France: Protecting cross-border businesses against the risks arising from national differences in the operation of the common system

An article by the CMS VAT Group

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VAT: how can cross-border businesses be protected against the risks arising from national differences in the operation of the common system?

For cross-border businesses, divergences in the way the common VAT rules are applied in the EU Member States give rise to administrative difficulties, legal uncertainties, tax conflicts and inconsistent treatment. Two simple solutions can be envisaged.

1. The situation

Some differences in the operation of the common system arise from the intention of EU legislators, in the sense that Member States were given certain choices as to its implementation (such as options, derogations, or aspects of its operation left to the Member States). Besides the points of divergence so "enacted", there are those which follow inevitably from the co-existence of 27 national legal frameworks implementing a single aspect of EU legislation.

There must be few - if any - cross-border businesses that have not had to face the difficulty of understanding how a particular provision of the Directive is applied in different Member States. The coming into force of Directive 2008/8 on the place of supply of services illustrates this perfectly. It brought a raft of issues in its wake, and the uncertainty these created has not been fully resolved by the recent Implementing Regulation (285/2011).

Such divergences are not necessarily the result of non-transposition or poor transposition of EU law by the Member States. In other words, they do not necessarily arise from a clear breach of EU law which would be actionable in the European Court of Justice. Rather, the differences tend to appear in the particular way certain provisions of EU law are applied, or in the scope of their application.

The mutual consultation between Member States that takes place through the VAT Committee has proved insufficient, mainly because the guidelines issued by the committee are not binding, but also, no doubt, because delegates have little enthusiasm for "revealing" certain national practices.

The work of the ECJ is essential in terms of ensuring that the common system of VAT applies uniformly, but it is not a practical solution for businesses since, on the one hand, it presupposes litigation with national tax authorities and, on the other, the Court deals only with the issues referred to it, often leaving a wide margin of appreciation to the national judge or the tax authorities. Legislating is no more efficient, since for both Directives and Regulations, the process is long and the unanimity rule restrictive.

2. What can be done?

The best is the enemy of the good, and it seems to us that in a landscape which is limited in terms of institutions, it is worth considering two ideas for new procedures intended to mitigate the risk of legal uncertainty to which cross-border businesses are subject. Neither of them would seem to require any significant legislative change. The proposals are to institute:

— A bilateral procedure for resolving tax conflicts;

— A multilateral advance ruling procedure.

Bilateral resolution of tax conflicts

Where a business identifies a risk of double taxation, arising from two Member States' divergent interpretations as to the effect of the place of supply Directive on the transaction in question, the Member States involved ought to have the capability to resolve the conflict rapidly.

A single, visible and effective procedure should be offered to businesses in this regard. This could, for instance, make use of the SOLVIT network.

Since 2002, the European Commission has provided this system to individuals and companies. It is intended to provide fast, practical solutions to difficulties they encounter as a result of incorrect application of EU rules.

Currently, only 4% of SOLVIT cases are submitted by businesses. Of that 4%, the cases relating to VAT are mainly submitted by businesses not established in the Member State in question, and concern late repayment of VAT (so called "8th Directive" refunds). SOLVIT is clearly an efficient system (the cases of long-delayed VAT refunds referred to in the 2010 report were generally resolved within one to four weeks) but it is not being used to address issues of divergent interpretations.

The system is presented by the European Commission as a procedure for dealing with cases of "incorrect application of EU law". However, the situations we are considering do not involve obvious breaches of clear rules, but differences of interpretation between two States.

Nevertheless, establishing this system as a mean of prompting discussion and joint action by two Member States would, in our view, enable double taxation cases to be dealt with rapidly.

It would be for the Commission and the Member States involved, where necessary, to follow up individual SOLVIT cases through the appropriate national or European legal measures.

A "multilateral" advance ruling

Where there is doubt over the effect of a tax rule, a taxpayer can enquire of its home tax administration, or that of the country where it is operating, as to the applicable tax treatment. The administration is then bound by its stated position.

A similar procedure could be made available to taxpayers where the issue relates to cross-border operations and thus arises in relation to several States, without the need to canvass the views of all the tax authorities concerned.

We would suggest a system, inspired by the new refund procedure under Directive 2008/9 of 12 February 2009, enabling taxpayers to submit their question to the various Member States concerned through the tax authorities of the Member State where they are established.

After satisfying itself that the situation had been described in sufficient detail, the administration would forward the question to its counterparts in the Member States concerned. This stage might or might not involve the Commission taking action, or at least being informed.

Within a limited timescale, each of the Member States to which the question was forwarded would be obliged to set out, in respect of its own jurisdiction, the correct way to account for VAT in the situation described by the taxpayer. The responses would all be forwarded to the taxpayer by the tax authorities in its place of establishment. Those responses would be binding on each Member State to the extent that each was involved.

Taxpayers would thus have the reassurance of knowing the rules which were applicable in the different jurisdictions where they operated, which they would be able to find out in a determinate timeframe and without having to make multiple requests.

The tax administrations could also benefit. Member States do not always have a clearer understanding than their taxpayers as to how the VAT system is operated by their European neighbours, and the responses given could reveal malfunctions, such as cases of double taxation which ought to be resolved immediately, and cases of non-taxation which taxpayers may not currently be eager to report.

As a final point, it is easy to imagine how the European Commission could use the material generated by this work as a basis for consideration and proposals.

We do not see any major legal obstacle to such a procedure. Each Member State would of course retain its fiscal autonomy and powers of inspection, as the originating taxpayer's Member State would simply act as a "postbox" for the question and the information in response.

As to the administrative cost of such a procedure for the Member State, anticipating the argument we would counterargue that:

— Additional costs would be borne only by the "postbox" State in its coordinating role. The other tax authorities would be in the ordinary position of an authority dealing with a request for an advance ruling. The additional cost would thus be shared between all the EU Member States. In addition, the number of requests could be limited by making them subject to a requirement for the taxpayer to show that serious difficulties had been encountered in at least three countries;

— If implemented, the procedure would create a valuable source of information in terms of guiding efforts to resolve differences of interpretation, either through the VAT Committee or the legislative powers of the European Council;

— Lastly, we think it is far from unreasonable to ask Member States to take a voluntary part in informing cross-border businesses as to the operation of the common system of VAT.

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