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Virtual Activities: EU VAT's Effort to Recompose the Broken 'Unity of Action, Time and Place' – Part I

Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Tuesday, January 4th, 2022

On 7 December 2021, government ministers from European Union (EU) countries gathering at the EU Council agreed on updates of the current rules governing value added tax (VAT) rates for goods and services. The new EU rules on VAT rates represent a long-awaited modernisation of the relevant provisions contained in [Annex III to Directive 2006/112/CE \(the VAT Directive\)](#), which date back to the 1990s, much earlier than 2016-17, when the EU Commission finally endorsed a [destination-based VAT](#).^[1]

Discussions among Member States' representatives for new rules on VAT rates have taken a long time. The EU Commission had tabled an initial [proposal](#) to modernise the current laws on VAT rates more than three years ago, on 18 January 2018. It is now for the EU Parliament to have a say on the [compromise text](#) agreed upon by participants at the EU Council's meeting of 7 December 2021.^[2]

In a nutshell, the new rules grant Member States more flexibility in setting reduced (two reduced rates of a minimum of 5%), super-reduced (one reduced rate lower than 5%), and zero (one exemption with input VAT deduction) VAT rates, although limiting the number (respectively, up to twenty-four and seven) of the items listed in Annex III of the VAT Directive eligible for a reduced and super-reduced or zero VAT rate.^[3] The new provisions also aim to preserve the functioning of the internal market and avoid distortions of competition between the EU Member States, by removing existing derogations that allowed some Member States only to apply preferential rates for certain products. Not least in terms of importance, the updated legislation intends to bring VAT into line with [the latest EU Commission's priorities](#), notably the fight against climate change, the support of digital transformation, and the protection of public health. To that effect, the new VAT rules enable the Member States to apply reduced, super-reduced, or zero VAT rates on goods and services (e.g., solar panels, Internet access services, pharmaceutical products) that help achieve these EU goals, while preparing the phasing out of existing preferential treatments for environmentally harmful supplies (e.g., chemical pesticides and fertilizers).^[4]

The New Place of Supply Rules for Virtual Activities

While the bulk of the new rules relate to VAT rate modernisation, the EU Council's draft text interestingly contains a few changes to the place of supply rules for services ([VAT Directive, Title](#)

V, Chapter 3, Articles 43-59a). In particular, the new VAT legislation includes a set of provisions that aim to clarify the place of supply of services relating to ‘*activities which are streamed or otherwise made virtually available*’ (according to the wording used in Point 10b of the [compromise text](#)).

Whereas 5d of the EU Council’s draft text explains the rationale behind these updates, which relates to full implementation of the destination principle: ‘*[t]o ensure taxation in the Member State of consumption, it is necessary for all services that can be supplied to a customer by electronic means to be taxable at the place where the customer is established, has his permanent address or usually resides. Therefore, it is necessary to modify the rules governing the place of supply of services relating to such activities*’.^[5]

The updates on the place of supply rules for services relating to virtual activities concern three specific provisions of the VAT Directive. Notably, Point 10a of the [compromise text](#) adds a new paragraph to Article 53 of the VAT Directive, which provides that ‘*[t]his Article shall not apply in respect of admission to the events referred to in the first paragraph where the attendance is virtual*’.^[6] Point 10b of the [compromise text](#) inserts a new subparagraph to Article 54(1) of the VAT Directive, which stipulates that ‘*[w]here the services relate to activities which are streamed or otherwise made virtually available, the place of supply shall however be at the place where the non-taxable person is established, has his permanent address or usually resides*’.^[7] Finally, Point 10c of the [compromise text](#) introduces a reference to the (new) second subparagraph of Article 54(1) into the wording of Article 59a of the VAT Directive, thus extending the scope of the use and enjoyment rule laid down therein to B2C services relating to virtual activities.^[8]

The origin of all these updates is unclear, and, indeed, the EU Commission’s initial [proposal](#) on VAT rates contained no provision to that effect. The EU legislative procedure resulting from the EU Commission’s initial [proposal](#), available on the [EUR-lex website](#), offers no additional information in this regard. The timeline of the legislative procedure only leads to infer that the updates concerning the place of supply rules for services relating to virtual activities should have been inserted into the text of the proposal between the end of 2018 and the end of 2021, when a new [compromise text](#) was elaborated at the EU Council’s meetings.^[9]

Geelen (Case C-568/17)

What happened then during this period (2018-2021)? Short answer: [Geelen \(Case C-568/17\)](#). On 8 May 2019, less than three months after [Advocate General \(AG\) Szpunar delivered his Opinion in the case](#) on 12 February 2019, the Court of Justice of the European Union (CJEU) released [its decision in Geelen \(C-568/17\)](#). The case concerned Mr Geelen, a Dutch VAT-registered individual who organised erotic webcam sessions streamed live on the Internet. All the models performing during the sessions were located outside the EU, in the Philippines. All the clients/viewers were instead situated in the Netherlands (apparently, only due to certain streaming technical limitations since, otherwise, the clients/viewers could have been located, in principle, anywhere in the world). The clients/viewers could interact with the models by sending specific instructions and requests during live streaming sessions.

Following a preliminary reference by the Supreme Court of the Netherlands (the *Hoge Raad*), the CJEU was to assess the nature and characteristics of the live streaming services in question,

whether they were classified, for EU VAT place of supply rules, as entertainment services or electronically supplied services. On this basis, the CJEU was also to clarify whether the place of consumption for VAT purposes of these services was in the Netherlands, in the Philippines, or somewhere else. To cut a long story short,^[10] the CJEU ruled that the principal objective of the live streaming services in question was ‘*entertainment*’^[11] and, therefore, the services at stake fell under the place of supply rule of Article 54(1) of the VAT Directive, which locates the place of consumption where the entertainment activities ‘*actually take place*’.^[12]

The determination of the nature and characteristics of the live streaming services at hand was only a first-step assessment. The place of performance of the entertainment activities concerned should also be established. While in the case of physical attendance to an event that place obviously coincides with the spatial location of the event where both the supplier and the customer are physically present, the place of performance is not straightforward to determine in the case of a virtual event, where the supplier and the customer are located in different sites.^[13] The CJEU ultimately found this place in the Netherlands, where Mr Geelen was established. This was because of the complex nature of the services at stake that involved not only erotic webcam shows but also the organization and live broadcast of those shows through the Internet, which was done by Mr Geelen in the Netherlands rather than by the models in the Philippines.^[14] Consequently, the live streaming services in question were subject to Dutch VAT.^[15]

The VAT Committee

The CJEU’s decision in *Geelen* (Case C-568/17) sparked debate among tax authorities and taxpayers. Indeed, the practical implications of the CJEU’s findings in the case were discussed at length in the [VAT Committee’s Working Paper no. 1013](#) on 19 April 2021. Notably, Romania requested the VAT Committee clarification regarding the application of place of supply rules in the case of services consisting of ‘*live streaming of digital content*’.^[16] After a careful analysis of the factual background provided by the Romanian tax authorities and the relevant VAT legislation, the EU Commission reached the conclusion that the live streaming services at hand had an entertainment character and, therefore, fell under the scope of Article 54(1) of the VAT Directive.

Differently to the CJEU’s findings in *Geelen* (Case C-568/17), the EU Commission considered that ‘*in the case of virtual activities/events, the place where such activities/events actually take place is where the customer is located and enjoys the entertainment*’ (p. 9).^[17] The EU Commission grounded its conclusions on two rationales: (i) ‘*the principle of taxation at place of consumption which is enshrined in the VAT Directive*’; and (ii) the “*simple application of VAT*” as favoured by the CJEU’. In this latter regard, the EU Commission reasoned that ‘*[c]urrently, it is possible to apply taxation where the final client is established and to collect easily the VAT due in all Member States via the VAT (Mini) One-Stop-Shop, not only for telecommunications, broadcasting and electronically supplied services, but as from 1 July 2021 for all other B2C supplies of services*’ (p. 10).

The EU Commission’s conclusions were not uncontroversial. Indeed, representatives of two EU Member States at the VAT Committee’s 118th Meeting on 19 April 2021 had different views on the VAT treatment of live streaming services. As can be read in [that meeting’s minutes](#) (Working Paper no. 1019), the two delegations in question took the view that the application of Article 54(1)

of the VAT Directive to ‘live streaming of digital content’ was not appropriate since ‘the place where the customer is located is not necessarily where the online event takes place and also because it would be difficult in a B2C context to ascertain the location of the customer’ (p. 14). The same delegations instead favoured introducing ‘a new place-of-supply rule in connection with this type of services supplied via the Internet, including also for scientific and educational services’ (p. 14).^[18]

The EU Commission took note of the critical observations raised by the EU Member States’ delegations at the VAT Committee’s meeting on 19 April 2021. In this connection, the EU Commission further anticipated that ‘agreement in Council on the VAT rates proposal could provide a solution to the issue discussed here, namely a change to the place-of-supply rule so that all services that can be supplied to a customer by electronic means are taxed at the place of the customer’ (p. 14). As explained above, the **compromise text** updating the current VAT rates, which was agreed upon by participants at the EU Council’s meeting of 7 December 2021, indeed contains changes to the place of supply rules for services relating to virtual activities, although – the author submits – the approach taken by the EU legislator is quite peculiar.

(End of the first part of the article)

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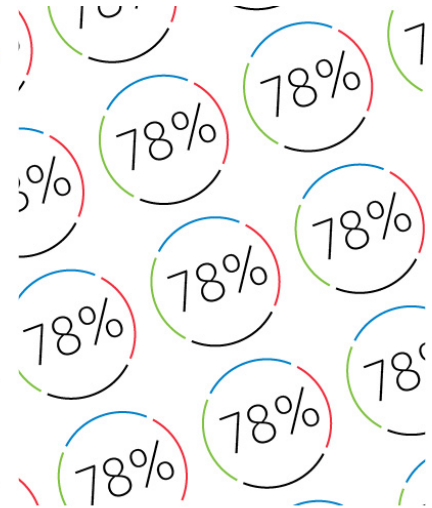
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