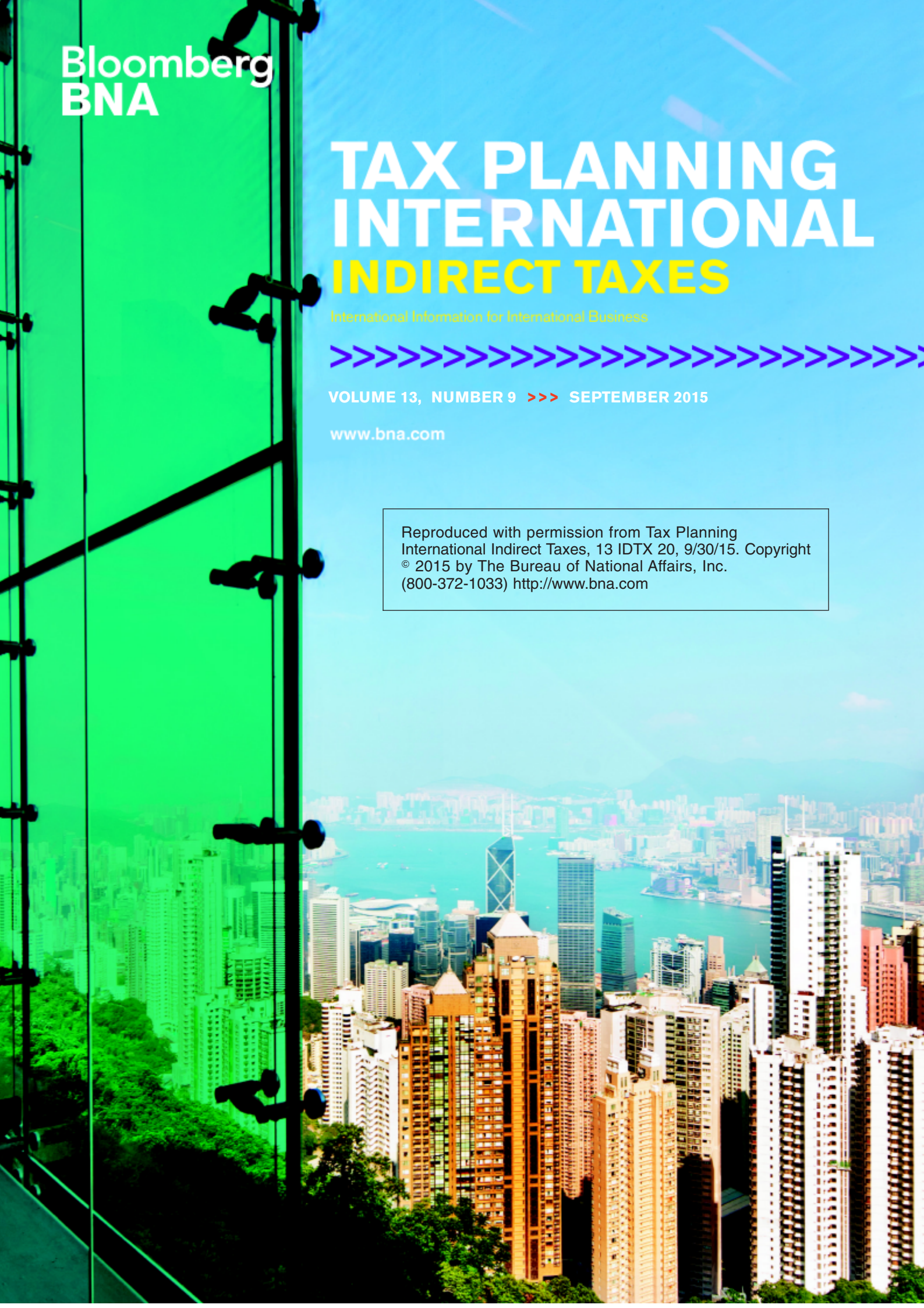

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Viewpoint: *Mapfre*—the CJEU Position on VAT Exemptions for Insurance and Financial Services

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This article in our Viewpoint series considers the recent decision of the CJEU in *Mapfre* which indicates that the Court is continuing to adopt a wide interpretation of VAT exemptions for insurance and financial services.

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The decision of the Court of Justice of the European Union ("CJEU") on July 16 in *Mapfre*[1] shows that the CJEU is continuing to adopt a wide interpretation of the VAT exemptions for insurance and financial services. In determining whether a transaction is one of "insurance or reinsurance", the CJEU has now arrived in a position which is practically identical to that proposed by the European Commission back in 2007 (despite the proposals never being adopted). The reaction of the CJEU, and the European Commission, has been to take a broad brush approach to the exemption, to catch the wide range of complex financial products now available and the sophisticated ways in which they can be delivered. However, despite the legislation being arguably out of date, have we moved too far away from the reason the exemption was introduced in the first place?

The issue in *Mapfre* was the width of the exemption for "insurance transactions", now contained in Article 135(1)(a) of Council Directive 2006/112/EC (the "Principal VAT Directive").

In a number of previous cases, the CJEU had given the insurance exemption a relatively broad construction. It had held that the exemption was not restricted to traditional insurance services offered by companies holding themselves out as insurers. In *CPP*,[2] the Court held that the United Kingdom was not entitled to restrict the scope of the insurance exemption exclusively to supplies by insurers who were authorized by national law to carry on insurance business. Similarly, in *Commission v. Greece*,[3] the CJEU held that the provision of car accident and roadside breakdown services by the Greek automobile association were exempt insurance services, even though the association was not an insurer.

Nor was it necessary that there be a direct contractual relationship between the ultimate insurer and the customers. In *CPP*, the CJEU held that the exemption

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also covered the provision of insurance cover under a block policy through which CPP, as the block policyholder, procured insurance cover for its customers from a third party insurer who assumed the risk assured. The logic of the Court's decision in *CPP* was extended in *BGZ Leasing*[4] to a situation where a leasing company itself obtained insurance cover for leased equipment from an insurer and reinvoiced the cost of that insurance to its client, the lessee. Again, the CJEU held that it did not matter whether the lessee obtained insurance directly from an insurer, or via the lessor—both transactions were exempt.

Nor was it necessary for the indemnity provided by the insurer (if the risk insured against did materialize) to consist in the payment of money. In *Commission v. Greece*, the CJEU held that the provision of assistance in kind—in the form of car accident and roadside breakdown services—were exempt insurance services.

In *Mapfre*, the issue was whether a company which provided a breakdown warranty in respect of secondhand vehicles was providing an insurance service. Mapfre argued that the warranty service was subject to VAT—it did so because the relevant French rate of VAT was lower than the French rate of insurance premium tax. In essence, what Mapfre argued was that the service it provided was simply an after-sales warranty offered by the secondhand car dealer to the car buyer, which the dealer subcontracted to Mapfre in return for a payment from the dealer. Both the Advocate General ("AG") and the CJEU disagreed and held that it appeared from the available factual material that (subject to further clarification of the full facts by the French referring court) the warranty service was in substance an exempt insurance service.

The CJEU came to that conclusion because the transaction exhibited what it identified as the three characteristic elements of an insurance transaction.

First, there was a relationship between Mapfre, as the provider of the warranty, and the purchaser of the vehicle, and that relationship was independent of the secondhand car dealer. The CJEU noted here that the car dealer was not involved in any way in the performance of the warranty—if the car broke down, the repairing garage contacted Mapfre and not the dealer.

Second, Mapfre provided the warranty service in return for a premium, in the form of a lump sum paid by the purchaser of the secondhand car, either included in the purchase price of the car or as an additional payment. That premium was passed on by the dealer to Mapfre. The CJEU determined that the payment was in essence an insurance premium because it was not repaid to the car buyer in the event that the warranty period expired without a breakdown having occurred or if the cost of repairs was less than the premium.

Third, the purpose of the contract was to underwrite risk—in this case, the risk to the purchaser of a secondhand car of it breaking down. The risk covered by the warranty offered by Mapfre was separate from the dealer's legal obligation to compensate the purchaser if the car proved to be defective.

The CJEU went on to state that "the essence of an 'insurance transaction' . . . lies in the fact that the insured person is exempted from the risk of bearing financial loss, which is uncertain, but potentially significant, by the premium, payment of which for that person is certain but limited".

The CJEU's conclusions in *Mapfre* certainly have the merit of consistency—treating Mapfre as an insurer, even though it did not describe itself as such, certainly fits in with the Court's previous judgments in *CPP* and *Commission v. Greece*. Furthermore, the Court's decision that there was a relationship between Mapfre and the car buyer is consistent with the wide interpretation given to the need for a relationship between the insured and insurer in *CPP* and *BGZ Leasing*.

What is more, the CJEU was certainly right to treat Mapfre's service as a separate service from the sale of the secondhand car by the dealer, given that the car buyer appears to have had the option to buy the car without the warranty or alternatively to enter into a different warranty with another supplier—and that Mapfre could terminate the warranty in certain circumstances without that termination affecting the contract for the sale of the car.

However, there are problems with the judgment in *Mapfre*. On a theoretical level, the decision to treat Mapfre's services as exempt insurance transactions is not supported by the original purpose of the insurance exemption. As AG Fennelly explained at paragraph 26 of his Opinion in *CPP,* that purpose was to deal with the problem of calculating the taxable amount on insurance transactions since the consideration received by the insurer for providing insurance cover is not the gross premium but the premium less the actuarial cost of providing the cover. In *Mapfre,* there was no suggestion that there was any difficulty in calculating the consideration for Mapfre's services which would justify treating them as exempt.

The essential characteristics of an insurance transaction articulated in *Mapfre* almost mirror the definition of insurance that the Commission proposed in 2007 to amend the Principal VAT Directive (COM/2007/747). It advanced a definition of "insurance and reinsurance" to be inserted into the Directive as Article 135a(1), being any "commitment whereby a person is obliged, in return for payment, to provide another person, in the event of materialization of a risk, with an indemnity or a benefit as determined by the commitment". Despite the Commission recognizing in its impact assessment that the main reason for the exemption seems to be the technical complexity inherent in taxing financial services, the direction that the Commission, and now the CJEU, is moving towards appears to be one of giving the exemption a wide scope to cover transactions that do not inherently impede accurate calculation of VAT due.

On a practical level, the judgment in *Mapfre* may create difficulties in distinguishing between warran-

ties provided by the manufacturers and retailers of goods and exempt insurance services. Mapfre argued that, since the former type of warranty was subject to VAT, treating its services as exempt would be contrary to fiscal neutrality. Although the CJEU declined to deal with that argument, for lack of sufficient factual evidence to give the issue context, AG Szpunar rejected it on the basis that Mapfre's service was not similar to a manufacturer's or retailer's warranty. However, that was on the somewhat unrealistic basis that a manufacturer or retailer is not acting as an insurer as they can control the risk of the product breaking down, whereas an insurer "has no influence over the vehicle's technical condition and does not even know what that condition is". Given that in *Mapfre,* the dealers were selling secondhand cars, it seems difficult to say that the dealers were, as the AG claimed, "in a position to guarantee that a specific breakdown will not occur in a particular motor vehicle for a particular period".

Interestingly, HM Revenue & Customs ("HMRC") do not go so far in their guidance (VAT Notice 701/36) as to suggest that retailers (rather than manufacturers) can have any control over the risk of product failure—so they do not appear to subscribe to AG Szpunar's reasoning for excluding retailer guarantees or warranties from the insurance exemption. HMRC do however advise that retailer guarantees and warranties will usually be seen as an automatic (often statutory) consequence of a contract for sale and that this transfer by the retailer of risk and property is not a supply of insurance. Although it may be true that in providing a warranty a retailer is merely fulfilling obligations towards the purchaser arising from the contract for sale, it is difficult to see how this service sits outside the scope of what the CJEU in *Mapfre* determined to be the essence of an insurance transaction. The only valid ground for standard rating such a service would be if it could be regarded as a single supply with the item being sold.

It will be interesting to see if, following *Mapfre*, the CJEU will continue to give the insurance exemption a broad construction, capable of catching practically any warranty or guarantee not provided by a retailer or manufacturer. It will also be interesting to see whether the Commission reignites its proposals to cement this wide interpretation of insurance and expand the scope of the other financial services exemptions contained in Article 135. It seems that in any event the exemption has firmly broken the boundaries beyond its originally intended purpose and it is now a case of seeing how far that will go.

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NOTES

[1] Case C-584/13 *Mapfre* ECLI:EU:C:2015:488.

[2] Case C-349/96 *CPP* ECLI:EU:C:1999:93.

[3] Case C-13/06 *Commission v. Greece* ECLI:EU:C:2006:765.

[4] Case C-224/11 *BGZ Leasing* ECLI:EU:C:2013:15.