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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 896

NEW LEGISLATION

MATTERS CONCERNING THE IMPLEMENTATION
OF RECENTLY ADOPTED EU VAT PROVISIONS

ORIGIN: Commission

REFERENCES: Article 58 and Annex II of the VAT Directive
Article 7 and Annex I of the VAT Implementing Regulation

SUBJECT: VAT 2015: Scope of the notion of electronically supplied services; minimal human intervention (follow-up)

1. INTRODUCTION

During the 102nd VAT Committee meeting, the scope of the notion of electronically supplied services was discussed¹. As a result of these discussions, guidelines were agreed².

Further questions were however raised by some Member States and by businesses in regard to the definition of electronically supplied services and in particular to one of its elements – the notion of 'minimal human intervention'.

For that reason, the Commission services have considered it would be useful to provide a further analysis of how to understand the meaning of the 'minimal human intervention' element of this definition.

2. SUBJECT MATTER

2.1. Issues linked with the notion of minimal human intervention already discussed

Several issues relevant for the better understanding of the notion of minimal human intervention were dealt with in Working paper No 843.

Amongst others, it was made clear that the purpose of the definition of electronically supplied services is to cover services supplied in a cross-border context at a distance, thanks to the existence of information technology.

Some aspects of that definition which were discussed are also reflected in the guidelines agreed by the VAT Committee.

First of all, the guidelines confirmed that all four elements of the definition of electronically supplied services included in Article 7(1) of the VAT Implementing Regulation³ should be analysed and treated on an equal footing.

Further, the guidelines stated that for the assessment of the notion of 'minimal human intervention' included in the definition of electronically supplied services, it is the involvement of the supplier and not that of the customer which is relevant. On the one hand, the situation where the supplier initially sets up the system needed for the supply, regularly maintains it or repairs where needed, is to be seen as requiring only 'minimal human intervention'. On the other hand, cases where each individual supply involves human intervention on the side of the supplier are to be seen as requiring more than 'minimal human intervention'.

¹ Working paper No 843.

² http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf; Guidelines resulting from the 102nd meeting of 30 March 2015; Document D – taxud.c.1(2015)4128689 – 862 (p. 192).

³ 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).

The VAT Committee also discussed issues linked with the scope of the definition of electronically supplied services (and in particular the notion of 'minimal human intervention') when dealing with the question of online gambling services⁴. Those discussions did not however result in guidelines. The main elements examined in Working paper No 882 are referred to under section 3.2.

2.2. What is required in terms of further work

Looking at the positions agreed by the VAT Committee up to now and at the inputs provided by various stakeholders it is clear that more efforts are necessary to identify the dividing line between what should and what should not be seen as covered by the notion of 'minimal human intervention' even more precisely. That is needed in order to assure harmonised understanding of the definition of electronically supplied services and as a consequence harmonised application by Member States of Article 58 of the VAT Directive.

3. THE COMMISSION SERVICES' OPINION

3.1. General context

Broader and more uniform application of the destination principle for VAT taxation is seen generally as the preferred way forward both within the European Union (the Commission's 2011 Communication on the Future of VAT⁵ followed by works within the Group on the Future of VAT and the VAT Expert Group) and at international level (works of the OECD⁶).

The Commission services believe that the assessment of the scope of electronically supplied services should be made taking into account this general political orientation.

3.2. Minimal human intervention: additional indicators/elements to be considered

1) The VAT Committee guidelines⁷ stated that for the assessment of the notion of 'minimal human intervention' what counts is the involvement on the side of the supplier and not on the side of the customer.

In Working paper No 882 it was explained that the minimal human intervention refers to the relationship between the supplier and his customer. Therefore the activity of a third party, to which services may in one way or the other relate (like for example in the case of betting on the results of sport events organised by an entity independent from the provider of betting services), cannot be relevant for the assessment of the 'minimal human intervention' element of the supply of those services.

⁴ Working paper No 882, see in particular p. 4-7.

⁵ http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/-communications/com_2011_851_en.pdf

⁶ <http://www.oecd.org/ctp/consumption/international-vat-gst-guidelines.htm>

⁷ http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_-_committee/guidelines-vat-committee-meetings_en.pdf ; Guidelines resulting from the 102nd meeting of 30 March 2015; Document D – taxud.c.1(2015)4128689 – 862 (p. 192).

The same applies where the activity of the third party, independent from the provision of services by the supplier, is relevant for the parties involved in the supply, as it is the case when that activity is being broadcasted live at the same time when the electronically supplied services are actually provided. In other words, it is the evaluation of the supplier's activity that matters and not any actions of an independent third party linked with the services supplied.

2) The VAT Committee guidelines also stated that the situation where the supplier initially sets up the system needed for the supply, regularly maintains it or repairs where needed, is to be seen as requiring only 'minimal human intervention'.

The Commission services believe that in respect of the running of the system by the supplier himself there are additional situations which can be seen as not exceeding the requirement of providing electronically supplied services with 'minimal human intervention'. Some of them were already mentioned in Working paper No 882.

One of them covered the situation where in the context of the services supplied the supplier offers an activity performed by a real person (persons) and addressed only to those acquiring services online. This activity is however performed independently of requests made to provide a particular supply to an individual customer. It means that the activity is performed at a given time regardless of whether there are actually any online requests for providing a particular service linked with that activity. The example given was that of different forms of online gambling like spinning the wheel of the roulette or drawing physical cards to play blackjack or baccarat at certain time intervals where players can place their bets or demand their cards.

As such activity (organised by the supplier of services himself) performed by real persons only with a view to the online deliveries is disconnected from individual supplies of services made to individual customers, the Commission services would see such an arrangement as part of the provision of a system as a whole enabling the supplier to provide services as such. This kind of arrangement should be seen as an activity of the supplier that is comparable to the ones mentioned above, i.e. initial setting up of the system needed for the supply, regular maintenance and repairs.

The same logic should be applied in the situation where the supplier has a group of people running the system in real time with a view of not allowing customers to break it or have it collapse by the way they act when requesting the provision of a service, like for example in the case of bookmakers updating the system where such activity may also include the refusal to take some bets from individual customers which could endanger the operation of the system as such.

The approach should also be the same when employees of a company are running the system in order to constantly update/customise its environment for the needs of clients provided that adjustments are not targeting the demand of a single individual. They may be using the input and feedback collected from customers via different channels for improving the system but that is not an activity which is inherent to a supply to an individual client.

For example in the case of e-games it is not uncommon that specialised teams are created with the aim of constantly adjusting the game by adding more features, content and events. They communicate with the players through social networks, by chatting with key players of the games or addressing player questions via a ticketing system. The company may also have a team dedicated to analyse players' behaviour, activities and identified patterns. It could be done on the basis of organised events in a game where the player plays against another player or versus the game. The games are constantly adjusted based on the customers' feedback in order to improve their environment, rules, etc. on a general level but not with a view to make adaptations for a single player.

All the activities described above are necessary for enabling the supplier to provide his services in the best way possible and should not influence the decision as to whether there is minimal/more than minimal human intervention.

Where the human activity on the side of the supplier focuses on the whole environment of the system and not on individual requests from customers this should not be seen as trespassing the requirement of minimal human intervention included in the definition of electronically supplied services. In other words, the existence of teams working for the supplier does not present an obstacle for a service to be covered by the definition of electronically supplied services. We should look at what the supplier is doing when providing a particular service and whether there is a requirement of human involvement for that service to be supplied to his customer. If yes, then there is more than minimal human intervention involved in the supply of such a service.

3.3. Electronically supplied services and abusive practices

The qualification of a service as electronically supplied or not is normally decisive when identifying in which Member State or third country a given service should be taxed.

The Commission services believe that in some cases it can be particularly important. For example, the supply of a standardised PDF where each file is manually e-mailed to the customer should not as such raise doubts as being a service provided with more than minimal human intervention. However, where a company starts to send hundreds of e-mails everyday it is for this company to prove that all that is done manually and not thanks to a special programme imitating a manual service. Further, where from accompanying circumstances it appears that a company established itself outside the EU and sends individual PDF using tens of employees dedicated to that task for the sake of circumventing the place of supply rules it should be seen as an abusive practice and disregarded for VAT purposes⁸.

3.4. Bundled supplies and electronically supplied services

In the case of electronically supplied services, as for any other service, the question of whether a bundled supply is being provided may arise.

Here the question to answer first of all is if the additional services provided are not in fact ancillary services aiming at the better enjoyment of the main service (i.e. the electronically supplied one). For example, in the opinion of the Commission services, when during a

⁸ See for example Court of Justice of the European Union (CJEU), case C-653/11, *Newey and Ocean Finance*, paragraph 46.

gambling activity a player is given the possibility for chatting with the dealer this should be seen rather as an ancillary service allowing the customer to better enjoy the main supply of gambling.

Where we are faced with a bundled supply the predominant element of this supply has to be identified and it should be verified whether this predominant element is fulfilling the conditions of the definition of electronically supplied services.

The qualification of a given scenario as a single supply or multiple supplies must be done on a case-by-case basis taking into account criteria set out by the CJEU. When carrying out this assessment, all circumstances of the transaction must be taken into consideration.⁹

3.5. Conclusions

Electronically supplied services usually involve, to some extent, human intervention. This is the reason why Article 7 of the VAT Implementing Regulation allows that a certain level of human intervention, referred to as minimal, can be involved in the supply of an electronically supplied service.

The requirement of minimal human intervention should be seen as referring to the activity deployed by the supplier to provide each individual service when such a service is requested by the customer. In cases where systems as such require some degree of human intervention for running and developing the system, this should be seen as not being more than minimal in the sense of Article 7(1) of the VAT Implementing Regulation. The same applies for the level of human intervention where activities carried out by persons different from the supplier are relevant for the supply of a service.

When interpreting the scope of electronically supplied services it is important to take into account the general political orientation for a destination principle and the need to limit the cases of abusive practices.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on matters raised by the Commission services and to provide their opinion on the scope of possible VAT Committee guidelines dealing with the issues presented.

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⁹ See for example CJEU case C-42/14 *Wojskowa Agencja Mieszkaniowa w Warszawie*, paragraph 30 and the following, and case C-349/96 *Card Protection Plan*, paragraph 27.