

# Article

## *The Comitology Proposal: Shifting the Legislative Balances in EU VAT*

John Gruson\* & Madeleine Merckx\*\*

*In this article the authors address the proposal to transform the status of the VAT Committee into a ‘comitology committee’ tabled by the European Commission in December 2020. The proposal basically confers implementation powers to the Commission via comitology in the area of EU Value Added Tax (hereinafter: VAT). If adopted by the EU Member States, this would lead to a groundbreaking situation in which for the first time in the area of taxation the decision-making based on unanimity of EU Member States is dropped in an area that does directly affect the EU Member States’ national tax revenues. The authors take this opportunity to explain the function and the consequences of the comitology procedure. After describing the core of the proposal, the authors pay a visit to other legislative areas in taxation where the comitology procedures apply before they dive deep in the scope of the powers granted under the proposal and reach a conclusion. The authors doubt whether the proposal will be adopted and whether EU Member States are prepared to confer more powers to the European Commission.*

**Keywords:** VAT (Value Added Tax), legislative process, VAT Committee, proposal, comitology, implementing powers, interpretation, QMV (Qualified Majority Voting)

### 1 INTRODUCTION

On 15 July 2020 the European Commission presented its Action Plan for Fair and Simple Taxation supporting the Recovery Strategy in a Communication to the European Parliament and the Council.<sup>1</sup> One of the twenty-five actions in the field of direct and indirect taxation to enforce existing tax rules and improve tax compliance that were announced was the initiative to transform the status of the VAT Committee into a ‘comitology committee’. The initiative matured into a proposal, tabled by the European Commission on 18 December 2020, basically conferring implementation powers to the Commission via comitology in the area of EU VAT.<sup>2</sup> If adopted, the proposal would shift the legislative balances in EU VAT. However, unfamiliarity breeds suspicion, certainly in the field of taxation, as comitology is a new phenomenon in the area of EU VAT, even if it has proven to be a common procedure within the field of EU lawmaking. In the authors’ view,

the proposal could have benefited more from a more precise description of how comitology exactly works. In this contribution the authors take the opportunity to fix this deficiency. In section 2 and section 3 the authors will discuss the current legislative balances in EU VAT and the current status and role of the VAT Committee, respectively, before describing the comitology procedure in detail in section 4. The authors describe the core of the proposal of the Commission in section 5. The authors will then pay a visit to other legislative areas in taxation where the comitology procedures apply in section 6, before they dive deep in the scope of the powers granted under the proposal in section 7. A conclusion can be found in the final section.

### 2 THE CURRENT LEGISLATIVE BALANCES IN EU VAT

Unanimity is the rule in the current legislative process in the field of EU tax law. The decision-making process has been closely linked to national sovereignty, due to its role in national revenues, budgets and policy choices. According to the Commission, Member States have defended this sovereignty and seen decision-making based on unanimity, entailing the possibility of a national veto, as a means of protecting it. As a result, the successive Treaties retained the general rule that the Council must decide unanimously on proposals in the area of taxation before they can be adopted at EU level.<sup>3</sup>

\* Indirect tax advisor at the Tax Research Centre of Deloitte the Netherlands in Rotterdam and a lecturer and researcher at Erasmus University Rotterdam. Email: gruson@ese.eur.nl.

\*\* An endowed professor of indirect taxes at Erasmus University Rotterdam and a partner at the Tax Research Centre of BDO The Netherlands. Email: merckx@law.eur.nl.

<sup>1</sup> Communication from the Commission to the European Parliament and the Council – An action plan for fair and simple taxation supporting the recovery strategy, Brussels 15 July 2020, COM (2020) 312 final.

<sup>2</sup> Proposal for a Council directive amending Directive 2006/112/EC as regards conferral of implementing powers to the Commission to determine the meaning of the terms used in certain provisions of that Directive, Brussels 18 Dec. 2020, COM (2020) 749 final.

<sup>3</sup> Communication from the Commission to the European parliament, the European Council and the Council Towards a more efficient and democratic decision making in EU tax policy, Strasbourg, 15 Jan. 2019, COM/2019/8 final.

The Commission has fought several times in vain for a switch to qualified majority voting in EU tax policy in the context of Treaty changes, particularly in the field of indirect taxation. However, Member States such as the United Kingdom were able to block this route.<sup>4</sup>

When focusing on VAT, binding implementing measures to make changes to the VAT Directive may only be adopted by the Council by unanimity based on a Commission proposal (Article 397 of the VAT Directive). Despite the required unanimity, an admirable amount of progress in EU tax policy was made in recent years, but largely in response to public pressure and external influence, focusing on the battle against VAT fraud and to reform the VAT rules applied to e-commerce. However, as the Commission mentioned in its 2019 Communication there have been several proposals in the field of VAT on which Member States could not reach unanimity, e.g., the proposal on the Standard VAT Return. In recent years, France and the Czech Republic locked horns and vetoed the proposal for applying the reduced VAT rate applied to e-publications<sup>5</sup> (favoured by France) and the proposal for the temporary application of a generalized reverse charge mechanism<sup>6</sup> (favoured by the Czech Republic). In the end both proposals were adopted, but only after several rounds of negotiations.

In 2019, the Commission started a policy debate on reforming the EU's decision-making in taxation and called on the European Council, the European Parliament, the Council and all stakeholders to launch an open debate on qualified majority voting in EU tax policy with an increased involvement of the European Parliament. In its 2019 Communication 'Towards a more efficient and democratic decision making in EU tax policy'<sup>7</sup> the Commission suggests a roadmap for a progressive and targeted transition to qualified majority voting under the ordinary legislative procedure in certain areas of shared EU tax policy. The Commission suggested four steps for a fairer and more efficient taxation policy, ranging from the introduction to qualified majority voting decision-making for measures that improve cooperation and mutual assistance between Member States in fighting tax fraud/tax evasion and for administrative initiatives for EU businesses (step 1), to advance

tax measures as a support tool for other policy goals, such as revising the Energy Tax Directive in view of the EU Green Deal (step 2), to measures that help modernize already harmonized EU rules, such as VAT (step 3), and to major tax projects, e.g., CCCTB (step 4). However, at the next Economic and Financial Affairs Council (ECOFIN) meeting after the publication of the Communication certain number of Member States was opposed to any changes to the current voting rules in taxation. In 2019 the new European Commission took up the challenge again to table proposals that would introduce qualified majority voting.<sup>8</sup> In the Action Plan for Fair and Simple Taxation supporting the Recovery Strategy<sup>9</sup> it is mentioned that in the context to fully deliver on the EU's fair tax agenda, the Commission will explore how to make full use of the provisions of the Treaty on the Functioning of the EU (hereinafter: TFEU) that allow proposals on taxation to be adopted by ordinary legislative procedure, including Article 116 TFEU the 'nuclear option' for qualified majority tax reform in the EU.<sup>10</sup> So far, no proposals in that regard have been tabled in 2021.

### 3 THE CURRENT STATUS AND ROLE OF THE VAT COMMITTEE

The VAT Committee in its present form is an advisory committee set up under Article 398 of the VAT Directive in 1977 and its purpose is to promote the uniform application of the provisions of the VAT Directive. The VAT Committee consists of representatives of the Member States and of the European Commission. Details of its current functions have been laid down in the rules of procedure.<sup>11</sup> With the help of Article 3 of this document a distinction can be made between several functions. On the one hand the wording of certain provisions in the VAT Directive demonstrates the extent to which the involvement of the VAT Committee is required on certain matters:

- Consultations involve points upon which the Committee is being consulted under the VAT Directive;
- Notifications refer to points upon which the Committee is being notified of certain measures Member States have taken.

On the other hand, the Member States are allowed to ask the VAT Committee to answer questions on certain matters or issues:

<sup>4</sup> See R. de la Feria, *The EU VAT System and the Internal Market* 41–43 (IBFD 2009).

<sup>5</sup> Council directive (EU) 2018/1713 of 6 Nov. 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals, Official Journal L 286, 14 Nov. 2018.

<sup>6</sup> Council Directive (EU) 2018/2057 of 20 Dec. 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalized reverse charge mechanism in relation to supplies of goods and services above a certain threshold, Official Journal L 329, 27 Dec. 2018.

<sup>7</sup> Communication from the Commission to the European parliament, the European Council and the Council Towards a more efficient and democratic decision making in EU tax policy, Strasbourg, 15 Jan. 2019, COM/2019/8 final.

<sup>8</sup> J. Englisch, *Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?*, (2) EC Tax Rev. 58 (2020).

<sup>9</sup> Communication from the Commission to the European Parliament and the Council – An action plan for fair and simple taxation supporting the recovery strategy, Brussels 15 July 2020, COM (2020) 312 final, at 2.

<sup>10</sup> See Englisch, *supra* n. 8.

<sup>11</sup> VAT Committee rules of procedure, Working Paper No 756 final, taxud.c.1(2013)1103950 – EN.

- matters concerning the application of EU VAT provisions referred to the Committee for consideration, either on the initiative of the Chair, or at the written request of a Member State;
- matters concerning the implementation of recently adopted EU VAT provisions;
- issues arising from recent judgments of the Court of Justice of the European Union.

With regard to points upon which the Committee is being consulted, there is a number of provisions of the VAT Directive which require Member States to consult the VAT Committee before they make use in their national legislation of options provided to them by the VAT Directive. The most recent example is the consultation on the introduction of the VAT grouping scheme in the national legislation by Poland<sup>12</sup> and France.<sup>13</sup> The very wording of Article 11 of the VAT Directive makes it clear that this scheme can only be implemented after the VAT Committee has been consulted. The same holds for the introduction in the national legislation of measures in relation to the following points:

- Article 27 the self-supply of services for business use;
- Article 102 applying a reduced rate to the supply of natural gas, electricity or district heating;
- Articles 155–164 the implementation of exemptions for transactions relating to international trade;
- Article 177, the exclusion of all or some capital goods or other goods from the system of deductions for cyclical economic reasons;
- Article 191 situations where the practical effect of the adjustment rules is negligible;
- Article 238 simplified invoices;
- Article 281 setting simplified procedures for charging and collection VAT regarding the special scheme for small enterprises;
- Article 318 determining the taxable amount in respect of supplies of goods subject to the margin scheme; and
- Article 352 applying VAT to specific transactions relating to investment gold.

Not all optional provisions of the VAT Directive require prior consultation of the VAT Committee. Instead, Member States may have to notify the VAT Committee after national legislation has been put in place. These optional provisions are:

- Article 80 taking measures to ensure that the taxable amount is the open market value for supplies of goods or services in case of close personal ties between the supplier and the customer;

<sup>12</sup> Consultation from Poland on VAT grouping, Working Paper No 997, taxud.c.1(2020)5961603 – EN.

<sup>13</sup> Consultation from France on VAT grouping, Working Paper No 1002, taxud.c.1(2020)6421312 – EN.

- Article 167a taking measures within an optional scheme for cash accounting to postpone the right of deduction of a taxable person until the VAT on the goods or services supplied to him has been paid to his supplier; and
- Articles 199, 199a and 199b regarding the introduction of the reverse charge mechanism connected with (mostly) immovable property on permanent bases, to combat the missing trader fraud in intra-Community trade ('MTIC') on a temporary basis and a Quick Reaction Mechanism ('QRM') applying until 30 June 2022, respectively.

The question asked by the Netherlands on the correct VAT treatment of 'combined lifestyle intervention'<sup>14</sup> is an arbitrary illustration of dealing with a matter concerning the application of EU VAT provisions referred to the Committee for consideration at the written request of a Member State, whereas the most recent case of recent matters concerning the implementation of recently adopted EU VAT provisions can be found in the questions asked about call-off stocks and Brexit against the background of the implementation of the Quick Fixes Package.<sup>15</sup> Finally, the request from Sweden to discuss certain issues linked with the judgment of the Court of Justice of the European Union (hereinafter: CJEU) in case C-647/17 *Srf konsulterna* is an example of issues arising from recent judgments of the CJEU.<sup>16</sup>

According to the rules of procedure, where the issue is of general interest and the conclusions of the Committee are supported by a clear majority consisting of nineteen Member States or more, the Committee will issue guidelines.<sup>17</sup> The guidelines on the application of the VAT Directive issued by the VAT Committee are merely views of an advisory committee and are therefore legally non-binding. They do not constitute an official interpretation of EU law and do not necessarily have the agreement of the European Commission. Moreover, they do not bind the European Commission or the Member States which are free not to follow them. In other words, they do not offer legal certainty. As a result, the VAT Committee guidelines can be regarded as an instrument of 'soft law', which has its advantages and its disadvantages.<sup>18</sup>

However, the authors note that some VAT Committee guidelines became binding implementing measures following the traditional legislative process of Article 397 VAT Directive in the past. These measures, which are

<sup>14</sup> Combined lifestyle intervention, Working paper No 981, taxud.c.1(2019)7741025.

<sup>15</sup> Call-off stocks and Brexit, Working paper No 998, taxud.c.1(2020)5963313.

<sup>16</sup> Case C-647/17 *Srf konsulterna*, Working Paper No 982, taxud.c.1(2019)7743552.

<sup>17</sup> Article 4 of the VAT Committee rules of procedure, Working Paper No 756 final, taxud.c.1(2013)1103950 – EN.

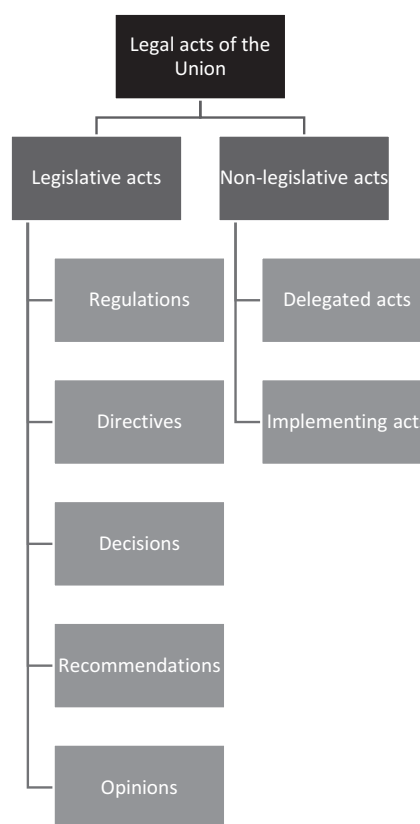
<sup>18</sup> See M. Lamensch, *Soft Law and EU VAT: From Informal to Inclusive Governance?*, 5(1) World J. VAT/GST L. 9–13 (2016).

directly applicable without transposition into national law, can be found in the VAT Implementing Regulation. For example, the guidelines concerning the definition of and the services connected with immovable property<sup>19</sup> found their way to Article 13b, Article 31a and Article 31b.

#### 4 WHAT IS COMITOLGY?

Although comitology is a new phenomenon in the area of EU VAT it is not an uncommon procedure within the field of EU lawmaking. In fact, comitology committees that are composed of representatives of EU Member States' administrations and chaired by a member of the European Commission are one of the oldest forms of administrative collaboration between the EU institutions and national administrations and have been applied since the 1960s.<sup>20</sup> Comitology committees enable the EU Member States' administrations to participate and control the Commissions' exercise of implementing powers.<sup>21</sup>

With the Lisbon Treaty a distinction has been made between legislative and other acts. Legislative acts are defined by Article 288 TFEU and consist of regulations, directives, decisions, recommendations and opinions. Non-legislative acts are delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Whether an act qualifies as a legislative or non-legislative act depends on the decision-making procedure that has been followed, not on its supposed legislative content or on account of having been adopted by the European Parliament and the Council.<sup>22</sup> Both legislative and non-legislative acts may include generally binding rules.<sup>23</sup> Legislative acts are adopted through the ordinary legislative procedure (Article 294 TFEU) or through a special legislative procedure (Article 289 (2) TFEU). Legislative acts are adopted on a proposal from the Commission and draft legislative acts must be submitted to the subsidiarity control of national parliaments. They cannot be adopted within a period of eight weeks after their transmission to the national parliaments.<sup>24</sup> The above can be represented schematically as follows:



Before the Lisbon Treaty the CJEU had defined the distinction between legislative and implementing acts in the *Köster case*.<sup>25</sup> In that case the CJEU ruled that there is a difference between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. The CJEU also ruled that it cannot be a requirement that all the details of the regulations concerning a certain area are drawn up by the Council according to the legislative procedure. It is sufficient that the basic elements of the matter to be dealt with have been adopted in accordance with that procedure. The provisions implementing the basic regulations may be adopted according to a different procedure, either by the Council itself or by the Commission by virtue of an authorization.

Under Article 290 (1) TFEU a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. In the *Biocides case* the CJEU made clear that the purpose of granting a delegated power under Article 290 TFEU is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act.<sup>26</sup> Under Article 291 TFEU where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers

<sup>19</sup> Guidelines resulting from the 93rd meeting of 1 July 2011, Document A – taxud.c.1(2012)400557–707.

<sup>20</sup> Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin, Bruno De Witte, Alison McDonnell & Stefaan Van den Bogaert, *The Law of the European Union* 273 (Kluwer Law International, the Netherlands 2018).

<sup>21</sup> *Ibid.*, at 276.

<sup>22</sup> *Ibid.*, at 238.

<sup>23</sup> Wim Voermans, *Delegation Is a Matter of Confidence: The New EU Delegation System Under the Treaty of Lisbon*, 17(2) Eur. Pub. L. 317 (2011).

<sup>24</sup> Jan Kuijper, Amtenbrink, Curtin, De Witte, McDonnell & Van den Bogaert, *supra* n. 20, at 239.

<sup>25</sup> CJEU 17 Dec. 1970, 25/70, ECLI:EU:C:1970:115.

<sup>26</sup> CJEU 18 Mar. 2014, C-427/12, ECLI:EU:C:2014:170, para. 38.

on the Commission. In the *Biocides case* the CJEU also made clear that with implementing acts the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States.<sup>27</sup> Implementing acts can be purely technical but may also deal with significantly more complex issues.<sup>28</sup>

Basic or essential elements cannot be delegated and are provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature.<sup>29</sup> According to the CJEU ascertaining which elements of a matter must be categorized as essential is not for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review.<sup>30</sup> According to the CJEU this requires account to be taken of the characteristics and particular features of the field concerned.<sup>31</sup> From the *SBC* and *Europol case*<sup>32</sup> it becomes apparent that the CJEU checks the measure in question in relation to the objective and relevant provisions in the legislature as well as the context of that legislature.

Regulation 182/2011<sup>33</sup> lays down the rules and general principles regarding implementing acts. The regulation provides for two procedures: the advisory and examination procedure, Article 2 (1) of Regulation 182/2011. For programmes with substantial budgetary implications or directed to third countries the examination procedure applies. Taxation is one of those areas, Article 2 (2) (v) Regulation 182/2011. The authors will only discuss the examination procedure, because the advisory procedure cannot be applied in the area of taxation.

In case the European Commission wants to adopt an implementing act it will need to table a proposal. Members of a comitology committee will be allowed to suggest amendments to the proposal and the European Commission, as chair of the meeting, can present amended versions of the draft implementing act, Article 3 (4) Regulation 182/2011. The chair will also need to endeavour to find solutions which command the widest possible support within the committee. The chair shall inform the committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards those

suggestions which have been largely supported within the committee, Article 3 (4) Regulation 182/2011.

Under the examination procedure an opinion of the committee must be adopted with qualified majority. According to Article 5 (1) of Regulation 182/2011 and Article 16 (4) and (5) Treaty on European Union (hereinafter: TEU) a qualified majority is as at least 55% of the members, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. The chair does not vote, Article 3 (2) Regulation 182/2011. In case the committee gives a positive opinion, the implementing act will be adopted, Article 5 (2) Regulation 182/2011. In case the committee gives a negative opinion, the Commission shall not adopt the draft implementing act, Article 5 (3) Regulation 182/2011. In case of no opinion the Commission cannot adopt the draft implementing act either, Article 5 (4) Regulation 182/2011. Both in the situation of a negative and no opinion where an implementing act is deemed to be necessary, the chair may either submit an amended version of the draft implementing act to the same committee within two months of delivery of the negative or no opinion, or submit the draft implementing act within one month of such delivery to the appeal committee for further deliberation, Article 5 (3) and (4) Regulation 182/2011.

The appeal committee is composed of high-level Member States' representatives.<sup>34</sup> The procedure applied is the same as for the comitology committee, Article 6 Regulation 182/2011. The draft implementing act can be adopted in case of a positive opinion or no opinion, Article 6 (3) Regulation 182/2011. The Commission can also adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU. The latter situation deals with fraud and illegal activities affecting the financial interests of the EU. This may occur in the field of VAT since part of the EU Member States' VAT income is part of the EU's own resources. In that case, the Commission shall immediately submit the adopted implementing act to the appeal committee. Where the appeal committee delivers a negative opinion on the adopted implementing act, the Commission shall repeal that act immediately. Where the appeal committee delivers a positive opinion or no opinion is delivered, the implementing act shall remain in force, Article 7 Regulation 182/2011.

Under Article 11 Regulation 182/2011 the European Parliament and the Council have a right of scrutiny. They may both indicate to the Commission that a draft implementing act in their view exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act,

<sup>27</sup> CJEU *Biocides*, para. 39.

<sup>28</sup> Jan Kuijper, Amtenbrink, Curtin, De Witte, McDonnell & Van den Bogaert, *supra* n. 20, at 281.

<sup>29</sup> CJEU 5 Sept. 2010, C-355/10, ECLI:EU:C:2012:516, paras 64 and 65.

<sup>30</sup> CJEU C-355/10, para. 67.

<sup>31</sup> CJEU 10 Sept. 2015, C-363/14, ECLI:EU:C:2015:579, para. 47.

<sup>32</sup> CJEU 10 Sept. 2015, C-363/14, ECLI:EU:C:2015:579.

<sup>33</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28 Feb. 2011, at 13–18.

<sup>34</sup> Jan Kuijper, Amtenbrink, Curtin, De Witte, McDonnell & Van den Bogaert, *supra* n. 20, at 278.

taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act. Article 11 Regulation 182/2011 only applies in case the basic act was adopted under the ordinary legislative procedure. In the area of EU VAT, the right of scrutiny does not apply, because the harmonization of turnover taxes under Article 113 of the TFEU takes place by a special legislative procedure.

## 5 THE EUROPEAN COMMISSION'S PROPOSAL

As announced in the Communication on an Action Plan for Fair and Simple Taxation supporting the Recovery Strategy the European Commission<sup>35</sup> at the end of 2020 tabled a proposal<sup>36</sup> that confers implementing powers to the European Commission in the area of EU VAT. It is a legislative instrument which is currently not applied with respect to the EU VAT Directive. The objective of the proposal is to allow for a more uniform application of the EU VAT legislation.

A non-uniform interpretation of EU law in the field of VAT could lead to double or non-taxation, legal uncertainty, additional costs for businesses and distortion of competition. There are currently two options in these situations. The first one is that businesses file a cross border ruling request under the cross-border ruling pilot.<sup>37</sup> However, not all EU Member States participate in this project and a solution consisting of a uniform interpretation is not guaranteed. The second option is to start judicial proceedings, the aim of which is to obtain clarification from the Court of Justice on the correct interpretation of a particular provision of the VAT Directive. This however takes considerable time and costs money. More generally speaking the ruling from the CJEU will resolve the uncertainty in the case at hand, but may not resolve all uncertainties, given the fact that CJEU rulings are made against the backdrop of the factual situation at hand. And the CJEU ruling might provide for an interpretation that EU Member States do not agree upon. A clear example of this is the interpretation of the cost sharing exemption, where the CJEU restricted the application of this exemption to situations where the members of the cost sharing organization carry out supplies exempt from VAT under Article 132 VAT Directive (and not Article 135 VAT Directive).<sup>38</sup>

Article 291 (2) TFEU allows for an implementation of a legislative situation where the European Commission can adopt implementing acts in certain areas, as now proposed in the area of EU VAT. The adoption of these implementing acts is overseen by a committee. The proposal allows the European Commission to adopt implementing measures to define the meaning of terms referred to in the VAT Directive in respect of terms concerning the following topics:

- Provisions in Title III and Annex I regarding taxable persons, for example terms like ‘occasional basis’ (Article 9 VAT Directive).
- Provisions in Title IV regarding taxable transactions, for example terms like ‘tangible property’ (Article 14 VAT Directive).
- Provisions in Title V and Annex II regarding the place of taxable transactions, for example terms like ‘assembly and installation’ (Article 36 VAT Directive).
- Provisions in Title VI regarding the chargeable event and the chargeability of VAT, for example terms like ‘payment on account’ (Article 65 VAT Directive).
- Provisions in Title VII regarding the taxable amount, for example terms like ‘subsidies directly linked to the price of the supply’ (Article 73 VAT Directive).
- Provisions in Title IX regarding exemptions.
- Provisions in Title X regarding deductions.
- Provisions in Title XI and Annex VI regarding obligations of taxable persons and certain non-taxable persons, for example terms like ‘intervention’ (Article 192a VAT Directive).
- Provisions in Title XII and Annexes VII, VIII and IX regarding special schemes.

The current legislative procedures in which the European Council exercises the power to adopt either provisions in the VAT Directive or in the VAT Implementing Regulation are maintained in the proposal as regards measures necessary to implement the provisions in Title I (subject matter and scope), Title VIII and Annexes III and IV (rates), Title XIII and Annex X (derogations) and Annex V (warehousing) VAT Directive, including provisions defining terms used in those Titles and Annexes. According to the explanatory memorandum to the proposal these topics are particularly sensitive for EU Member States.<sup>39</sup> The current legislative procedures will also apply in any case where measures do not entail a determination of the meaning of terms used in the provisions of the VAT Directive. As such, the powers of the European Commission are strictly limited to implementing acts defining terms in certain provisions of the VAT Directive. The European Commission under the proposal will not have the power

<sup>35</sup> Communication from the Commission to the European Parliament and the Council – An action plan for fair and simple taxation supporting the recovery strategy, Brussels 15 July 2020, COM (2020) 312 final.

<sup>36</sup> Proposal for a Council Directive amending Directive 2006/112/EC as regards conferral of implementing powers to the Commission to determine the meaning of terms used in certain provisions of the Directive, Brussels 18 Dec. 2020, COM (2020) 749 final, 2020/0331 (CNS).

<sup>37</sup> [https://ec.europa.eu/taxation\\_customs/business/vat/vat-cross-border-rulings-cbr\\_en](https://ec.europa.eu/taxation_customs/business/vat/vat-cross-border-rulings-cbr_en) (accessed 27 Apr. 2021).

<sup>38</sup> These issues are pointed out by the European Commission in its Explanatory Memorandum in the proposal in s. 1.

<sup>39</sup> Section 4 of the explanatory memorandum.

to adopt implementing acts in the following four situations:

- When it regards provisions that allow EU Member States to exercise an option as regards the decision of EU Member States whether or not to apply this option. In the authors' view this means that with implementing acts the European Commission cannot, with a majority of the VAT committee, decide on whether or not a specific EU Member State should for example implement or not implement VAT grouping in its national legislation.
- When it regards provisions containing express reference to terms to be defined by the EU Member States, when it concerns the definition of these terms, for example terms like 'special investment fund' in Article 135 (1) (g) VAT Directive.
- When it concerns provisions where conditions, procedures and rules are to be determined by EU Member States in so far as those conditions, procedures and rules are concerned, for example the modification of the taxable amount under Article 90 VAT Directive.
- Provisions on the tax reference number in Article 239 VAT Directive.

The examination procedure (addressed in section 4) will apply to these implementing acts meaning that the European Commission cannot act alone when adopting implementing acts. It will need to obtain a positive opinion of the VAT committee. A negative or no opinion will not allow for adopting implementing acts.

The VAT committee will also keep its role as the body in charge of examining consultations provided for under the VAT Directive, for example in Article 11 VAT Directive. The VAT committee will also be allowed to examine any other matters on application of Union provisions on VAT. In these areas it will however only be allowed to issue non-binding guidelines as is currently the situation (see section 3).

It should be noted that with respect to the proposal the current Article 397 VAT Directive is being replaced. Article 397 VAT Directive currently provides for the legal basis of the VAT Implementing Regulation.<sup>40</sup> Adoption of the comitology proposal from the European Commission will therefore mean that the instrument of the VAT Implementing Regulation will no longer be applied in certain areas of EU VAT. The relevance of the VAT Implementing Regulation as it is will also gradually disappear in those areas, as is shown by the new Article 397a (2) in the proposal. In case of any implementing act that has the same scope as the provisions in the VAT Implementing Regulation the provisions in the

VAT Implementing Regulation will have to be deleted. The VAT Implementing Regulation, as is shown by the second recital of the preamble of this regulation, also has similar purposes compared to the current proposal. A uniform application of the EU VAT rules in case of provisions that can be subject to different interpretation.

With the current proposal in the authors' view the Commission tries to achieve to apply a different procedure to create implementing acts that are equally binding compared to the VAT Implementing Regulation, but that do not require unanimity as is the case with the adoption of an implementing regulation. The control of the European parliament and national parliaments will be circumvented as well. It should however be noted that the scope of the proposal is less wide than the current VAT Implementing Regulation. For example, the VAT Implementing Regulation contains provisions on the implementation of Title I, while this is not allowed under the proposal. In respect of such matters the Council will still need to adopt implementing measures if necessary. The authors assume that this will be done by amending or supplementing the VAT Implementing Regulation, although it is no longer explicitly stated that this particular instrument must be used. The powers granted to the Commission under the proposal are also strictly limited to the determination of the meaning of terms used in the VAT Directive. Any interpretation that goes beyond the scope of the meaning of terms is still reserved for the Council. We will elaborate on this further in section 7.

## 6 OTHER LEGISLATIVE AREAS IN TAXATION WITH COMITOLGY PROCEDURES

Comitology procedures apply in other legislative areas in taxation as well. A clear example is customs law where both a delegated regulation<sup>41</sup> based on Article 290 TFEU and an implementing regulation<sup>42</sup> under Article 291 TFEU provide for the legislative framework for EU customs law together with the Union Customs Code (UCC).<sup>43</sup> The legal basis for the implementing regulation can be found in Article 285 UCC. This article states that the commission will be assisted by the Customs Code Committee, which is a comitology committee under Regulation 182/2011. There is no specific limitation as

<sup>40</sup> Council Implementing Regulation (EU) No 282/2011 of 15 Mar. 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23 Mar. 2011, at 1–22.

<sup>41</sup> Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 29 Dec. 2015, at 1–557.

<sup>42</sup> Commission Implementing Regulation (EU) 2015/2447 of 24 Nov. 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 29 Dec. 2015, at 558–893.

<sup>43</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code OJ L 269, 10 Oct. 2013, at 1–101.

to what implementing measures can be adopted, where in the EU VAT comitology proposal the powers of the commission are limited to the definition of terms in the VAT Directive. The Implementing Regulation contains 350 articles that deal with various topics. It should also be noted that customs duties are part of the own resources of the EU. Implementing acts adopted under the comitology procedure will thus not affect the EU Member States' tax revenues directly.

Other areas of indirect taxes where comitology procedures are used are:

- Standing Committee on Administrative Cooperation assisting the commission as regards implementing measures under Regulation 904/2010.<sup>44</sup>
- Committee for Mutual Assistance on Recovery of Claims under the Recovery Directive.<sup>45</sup>
- Committee on Excise Duty under the Excise Duty Directive<sup>46</sup> and the Council Regulation 389/2012 on administrative cooperation in the field of excise duties.<sup>47</sup>

In Regulation 904/2010 the implementing powers are specifically defined and cover practical arrangements, technical arrangements, procedures and standard forms with the exception of Article 14 (1) Regulation where the categories of information subject to automatic exchange are set.<sup>48</sup> Again implementing acts adopted under the

comitology procedure do not directly affect EU Member States tax revenues, because the Directive deals with administrative cooperation only.

The Recovery directive (Directive 2010/24/EU) also provides for a comitology procedure. With reference to Article 25 of the Recovery directive Article 26 states that the commission shall adopt detailed rules for implementing certain articles.<sup>49</sup> As under the Regulation of administrative cooperation these arrangements too are practical arrangements, standard forms and means of communication and the implementing powers granted to the commission do not affect the tax revenues of EU Member States directly.

The Committee on Excise Duty assists the European Commission when implementing acts regarding: the form and content of the exemption certificate (Article 13 (2) Excise duty directive), exchange of messages and the structure of the paper documents (Article 29 (1) Excise duty directive) and form and content of the accompanying document (Article 34 Excise Duty Directive). Article 44 of the Excise Duty Directive states that the committee on Excise Duty shall examine matters concerning the application of Community provisions on excise duty raised by its chairmen either on its own

<sup>44</sup> Council Regulation (EU) No 904/2010 of 7 Oct. 2010 on administrative cooperation and combating fraud in the field of value added tax OJ L 268, 12 Oct. 2010, at 1–18.

<sup>45</sup> Council Directive 2010/24/EU of 16 Mar. 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31 Mar. 2010, at 1–12.

<sup>46</sup> Council Directive 2008/118/EC of 16 Dec. 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 14 Jan. 2009, at 12–30.

<sup>47</sup> Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004, OJ L 121, 8 May 2012, at 1–15.

<sup>48</sup> The Standing Committee on Administrative Cooperation assists the committee as regards rules regarding: the refusal to respond to an enquiry (Art. 7(4) Regulation), standard forms (Arts 8 and 14 (3) Regulation), determining (1) the exact categories of information subject to automatic exchange, (2) the frequency of the automatic exchange for each category of information and (3) the practical arrangements for the automatic exchange of information (Art. 14 (1) Regulation), feedback (Art. 16 Regulation), technical details concerning the automated enquiry of the information (Art. 17 (2) Regulation), determine which changes are not pertinent, essential or useful and therefore need not be made to the electronic system for storage and exchange of special information by Member States (Art. 19 (2) Regulation), details and format of the information to be submitted (Art. 32 (2) Regulation), the technical details as regards transmitting information and returns, including a common electronic message, under the Mini One Stop Shop (Arts 39, 40, 44 and 45 Regulation), the technical details, including a common electronic message by which information is to be transmitted under Directive 2008/9/EC (Refund Directive) (Art. 48 (2) Regulation), harmonized codes under Directive 2008/9/EC (Art. 48 (3) Regulation), a list of statistical data needed for evaluation of this Regulation (Art. 49 (3) Regulation), arrangements for communication of information (Art. 51 (1) Regulation), a service level agreement ensuring the technical quality and quantity of the services to be delivered by the Commission and the Member States for the

functioning of communication and information exchange systems (Art. 53 Regulation) and a minimum threshold triggering a request for assistance (Art. 54 (7) Regulation). The Standing Committee on Administrative Cooperation also has other functions. It reviews the results of automatic exchange (Art. 14 (1) Regulation), the EU Member States need to inform the committee of measures implemented at national level to ensure the quality and reliability of the information (Art. 22 (2) Regulation) and Eurofisc working field coordinators shall submit an annual report of the activities of all working fields to the Committee (Art. 37 Regulation).

<sup>49</sup> 1. Article 4 (2), (3) and 4 dealing with designating central liaison offices and liaison departments.  
2. Article 5 (1) regarding requests for information.  
3. Article 8 concerning requests for notification of certain documents relating to claims  
4. Article 10 dealing with requests for recovery.  
5. Article 12 (1) dealing with the uniform instrument permitting enforcement  
6. Article 13 (2), (3), (4) and (5) regarding the execution of the request for recovery  
7. Article 15 concerning amendment or withdrawal of the request for recovery assistance  
8. Article 16 (1) relating to requests for precautionary measures  
9. Article 21 (1) regarding standard forms.

Those rules shall relate to at least the following:

- (a) the practical arrangements with regard to the organization of the contacts between the central liaison offices, the other liaison offices and the liaison departments, referred to in Art. 4(2), (3) and (4), of different Member States, and the contacts with the Commission;
- (b) the means by which communications between authorities may be transmitted;
- (c) the format and other details of the standard forms to be used for the purposes of Art. 5(1), Arts 8, 10(1), Art. 12(1) and Art. 16 (1);
- (d) the conversion of the sums to be recovered and the transfer of sums recovered. Both directives and the comitology procedure are addressed by Marius Vascega and Servaas van Thiel, 'Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation', EC Tax Review 2011–3, at 154.



initiative or at the request of the representative of a Member State. The Committee on Excise Duty also assists the European Commission as regards implementing powers under Regulation 389/2012.<sup>50</sup> The Commission may also adopt implementing acts to determine the situations where the competent authorities may consider the computerized system unavailable for the purposes of paragraph 4 of Article 15 Regulation relating to the exchange of information without prior request. The authors again note that the comitology procedure in the area of excise duties is limited to measures that do not directly affect EU Member States tax revenues and are comparable to those discussed previously in this section.

Adoption of implementing measures under the comitology procedure can also be found in the Directive on Administrative Cooperation in the field of direct taxes.<sup>51</sup> The comitology procedure is described in Article 26 of the Directive. The authors note that the implementing powers here are specifically defined and cover practical arrangements, procedures and standard forms.<sup>52</sup> Again implementing acts adopted under the comitology procedure do not directly affect EU Member States tax revenues, because the Directive deals with administrative cooperation only.

The authors conclude that even though the European Commission in its proposal to implement the comitology procedure in EU VAT states that those procedures are already used for VAT administrative cooperation and excise duties,<sup>53</sup> the proposal is groundbreaking indeed.

If the proposal is adopted, for the first time in the area of taxation the unanimity rule will be dropped in a situation where the European Commission can implement rules that directly affect the EU Member States' tax revenues. The authors note that the comitology procedure involving conferring implementing powers to the Commission is also proposed in the ideas set out for the Common Consolidated Corporate Tax base (hereinafter: CCCTB/CCTB). In the CCCTB context the comitology procedure could be envisaged to be used for common interpretation of terms, for implementing detailed rules on basic provisions laid down in the basic Directive and for detailed administrative rules. Similar to the comitology procedure in EU VAT, this would have affected the EU Member States' tax revenue, as it involved making use of the comitology procedure on rules on the calculation of factors in the formula for apportionment of the tax base to the various Member States. A working paper with an explanatory note on the comitology procedure was needed after Member States expressed concerns regarding comitology raising potential national constitutional problems.<sup>54</sup> In the end, a reference was still made to the comitology procedure in the re-launched CCCTB proposals of 2016, but the European Commission backed away from its original plans to make use of the comitology procedure in taxation.<sup>55</sup> The proposed comitology procedure now mainly sees to administrative rules.

## 7 A DEEP DIVE IN THE SCOPE OF THE POWERS GRANTED UNDER THE PROPOSAL

As mentioned in section 5 the comitology proposal results in a situation where VAT lawmaking can take place without the currently required unanimity in the Council. To get a more in-depth view of what this would actually mean the authors analyse both the current provision in the VAT Implementing Regulation and the VAT committee guidelines of the last three years. The provisions of the VAT Implementing Regulation will all be analysed and the authors will provide their view on whether this would be covered by the proposal or not. From the VAT Committee guidelines, the authors will provide examples of what would be covered by the proposal and could be dealt with in the comitology procedure instead of a VAT committee guideline.

### 7.1 Scope of the Proposal: VAT Implementing Regulation Perspective

The VAT Implementing Regulation contains six different types of provisions. In this section the authors will

<sup>50</sup> This relates to implementing acts to determine: (1) the structure and content of the mutual administrative assistance documents, (2) the rules and procedures relating to the exchanges of mutual administrative assistance documents, (3) the model, form and content of the fall-back mutual administrative assistance document and (4) the rules and procedures relating to the use of the fall-back mutual administrative assistance document, (5) the exact categories of information that shall be exchanged without prior request, (6) the frequency of regular exchange and the time limits for event-driven exchange for each category of information, (7) the structure and content of the mutual administrative assistance documents (Articles 9 (2), 15 (5) and 16 (3) Regulation), technical details concerning the automated update of the databases and rules and procedures concerning the access to and correction of information (Art. 22 Regulation), a minimum threshold (Art. 27 Regulation) and statistical data (Art. 34 (5) Regulation).

<sup>51</sup> Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11 Mar. 2011, at 1–12.

<sup>52</sup> The following provisions provide for adoption of implementing measures under the comitology procedure:

(1) Article 8 (7) states that the Commission shall adopt the practical arrangements for the automatic exchange of information.

(2) Article 14 (1) states that the Commission shall determine the practical arrangements for the provision of feedback in case a Member State has provided another EU Member State with information.

(3) Article 20 grants the Commission implementing powers as regards standard forms and formats for exchange of information.

(4) Article 21 (1) states that the Commission shall adopt practical arrangements for communication by electronic means.

(5) Under Art. 23 that deals with evaluation the Commission will determine the form and the conditions of communication of a yearly assessment, determine a list of statistical data which shall be provided by the Member States for the purposes of evaluation.

<sup>53</sup> Explanatory memorandum COM 2020, 749, at 2.

<sup>54</sup> CCCTB/WP/062 Explanatory note on the comitology procedure, Brussels, 26 Nov. 2007.

<sup>55</sup> M. Lang et al., *Horizontal Tax Coordination* 34 (IBFD 2012).

categorize these provisions and will make clear whether these provisions will or could in their view fall within the scope of the comitology proposal, giving powers to the Commission to deal with interpretation issues involving these particular provisions when the comitology proposal is adopted by the EU Member States:

1. A first category of provisions are provisions where there is a clear definition of a certain term. In the authors' view it is clear that this type of provisions will fall within the scope of the comitology proposal. An example of such a provision is Article 11 of the VAT Implementing Regulation where the term fixed establishment is defined.<sup>56</sup>

2. Another category of provisions are provisions that do not define a certain term from the VAT Directive but that provide examples of what would qualify under a certain term of the VAT Directive, for example Article 8.<sup>57</sup>

In the authors' view these types of provisions might be covered by the comitology proposal since by giving examples the scope of a certain term in the VAT Directive is explained. However, one can also argue that it is not a pure definition of a term provided in the VAT Directive.

3. A third category of provisions are provisions that explain the functioning or a provision of the VAT Directive to a greater extent, which often has a practical meaning. An example is Article 16.<sup>58</sup>

This category of provisions in the authors' view will not fall within the scope of the comitology proposal because there is no definition of a certain term from the VAT Directive.

4. A fourth category of provisions is what the authors would call 'pushing an open door'. A provision in this category states something that is stating the obvious when perusing the VAT Directive. Such a provision is often followed by a provision of one of the other categories. The 'open door' provision therefore has a function only in relation to the other provision. A clear example is Article 17 (1) that is followed by Article 17 (2) that falls within the scope of the second category.<sup>59</sup>

In the authors' view this type of provisions can be combined with provisions in category one (and maybe two) when the Commission is exercising its powers

<sup>56</sup> Other examples are: Arts 5a and 5b which apply as of 1 July 2021, Arts 6, 6b, 7, 10, 12, 13, 13a, 13b, 15, 30, 31a (1), 32, 33, 35, 38 (1), 40, 41a (applicable as of 1 July 2021), 47, 53, 54b (applicable as of 1 July 2021), 57a and 61b.

<sup>57</sup> Other examples are Arts 5, 6a-7, 9, 17 (2), 26, 27, 28, 29, 31, 31a (2) and (3), 31b, 33a, 34, 37, 38 (2) and (3), 41, 42, 43, 44, 45, 46 and 49.

<sup>58</sup> Other examples are: Arts 14 (applicable until 1 July 2021), 24, 25, 31c, 39, 48, 52, 54, 55, 56, 57, 57c, 57d, 57e, 57f, 57g, 57h, 58, 58a, 58b, 58c, 59, 59a, 60, 60a, 61, 61a, 61c, 62, 63, 63a, 63b and 63d.

<sup>59</sup> Another example is: Art. 36 (that is followed by Art. 37 that falls within the scope of the second category).

under the comitology proposal as is currently proposed. They do not amend or supplement the VAT Directive.

5. A fifth category of provisions provides for some practical arrangements for the taxable person, sometimes as (rebuttable) presumptions. A clear example is Article 22.<sup>60</sup>

In the authors' view this type of provisions is not covered by the powers granted to the Commission under the comitology procedure, because this does not deal with an explanation of terms from the VAT Directive.

6. A sixth category of provisions puts forward conditions for application of a certain provision from the VAT Directive, including the elaboration of how the taxable person must fulfil certain conditions, such as keeping a register (e.g., Article 54a), using certain certificates (e.g., Article 51) or keeping accounts (e.g., Article 63c). An example that puts forward certain conditions is Article 50.<sup>61</sup>

This type of provisions will not fall within the scope of the powers granted to the Commission under the comitology proposal, because there is no definition of a term from the VAT Directive.

## 7.2 Scope of the Comitology Proposal: VAT Committee Guidelines Perspective

In this section the authors analyse the VAT committee guidelines that were released by the VAT committee as a result of VAT committee meetings that took place in the period 2018–2020. The authors note that guidelines may have been adopted in a later year, but they are a result of those meetings that can be found in the heading of each VAT committee guideline. This is the only reference that can be found as regards a particular year.

In the period 2018–2020, in total nineteen guidelines were adopted on the following topics:

- VAT treatment of certain services provided in relation to syndicated loans;
- The significance of the VAT identification number;
- Services provided by an electronic platform connecting for remuneration, by means of a smartphone application, a driver using his own vehicle with persons who wish to make urban journeys;
- Conditions for a transaction in which Internet services are provided in exchange of user data to be a taxable transaction for VAT;
- VAT treatment of organizations collectively managing copyright and related rights;

<sup>60</sup> Other provisions that fall within the scope of this category are: Arts 5c and 5d applicable as of 1 July 2021, Arts 9a (it is presented like this although it can be argued that this provision extends the scope of the deeming provision of Art. 28 VAT Directive), 18, 19, 20, 21, 22, 23, 24a, 24b, 24c, 24d, 24e, 24 and 45a.

<sup>61</sup> Another example that falls within the scope of this category is: Art. 54c (applicable as of 1 July 2021).

- Case C-288/16 ‘L.Č.’ IK;
- VAT rules applicable to transactions related to the recharging of electric vehicles;
- Implementation of the Quick Fixes Package: Council Directive (EU) 2018/1910 and Council Implementing Regulation (EU) 2018/1912 (seven different guidelines);
- Case C-647/17 *Srf konsulterna*;
- VAT treatment of ‘combined lifestyle intervention’;
- Implementation of the Quick Fixes Package: Council Directive (EU) 2018/1910 VAT identification number obtained after the moment of chargeability of the tax on the supply;
- Implementation of the Quick Fixes Package: Council Directive (EU) 2018/1910 Call-off stocks and Brexit;
- Questions concerning the application of EU VAT provisions in case of withdrawal of the United Kingdom from the European Union without an agreement.

Of these guidelines there is only one in which a term from the VAT Directive is defined. In the guideline on Case C-288/16 ‘L.Č.’ IK<sup>62</sup> it is stated:

1. Further to the decision of the Court of Justice of the European Union in case C-288/16 ‘L.Č.’ IK, the VAT Committee, at large majority, agrees that the words “directly connected” in Article 146(1)(e) of the VAT Directive are to be interpreted as meaning that the transport or ancillary services must be provided directly to the consignor or the consignee of the goods.

2. Therefore, the VAT Committee, at large majority, agrees that the VAT exemption laid down in Article 146(1)(e) of the VAT Directive shall not apply to a supply of services, such as transport of goods to a third country, when these services are not provided directly to the consignor or the consignee of the goods.

One of the other guidelines defines the term connected parties from Article 45a of the VAT Implementing Regulation,<sup>63</sup> but this is not a term from the VAT Directive. Many of these guidelines describe the VAT consequences of particular situations. This may include an example of what situation would qualify under a certain term from the VAT directive as described under category two in the previous section.<sup>64</sup>

<sup>62</sup> Guidelines resulting from the 112th meeting of 12 Apr. 2019 Document A – taxud.c.1(2019)8721302–980.

<sup>63</sup> Guidelines resulting from the 113th meeting of 2 June 2019, document H – taxud.c.1(2019)7901898–979.

<sup>64</sup> An example can be found in Guidelines from the 113th meeting of 3 June 2019 Document C – taxud.c.1(2019)7898957–974: ‘4. The VAT Committee, at large majority, agrees that where the warehouse, to which goods are transported from another Member State with a view to those goods being supplied at a later stage to an identified customer, is owned (or rented) and directly run by the supplier with his own means present in the Member State where the warehouse is located, this warehouse shall be seen as his fixed establishment. However, where such warehouse is not run by the supplier with his own means, or where those means are not actually present in the Member State in which the warehouse is located, the VAT Committee, at large majority, agrees that

Overall, the authors conclude that if the comitology proposal is adopted the VAT committee will get another task indeed.

## 8 CONCLUSION

In this article the authors addressed the proposal of the European Commission to apply a comitology procedure in the area of EU VAT. If adopted by the EU Member States, this would lead, in the authors’ view, to a groundbreaking situation in which for the first time in the area of taxation the decision-making based on unanimity of EU Member States is dropped in an area that does directly affect the EU Member States’ national tax revenues, whereas now only comitology procedures are in place in areas of taxation that cover practical arrangements, standard forms and means of communication or in the area of customs duties that are part of the EU’s own resources. The authors described the function of comitology and what the consequences are of the comitology process. The proposal has a well-defined and limited scope, because it only allows for determining the definition of certain terms. The authors analysed the current VAT Implementing Regulation to conclude that only certain categories of provisions from the VAT Implementing Regulation would fall within the scope of the proposal. The VAT Implementing Regulation retains its right to exist alongside the new powers granted to the VAT Committee in this proposal, once adopted. The VAT Committee will also be allowed to continue its current activities. Only in situations where the VAT Committee issues guidelines defining a term the comitology procedure seems a more suitable approach, once adopted. The authors, however, seriously doubt whether the proposal will be adopted and whether EU Member States are prepared to confer more powers to the European Commission. Moreover, it remains to be seen if the time is right for EU Member States to agree with the loss of the possibility of blocking a European Commission proposal they do not agree with.

Should the proposal eventually fail, one of the alternatives the authors would bring forward, inspired by the reaction of the Dutch government on the comitology proposal,<sup>65</sup> is to change the functioning of the existing VAT Committee by leaving room in its guidelines for a written contribution from the Member States. At the moment, it is not possible to know which Member State voted against or in favour of a guideline. In the event

notwithstanding that the warehouse is owned (or rented) by the supplier, it may not be considered his fixed establishment’.

<sup>65</sup> Brief van de Ministerie van Buitenlandse Zaken van 5 Feb. 2021, 22112–3043, Nieuwe Commissievoorstellen en initiatieven van de lidstaten van de Europese Unie, Fiche 5: Richtlijn toekenning uitvoeringsbevoegdheden btw (‘Letter Ministry of Foreign Affairs of 5 Feb. 2021, 22112-3043, New Commission proposals and initiatives from the Member States of the European Union, Sheet 5: Directive on the granting of implementing powers for VAT’).

that unanimous agreement cannot be reached on a VAT Committee guideline, the written contribution can clarify which Member States are in favour of and which Member States (for policy or implementation reasons) are against the chosen interpretation.<sup>66</sup> In that case, both tax authorities and taxpayers benefit from the interpretation of provisions from the VAT Directive.

Even though the guidelines are an instrument of soft law, and hence do not offer legal certainty, more transparency on the divided opinions of the Member States would help businesses, for example, to decrease legal uncertainty and to take decisions regarding their business models in order to avoid additional costs or even double taxation.

<sup>66</sup> This would involve a change to Art. 15 on the confidentiality of deliberations in the VAT Committee rules of procedure, Working Paper No 756 final, taxud.c.1(2013)1103950 – EN.