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**Opinion Statement of the CFE
on the distinction between taxable
and VAT exempt letting of immovable property**

Submitted to the European Institutions in November 2009

This is an Opinion Statement prepared by the Fiscal Committee of the Confédération Fiscale Européenne (CFE), the European association of national tax advisory organisations with 32 members representing over 180,000 tax advisers.

The CFE remembers that the principle of legal certainty and the protection of individuals requires, in areas covered by Community law, that the Member States' legal rules be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations, and to enable national courts to ensure that those rights and obligations are observed (case 257/86 *Commission v Italy* [1988] ECR 3249).

The CFE observes that some words used in the VAT directive in order to determine if an operation is taxable or VAT exempt are identical to legal concepts used in some national VAT legislation before the introduction of the Sixth VAT Directive. Although these national concepts are supposed to implement the directive, they have a well established meaning as a matter of national law.

This is for example the case for article 135(1)(l) of the directive 2006/112/CE imposing the Member States to exempt the “the leasing or letting of immovable property” under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. The same provision of the directive exempts some operations such as “*affermage*” in French, “*Verpachtung*” in German, “*verpachting*” in Dutch that have not even been translated in all linguistic versions and which generally cover long term leases in the agricultural sector.

According to settled case-law the exemptions provided for in Articles 131 to 137 of the VAT Directive generally have their own independent meaning in Community law and must therefore be given a Community definition (see Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 51; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25; and Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22). As the Court pointed out in the Case 320/88, *Staatssecretaris van Financiën v. Shipping and Forwarding SAFE BV* [1990] ECR p I-285. , this view is in accordance with the purpose of the directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions.

As regards the exemptions laid down under Article 135(1)(l) of the Sixth Directive, the Court has noted that that provision does not define ‘letting’, nor does it refer to relevant definitions adopted in the legal orders of the Member States (see Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 44, and *Sinclair Collis*, paragraph 24). That

provision must therefore be interpreted in the light of the context in which it is used, and of the objectives and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption which it establishes (see, to that effect, *Goed Wonen*, paragraph 50).

In Case C-284/03 *Belgian State v Temco Europe* [2004] ECR I- I-11237, the ECJ has pointed out that “the leasing and the letting of immovable property” concerns contracts that have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time. The Court has done so in order to distinguish between a transaction comprising the letting of immovable property, which is usually a “relatively passive activity” linked simply to the passage of time and not generating any significant added value (see, to that effect, *Goed Wonen*, paragraph 52), from other activities which are either industrial and commercial in nature, such as the exceptions from the exemption referred to in Article 13B(b)(1) to (4) of the Sixth Directive, or have as their subject-matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraphs 24 to 27), the right to use a bridge in consideration of payment of a toll (*Commission v Ireland*) or the right to install cigarette machines in commercial premises (*Sinclair Collis*, paragraphs 27 to 30).

The CFE observes that in daily practice, this criteria of “relatively passive activity” is unclear and is a source of major uncertainty. For example, should the obligation to maintain a building in good state be considered as “passive”? Should the presence of a receptionist or some cleaning services be sufficient to transform what would otherwise be an exempt letting of office space into a taxable supply? The answers to these questions could impact not only on a trader’s output tax liabilities but also on his ability to recover input tax over a twenty-year period.

The CFE considers that it is unfortunate that the Court is adopting a test that introduces such uncertainty into the law. In order to avoid such disputes, it considers that it would be preferable if the scope of the exemptions could be defined by national concepts that have been used in the Directive and which have a well defined meaning in national law. It is not unusual for national law to be relevant when interpreting the Directive. For example it is relevant when determining what bodies are public bodies and members states are frequently given an element of discretion when determining the scope of exemptions, for example when defining collective investment schemes in article 135(1)(g). Indeed article 135(2) expressly gives the Member States discretion to add to the exclusions from the exemption for letting land.

The CFE can see that the criterion of “relatively passive activity” used by the Court could be used as a guide to assist Member States when selecting the national law concepts that are suitable for implementing the directive and when determining what activities should be excluded from the exemption. However, in the interest of legal certainty, it would be preferable if the core exemption could be defined by national concepts with a well recognised meaning. The need for a totally harmonised definition is reduced by the fact

that the letting of immovable property inevitably just occurs in a national context. Unlike some of the other exempting provisions, such an approach should therefore not cause any distortions of competition within the Community.

The CFE suggests the Commission revisit the VAT exemptions with a view to introducing greater legal certainty, either by legislative changes or by suggesting that the Court should accept that the issue is one where the member states should have discretion to define the scope of the exemption by reference to national concepts.