

CJEU Q-GmbH: license to use an insurance product and any ancillary mediation subject to VAT

On March 25, 2021 the Court of Justice of the European Union ('CJEU') rendered judgment in the German Q-GmbH case (no. C-907/19). In this case the CJEU ruled that the granting of a license by an underwriting agent to an insurer to use an insurance product is – in itself – subject to VAT. According to the CJEU, if the insurance mediation services performed by the underwriting agent for the insurer are ancillary to the granting of that license, then these are also subject to VAT. The CJEU noted that it is up to the referring German court to categorize this.

1. Scope of VAT insurance exemption

Under the EU VAT Directive, insurance and reinsurance transactions and related services, performed by insurance brokers and insurance agents are exempt from VAT. In a number of cases, the CJEU has provided some guidance on the scope of the exemption and it reiterated this in the Q-GmbH case.

There is a VAT-exempt insurance activity if: (i) the insurer (ii) in exchange for the prior payment of a premium (iii) undertakes to pay the insured (iv) in the event the insured risk occurs (v) the payment (vi) agreed when the contract was concluded (in other words: provide insurance).

Insurance-related services are present if (i) the service provider has a relationship with both the insurer and the insured and (ii) performs activities essential to the function of an insurance intermediary, such as finding prospective clients and introducing those new clients to the insurer (in other words: insurance mediation).

2. The case

Q-GmbH is an underwriting agent. It concluded an agreement with an insurer under which it performs the following types of services:

- The provision of a (non-exclusive) license to use an insurance product against piracy.
- Placing insurance contracts for that insurer, adapting policies if necessary, and assessing risks.
- Managing the insurance contracts and settling claims.

The insurer paid Q-GmbH a fee for this in the form of a brokerage fee.

3. CJEU judgment

The facts in this case are actually not clear enough. On the basis of several assumptions the CJEU nevertheless renders judgment and instructs the German court to assess these assumptions against the facts.

The CJEU ruled that the granting of a license by an underwriting agent to an insurer to use an insurance product is – in itself – subject to VAT. According to the CJEU, the granting of a license does not qualify as insurance, nor is it insurance mediation. The CJEU ruled this subject to verification by the national court, but that verification seems more of a formality.

In addition, the CJEU addressed the relationship between the granting of a license and the insurance mediation services provided by Q-GmbH. In that respect, the CJEU considered that it appears that the granting of the license and the mediation must not be regarded as a single supply for VAT purposes. The insurer does not seem to need the mediation services of Q-GmbH in order to have policyholders take out the insurance product. The insurer is free to engage other intermediaries for this. The CJEU referred the case back to the German court to further establish the facts. The conclusions of the CJEU are striking, because in the request for a preliminary ruling the German court had established that there was a single supply. The CJEU often accepts such a finding as fact and then proceeds to answer the question. In this case, the CJEU appears to have a number of critical comments about this finding.

However, the CJEU does subsequently proceed to answer the question taking into account that there is a single supply, as “*it cannot be entirely ruled out*” that the German court will reach that conclusion. The CJEU does not consider the fact that Q-GmbH also performs insurance mediation services for the insurer as being, by definition, relevant for the VAT treatment. It is also irrelevant that the insurance product against piracy was specifically designed for a limited class of persons according to their specific needs (prospective policyholders). The prospective future policyholders still have to be actively approached, with the help of an intermediary. The CJEU added that if the services that Q-GmbH performs form a single supply, the VAT insurance exemption does not apply. The CJEU thereby took into account that the referring court regards the granting of the license as the principal service and that this service is subject to VAT.

4. Practical consequences

It seems to follow from the operative part of the judgment that the granting of an insurance license in combination with insurance mediation services is subject to VAT. This judgment could put pressure on the Dutch practice, where a combination of mediation and other services closely related to insurance that are performed as a single

supply are regarded as fully VAT-exempt. However, the operative part of the judgment requires nuance. The request for a preliminary ruling took as fact that the granting of the license is the principal service, although as far as we are concerned this could also be an ancillary service, depending on the facts. Furthermore, the CJEU has given a very explicit instruction to the German court to re-assess whether there is a composite service. As far as we are concerned, this nuance limits the impact of this judgment.

Nevertheless, the judgment will accelerate the discussion with regard to the application of the VAT exemption for insurance mediation to composite services. Previous CJEU case law shows that an intermediary is able to do quite a lot under the VAT exemption, for example – in addition to concluding insurance contracts – processing policy changes, issuing insurance policies, settling commission, providing information to the insurance company and to policyholders and offering and concluding new insurance policies independently and on its own initiative. Where this range of services is further expanded or where elements that do not themselves qualify as mediation become predominant, the VAT exemption is placed in jeopardy. This case has also once again shown that the choice whether or not to purchase certain services or to purchase them from a third party is an important indication that various activities are separate services for VAT purposes, which must be assessed on their own merits. We recommend that certainly in those types of situations you re-assess the application of the VAT exemption and, where necessary, take that assessment into account in the manner in which services are performed and contracts are drawn up.

The tax advisors of KPMG Meijburg & Co's Indirect Tax Financial Services Group would be pleased to help you identify the potential implications of this judgment. Feel free to contact one of them or your regular advisor for more information.

KPMG Meijburg & Co
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