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**CCBE****Council of Bars and Law Societies of Europe****President Mr. Michel Benichou****Rue Joseph II, 40 / 8****B-1000 BRUSSELS****Belgique****Št. 2320/2016****Ljubljana, 07.12.2016***Dear Mr. President,*

*as President of the Bar Association of Slovenia I would like to propose the CCBE to participate and take standing in a proceedings before the Constitutional court of Slovenia regarding VAT with respect to legal aid. In a similar case in Belgium that subsequently led to the proceeding before the CJEU (C-543/14) the CCBE applied for and was given standing in order to present the view of its members on the issues involved.*

*The CJEU has so far decided that legal aid is not exempted from VAT (judgement nr. C-543/14) and that Member States are not allowed to apply an extra reduced tax rate in that regard (judgement nr. C-246/08). It has not yet explicitly ruled on the exact time of taxable services within legal aid (taxable event) although in the above-mentioned judgment C-246/08 the regulation in France was very similar to that in Slovenia. It involves simultaneous effect of tax and judicial legislation. The later demands, first, that a lawyer performs legal aid services as mandated with a decision of granting legal aid to a particular customer. Secondly, these services are evaluated and a separate decision on costs is issued. Finally, a lawyer is allowed to issue invoice strictly in accordance with that decision. In practice it can take several months in Slovenia for such a decision to be issued after a lawyer has submitted a claim for it.*

*On 13 May 2013 the Government of the Republic of Slovenia officially proposed a VAT rate rise to the Parliament. Later that month the Parliament enacted the proposed VAT rate rise from 20% to 22%. It explicitly stipulated that from 1 July 2013 the new rate is to be applied to services performed thereafter. For*

*services performed until 30 June the old rate was applicable but any such invoice had to be issued until 20 July at the latest.*

*In order to clarify matters, individual lawyers contacted Legal Aid Service in June 2013 and were reassured that their existing claims need not to be altered and that they would be able to issue invoices in accordance with the enacted legislation applying the new tax rate after decisions on costs would be issued after 1 July. The Bar Association of Slovenia additionally sought to receive an official confirmation of this from the President of the Supreme Court of the Republic of Slovenia Mr. Branko Masleša who is responsible for judicial administration which also includes Legal Aid Service. He was not able to provide a coherent answer himself. Neither did he receive any answer from justices of the Supreme Court who decide tax matters. Moreover, he officially requested guidance from the very Tax Authority the courts are supposed to supervise by judicial review. There was also no legal basis for such a request to the Tax Authority which further undermines the public confidence in judiciary. Finally, the Tax Authority entirely overlooked the existence of judicial legislation when producing its guidance on VAT regarding legal aid.*

*To make matters worse Mr. Masleša later issued an order to the Legal Aid Service to act in accordance with the Tax Authority's guidance which he considered binding. This resulted in lawyers receiving decisions after 20 July 2013 with instruction to issue invoices for legal aid with the 20% tax rate that legislation explicitly prohibits under severe penalties. The above-mentioned 'binding guidance' was enclosed to these decisions. Since accounting software would not allow to issue and account for invoices with 20% tax rate lawyers were forced to 'initiate a separate tax year 2013-bis' in order to account for these evidently illegal invoices. Correct VAT reports were also practically impossible. Upon our bar association's inquiry the Tax Authority even admitted they were unaware of the existing judicial legislation concerning legal aid.*

*Some lawyers acted according to this 'binding guidance' in order to receive any payment at all for the services performed despite severe penalties prescribed regarding invoicing rules. Some decided not to issue any invoice and declared their services pro bono in order not to risk any penalties.*

*Nevertheless, our bar member Mr. Aleksander Pevec who has recently been nominated into the CCBE Tax Working Group decided to challenge such a decision by judicial review. He proposed a request for preliminary ruling by the CJEU concerning EU law since this matter has not yet been explicitly decided despite legal aid regulations that vary across individual Member States.*

*The administrative court of first instance rejected his motion stating that the very same differences in regulations between Member States indicate the issue does not require a preliminary ruling by the CJEU. The President of the Supreme Court's formal request for a guidance from the Tax Authority was also not considered being in breach of the constitutionally protected judicial independence by the court of first instance.*

*After appealing to the Supreme Court in 2014, again proposing a request for a preliminary ruling from the CJEU on the matter and invoking constitutionally protected judicial independence, the judge rapporteur initially even drafted a decision to accept the appeal and request a preliminary ruling. However, given the ongoing public turmoils regarding Mr. Masleša as the President of the Supreme Court the senate was obviously very reluctant to proceed with any decision on the matter. The case remained undecided for almost two years until another judge rapporteur was nominated following her promotion to the Supreme Court earlier this year.*

*The Supreme Court finally decided the matter on 21 September 2016 and avoided these questions entirely by simply claiming that the appellant should have claimed reimbursement of 22% VAT initially on 5 April 2013. This reasoning is arbitrary since the Supreme Court overlooked the fact that the appellant submitted the claim one month prior to the government's legislative proposal on 13 May 2013 and was subsequently even given reassurance that no alteration of his claim was needed – those facts were undisputable in the proceedings. There were no further reasons given regarding the dubious legality of the decision by the Legal Aid Service following that 'binding guidance' which was evidently in breach of the interim provision of the statute regarding invoicing that would normally lead to severe penalties for a taxpayer. The Supreme Court further deemed it was not necessary to take any position regarding its president's formal request for a 'binding ruling' from the same Tax Authority it is supposed to supervise. The Bar Association of Slovenia also participated in the proceedings invoking Art 19 of the Judicial Review Act. The Supreme Court decided that its standing is not relevant anymore since the claimant's appeal has been rejected. The decision has not even been delivered to the Bar Association of Slovenia but only to the claimant.*

*The matter is to be brought before the Constitutional Court of the Republic of Slovenia in the coming weeks. Our Bar Association intends to join the appellant in the proceedings. According to the latest constitutional jurisprudence in Slovenia administrative courts are obliged by the Constitution (right to access to the court) to request preliminary rulings in matters under jurisdiction of the CJEU (decision nr. Up-1056/11 on 21 November 2013). The issue of 'taxable event' concerning legal aid under VAT Directive 2006/112/EC has not yet been*

*explicitly decided by the CJEU. Arbitrary judicial decisions are also deemed unconstitutional. Finally, we find that judicial independence is at risk when the President of the Supreme Court officially applies for 'binding guidance' from the very same Tax Authority his court is supposed to supervise.*

*Therefore, I propose the CCBE to join Bar Association of Slovenia in taking standing before the Constitutional court of the Republic of Slovenia as it had done in the proceedings before the Belgian Cour constitutionnelle. We think that the necessary ruling by the CJEU would concern other CCBE members as well. Above all, given the current development in the field of taxation the issue of judicial independence in tax matters could not be more relevant.*

*We would be grateful for prompt reply because of statutes of limitations. In case that CCBE would not represent itself in front of the Constitutional court of the Republic of Slovenia, I would be happy to represent you as an attorney. There will be no costs for CCBE with the proceeding, except potential costs of translation of the constitutional complaint in other languages.*

*Yours faithfully,*

*mag. Roman Završek, President*

