



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Indirect Taxation and Tax administration  
**Value added tax**

**taxud.c.1(2015)694775 – EN**

Brussels, 12 February 2015

**VALUE ADDED TAX COMMITTEE**  
**(ARTICLE 398 OF DIRECTIVE 2006/112/EC)**  
**WORKING PAPER NO 843**

**NEW LEGISLATION**

**MATTERS CONCERNING THE IMPLEMENTATION**  
**OF RECENTLY ADOPTED EU VAT PROVISIONS**

<b>ORIGIN:</b>	<b>Belgium</b>
<b>REFERENCES:</b>	<b>Article 58 and Annex II of the VAT Directive</b> <b>Article 7 and Annex I of the VAT Implementing Regulation</b>
<b>SUBJECT:</b>	<b>VAT 2015: Scope of the notion of electronically supplied services</b>

## **1. INTRODUCTION**

The Belgian tax authorities submitted questions for examination by the VAT Committee regarding the notion of electronically supplied services as referred to in the VAT Directive<sup>1</sup> and defined in the VAT Implementing Regulation<sup>2</sup>, the possible interaction of this type of services with other services and the issue of VAT exemption of such services. The Belgian paper refers in particular to financial services and their correct VAT treatment.

The questions and the assessment submitted by the Belgian delegation are attached in annex.

## **2. SUBJECT MATTER**

As from 1 January 2015 telecommunications, broadcasting and electronic services supplied to non-taxable persons (B2C transactions) have, following changes to Article 58 of the VAT Directive, been subject to VAT at the place where the customer is located. In accordance with Article 45 of the VAT Directive services supplied to final consumers are, with some exceptions, taxable at the place where the supplier is located. Therefore it is very important, especially taking into account the risks of double or non-taxation, to draw a clear line between what is and what is not covered by the new rules.

Up to now stakeholders did not raise any particular issues linked with the notions of telecommunications or broadcasting services.

There are however questions posed in relation to the correct identification of what is covered by the notion of electronically supplied services and linked with it the problem of VAT exemption. The paper focuses on these issues.

## **3. THE COMMISSION SERVICES' OPINION**

### **3.1. Definition of the notion of electronically supplied services**

In accordance with Article 7(1) of the VAT Implementing Regulation '*Electronically supplied services*' as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.'

EU VAT legislation further provides illustrative lists of supplies which are and which are not regarded as electronically supplied services. The (positive) list of the services included in this group is to be found in Article 7(2) and Annex I of the VAT Implementing

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<sup>1</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

<sup>2</sup> Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

Regulation as well as in Annex II of VAT Directive<sup>3</sup>. The (negative) list of the supplies not regarded as electronically supplied services is contained in Article 7(3) of the VAT Implementing Regulation.

### *3.1.1. Purpose of the definition*

When a rule concerning electronically supplied services was first introduced in 2003<sup>4</sup> it did not provide for a definition; only a list of examples was included there which is now to be found in Annex II of the VAT Directive. The rule aimed at services which can be supplied at a distance, very often in a cross-border context, thanks to the existence of information technology.

It was known already then that the e-commerce market segment is developing rapidly and that in the longer run it would be difficult to identify which services should be treated as electronically supplied services relying only on a list of examples. At the time it was therefore recognised that there is a need for a definition and that such a definition should aim at grasping to the widest possible extent services heavily dependent on information technology. That was also the position presented in Working Paper No 366 to the VAT Committee where the problem was discussed. This paper did not yet provide for a definition as such but it was the basis of further work which led the VAT Committee to agree guidelines at its 67<sup>th</sup> meeting.

The definition of electronically supplied services introduced in 2005<sup>5</sup> reflects the approach taken by the VAT Committee which is still valid today.

### *3.1.2. The significance of each of the elements included in the definition*

The definition of electronically supplied services encompasses four elements:

- the services are to be delivered over the Internet or an electronic network (1<sup>st</sup> element) and;
- their nature is that they:
  - are essentially automated (2<sup>nd</sup> element) and;
  - involve minimal human intervention (3<sup>rd</sup> element) and;
  - are impossible to ensure in the absence of information technology (4<sup>th</sup> element).

The way it is formulated requires that all four conditions have to be taken into account on equal basis when assessing the classification of a service.

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<sup>3</sup> Article 7(2) of the VAT Implementing Regulation lists a few different types of electronically supplied services and refers to Annex I. Annex I of the VAT Implementing Regulation should be read together with Annex II of the VAT Directive which lists five types of electronically supplied services (with some being partially covered by Article 7(2) of the VAT Implementing Regulation and Annex I thereof providing more detailed examples for each of those five groups).

<sup>4</sup> Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services (OJ L 128, 15.5.2002, p. 41).

<sup>5</sup> Council Regulation of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ L 288, 29.10.2005, p. 1).

As mentioned this definition was introduced by the Council in 2005 and it is based entirely on the guidelines of the VAT Committee resulting from its 67<sup>th</sup> meeting which also provide a guide to the interpretation of what electronically supplied services are.

This guide states that an “*electronically supplied service*” is one that:

- *in the first instance is delivered over the Internet or an electronic network (i.e. reliant on the Internet or similar network for its provision); and then*
- *the nature of the service in question is heavily dependent on information technology for its supply (i.e., the service is essentially automated, involving minimal human intervention and in the absence of information technology does not have viability).*

The guide presents a two-step approach against which a service should be verified. Firstly a service has to be delivered over the Internet or an electronic network and secondly the nature of the service should heavily depend on information technology for its supply. The dependence of a supply of a service on information technology is characterised by three features which are now all listed in the definition that is the subject of the present analysis. The way it is presented in the definition itself and in the guide does not allow putting more value to some of these elements and less to others.

Therefore the suggestion by the Belgian delegation that one of the elements (notably the requirement that the service cannot be carried out without using information technology) should not be seen as a valid condition for identification of electronically supplied services, does not have any grounds in the legislation or the preparatory work of the VAT Committee which led to the formulation of the definition and should be seen as arbitrary and without valid substance.

### *3.1.3. Elements of the definition – how to understand them*

As explained under point 3.1.2 all four elements of the definition should be read together without putting more importance to some at the expense of others. In order to better understand the definition some indicators relevant to its individual elements can be mentioned.

#### *1<sup>st</sup> element – services delivered over the Internet or an electronic network*

The Internet is a publicly accessible electronic communications network that connects computer networks and organisational computer facilities around the world<sup>6</sup>. An electronic network is a system of interconnected electronic components or circuits<sup>7</sup> which in practice covers all the communication networks which allow for electronic communication.

#### *2<sup>nd</sup> element – services where their nature renders supply essentially automated*

Automation is the application of machines to tasks once performed by human beings or, increasingly, to tasks that would otherwise be impossible<sup>8</sup>. In the context of electronic networks when a supply is essentially automated it means that the process, technique or system via which it is being delivered is automated through the use of computers and

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<sup>6</sup> <http://www.merriam-webster.com/dictionary/internet> (verified on 4.2.2015)

<sup>7</sup> <http://www.thefreedictionary.com/electronic+network> (verified on 4.2.2015)

<sup>8</sup> <http://www.britannica.com/EBchecked/topic/44912/automation> (verified on 4.2.2015)

computer software (electronic devices). Such a process requires less human intervention and less human time to deliver<sup>9</sup>.

*3<sup>rd</sup> element – the nature of the service allows for supply with minimal human intervention*

The supply of a service where minimal human intervention is required is very closely linked with the automation of the process, technique or system put in place for delivery of the service. One could say metaphorically that the 2<sup>nd</sup> and 3<sup>rd</sup> elements of the definition are two sides of the same coin. However as it cannot be excluded that a supply is automated but having human intervention that is more than minimal, both elements would still need to be taken into account.

At practical level there should be no doubt that the initial setting up of the system as well as its regular maintenance should be seen as minimal human intervention in the context of the definition. On the other hand in cases where each separate supply requires human intervention this should be seen as more than minimal one.

*4<sup>th</sup> element – the nature of a service makes it impossible to ensure it in the absence of information technology*

Information technology is the branch of engineering that deals with the development, maintenance and use of computers and telecommunications systems to retrieve, store, transmit and manipulate information or data<sup>10</sup>. The nature of the service should not be assessed theoretically and in general, but taking into account each service in particular (see below).

*3.1.4. Types of services covered by the definition – the issue of services that can be supplied both online and offline*

The definition of electronically supplied services aims at covering all the services that highly depend on information technology and are delivered over the Internet or other electronic networks. It is future oriented and applies to the fast growing and innovating market where new types of services are constantly being developed. Some of those services may be available only online but there are also many comparable services which are capable of being delivered both online and offline.

For example in the case of teaching, the service is covered under point (5) of Annex I of the VAT Implementing Regulation when it is automated, with no more than minimal human intervention and delivered over the Internet. Distance teaching however falls outside the scope of the definition if the Internet is used only as a simple tool for communication or where it takes the form of correspondence courses with materials being sent by post. The same obviously goes for most traditional teaching where a pupil and a teacher are in the same classroom.

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<sup>9</sup> [http://www.webopedia.com/TERM/P/process\\_automation.html](http://www.webopedia.com/TERM/P/process_automation.html) (verified on 4.2.2015)

<sup>10</sup> <http://www.thefreedictionary.com/automation> (verified on 4.2.2015)

<http://www.vocabulary.com/dictionary/automatic#word=information%20technology> (verified on 4.2.2015)

<http://www.merriam-webster.com/dictionary/information%20technology> (verified on 4.2.2015)

<http://www.oxfordreference.com/search?siteToSearch=aup&q=information+technology&searchBtn=Search&isQuickSearch=true> (verified on 4.2.2015)

Another example is the case of video on demand (where films can also be watched in the cinema or on DVD) and online data warehousing (in this case offline data warehousing services are explicitly listed in the negative list in Article 7(3) of the VAT Implementing Regulation).

The Belgian delegation states in its paper that the fact that some of the examples of electronically supplied services included in Annex II of the VAT Directive and in Article 7 and Annex I of the VAT Implementing Regulation can also be provided offline excludes as a valid condition the last element of the definition of electronically supplied services (i.e. the requirement that a service cannot be carried out without using information technology). They underline that the reference to the nature of the service in the definition must be taken to mean that its features – flowing from the use of information technology – are intrinsic conditions of the supply and not just a way to deliver. Therefore it is argued that this last element of the definition should be seen only as a consequence of the two other conditions i.e. that the supply of the service is essentially automated and involves only minimal human intervention.

The Commission services do not agree with such an approach as it leads to limiting the scope of the definition in an arbitrary way which cannot be justified taking into account the wording of the definition and its purpose.

Firstly, the purpose of this definition is, as explained under point 3.1.1, to cover all electronically supplied services where their supply is based on the use of information technology.

Secondly, as already explained under point 3.1.2, the wording of the definition itself as well as the outcome of the VAT Committee works which led to its formulation do not support this stance.

Thirdly comparable services having similar features may be supplied by using information technology or in more traditional ways (which may include physical intervention in some cases). There should be no doubt that out of the group of such comparable services the ones fulfilling all the conditions of the definition of electronically supplied services are supposed to be covered by it. Examples of comparable services, in certain circumstances covered by the definition being analysed and in others not, can be found in the provisions discussed in this paper. There are many more comparable services, which are not explicitly included in positive and negative lists. The features of comparable services which can be supplied both online and offline may have some or many elements in common but they are still not entirely identical. Therefore there are no grounds to assume that the existence (of many) of such comparable services should influence the way in which this definition is to be read.

It is also important to remember that although in everyday language one talks about electronic services, the definition provided for in Article 7(1) of the VAT Implementing Regulation refers to electronically **supplied** services showing that the element of the way the services are supplied is intrinsic to the definition and cannot be disregarded.

At the same time the definition does not cover services where the communication between the supplier and the customer is merely carried out via the Internet or other electronic network but otherwise they do not depend on the information technology. That is

consistent with the fact that, according to Article 7(1) of the VAT Directive, communication between the supplier of a service and the customer via electronic mail of itself does not mean that the service supplied is an electronically supplied service.

In conclusion, the Commission services believe it is necessary to analyse all four elements of the definition on an equal footing. This is based on the wording of the definition, the preparatory work of the VAT Committee leading to its formulation and the analysis of the purpose of this definition, and is supported by the examples included in positive and negative lists of electronically supplied services.

*3.1.5. Examples of services covered and not covered by the definition of electronically supplied services*

As explained above when assessing whether a service is covered by the definition of electronically supplied services all the four conditions mentioned there should be verified and only on that basis it is possible to determine whether a given service qualifies as an electronically supplied service or not.

Below some examples are analysed in the light of the definition of electronically supplied services.

- 1) PDF files are used by some businesses in order to send different contents such as knitting patterns, logo designs and the like which can be forwarded or delivered by the business in this form to its customers.

The supply of such PDF files will be treated as electronically supplied services when it is automated, involves minimal human intervention, is impossible to ensure in the absence of information technology and is delivered over the Internet. That will therefore cover any situation where a PDF file is downloaded from a website or it is automatically e-mailed by the supplier's system.

On the other hand individually commissioned content (which was not the result of an automated procedure) sent in digital form like a PDF file is not an electronically supplied services. Examples of such content could be photographs, reports, business logos, medical results. Also any digital content (individually commissioned or not) that is manually e-mailed by the supplier is not covered by the definition as it involves more than a minimal human intervention and is not automated.

- 2) Market places are facilitating contacts between vendors selling second-hand goods and their customers. Platforms are facilitating contacts between people (employers and possible future employees, groups of similar interests, date sites, etc.).

In the mentioned examples market places or platforms give access to their digital facilities where their customers may exchange information and make connections. Where such a service is supplied for consideration to a customer and is provided in an automated way, with no more than minimal human intervention and cannot be provided without information technology, then it is covered by the definition. However where a given service would require human intervention for example the content put on a date site is verified by a psychologist then it would fall outside the scope of the definition.

- 3) Platforms providing for crowdfunding facilities normally create an environment where entrepreneurs (*e.g.*, creators, inventors, project managers, etc. seeking funds) on the one hand and contributors (people providing with funds) on the other can meet virtually. When the platform is run in an automated manner with minimal human intervention and the provision of the service is impossible without information technology then the access to such platform supplied for consideration should be seen as covered by the definition.
- 4) Online gambling is normally based on an automated, requiring minimal human intervention, with the process impossible to deliver without information technology and therefore it should be qualified as electronically supplied service.
- 5) Financial services may take many different forms and can be supplied in different ways. Therefore the assessment is only possible when a concrete case is analysed against the four elements of the definition. Insofar as those four elements are met, financial services can qualify as electronically supplied services.
- 6) When stock photographs are available for consideration for automatic download via the Internet, where minimal human intervention is required and such a supply would be impossible in the absence of information technology then it should be qualified as an electronically supplied service.
- 7) In the case of live webinars human intervention is crucial for the service to be supplied and therefore it cannot be seen as an electronically supplied service.
- 8) Online courses consisting of pre-recorded video and downloadable PDFs should normally be seen as electronically supplied services as the supply fulfils the requirements of the definition.
- 9) Online courses consisting of pre-recorded video and downloadable PDFs plus support from a live tutor should be seen as a supply where the human intervention is more substantial and therefore the supply does not qualify as an electronically supplied service.

All these examples illustrate the logic to be followed when assessing concrete cases in an area which develops every day.

### **3.2. Electronically supplied services and possible VAT exemptions**

The EU VAT system has its own internal logic which requires that when identifying the correct tax treatment of a supply certain steps need to be taken in a certain order as reflected by the structure of the VAT Directive itself.

Therefore there is no doubt that before entering into the question whether a given supply is taxed or exempt its place of supply first has to be identified.

In order to do that a service has to be categorised for the use of the place of supply rules. In accordance with established jurisprudence of the Court of Justice of the European Union (CJEU) each service has to be evaluated on its own merits without giving any preference to general rules over any of the particular provisions included now in Chapter 3 of the VAT Directive (Place of supply of services). In other words every time it has to be



assessed whether a service is covered by one of the particular provisions and, if not, then it falls under the general rules. The objective is first to avoid conflicts of jurisdiction and second non-taxation<sup>11</sup>.

The Belgian delegation in its paper suggests that because of the clashes that could occur as a result of certain services being able to be covered by more than one of the particular rules, the definition of electronically supplied services should be interpreted narrowly. As an illustration they refer to the surveillance of a building, underlining that under certain circumstances it can be considered both as a supply connected to immovable property in accordance with Article 47 of the VAT Directive and as an electronically supplied service covered by Article 58 of the VAT Directive.

When a service might be covered by more than one of the particular rules governing the place of supply of services it is important to assess the application of each of them with a view to determine which one would bring the most satisfactory outcome from the point of view of ensuring taxation at the place of consumption of the service as it is an overall purpose of these rules<sup>12</sup>.

However in the Commission services' opinion this is not an argument which would allow in general to interpreting narrowly the definition of electronically supplied services as such.

It is only after establishing the correct place of supply that a given supply may be assessed from the point of view of applying the correct VAT rate or exemption.

It is of key importance to remember that sometimes (but not always) different levels of precision are being applied to the identification of the services referred to in the various parts of the VAT Directive.

So in the place of supply rules there is an explicit reference to electronically supplied services whilst financial services (which are being discussed in the Belgian paper in the context of limiting the application of the definition of electronically supplied services) are not mentioned there at all.

At the same time the provisions dealing with VAT exemptions refer extensively to financial services but they are silent with regard to electronically supplied services.

Therefore a financial service – contrary to what is suggested by the Belgian delegation – may be qualified as an electronically supplied service for the place of supply rules and afterwards it will need to be assessed in accordance with the rules of the relevant Member State whether it is VAT exempt.

It is worth to add that the situation differs as regards the application of reduced VAT rates where in Article 98(2) of the VAT Directive Member States are precluded from applying reduced rates to electronically supplied services.

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<sup>11</sup> See case C-168/84 *Berkholz*; case C-327/94 *Dudda*; case C-166/05 *Heger Rudi* and case C-401/06 *Commission v. Germany*.

<sup>12</sup> See p .39 of the judgment in case C-37/08 *RCI Europe*.

The question of the VAT exemption is further developed in Working paper No 844 which is to be discussed during the same VAT Committee meeting.

### **3.3. Conclusion**

The scope of the definition of electronically supplied services should be assessed taking into account its purpose, the preparatory works which led to its formulation and its wording.

The Commission services believe that the definition is future proof but requires a firm application without accommodating for the needs of any particular business group. Indeed, this is the only way to ensure that its application is objective and does not bend to requests of particular players/segments of the market. Therefore the understanding of the scope of the definition should not be influenced by the fact that this could possibly impact the extent to which the services concerned may be exempted. Any impact on the exemption is merely the result of the place of supply rules being correctly applied (which in a cross-border environment could see the place of taxation change to the Member State in which a given service is seen as being supplied). As underlined the market of e-commerce is a growing one and any inconsistency in the approach to the definition of electronically supplied services will sooner or later bring about other problems of interpretation whether or not to cover services which are not yet identified.

## **4. DELEGATIONS' OPINION**

The delegations are invited to give their opinion on the presented issues.

- 1) They are asked to state whether they agree with the Commission services' approach as regards the definition of electronically supplied services.
- 2) They are invited to present any further examples of services which are or which are not covered by the definition.
- 3) The delegations are also invited to present their position as regards VAT exemption in the context of the application of the place of supply rules for electronically supplied services.

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## **Belgian question**

**Subject: Concept of electronic services for the purposes of the application of Article 58 of Council Directive 2006/112/EC – Classification – Interaction with other provisions on place – Interaction with the exemption provisions**

### **1. BACKGROUND**

Article 58 of Council Directive 2006/112/EC (in the version applicable from 1 January 2015) states that the place of supply of electronic services to a non-taxable person is the place where that person is established, has his permanent address or usually resides. Suppliers delivering this type of services in a Member State in which they are not established will be able to use the Mini One-Stop Shop in order to declare and pay the VAT due in that Member State.

It is therefore essential for the economic operators supplying different types of electronic services to be able to establish with certainty which of these services are electronic services within the meaning of Article 58, so they know whether they have to charge the VAT of the customer's country and, where applicable, declare and pay it through the Mini One-Stop Shop.

Article 7 of Council Implementing Regulation (EU) No 282/2011 defines ‘electronic services’ and gives examples of services that are considered to be electronic services and services that are not. Furthermore, Annex II to Directive 2006/112/EC, containing the indicative list of services to be considered electronic services, provides guidance, which is expanded on () in Annex I to Council Implementing Regulation (EU) No 282/2011. The Explanatory Notes published on 3 April 2014 by the European Commission also provide further details.

However, following informal contacts between the Belgian administration and economic operators and other Member States, it appears necessary for the VAT Committee to clarify the concept of electronic service in order to prevent a service being considered an electronic service in one Member State and not in another (which could lead to double taxation or non-taxation).

### **2. BELGIUM'S ANALYSIS OF THE CONCEPT OF ELECTRONIC SERVICES**

#### **2.1. Classifying a supply**

##### **2.1.1. Conditions**

Article 7(1) of Council Implementing Regulation (EU) No 282/2011 defines the ‘electronically supplied services’ referred to in Directive 2006/112/EC as ‘services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology’.

In accordance with this Article, for a service to be classified as an electronic service, three factors have to be taken into account:

- the service must be delivered over the Internet or an electronic network;
- the nature of the service has to render the supply essentially automated and involving minimal human intervention;
- the service must be impossible to ensure in the absence of information technology.

On the basis of Belgium's informal contacts with operators and other Member States, the key issue is knowing exactly what the third factor referred to in Article 7 encompasses, and in particular whether they have to check that the supply can be provided offline or, conversely, that it can only be provided online.

Semantically, there are two possible approaches:

1. Article 7 of the Implementing Regulation lists three separate and distinct conditions that have to be met for a supply to be classified as an ‘electronically supplied service’

This position is underpinned by the use of ‘and’ in Article 7.

However, such a position means that few supplies fall within the scope of Article 7, since it is very often conceivable that a supply might be carried out without using information technology. In theory, computer maintenance can be carried out both online and on site (with someone physically present). Moreover, such a position is difficult to reconcile with the analysis of the examples in Annex I to Implementing Regulation No 282/2011 and in Annex II to Directive 2006/112/EC. The examples in these lists include a number of services that may be supplied both by using information technology and through physical intervention.

Point 4 of Annex II to Directive 2006/112/EC as supplemented by Annex I to the Implementing Regulation states that the following are to be considered as electronically supplied services: reception of radio or television broadcasts through a radio or television network, the Internet or a similar electronic network for listening or watching programmes at a time picked by the user and on individual users’ request on the basis of the list of programmes selected by the media service provider (such as on request television or video channels). If the supply is considered theoretically, it is possible to watch a video non-digitally (for instance, by going to the cinema), thereby proving that an abstract analysis cannot be accepted and that the last part of the definition of the above-mentioned Article 7 cannot be understood as an extra condition.

2. There are in fact only two separate and distinct conditions listed in Article 7 of the Implementing Regulation, the final part of the Article being no more than an explanation of the second condition

According to this approach, the final part of the Article is to be understood more as a consequence of the first two conditions of the definition of electronic services: since the very nature of the supply has to render it essentially automated, this supply could not actually be carried out without using information technology.

This is the approach taken by the Commission in Working Document No 366, in which it writes that the ‘service is interactive or automated to the extent of creating a service which could not function in any other way than through Internet technology’.

Point 2.4.3.1 of the Explanatory Notes of 3 April 2014 also appears to confirm this position: ‘*The nature of services consisting of price comparison (and services offered by similar webpages) should be assessed against the definition included in Article 7(1). They are provided over the Internet and normally their supply is automated without human intervention. Therefore, usually, these services should be qualified as electronic services.*’. No other condition is required for the supply to be considered an electronic service.

The Belgian delegation endorses this second approach and considers that a supply must actually be carried out by means of information technology without there being any need to check whether the supply can conceivably be carried out without this technology.

#### 2.1.2. Interaction with other classifications

As stated above, assuming that a supply is to be classified as an electronic supply service where the above-mentioned two conditions are met, some supplies may fall within the scope not just of Article 58 but also of another provision in Directive 2006/112/EC regarding the place of supply. For instance, the surveillance of a building could be considered both a supply connected to immovable property in accordance with Article 47 of the Directive and a supply delivered electronically pursuant to Article 58.

This overlap between different provisions of Directive 2006/112/EEC stems from the fact that the classification of a supply as an electronic service supply refers to the way and conditions in which the supply is delivered. This in turn raises the issue of the interaction of these provisions and the scope of the concept of electronic service supply.

In the past it was felt that ‘electronically supplied services’ should be interpreted as loosely as possible<sup>13</sup>, which could be understood as meaning that Article 58 of the VAT Directive prevails whenever there is a conflict with another provision.

Belgium, however, considers that this definition needs to be limited: as stated above, the **nature** of the service must render the supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology in order for it to fall under Article 58 of the Directive and Article 7(1) of Implementing Regulation No 282/2011.

As a consequence of the developments listed under point 2.1.1 above, the use of information technology must therefore be one of the intrinsic conditions of the supply rather than just a way to deliver it.

Thus, financial services cannot be qualified as electronically supplied services if delivery via the Internet is not intrinsic to the nature of the service but simply makes it easier to deliver the supply.

Similarly, in the case of the surveillance of a building (a warehouse for example), the fact that it is carried out by guards watching camera footage means that it cannot be classified

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<sup>13</sup> Working paper No 366

an electronic service supply (since the supply is not essentially automated). If, however, the contract provides for a warehouse owner to be notified of intruders via his smartphone without any human assistance/intervention at any time, the supply will then be deemed an electronically supplied service. Here, surveillance of the building over the Internet (or another network) is a condition for delivery of the supply rather than just a means of delivery.

The Belgian delegation believes that the application of this concept should be limited to supplies for which there is an intrinsic need to use information technology, as otherwise there is a danger that any supply might qualify as an electronically supplied service.

## **2.2. Exemption**

The issue is whether a supply which, by its nature, could benefit from an exemption clause remains eligible for this exemption if it is classified as an electronically supplied service of the kind defined in Article 7(1) of Implementing Regulation No 282/2011. The question is whether the electronic services described in point 5(a) of Annex I to Implementing Regulation No 282/2011 remain eligible for the exemption referred to in Article 132(1)(i) of Directive 2006/112/EC if the conditions for exemption are met.

There are basically two conceivable approaches:

1. A supply is classified as an electronically supplied service pursuant to Article 58 of Directive 2006/112/EC. Such classification is warranted for the purposes both of determining the place of supply and of applying a possible exemption.
2. Even if a supply is classified as an electronically supplied service pursuant to Article 58 of Directive 2006/112/EC, this classification should be disregarded when examining the conditions of application of any exemption.

The issue, of course, arises only when a supply has been classified as an ‘electronically supplied service’. The first thing that needs to be done is therefore to determine whether the term ‘electronically supplied service’ is to be interpreted narrowly or loosely (see point 2.1 above).

In the Belgian delegation's opinion, the judgment of the Court in Case C-2/95, *Sparekassernes Datacenter (SDC) v Skatteministeriet*, must be applied<sup>14</sup>. In paragraph 37 of its judgment, the Court states with regard to financial exemption *that the specific manner in which the service is performed, electronically, automatically or manually, does not affect the application of the exemption. The provisions in question make no distinction in this regard. Accordingly, the mere fact that a service is performed entirely by electronic means does not in itself prevent the exemption from applying to that service. If, on the other hand, the service entails only technical and electronic assistance to the person performing the essential, specific functions for the transactions covered by points 3 and 5 of Article 13B(d), it does not fulfil the conditions for exemption. That conclusion follows, however, from the nature of the service and not from the way in which it is performed.*

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<sup>14</sup> Case C-2/95 of 5 June 1997.

Moreover, this position was confirmed by a statement by all the Member States and the Commission included in the official report of the Ecofin Council at which the first amendment to the rules on determining place for electronic services was adopted in 2003 as regards the special case of online games and betting. This statement reads: ‘the Council and the Commission takes note that regulating the place of taxation for games of chance and gambling games will not prejudice present exemptions in Member States or any present restrictions as regards access to cross-border provision of services of this kind.’

In other words, this criterion does not have to be taken into consideration when examining application of the exemption. Only the conditions for application of an exemption need to be examined; if the manner of delivery of the supply does not figure among the conditions for benefiting from the exemption, then it does not need to be examined.

### **3. QUESTION**

In view of the many questions raised by Belgian firms that may supply electronic services, Belgium would like the views of the Commission and the other Member States on ‘electronically supplied services’. Belgium would also welcome confirmation of its interpretation of the above-mentioned Articles of the Directive and the Implementing Regulation.