

Kluwer International Tax Blog

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

Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Wednesday, January 5th, 2022

The first part of this two-piece article titled “**Virtual Activities: EU VAT's Effort to Recompose the Broken 'Unity of Action, Time and Place' – Part I**” provided an overview of the new place of supply rules for services relating to virtual activities introduced in the VAT Directive by the [compromise text](#) for updates on VAT rates agreed upon by the EU Council on 7 December 2021. The first part also explained the relevant legal background surrounding these changes. This second part will instead host the author's comments and critical reflections on the new place of supply rules for services relating to virtual activities.

Author's Comments on the New Place of Supply Rules for Virtual Activities

The updates on the EU VAT place of supply rules aim to establish a feasible approach for determining the place of supply of services relating to virtual activities. This issue is quite pressing since entertaining virtual events such as online conferences, live-stream lectures, on-demand training courses, sport live sessions are all booming during the COVID-19 pandemic. Unlike in face-to-face events, there is no event location where the host and participants meet virtually. The EU legislative initiative in this regard is therefore welcome.

However, the author submits that some elements in the current [compromise text](#) are critical and should be attentively examined before receiving final approval by the EU Council.

1. Point 10a of the [compromise text](#) excludes the application of Article 53 of the VAT Directive to services relating to ‘*admission to the events ... where the attendance is virtual*’. It follows from this exclusion that the relevant place of supply for B2B services relating to events attended virtually is Article 44 of the VAT Directive, i.e., the general place of supply rule for B2B transactions.^[1] Accordingly, the place of supply is found at the business customer's location pursuant to Article 44 rather than where those events actually take place pursuant to Article 53. In practice, the new paragraph added to Article 53 disqualifies the admission to virtual events for the purposes of Article 53. Hence, the scope of application of Article 53 appears quite limited since it covers only services relating to admission to physical events. With effect from 1 January 2011,^[2] B2B services, other than admission, relating to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, are subject to the general B2B place of supply rule of Article 44.^[3] It is also curious that the exclusionary provision

for admission to virtual events was inserted in the text of the VAT Directive and not in [Council Regulation \(EU\) No 282/2011 of 15 March 2011 \(the VAT Implementing Regulation\)](#). Notably, Article 32 of the VAT Implementing Regulation contains a specification of the concept of ‘*admission*’, which leads to excluding certain activities from the scope of Article 53 of the VAT Directive.^[4] In particular, Article 32(3) of the VAT Implementing Regulation specifies that the concept of ‘*admission*’ ‘*shall not cover the use of facilities such as gymnastics halls and suchlike, in exchange for the payment of a fee*’. The author wonders why the exclusion for services relating to admission to virtual events was not inserted in Article 32 of the VAT Implementing Regulation, either on the ground that the granting of the right of admission to a virtual event does not qualify as ‘*admission*’ for VAT purposes, or, more broadly, since a ‘*virtual event*’ is not an ‘*event*’ for VAT purposes.^[5]

2. Paragraph 10b of the [compromise text](#) introduces a subparagraph in Article 54(1) of the VAT Directive, which pinpoints the place of supply at the private customer’s location in the case of services relating to ‘*activities which are streamed or otherwise made virtually available*’. The wording of this provision appears quite broad since it does cover all B2C entertainment activities supplied by digital means. Therefore, the provision is not limited to live-streamed activities, which presuppose specific interactions between the host and participants to the virtual event (e.g., Q&As during online conferences or inputs during online sport coaching classes). This consideration calls into question the boundary lines between B2C services relating to virtual activities covered by the new provision under Article 54 of the VAT Directive on the one hand and the B2C supply of telecommunications, broadcasting and electronic (TBE) services under Article 58 of the VAT Directive on the other. Arguably, as also the EU Commission assumes,^[6] this latter provision should only apply to services relating to virtual activities (generally, not including live-streamed events) where there is only minimal human interaction among the supplier and the customer, as required by the very narrow definition of electronically supplied services under Article 7(1) of the VAT Implementing Regulation.^[7] Indeed, both provisions (i.e., Articles 54(1), second paragraph, and 58 of the VAT Directive) implement the destination principle (i.e., taxation at the private customer’s place). Moreover, since 1 July 2021, the MOSS has been extended to all types of B2C services (i.e., the MOSS is no longer limited to TBE services only).^[8] However, the VAT treatment of services under the two provisions is not necessarily the same. For instance, the threshold of EUR 10 000 for micro-business laid down in Article 59c of the VAT Directive applies only to TBE services under Article 58 of the VAT Directive.^[9] Consequently, based on the current rules, a micro-business established in an EU country cannot extend the same VAT treatment of its domestic supplies to cross-border services relating to virtual activities, even if the relevant turnover is below the said threshold. Instead, the supplier must register in each and every Member State where its customers are located or, in the alternative, register on the MOSS and pay VAT through the online portal. Limitations also entail the application of the presumptions laid down in Article 9a of the VAT Implementing Regulation, which applies only to ‘*electronically supplied services ... supplied through a telecommunications network, an interface or a portal such as a marketplace for applications*’.^[10] Services relating to virtual activities supplied through a marketplace or platform are instead outrightly excluded from the scope of Article 9a of the VAT Implementing Regulation. The author wonders about the rationale of maintaining such a paper-thin distinction between virtual entertainment activities and electronically supplied services based on the artificial concept of ‘*minimal human intervention*’ under Article 7(1) of the VAT Implementing Regulation.^[11]

3. Paragraph 10c of the [compromise text](#) extends the application of the use and enjoyment rule under Article 59a of the VAT Directive also to services relating to ‘*activities which are streamed or otherwise made virtually available*’ under Article 54(1), second subparagraph of the VAT Directive. In brief, the use and enjoyment rule of Article 59a of the VAT Directive, according to the current wording that came into force on 1 January 2010, functions as an override provision, which, to prevent double taxation, non-taxation or distortions of competition, enable each Member State to shift the place of taxation from a location outside the EU to its territory, where the services are (allegedly) effectively used and enjoyed. A specular opposite rule is also provided, based on which each Member State has an option (a separate and different one) to shift the place of taxation of a service from its territory to a place outside the EU where the services are (allegedly) effectively used and enjoyed.^[12] The issue is that there are no definitive criteria under EU VAT legislation to establish whether a specific service is effectively used and enjoyed inside or outside the territory of a Member State, as also shown by the CJEU’s decision in [SK Telecom \(Case C-593/19\)](#).^[13] The author cannot conjecture based on which concrete evidence the EU Member States may decide to resort to the overriding rule of Article 59a of the VAT Directive and claim that the ‘*effective use and enjoyment*’ of services relating to an online activity took place in their territory rather than outside the EU (e.g., could possible evidence be the location of the organiser or the broadcaster of the virtual event?).
4. A final remark common to all the provisions analysed above relates to the case of hybrid activities, which entails a combination of online and offline events. In such circumstances, it is unclear which place of supply rules should prevail, i.e., the provisions for services relating to on-premises activities (i.e., Articles 53 or 54 of the VAT Directive) or those for services relating to virtual events (i.e., Articles 44 or 54(1), second paragraph of the VAT Directive). The possibility to apply or not the use and enjoyment rule of Article 59a of the VAT Directive also depends on the prior determination of the relevant place of supply rule. If one has to follow the approach adopted by the [VAT Committee in its Guidelines](#), concerning an event that takes place in multiple Member States, the hybrid activities should be split, and different place of supply rules will apply to each part, depending on whether that part specifically concerns a physical or virtual event. This approach, however, is not feasible in the case where one of the two parts is principal, and the other one is purely ancillary to that essential part. In such circumstances, the principal part’s VAT treatment should also apply to the ancillary part.^[14] Whether this approach can effectively be extended to hybrid activities is unclear, and, even if so, it remains to be seen how to make the apportionment between physical and virtual activities (e.g., based on the duration or the value of each of the two activities concerned). The author submits that a common understanding between the EU Member States on how to approach hybrid activities is necessary to avoid situations of double or non-taxation.

The author welcomes the EU VAT’s effort to recompose the broken ‘unity of action, time and place’ – to borrow a reference to classical theatre made by AG Szpunar in his [Opinion in Geelen \(Case C-568/17, point 17\)](#) – in the case of services relating to virtual activities, where the supplier and the customer are located in different places. The author submits that the need to introduce the new place of supply rules for virtual activities is the inevitable consequence of the digitalisation of the economy and the impact of technological developments on the VAT system. As Hans Kogel predicted before the turn of the Millennium, ‘*it is to be expected that some services that until recently were only supplied in physical form will be increasingly provided online*’, among which we can now include services relating to virtual activities.^[15]

This work has been developed within the framework of the Amsterdam Centre for Tax Law (ACTL) research project “Designing the tax system for a cashless, platform-based and technology-driven society” (CPT project). The CPT project is financed with university funding and funds provided by external stakeholders (i.e., businesses and governments) interested in supporting academic research to design fair, efficient and fraud-proof tax systems. For more information about the CPT project and its partners, please visit its website <https://actl.uva.nl/cpt-project/cpt-project.html>. The usual disclaimers apply.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe [here](#).

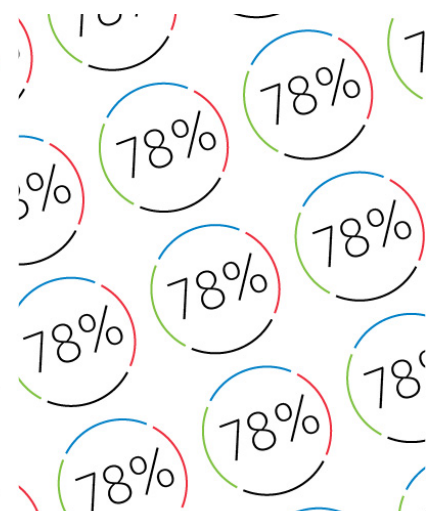
Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer’s top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

78% of the lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity.

Discover Kluwer International Tax Law.
The intuitive research platform for Tax Professionals.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

References[+]

This entry was posted on Wednesday, January 5th, 2022 at 2:00 pm and is filed under [Entertainment services](#), [EU law](#), [Place of Supply](#), [VAT](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.