply by the retailer who receives the reimbursement, it is important to note that the fact that a portion of the consideration received for that supply was not actually paid by the final consumer himself but was made available on behalf of the final consumer by a third party not connected with that transaction is immaterial for the purposes of determining that retailer's taxable amount*"[23].

In *Ludwig*[24], the CJEU examined in the context of financial services a transaction which it could also be useful to look at. The case concerned a self-employed financial adviser (Mr Ludwig) acting on behalf of "DVAG", who made available to private persons a range of financial products such as credit facilities which had been defined in accordance with the lending financial institutions (the lenders). The services supplied by the financial adviser (and DVAG) were rewarded by the lender with a commission (DVAG received the commission and then paid to the financial adviser), if the contract between the client and the lender was concluded. The client, for his part, did not pay any commission, neither to DVAG nor to the adviser.

The CJEU said that the activity of negotiation of credit in *Ludwig* had been divided into two services, the first one provided by the agent DVAG (negotiation with the lenders) and the second by the financial adviser (negotiation with the borrowers)[25]. The fact that the financial adviser was ultimately remunerated by the lenders was not seen as problematic for there being a taxable service, although the analysis focused on the application of the exemption pursuant to Article 135(1)(b) of the VAT Directive.

Based on the case-law above, the fact that the service consisting in the management of the syndicated loan provided by the credit agent is paid by the borrower (regardless of whether the beneficiary is the borrower, the syndicated banks, or both) would not preclude

[22] CJEU, judgment of 7 October 2010, joint cases *Loyalty Management UK* and *Baxi Group*, C-53/09 and C-55/09, EU:C:2010:590, paragraph 56.
[23] CJEU, judgment of 15 October 2002, *Commission v Germany*, C-427/98, :EU:C:2002:581, paragraph 46.
[24] CJEU, judgment of 21 June 2007, *Ludwig*, C-453/05, EU:C:2007:369.
[25] *Ludwig*, paragraph 37.

that service from being provided for consideration and there being a direct link, thus falling within the scope of Article 2(1)(c) of the VAT Directive.

3.1.2. Exemption

The following question is then whether this taxable supply of services could be exempt pursuant to Article 135(1)(b) of the VAT Directive on the basis of it being the management of credit by the person granting it.

There seems to be no doubt that the service hereby examined qualifies as "management", so the aspect which shall be examined is whether the credit agent could be seen as the person granting the credit.

The syndicated loan is funded by all the syndicated banks participating in the arrangement. Since the credit agent is usually one of such banks, it is clear that the agent can be seen as one of the multiple lenders of the transaction. However, as explained above, the credit agent manages the whole of the syndicated loan and, therefore, technically speaking he manages his own part of the loan but also manages the parts of the loan in respect of which he is not the creditor. Therefore, some may argue that the service consisting in the management of the credit is not being supplied (in its entirety) by the person granting it, and that therefore the exemption should not apply.

However, we find this interpretation difficult to sustain for several reasons.

Firstly, because, as explained in section 3.1.1, it does not seem possible to split the management of the credit agent's own part of the syndicated loan from the management of the parts of the syndicated loan facilitated by the other banks on their behalf. In other words, while the management of the syndicated loan implies indeed two such activities, it seems to constitute a single indivisible economic supply.

Secondly, while the CJEU has not examined the condition that the credit must be managed by the person granting it, and that no explanations were given in the Sixth VAT Directive[26] as regards Article 13(B)(d)(1) which introduced this exemption, in determining the scope of a provision of EU law, its wording, context and objectives must be taken into account[27].

One of the possible reasons for the legislator having introduced this condition is to make sure that there is a close link between the activity of management of credit and the granting of the credit in itself, as opposed to management being performed by a third party other than the creditor, which could have a much more administrative nature. It almost seems from the provision in Article 135(1)(b) of the VAT Directive that the management of the credit is treated as an "ancillary service" to the granting of the credit.

In *Ludwig*[28], the CJEU ruled that the ancillary service shares the same tax treatment as the principal service. As a result, the management of the syndicated loan which is ancillary to

[26] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1–40).

[27] CJEU, judgment of 8 December 2005, *Jyske Finans*, C-280/04, EU:C:2005:753, paragraph 34, and case-law cited.

[28] CJEU, judgment of 21 June 2007, *Ludwig*, C-453/05, EU:C:2007:369, paragraph 20.

the granting and the negotiation of the credit itself should receive the same treatment and thus be VAT exempted.

From this perspective, although the activity of the credit agent involves the management of credit granted by creditors other than him (i.e. management of the portion of the syndicated loan facilitated by the other syndicated banks), it is nonetheless true that the credit agent is one of the syndicated banks. Given the existence of a single legal relationship between the borrower and the bulk of syndicated banks, as well as the existence of a single supply consisting in the management of credit (see section 3.1.1), it seems reasonable to assume that the bank acting as credit agent can be considered to be seen as "the person granting the credit" for the purposes of the exemption.

The case at hand would still be different from the outsourced management of credit by third-parties clearly not involved in the granting of credit. For instance, the view taken as regards the management of NPLs by specialised third-party companies was that the exemption was not available because they could not be seen as the creditors of the loan[29]. Such companies are in fact not concerned by the underlying granting of credit.

And thirdly, if the interpretation was that the credit agent could not be regarded as the person granting the credit, management services provided in respect of a syndicated loan could only be exempted if each and every one of the various lenders were involved in such activities. Due to the nature of syndicated loans and their functioning, the exemption would become *de facto* inapplicable. It is not clear that such an outcome was intended by the legislator.

It therefore seems safe to conclude that the service consisting in the management of the syndicated loan provided by the credit agent could be considered to qualify as the management of credit "by the person granting it" and therefore exempted in accordance with Article 135(1)(b) of the VAT Directive, given that the credit agent is one of the creditors of the loan.

3.2. The management of the credit guarantees (by the guarantees agent)

The analysis of the Commission services as regards the management of the credit guarantees by the syndicated bank acting as the guarantees agent is analogous to the reasoning already set out in previous section 3.1, both as regards submission to VAT and the applicability of the exemption pursuant to Article 135(1)(c) of the VAT Directive.

As regards the exemption, we must note in particular that points (b) and (c) of Article 135(1) of the VAT Directive both require that services consisting in the management of credit and the management of credit guarantees are supplied by the person granting the credit.

Therefore, the service consisting in the management of credit guarantees provided by the guarantees agent and paid by the borrower would constitute a service for consideration falling within the scope of Article 2(1)(c) of the VAT Directive. That service could be considered to qualify as the management of credit guarantees "by the person who is granting the credit" and therefore be exempt in accordance with Article 135(1)(c) of the VAT Directive.

[29] See Working paper No 917 (section 3.2).

3.3. Conclusions

Given the legislation as it stands and taking into account the pertinent case-law of the CJEU, the VAT treatment of the transactions examined in this document would, in the opinion of the Commission services, be the following:

- The activities by the credit agent consisting in the management of the syndicated loan, which technically speaking involve the management of his own credit, and the administration of the credit granted by the other syndicated banks, should be treated as a single supply for VAT purposes. Such activities seem to be so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

- The service consisting in the management of the syndicated loan provided by the credit agent and paid by the borrower would constitute a supply made for consideration, where there is a direct link between the consideration and the supply, thus falling within the scope of Article 2(1)(c) of the VAT Directive. That would be so regardless of whether the beneficiary of the service is the borrower, the syndicated banks, or both.

- The service consisting in the management of the syndicated loan provided by the credit agent could qualify as the management of credit "by the person granting it" and therefore be exempted in accordance with Article 135(1)(b) of the VAT Directive, given that the credit agent is one of the creditors of the loan.

- The service consisting in the management of credit guarantees provided by the guarantees agent and paid by the borrower would also constitute a supply made for consideration falling within the scope of Article 2(1)(c) of the VAT Directive. That service could qualify as the management of credit guarantees "by the person who is granting the credit" and therefore be exempted in accordance with Article 135(1)(c) of the VAT Directive.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on this matter.

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ANNEX

QUESTION FROM ROMANIA

Request for the inclusion on the agenda of the next VAT Committee meeting of the issue on the VAT regime applicable to the management of credit services, respectively the management of credit guarantees services provided under contracts for syndicated loans.

Description of the situation

In contracts for syndicated loans, several banks agree setting up of an entity without legal personality, called union, consortium or "pool" bank, with the aim of granting a credit to a client, each bank having its own contribution to that credit.

The purpose of the syndicated loans is the distribution of the risk among several lenders, so as to allow funding of larger projects that otherwise could not be funded due to prudential rules applicable to the lenders. The necessary loan for the client may be too high for one bank or may be outside the scope/strategy of the bank's risk exposure. Syndication allows lenders to provide a large financing, while maintaining an acceptable level of exposure, in accordance with the prudential rules.

In practice, the management of credit and/or the management of credit guarantees are made by one or few of the banks that granted the syndicated loan or by a third party.

According to the practice in this area, one of the banks participating in the syndicate is called by syndicated loan agreement, the credit agent, respectively the guarantees agent.

As a **Credit Agent,** one of the banks, member of the syndicate, aims to fully manage the flow of the financing documents and the cash flow for the client, for the entire granted loan. The Credit Agent is empowered by the other creditor banks to complete all financing documents and to manage financial flows for credit, interest and fees for the syndicated loan.

The management of credit (The Facility Agency) includes in the case of syndicated loans the following activities:

- direct communication with the client, maintaining the communication and the transmission of information between the syndicate and client;
- execution of financing (the release of funds in full or in installments, with verifying contractual conditions);
- processing of payments;
- periodic monitoring of the client's situation, including financial situation and commitments;
- monitoring of project progress and the achievement of plans and commitments;
- conducting the operations related to amendments, applications for exemption by sending documents between the parties and the administration of the voting process;
- cooperation with the Guarantee Agent in different cases related to the management of credit.

For the activity as Credit Agent, the bank charges the client (the debtor in the syndicated loan agreement) with a single commission, called commission for credit agent. This commission is not broken down by individual participating of each bank of the consortium. Also, for this management of credit service, the bank designated as Credit Agent is not paid by the other participating banks.

As a **Guarantees Agent**, one of the bank, member of the syndicate, aims to manage the guarantees received from the client for the entire credit granted by banks participating in the syndicate. Guarantees Agent acts exclusively on the authorizations and instructions of the participating banks and the execution of the credit guarantees can be done only through the Guarantees Agent.

The management of credit guarantees (Security Agency) in the case of syndicated loans include the following activities:

- recording of guarantees: the archive of guarantees, land registry, other notifications (assignment of claims);
- conducting or assisting to conclude insurance policies, where appropriate;
- periodic monitoring of the value and integrity of the guarantees and the coverage of loan guarantees, revaluation of the guarantees;
- additional guarantees, if necessary, depending on the contract.

For the activity as Guarantees Agent, the bank charges the client (the debtor in the syndicated loan agreement) with a single commission, called commission for guarantees agent. This commission is not broken down by individual participating of each bank of the syndicate. Also, for this management of credit guarantees service, the bank designated as Guarantees Agent is not paid by the other participating banks.

The legal framework in terms of VAT

It follows from the provisions of Community and national VAT legislation that the application of the VAT exemption for the management of credit, respectively for the management of credit guarantees is limited to the situation where those activities are performed by the person who granted the credit.

According to Art. 135 para. (1) letter (b) of Directive 2006/112/EC on the common system of VAT, as amended and supplemented (the VAT Directive), Member States shall exempt the granting and the negotiation of credit and **the management of credit by the person granting it.**

According to Art. 135 para. (1) letter (c) of the VAT Directive, Member States shall exempt the negotiation of or any dealings in credit guarantees or any other security for money and **the management of credit guarantees by the person who is granting the credit.**

The provisions of Art. 135 para. (1) letter (b) of the VAT Directive are transposed into national legislation at Art. 141 para. (2) letter (a) point (1) of Law no. 571/2003 regarding the Fiscal Code, as subsequently amended and supplemented (the Fiscal Code), according

to which the granting and the negotiation of credit and **management of credit by the person granting the credit,** are operations exempted from value added tax.

Regarding the provisions of Art. 135 para. (1) letter (c) of the VAT Directive, those are transposed into national legislation at Art. 141 para. (2) letter (a) point (2) of the Fiscal Code, according to which the negotiation of credit guarantees or other guarantees or any operations with such guarantees and the **management of credit guarantees by the person who is granting the credit** are operations exempted from value added tax.

According to the European Union Court of Justice, the exemptions referred to in Article 13 of the Sixth Directive, the equivalent of Art. 135 of Directive 2006/112/EC, constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (Case C-349/96 CPP, paragraph 15; Case C-540/09 Skandinaviska Enskilda Banken, paragraph 19; and Case C-259/11 DTZ, paragraf 19).

It is also established în case-law that the terms used to specify those 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 person (Case C-8/01 Taksatorringen, paragraph 36; Case C-472/03 Arthur Andersen, paragraph 24; Case C-453/05 Ludwig, paragraph 21 and Case C-259/11 DTZ paragraf 20).

Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions provided for in Article 13 of the Sixth Directive, the equivalent of Art. 135 of Directive 2006/112/EC 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 13 should be construed in such a way as to deprive the exemptions of their intended effect (Case C-445/05 Haderer, paragraph 18, Case C-461/08 Don Bosco Onroerend Goed, paragraph 25, and Case C-259/11 DTZ paragraf 21).

In the view of the specialized directorate of the Ministry of Public Finance, both the management of credit service and the management of credit guarantees service provided by the Credit Agent, respectively by the Guarantees Agent for the benefit of the other banks in the syndicate, are not covered by the VAT exemption provided in Art. 135 para. (1) letter (b), respectively Art. 135 para. (1) letter (c) of the VAT Directive.

It is considered that from the analysis of legislative provisions and jurisprudence of the EUCJ were not identified elements that support VAT exemption provided in Art. 135 para. (1) letter (b) and letter (c) of the VAT Directive for the above mentioned services.

Against this background, the business consider that both management of credit and management of credit guarantees provided by the Credit Agent or Guarantees Agent are exempt from VAT, on the following arguments:

- the existence of a single financial services exempt of VAT from the perspective of the client that reimburses a single loan, even if each bank separately records its credit. It is argued that there is only one contract with the client having as principal service, the granting of credit, and ancillary services such as the management of credit, the management of credit garantees, s.a.

- the lack of a direct link, meaning that in case of syndicated loans, there is no indication that the services provided by Credit Agent/Guarantees Agent would be performed for the entities that are granting syndicated loan.

Considering the above mentioned, Romania request a consultation in the VAT Committee regarding the VAT regime applicable to the management of credit services, respectively to the management of credit guarantees services provided under contracts of syndicated loans.

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As stated in our last request, in the opinion of the specialized department of the Ministry of Public Finance, both the management of credit service, and the management of credit guarantee service provided by the Credit Agent, respectively by the Credit Guarantee Agent, for the benefit of the other banks in the syndicate, does not fall under the VAT exemption provided for in art. 135 par. (1) lit. b) of the VAT Directive, respectively art. 135 par. (1) lit. c) of the VAT Directive.

Such conclusion was based on the analysis of the legal framework in which the application of the VAT exemption provided for in the abovementioned articles on the activity of management of credit, respectively the management of credit guarantee is limited only to the case in which those transactions are carried out by the person granting the credit.

As is clear from the settled case-law of the Court of Justice of the European Union, when an operation consists of a set of elements, all the circumstances must be taken into account in order to determine whether there are two or more distinct and independent operations or it is a single operation.

In our opinion, the Agent Bank provides two distinct operations, namely the management of the credit/credit guarantees related to its own credit/guarantees and the administration of the credit/ the credit guarantees related to the credit/guarantees granted by the other participating banks. In support of this opinion, we mention that in the specific case of syndicated loans, the Agent Bank manages a credit, including the related guarantees, to which it contributed only partially, the rest of the contribution to the credit being provided by the other banks.

In addition, we consider relevant that the Agent Bank managing the credit or the guarantees received from the client for the credit granted by the banks participating in the syndicate acts solely on the basis of the mandats and instructions of the participating banks and not on the basis of the client's mandates and instructions.

As it results from the information provided by the banking institutions, in practice for the performance of these activities, the Agent Bank charges a single commission, called commission for credit/guarantee agent. Although this commission paid by the client is not broken by taking into account the part of the bank's own credit and the part related to the credits granted by the other banks, we consider that this commission is partly the counterpart of the management service of its own credit and partly the counterpart of the management service of the other banks' credits.

In our opinion, although the counterpart of the services is paid by the client, the operations are only partially provided for the benefit of the client and partly for the benefit of the other syndicate banks that contribute to the credit.

We believe that in the analyzed situation it cannot be considered that the Credit/Guarantee Agent Bank performs a single transaction from the client's perspective, provided that the client is only one of the beneficiaries of the management services, proportionate to the credit/guarantee granted by the Agent Bank, and the rest of the banks participating in the syndicated loan are partial beneficiaries, for the credit/guarantee provided to the client by these banks.

The VAT exemptions provided for in art. 135 par. (1) lit. (b) and (c) of the VAT Directive would have been applicable only if the Agent Bank would have been a single creditor in respect of the credit and/the related credit guarantees and would have acted in that capacity for the purpose of managing credits and credit guarantees granted.

Actually, the VAT exemption applies only if the management of credit/ credit guarantee is part of a set of activities provided by the creditor to its client, usually within the same contract, and where the granting of credit/ credit guarantees is the main operation and the administration of the credit/ credit guarantees represents for the client a means of obtaining in the best possible conditions of the credit granted by the creditor.

Or, in our case, the management of the credit/credit guarantees by the Agent Bank related to the credit provided by the other participating banks is a service of managing a credit/credit guarantees that have not been provided by the Agent Bank and which is made for the direct benefit of the participating banks and not of the actual beneficiary of the credit, irrespective of the person who actually supports the commission for credit/guarantee agent.

As we mentioned in the request submitted in 2015, according to the provisions of the VAT Directive, as interpreted in accordance with the settled case-law of the Court of Justice of the European Union, the VAT exemptions are to be interpreted strictly.

Accordingly, related to the provisions of national and Community legislation result that from the point of view of VAT, the application of the VAT exemption for the activity of managing of credit and managing of credit guarantees is strictly limited to the situation in which those activities are carried out by the person granting the credit.

In this context, we argue that the VAT regime for the management of the syndicated loan and the credit guarantees associated with the syndicated loan must be analyzed separately depending on the quality of the credit/credit guarantee manager, respectively whether it is also the creditor for the respective credit/credit guarantee.

Regarding the operation consisting in the management of the credit/ credit guarantees provided for the other participating banks, this is a taxable supply.

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As we previous mentioned in the above letters, by this type of credit agreement, are established several creditors jointed in a bank syndicate and there is only one client.

This contract with the client has as a main supply the granting of a credit (this is the purpose for which the client enters into this transaction) as well as ancillary services such as management of credit, management of guarantees etc., that are not a purpose in itself for the client but are services accepted by client as a means of benefiting from the principal supply consisting in granting of credit.

Regarding the management of credit/guarantees, from our point of view it is also important the perspective of the supplier, namely the fact that the agent manages a credit granted by the bank syndicate, a credit to which it has contributed only partially.

In this regard, in the last request, we mentioned that, in the analyzed situation, the credit/guarantees agent bank performs two operations, one for managing its own credit and one for managing the credit of other banks, referring to the fact that the agent bank manages credit in the name and in the account of the syndicate, both for the credit granted by the agent as well as for the credit provided by the rest of the banks.

We also did not find any evidence to argue that the management of its own credit by the bank agent is a main transaction and the management of the credits of the other banks are an accessory to the main supply.

In our opinion, the services provided by the agent bank are made indirectly to the benefit of the syndicate granting the credit, even if the client pays these fees directly to the management/guarantee agent, and the rest of the banks do not pay a remuneration as such to the agent bank. As mentioned above, the agent bank that manages the credit or guarantees acts only on the basis of the mandates and instructions of the participating banks and not on the basis of the client's mandates and instructions.

The VAT exemptions provided in Art. 135 par. (1) let. (b) and (c) of the VAT Directive would have been applicable only if the agent bank had been a single creditor, both in respect of the credit as well as the related credit guarantees and would have acted in that quality for managing credit and credit guarantees granted. This would have been possible if the contractual arrangements within the syndicate would have assumed that the other banks in the syndicate would finance the agent bank and this would have granted the credit in its own name.

Our opinion was based on an analysis of the Community legal framework, from which it results that the application of the VAT exemption for the management of credit and the management of credit guarantee is limited only to the situation where those activities are done by the person granting the credit/guarantee.

We have not identified jurisprudence applicable for the exemptions from Art. 135 par. (1) let. (b) and (c) of the VAT Directive, in case where the credit is managed by a person other than the one who granted the credit, and this is also one of the main reasons why we have addressed to the VAT Committee for consultation.

From our point of view, the application of the exemption for the management of syndicated credit made by the agent bank would be an extension of the VAT exemption provided by Art. 135 par. (1) let. (b) and (c) of the VAT Directive. In this respect, the CJEU has been ruled in the jurisprudence cited in our first request from 2015, from which it results that the VAT exemptions are of strict interpretation.

If we go on an extended approach of the exemption, it would mean that any person other than the one who granted the credit can benefit from VAT exemption for the management of credit.

Even by analyzing the management of credit itself, difficulties arise in establishing the VAT regime, as it implies, as we have set out in the previous requests, a set of activities, including the collection of interest due for the credit granted by the lender. Concerning the activities consisting in collecting the interest due for the credit granted by the lender (which in fact represents the core supply of management of credit), the CJEU established in AXA case (C-175/2009) that the collection, processing and subsequent payment of sums of money due as debits by a third party are specifically excluded from the VAT exemption provided for in Art. 135 par. (1) let. d) of the VAT Directive.

In conclusion, in the case of the management of credit, it is difficult to establish whether the simple collection of the interest rate should be excluded from the exception for the management of credit as a separate taxable transaction or if the collection of interest is ancillary in the context of the process of the management of credit. By way of example, it should be noted that on the basis of the guidance provided by the CJEU in CPP C-349/96, the service of collecting the interest would have a purpose in itself for the client, which leads to separate treatment for tax purposes.

In the absence of appropriate clarifications in the European jurisprudence, we consider that in relation to the provisions of the VAT Directive, the management of credit service and the management of credit guarantee service provided by the credit agent, respectively by the guarantee agent, for the benefit of the other banks from the syndicate, did not fall under the VAT exemption stipulated in Art. 135 par. (1) let. b), respectively Art. 135 par. (1) let. c) of the VAT Directive.