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THE VAT TREATMENT OF CRYPTOCURRENCIES

Summary. Since their creation in 2009, crypto-assets have evolved from niche products into assets held and used much more widely. These assets pose challenges for policymakers and tax administrations, because, as pointed out by the OECD, they can be transferred and held without the participation of traditional financial intermediaries and without central administrators being aware of the transactions carried out or the location of crypto-assets holdings.

On the indirect taxation side, the VAT Committee discussed the issues relating to the VAT treatment of crypto-assets and, in particular, of cryptocurrencies, on several occasions. The discussion on the most recent of the working papers on this subject, No. 1037 on the *VAT treatment of crypto-assets*, resulted in the adoption of the Guidelines which aim at harmonising tax administrations' practice regarding the VAT implications of the different transactions linked to crypto-assets.

The article highlights the main challenges posed by cryptocurrencies in terms of VAT while focusing on the main supplies with the use of cryptocurrencies and their qualification for the VAT purposes. Those transactions range from the creation, verification, validation, and supply of cryptocurrencies through their modification, storage, transfer, to exchange. The article explains in this context the position of the VAT Committee reflected in the Guidelines.

Keywords: VAT, cryptocurrency, tax exemptions, currencies transactions, payment or transfer transactions, *Hedqvist*

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1. INTRODUCTORY REMARKS

Since their creation in 2009, crypto-assets have evolved from niche products into assets held and used much more widely¹. A. Olbrecht and G. Pieters refer to the number of blockchain-based digital tokens of over 22,000². These assets pose challenges for policymakers and tax administrations, because, as pointed out by the OECD, they can be transferred and held without the participation of traditional financial intermediaries and without central administrators being aware of the transactions carried out or the location of crypto-assets holdings³. Those challenges are, moreover, linked to the volatile rise in the crypto-assets' market capitalisation and their growing correlation with other financial assets⁴. The IMF emphasises that the strong push to design appropriate policies to deal with crypto-assets comes from the collapse of some of them and failures of exchanges in the crypto-ecosystem amid the recent slide in crypto-valuations⁵.

The OECD issued in October 2022 *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard*⁶ for the purposes of direct taxation. These developments at the OECD level have been reflected in the EU in a proposal for an amendment to the Directive for Administrative Cooperation (DAC 8), adopted by the Commission on 8th December, 2022⁷. The proposal puts forward new tax transparency rules for all service providers facilitating transactions in crypto-assets for customers resident in the EU⁸.

¹ See OECD, *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues*, 2020, p. 7.

² A. Olbrecht, G. Pieters, *Crypto-Currencies and Crypto-Assets: An Introduction*, "Eastern Economic Journal" 2023, no. 49, p. 201.

³ OECD, *Crypto-Asset Reporting: Framework and Amendments to the Common Reporting Standard*, 2022, p. 6.

⁴ IMF, *IMF Policy Paper: Elements of Effective Policies for Crypto Assets*, February 2023, p. 5.

⁵ Idem, p. 5; See also e.g. *Crypto's downfall*, p. 13 and *Hold on for dear life*, pp. 63–65, "The Economist", 19.11.2022.

⁶ <https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf> (access: 16.09.2023).

⁷ Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final, Brussels, 8.12.2022.

⁸ See Press release IP/22/7513, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7513 (access: 16.09.2023).

On the indirect taxation side, the VAT Committee, set up under Article 398 of the VAT Directive⁹ to promote its uniform application, discussed the issues relating to the VAT treatment of crypto-assets – and, in particular, of cryptocurrencies – on several occasions¹⁰. The discussion on the most recent of the working papers on this subject, No. 1037 on the *VAT treatment of crypto-assets*¹¹, resulted in the adoption of the Guidelines which aim at harmonising tax administrations' practice regarding the VAT implications of the different transactions linked to crypto-assets¹². Even though the Guidelines are not legally-binding¹³, they are important because they reflect common position of tax administrations in the Member States and are often referred to in the CJEU's case law.

The present article highlights the main challenges posed by cryptocurrencies in terms of VAT and explains in this context the position of the VAT Committee reflected in the Guidelines.

2. DEFINITIONS

The definitions included in the Guidelines of the VAT Committee are, for consistency reasons, based on the Regulation on markets in crypto-assets (MiCA Regulation)¹⁴ and the Regulation on a pilot regime for market infrastructures based on distributed ledger technology¹⁵.

⁹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

¹⁰ See Working papers No. 811 *VAT treatment of Bitcoin*, 854 *VAT treatment of Bitcoin (II)*, 892 *CJEU Case C-264/14 Hedqvist: Bitcoin* and 1037 *VAT treatment of crypto-assets*, available at https://taxation-customs.ec.europa.eu/vat-committee_en (access: 16.09.2023). See also the Guidelines resulting from the 120th meeting of 28 March 2022, document B-taxud.c.1(2023)3625373-1045, available at https://taxation-customs.ec.europa.eu/system/files/2023-05/guidelines-vat-committee-meetings_en.pdf (access: 16.09.2023).

¹¹ Referred to above.

¹² Guidelines resulting from the 120th meeting of 28 March 2022, document B-taxud.c.1(2023)3625373-1045, referred to above.

¹³ The VAT Committee is an advisory committee and has not been attributed any legislative powers.

¹⁴ REGULATION (EU) 2023/1114 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 May 2023, on markets in crypto-assets, and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.06.2023, p. 40.

¹⁵ REGULATION (EU) 2022/858 OF THE EUROPEAN PARLIAMENT AND OF

Point 1(a) of the Guidelines stipulates that crypto-assets are *a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*.

The Guidelines further provide the definitions of a distributed ledger technology, distributed ledger, consensus mechanism, and DLT network node. Notably, they specify that:

- “*distributed ledger technology*” or “*DLT*” means *a technology that enables the operation and use of distributed ledgers*;
- “*distributed ledger*” means *an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism*;
- “*consensus mechanism*” means *the rules and procedures by which an agreement is reached, among DLT network nodes, that a transaction is validated*;
- “*DLT network node*” means *a device or process that is part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger*.

A broader notion of crypto-assets comprises three main categories of digital financial assets, namely payment tokens, security tokens, and utility tokens¹⁶.

Payment tokens, also referred to as virtual currencies, operate as a unit of account and means of payment.

Security tokens, also referred to as investment, assets, and financial tokens¹⁷, are tradeable assets held for investment purposes and qualified as a security in several national legal systems.

Utility tokens function as a pre-payment or voucher for a good or service and are designed to facilitate the exchange of or access to specific goods or services¹⁸.

THE COUNCIL of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No. 600/2014 and (EU) No. 909/2014 and Directive 2014/65/EU, OJ L 151, 2.06.2022, p. 1.

¹⁶ See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, taxud.c.1(2022)1585400, p. 3 and OECD, *Taxing Virtual Currencies...*, quoted above, p. 9; See also European Banking Authority, *Report with advice for the European Commission on crypto-assets*, 9.01.2019, p. 7.

¹⁷ See European Parliament, Study requested by the ECON committee, *Crypto-assets. Key developments, regulatory concerns and responses*, April 2020, p. 21.

¹⁸ See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, p. 3.

The above categories are, however, only indicative, given that, as pointed out by the OECD, they may be interpreted differently in different national legal systems, which may trigger distinct tax implications. Moreover, some assets may be difficult to classify under any of these categories, while others may constitute “hybrids” that could be classified under multiple categories¹⁹. The assessment of crypto-assets is further complicated by the fact that tokens’ character may also change in the course of their lifetime.

The focus of the present article is on **payment tokens**, i.e. **virtual currencies or cryptocurrencies**. Most guidance issued by the different tax administrations concerns this type of tokens²⁰, also the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022 focus actually on crypto-currencies.

The Guidelines define cryptocurrencies as *crypto-assets that are accepted as a unit of account and means of payment in accordance with the case-law of the Court of Justice of the European Union (CJEU)*.

Let us take a look now at the supplies in which cryptocurrencies may be involved and for which the determination of the VAT treatment is needed.

3. SUPPLIES AT STAKE AND THEIR VAT TREATMENT

The key supplies with the use of cryptocurrencies – the VAT implications of which should be considered – include the following:

- supplies of goods and services remunerated in crypto-currencies;
- the creation, verification, validation, and supply of cryptocurrencies (mining and forging);
- modification for own use;
- storage and transfer;
- exchange.

3.1. Supplies of goods and services remunerated in cryptocurrencies

As regards the supplies of goods or services remunerated in cryptocurrencies, there is little doubt as to their VAT implications. The VAT Committee unanimously agreed that **such supplies should be treated**

¹⁹ OECD, *Taxing Virtual Currencies...*, quoted above, p. 12; see also European Parliament, Study requested by the ECON committee, *Crypto-assets...*, p. 22.

²⁰ *Idem*.

in the same way as any other supplies for VAT purposes. Following the judgment of the CJEU in case C-264/14 *Hedqvist*²¹, it is clear that within such transactions, cryptocurrencies constitute a means of payment and no VAT should be levied on the value of the cryptocurrencies themselves²². The above principles are reflected accordingly in points 2 and 3 of the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022, referred to above.

In case of such supplies, the taxable amount is, on the basis of Article 73 of the VAT Directive, everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party. If consideration is paid in cryptocurrency, it is necessary to convert the amount in cryptocurrency into the currency of the Member State where the supply takes place. The way to carry out such a conversion is analysed in the VAT Committee Working papers No. 854²³ and 892²⁴.

3.2. The creation, verification, validation, and supply of cryptocurrencies (mining and forging)

3.2.1. *The assessment of whether these transactions are subject to VAT*

The creation of virtual currency units can happen in a number of ways. **Mining** is a process by which transactions in crypto-assets are verified and added to the blockchain-based ledger, which constitutes the record of transactions²⁵. Blockchain itself is a technology that enables secure sharing of information and distributes the power to update the database between the nodes of a computer network²⁶. Under the **proof of work protocol**, the miner carries out the necessary computer processes by being the first one to solve complicated equations²⁷.

²¹ CJEU, judgment of 22 October 2015 in C-264/14, *Hedqvist*, EU:C:2015:718.

²² See the VAT Committee Working paper No. 892, p. 8 and Working paper No. 1037, p. 10.

²³ Section 3.5.1.

²⁴ Section 5.2.2.

²⁵ The VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, p. 6.

²⁶ See McKinsey & Company, *What is proof of stake?*, 3.01.2023, <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-proof-of-stake> (access: 16.09.2023).

²⁷ OECD, *Taxing Virtual Currencies...*, quoted above, p. 13.

In order to determine whether mining constitutes a transaction subject to VAT, one must examine whether it can be considered a supply of service for consideration by a taxable person acting as such, within the meaning of Article 2(1)(c) of the VAT Directive. The focus of the analysis will therefore naturally be on the existence of **consideration** and on the supply being effected by a **taxable person acting as such**. According to Article 9(1) of the VAT Directive, a taxable person is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity²⁸. Article 9(1) further clarifies that any activity of producers, traders, or persons supplying services – including mining and agricultural activities and activities of the professions – must be regarded as economic activity and that the concept also covers the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.

According to a settled case-law of the CJEU, a supply of services is effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive only if there is a **direct link** between the services supplied and the consideration received as well as a reciprocal performance between the provider and the recipient of the service²⁹.

The VAT Committee Working paper No. 892 highlights the difficulties with the assessment of the existence of consideration and the direct link in the case of mining. In particular, the existence of the direct link between the mining service and the consideration may be questioned where the miner receives no transaction fee, but is rewarded with the cryptocurrency automatically generated by the system. The transaction fees seem to be, however, becoming a norm and in the future they might be indeed necessary to obtain a verification of a transaction request. That is so because virtual currencies are designed with a hard cap or a maximum limit³⁰. As the supply of cryptocurrencies diminishes, so does the automatic reward

²⁸ As regards the notion of a taxable person, see e.g. CJEU, judgment of 13 June 2019 in case C-420/18 *IO v. Inspecteur van de rijksbelastingdienst* EU:C:2019:490, paragraph 21 and the following; judgment of 12 October 2016, *Nigl and Others*, C340/15, EU:C:2016:764, paragraph 27 and the case-law cited.

²⁹ See e.g. CJEU, judgment of 27 March 2014 in case C-151/13 *Le Rayon d'Or* EU:C:2014:185, paragraph 29; Case C-16/93 *Tolsma* EU:C:1994:80, paragraph 14; Case C174/00 *Kennemer Golf* EU:C:2002:200, paragraph 39.

³⁰ See How many bitcoins are there and how many are left to mine? – Blockchain Council (blockchain-council.org) (access: 2.09.2023).

for the mining, which may become insufficient for the creation of the profit for miners. As a result of this evolution, the assessment of the existence of consideration and the direct link between the mining services and the consideration will be rendered more straightforward³¹.

The qualification of miners as taxable persons raises less doubt, because in order to carry out mining, it is necessary to operate some powerful hardware capable of solving complex mathematical problems. This element would certainly impact the analysis of mining as an economic activity³².

An alternative to the proof of work protocol is **the proof of stake mechanism**. Under this mechanism, shares or validation rights are assigned to users according to the stake they have in the blockchain. The methods to measure the stakes vary and may be linked to the amount of owned tokens, the holding period, or an amount of assets locked in the blockchain as collateral. Validators, who are referred to as forgers or stakers, must have a minimum stake in the blockchain as a pre-condition for participation in the verification process³³. They “stake” some of their cryptocurrency as collateral and if a trader adds a transaction to the blockchain that other validators deem to be invalid, forgers may lose a part of what they staked³⁴. For their service they receive a transaction fee or new tokens. Under the proof of stake, no mathematical equations are required in order to verify a transaction, which makes the system much more energy-efficient than a proof of work protocol³⁵.

It stems from the above that the main difference between the proof of work and the proof of stake systems is the connection of the validator, i.e. the miner or forger, with the network. Miners do not need to own a type of tokens they are mining, while forgers can only receive tokens or transaction fees in respect of their prior holdings of a given type of crypto-assets and in proportion to their share of the crypto-assets in question³⁶. While this difference may be relevant from the point of view of direct tax, it is not necessarily so from the point of view of VAT. The most significant elements of the service supplied in the case of both mining and forging

³¹ See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, p. 6.

³² *Idem*.

³³ OECD, *Taxing Virtual Currencies...*, quoted above, p. 11; see also the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, p. 7.

³⁴ See McKinsey & Company, *What is proof of stake?*, quoted above.

³⁵ OECD, *Taxing Virtual Currencies...*, quoted above, p. 11.

³⁶ See the VAT Committee Working paper No. 1037, *VAT treatment of crypto-assets*, p. 7.

for their qualification as taxable transactions under the VAT Directive include the verification and validation of transactions. As concluded in the VAT Committee Working paper No. 1037³⁷, the principles governing the VAT assessment of the supplies of the mining services apply also to the forging services.

3.2.2. *The assessment of whether the transactions in question are exempt*

If the conditions relating to the existence of consideration, direct link, and the qualification of miners/forgers as taxable persons are met, mining and forging fall within the scope of VAT and it should be examined whether they are exempt under Article 135(1) of the VAT Directive. In this context, the most relevant exemptions relate to **transactions concerning currency** (under Article 135(1)(e)) and **transactions concerning payments or transfers** (under Article 135(1)(d)). Both provisions must be interpreted in line with the general principle of equal treatment, entrenched in Article 20 of the Charter of Fundamental Rights³⁸, as well as the principle of neutrality, requiring similar transactions to be taxed similarly³⁹.

In accordance with the settled case law, the exemptions laid down in Article 135(1) of the VAT Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system between Member States. 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. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Therefore, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 135(1) must be construed in such a way as to deprive the exemptions of their effect⁴⁰.

As regards the **exemption for transactions concerning currency** under Article 135(1)(e) of the VAT Directive, the VAT Committee Working

³⁷ P. 8.

³⁸ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

³⁹ See B. Terra, J. Kajus, Z. Szatmari, *Commentary on European VAT*, IBFD 2023, section 9.3.2.5.6. *Cryptocurrencies*, Document – Chapter 9 – Exemptions – Tax Research Platform – IBFD (access: 16.09.2023).

⁴⁰ CJEU, judgment in C-264/14, *Hedqvist*, paragraphs 33–35 and the case-law cited.

paper No. 892 clarifies that such transactions must be closely related to the supply of currency *per se* in order to be exempt⁴¹. In this context, it should be noted that the services provided by the miners and forgers not only lead to the creation of new units of the crypto-currency, but are also essential for keeping the system functional and trustworthy. Therefore, it can be concluded that **the services supplied by the miners and forgers are sufficiently related to the supply of cryptocurrencies to consider them to be transactions concerning currency within the meaning of Article 135(1)(e) of the VAT Directive**⁴².

As regards the exemption for **transactions concerning payments or transfers** pursuant to Article 135(1)(d) of the VAT Directive, according to A.G. Kokott, such transactions must comprise the execution of cash and non-cash payments to a particular third-party recipient⁴³.

In SDC, the CJEU held that in order to qualify for the exemption referred to above, the services must

...form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank...⁴⁴.

While it could be argued that the mining and forging services are linked to technical aspects and the passing-on of information⁴⁵, the role of these services actually goes beyond this. A miner and a forger check whether the information included in a transaction request is valid and consistent with the information on past transaction registered in a ledger. Their role is of crucial importance to the functioning of the cryptocurrency systems and it can be argued that their services constitute an actual transfer of funds.

It can therefore be concluded that **mining and forging qualify as exempt supplies under Article 135(1)(d) of the VAT Directive**.

⁴¹ P. 11.

⁴² See the VAT Committee Working paper No. 892, p. 17.

⁴³ Opinion in C-264/14, *Hedqvist*, point 47.

⁴⁴ CJEU, judgment of 5 June 1997 in C-2/95, *Sparekassernes Datacenter (SDC) v Skatteministeriet*, EU:C:1997:278, paragraph 66; see also e.g. CJEU, judgment of 13 December 2001 in case C-235/00 *CSC Financial Services*, EU:C:2001:696, paragraph 25.

⁴⁵ See the VAT Committee Working paper No. 892, p. 18; see also e.g. CJEU, judgment of 28 July 2011 in case C-350/10 *Nordea*, EU:C:2011:532, paragraph 13.

The VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022 endorse the above reasoning by stating in point 3(b) that “...the creation, the verification and validation (mining and forging), the supply (...) of crypto-currencies shall be treated as taxable, but exempt under Article 135(1)(e) or (d) of the VAT Directive, where they are made for consideration directly linked to the supply at stake.”

It must be stressed that the above analysis is only valid when the cryptocurrencies are supplied for consideration. If the supplies are carried out for free, i.e. without remuneration, they fall out of the scope of VAT. Such is the case of an airdrop, which constitutes the distribution of tokens for free, generally undertaken to increase the awareness of a new token and to increase liquidity in the early stages of a new cryptocurrency project⁴⁶.

3.3. Modification for own use

There is one exception to the rule that where miners or forgers receive no transaction fee in return for their verification services, the transaction falls outside the scope of VAT. It is established in Article 26(1)(b) of the VAT Directive which taxes private use. This provision stipulates that the supply of services carried out free of charge by a taxable person for his/her private use or for that of his/her staff or, more generally, for purposes other than those of his/her business should be treated as a supply of services for consideration. That is so if, in the first place, the miner or the forger qualifies as a taxable person. On the basis of Article 26(2), Member States may, however, derogate from this principle, provided that such derogation does not lead to a distortion of competition.

This principle is reflected in point 3 of the VAT Committee Guidelines resulting from the 120th meeting of 28th March, 2022, which refers to the modification of cryptocurrencies for own use, even though the wording of this point in this respect may not be entirely clear.

It must be noted that the evolution of a token is listed by the OECD among the key taxable events related to virtual currencies⁴⁷. Modifications of a token may improve its performance, i.e. the speed at which transactions are processed. As explained in their report *Taxing Virtual Currencies*, the rules defining the functioning of a virtual currency are established by

⁴⁶ OECD, *Taxing Virtual Currencies...*, quoted above, p. 13.

⁴⁷ OECD (2020), *Taxing Virtual Currencies...*, quoted above, p. 14 and the following.

the underlying protocol and most changes to the functioning of a token require a change in the underlying protocol. These changes are referred to as **forks** in the chain and they trigger a need to update the protocol software by the users. A fork requires an agreement of the majority of users running the protocol to enter into force. The OECD report makes a distinction between two main types of fork⁴⁸:

- A **hard fork** (also known as a chain split) changes the protocol code and creates a new version of the blockchain alongside the old version. The original token continues to operate despite a new token being created.

- A **soft fork** updates the protocol with the aim of being adopted by all users on the network without creating any new token⁴⁹.

For the VAT purposes, modifications would be treated similarly to mining and forging⁵⁰.

Point 3 of the VAT Committee Guidelines refers to the specific case of the modification of the existing cryptocurrencies already in use. The creation of a new cryptocurrency following the modification would be covered by the notion of “creation” referred to earlier in point 3 of the Guidelines.

3.4. Storage and transfer (digital wallets)

Digital wallets are needed to hold cryptocurrency accounts, keep record of balance, and carry out transactions with the use of cryptocurrencies. Digital wallets are software platforms, devices, or programmes that store cryptocurrency keys and allow users to access their assets⁵¹. They can be either connected to the Internet or not⁵².

3.4.1. *The assessment of whether these transactions are subject to VAT*

From the VAT perspective, it is not necessarily relevant whether the wallets are “hot” or “cold”, i.e. connected to the Internet or not⁵³. In order to assess whether the supply of services by digital wallet providers constitutes

⁴⁸ Idem, pp. 14–15.

⁴⁹ See also the VAT Committee Working paper No. 1037, p. 10.

⁵⁰ Idem, p. 10.

⁵¹ See for example: Cryptocurrency Wallet: What It Is, How It Works, Types, Security (investopedia.com), (access: 10.09.2023).

⁵² See the VAT Committee Working paper No. 892, p. 9; the VAT Committee Working paper No. 1037, p. 8; OECD, *Taxing Virtual Currencies...*, p. 13 and the following.

⁵³ The VAT Committee Working paper No. 1037, p. 8.

a taxable transaction, it needs to be established whether these services are supplied for **consideration** by a **taxable person acting as such**, within the meaning of Article 2(1)(c) of the VAT Directive⁵⁴.

At the outset of the analysis, it must be noted that where **digital wallet providers supply their services free of charge**, such supplies are considered to fall outside the scope of VAT⁵⁵. That is so because due to the lack of consideration, they do not qualify as taxable transactions within the meaning of Article 2(1)(c) of the VAT Directive.

If **digital wallet providers ask for the payment of fees for their services**, there is little doubt that such fees would constitute a remuneration for the services supplied and the services would therefore *prima facie* qualify as taxable transactions in the sense of Article 2(1)(c) of the VAT Directive.

The qualification of digital wallet providers as **taxable persons** raises little doubt, in particular given the broad scope of the notion of a taxable person under the VAT Directive.

The development, management, and exploitation of the software platforms, devices, or programmes made available to the users of cryptocurrencies in exchange for a consideration constitute an economic activity in the sense of Article 9(1) and, in consequence, digital wallet providers qualify as taxable persons.

Services supplied for a fee by digital wallet providers can therefore be considered to be provided for consideration by taxable persons acting as such within the meaning of Article 2(1)(c) of the VAT Directive and constitute taxable transactions in the meaning of that Directive.

3.4.2. *The assessment of whether the transactions in question are exempt*

Once it is established that the supplies of services by digital wallet providers constitute taxable transactions, one should consider whether they could be covered by one of the exemptions set out in Article 135(1) of the VAT Directive. Similarly, as in the case of mining and forging, the most relevant exemptions relate to **transactions concerning currency** (under Article 135(1)(e)) and **transactions concerning payments or transfers** (under Article 135(1)(d)). As recalled in section 3.b.ii, these exemptions are to be interpreted strictly, since they constitute exceptions to the general

⁵⁴ See section 3.b.i.

⁵⁵ The VAT Committee Working paper No. 892, p. 9.

principle that VAT is to be levied on all services supplied for consideration by a taxable person.

The VAT Committee Working paper No. 892 analyses the application of **Article 135(1)(e)** of the VAT Directive to the services supplied by the Bitcoin digital wallet providers. It states that an application of the exemption set out in this provision to the services which allow Bitcoin users to hold and operate with this virtual currency would be in line with the current application of the exemption in the traditional banking field, which would be compatible with the principle of fiscal neutrality. It is pointed out, in particular, that services provided by banks and financial institutions which consist in making bank accounts available for a service fee resemble the activities of Bitcoin digital wallets and are also exempt⁵⁶.

This assessment remains valid in relation to digital wallets operated in relation to any other cryptocurrencies. The services supplied by digital wallet operators concern directly means of payment: they make the cryptocurrencies available to the users and create rights and obligations in relation to the means of payment. Such services are covered by the exemption provided for in Article 135(1)(e) of the VAT Directive.

The Commission services considered also the possibility to apply the exemption for **transactions concerning payments or transfers pursuant to Article 135(1)(d) of the VAT Directive** to the services provided by the digital wallet operators⁵⁷.

As indicated in section 3.b.ii, in order to qualify as “a transaction concerning transfers”, the services provided must have the effect of transferring funds and entail changes in the legal and financial situation. In order to qualify for this exemption, the services in question should not only constitute an input to another exempt service, but must have the characteristics of an exempt service themselves.

Digital wallets allow a connection between cryptocurrency users and the miners or forgers who are tasked with the verification of transactions. Supplying a service which allows this connection does not result in any transfer of funds. It does not entail changes in the legal and financial situation independently of the fact that the services may be necessary for a transaction in cryptocurrency to take place.

⁵⁶ The VAT Committee Working paper No. 892, p. 11.

⁵⁷ The VAT Committee Working paper No. 892, pp. 12–13; the VAT Committee Working paper No. 1037, p. 9.

In the light of the above, Working paper No. 892 goes on to conclude that **taxable services supplied by digital wallet providers in exchange for a consideration do not fall within the exemption established in Article 135(1)(d) of the VAT Directive**⁵⁸. This finding is then reflected also in the Working paper No. 1037⁵⁹ and in the VAT Committee Guidelines resulting from the 120th meeting of 28 March 2022, which in point 4 state that “storage and transfer of crypto-currencies, such as made through the digital wallets, shall be treated as taxable, but exempt under Article 135(1)(e) of the VAT Directive”.

3.5. Exchange

Exchanges allow users to trade cryptocurrencies for other assets, such as conventional fiat money or other digital currencies. They may take place online and offline, peer to peer or be brokered by a third-party intermediary⁶⁰.

Let us refer once again to the judgment of the CJEU in case C-264/14 *Hedqvist* to quote its sentence:

1. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that transactions such as those at issue in the main proceedings, which consist of the exchange of traditional currency for units of the ‘bitcoin’ virtual currency and vice versa, in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, constitute the supply of services for consideration within the meaning of that article.
2. Article 135(1)(e) of Directive 2006/112 must be interpreted as meaning that the supply of services such as those at issue in the main proceedings, which consist of the exchange of traditional currencies for units of the ‘bitcoin’ virtual currency and vice versa, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, are transactions exempt from VAT, within the meaning of that provision.
Article 135(1)(d) and (f) of Directive 2006/112 must be interpreted as meaning that such a supply of services does not fall within the scope of application of those provisions.

⁵⁸ p. 13.

⁵⁹ p. 9.

⁶⁰ The VAT Committee Working paper No. 1037, p. 9.

It stems from the judgment that the CJEU treated a cryptocurrency, a bitcoin in this case, in the same way as traditional currencies as regards the exchange services⁶¹. The factual circumstances in *Hedqvist* concerned the exchange of cryptocurrency for the traditional currency. The VAT Committee Guidelines extend this VAT treatment to exchanges of crypto-assets for other crypto-assets. **All these exchanges are therefore to be considered taxable, but exempt from VAT on the basis of Article 135(1)(e) of the VAT Directive.** This is reflected in point 4, second paragraph of the VAT Committee Guidelines.

4. CONCLUDING REMARKS

Cryptocurrencies constitute a new and evolving phenomenon, and the determination of their legal status and tax consequences is under way. As pointed out by Terra, Kajus, and Szatmari, cryptocurrencies “...have a unique identity and cannot, therefore, be directly compared to any other form of investment activity or payment mechanism”⁶². That is why the assessment of cryptocurrencies also from the point of view of the VAT is not a straightforward task.

The VAT Committee Guidelines resulting from the 120th meeting set some basic principles for such an assessment. They provide definitions and cover a set of possible transactions involving cryptocurrency. The Guidelines remain quite general and do not elaborate on every conceivable variation of these transactions, but they provide useful criteria that make it possible to assess which transactions are within the scope of the VAT and which exemptions may apply to them.

The Guidelines reflect a pragmatic approach which reckons with the constant evolution of cryptocurrencies. Owing to their general character, they will remain relevant for a while despite the changes in the way in which the cryptocurrencies function and in the way in which the transactions with the use of cryptocurrencies are carried out.

⁶¹ See, e.g., *The Implications of Online Platforms and Technology for Taxation*, IBFD April 2023, Editor: Dennis Weber, Chapter 6: Beyond *Hedqvist* (C-264/14): The Characterization of Cryptoassets under European VAT by Giorgio Beretta, *The Implications of Online Platforms and Technology on Taxation* | IBFD (access: 16.09.2023).

⁶² B. Terra, J. Kajus, Z. Szatmari, *Commentary on European VAT*, section 9.3.2.5.6. *Cryptocurrencies*, Document – Chapter 9 – Exemptions – Tax Research Platform – IBFD (access: 16.09.2023).

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OPODATKOWANIE VAT-EM KRYPTO WALUT

Streszczenie. Od czasu ich stworzenia w 2009 r. kryptoaktywa przekształciły się z dóbr niszowych w aktywa posiadane i wykorzystywane w znacznie szerszym zakresie. Aktywa te stanowią wyzwanie dla decydentów politycznych i administracji podatkowych, ponieważ – jak wskazała OECD – mogą być przenoszone i przechowywane bez udziału tradycyjnych pośredników finansowych oraz bez wiedzy centralnych administratorów o przeprowadzanych transakcjach lub miejscu działalności ich uczestników.

Komitet ds. VAT kilkakrotnie omawiał kwestie związane z opodatkowaniem kryptoaktywów, a w szczególności kryptowalut, podatkiem VAT. Dyskusje nad najnowszym Dokumentem roboczym na ten temat, nr 1037 w sprawie opodatkowania kryptoaktywów podatkiem VAT, doprowadziły do przyjęcia Wytycznych mających na celu harmonizację praktyk administracji podatkowych w zakresie kwalifikacji różnych transakcji związanych z kryptoaktywami z punktu widzenia podatku VAT.

W artykule wskazano główne wyzwania, z punktu widzenia podatku VAT, związane z kryptowalutami, przy czym skoncentrowano się na najważniejszych dostawach z wykorzystaniem kryptowalut i ich kwalifikacji dla celów podatku VAT. Transakcje te obejmują m.in. tworzenie, weryfikację, walidację i dostawę kryptowalut, ich modyfikację, przechowywanie, transfer i wymianę. Artykuł wyjaśnia w tym kontekście stanowisko Komitetu ds. VAT odzwierciedlone w Wytycznych.

Słowa kluczowe: VAT, kryptowaluta, zwolnienia, transakcje dotyczące walut, transakcje dotyczące płatności lub przelewów, *Hedqvist*