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# Opinion Statement FC 9/2018 on the notion of “minimal human intervention”<sup>1</sup> in the definition of “electronically supplied services” for the purposes of Article 58 of the VAT Directive<sup>2</sup>:

## European Commission VAT Committee Guidelines Resulting from its 108<sup>th</sup> Meeting held on 27 – 28 March 2017

Prepared by the CFE Fiscal Committee  
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This Opinion Statement discusses the implications of the European Commission VAT Committee Guidelines resulting from its 108<sup>th</sup> Meeting held on 27-28 March 2017 concerning the notion of “minimal human intervention” in “electronically supplied services” and CFE’s view as to whether they conform with the intended effect of Article 58 of the VAT Directive.

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Ms. Stella Raventós, Chair of the CFE Fiscal Committee or Brodie McIntosh, Tax Technical Officer, at [info@taxadviserseurope.org](mailto:info@taxadviserseurope.org). For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

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<sup>1</sup> Article 7(1) of the VAT Implementing Regulation (Regulation 282/11)

<sup>2</sup> Directive 2006/112/EC

## I. Introduction

During its 106th meeting, the European Commission VAT Committee discussed Working Paper 896 on the notion of ‘minimal human intervention’, one of the elements of the definition of ‘electronically supplied services’ in Article 7(1) of the VAT Implementing Regulation.<sup>3</sup> The matter was discussed by the VAT Committee once again at its 108th meeting, in relation to Working Paper 919, resulting in the VAT Committee Guidelines published on 1 May 2018.<sup>4</sup>

Working Paper 919 sets out indicators which aim to identify in a more precise manner what should be covered by the notion of ‘minimal human intervention’. Some of these indicators were already agreed to by the VAT Committee in earlier Guidelines,<sup>5</sup> whilst others reflect the Commission’s view as set out in previous Working Papers on the subject matter.<sup>6</sup> Working Paper 919 added some additional indicators and also examined further examples of services which involve the internet, assessing whether or not the level of “minimal human intervention” is exceeded in those scenarios.

It is acknowledged that in a fast-evolving digital sector which has seen and continues to see the digitalisation of services, in particular of traditional brick-and-mortar-type services, it is essential to establish where a line is to be drawn between services which can be classified as ‘electronically supplied services’ for the purposes of Article 58 and those which cannot.

It is further acknowledged that the involvement of the internet in the context of a supply of services does not lead to the automatic determination that the service is an electronically supplied service. As the VAT Committee has unanimously agreed: *“the definition of electronically supplied services from Article 7(1) of the VAT Implementing Regulation consists of the four following elements: (1) a service is delivered over the Internet or an electronic network, (2) the nature of the service is that it is essentially automated, (3) the nature of the service is that it involves minimal human intervention, and (4) the nature of the service is such that it is impossible to ensure in the absence of information technology. The VAT Committee unanimously agrees that in the assessment of whether a service qualifies as an electronically supplied service all these four elements are equally important”*.<sup>7</sup>

Guidance on the third element of this definition would assist businesses in assessing their activities and determining whether their services fall within the scope of Article 58 of the VAT Directive, and sector-specific examples may also be helpful. However, any such guidance should be future-proof, and broad generalisations should be avoided. To this end, sectoral examples should make reference to the elements of the specific service which make it an ‘electronically supplied service’ or otherwise, so as to avoid pigeon-holing supplies according to their sector rather than their specific characteristics.

The recent EU proposal applying the definition of ‘electronically supplied services’ outside the sphere of VAT<sup>8</sup> further increases the need for clarity, consistency and harmonisation of interpretation, and in this regard it is acknowledged that the Commission may be undertaking further work on the proposed

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<sup>3</sup> VAT Implementing Regulation (Regulation 282/11)

<sup>4</sup> Guidelines resulting from the 108th meeting of 27-28 March 2017; Document C – taxud.c.1(2018)2397450 – 930 (p. 220)

<sup>5</sup> Guidelines resulting from the 102nd meeting of 30 March 2015; Document D – taxud.c.1(2015)4128689 – 862 (p. 192)

<sup>6</sup> for example, Working Paper 896 and Working Paper 882 (28 September 2015)

<sup>7</sup> Guidelines resulting from the 102nd meeting of 30 March 2015; Document D – taxud.c.1(2015)4128689 – 862 (p. 192)

<sup>8</sup> Proposal for a Council Directive laying down rules relating to the taxation of a Significant Digital Presence, art 3(5)

definition of ‘digital services’ which reflects the definition and scope of electronically supplied services in the VAT Directive and the Implementing Regulation.

## 2. Indicators and the assessment of examples of certain services

The VAT Committee Guidelines set out additional ‘indicators’ based on those contained in Working Papers 896 and 919, which were not already contained in earlier guidelines. It also sets out the Committee’s conclusions on the assessment of the level of human intervention in particular scenarios.

CFE has considered the content of the Working Papers and the conclusions reached by the VAT Committee, and set out our views below.

### 2.1 Guideline 1(a) – Activity of a Third Person/Party Independent from the Supply to Which the Service Being Analysed Relates

We are, in principle, in agreement that the activity of a third person/party, independent from the supply to which the service being analysed relates, may not be relevant for the assessment of ‘minimal human intervention’. This would be the case, for example, in the scenario mentioned in Working Paper 896.<sup>9</sup> However, it is recognised that it is not unknown for business to outsource a component of its functions to a third party. To the extent that the outsourced component is labour-intensive and central to the supply of the service, then the fact that those activities are carried out by a ‘third party’ should not be relevant to the assessment of whether the service delivered to the customer is an electronically supplied service or otherwise.

### 2.2 Guideline 1(b) – Individual Approach to Individual Customers

When analysing the limits of human intervention, the various Working Papers on ‘human intervention’ have placed emphasis on the existence of an “individual approach to an individual customer”, and on the supplier responding to “individual requests from customers”. The VAT Committee is of the (almost unanimous) view that *“the activity of staff of the supplier of services, performed independently from any individual request to provide a particular service made by a customer, shall be seen as falling within the limits of “minimal human intervention”.*

It is acknowledged that this ‘test’ (i.e. the supplier – customer interaction, or the supplier response to individual customer requests) is one which can be logically applied to many scenarios involving the supply of services over the internet, as a determining test of the level of human intervention. However, it cannot be ignored that this test may not necessarily be of universal application, and that it would not be reasonable to apply a one-size-fits-all approach.

### 2.3 Guideline 2: Human Involvement in Generic Activities

This guideline once again makes reference to ‘individual requests by customers’, essentially suggesting that any ‘human intervention’ which is not prompted by a request by an individual

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<sup>9</sup> According to Working Paper 896, the activities of third parties organising a sporting event should not be relevant to the assessment of whether an online sportsbetting service classifies as an electronically supplied service.

customer is merely minimal. We are in agreement with the view that human involvement in generic activities, such as adjustments to the system environment, updates and improvements (i.e. support and preparatory functions), are not relevant to the assessment of the level of human intervention in a service.<sup>10</sup> However, we believe that what constitutes a support or a preparatory function may vary from service to service, and thus can only be properly assessed in the context of a specific service.

In our view, preparatory/support functions refer to those functions which enable the technical infrastructure and the creation of the environment in which the electronic service is supplied<sup>11</sup>, and do not include functions which are intrinsic to and the essence of the service itself. However, it is acknowledged that this may not necessarily correspond with the view of the Commission, as illustrated in the examples provided in Working Paper 896 (Section 3.2).<sup>12</sup>

## 2.4 Guideline 8: Education Services

With specific reference to education services, the proposed approach suggests that, where an online course is not merely automated (i.e. text-based) but involves lectures or seminars delivered by tutors and streamed in real-time, such that the internet is merely a means of transmission, these features are not sufficient to constitute more than minimal human intervention. The level of human intervention is regarded as more than minimal only if the students have the option to ask questions to the tutor, even if the option is not exercised.

It is our view that where the internet is merely the medium by which a service is purchased, and the service itself by its nature requires the involvement of individuals in its delivery, then their involvement should be regarded as constituting more than minimal human intervention. This would reconcile with the position adopted in the Guidelines following the 67th Meeting of the VAT Committee concerning conventional auctioneer services. However, Guideline 8(a) concerning online access to seminars would appear to be taking a different, and contradictory, approach. Furthermore, it would seem that the interpretation of the notion of 'human intervention' is shifting from the requirement of intervention from the side of the supplier<sup>13</sup> to that of 'interaction' between the supplier and the customer.

## 2.5 Guidelines 8 and 10: Possibility of Interaction between the Customer and Service Provider

It is noted that for certain sectors, Working Paper 919 proposed that where there is the possibility of interaction between the customer and the service provider (or an individual on behalf of the service provider), then that of itself is sufficient to constitute more than 'minimal human intervention', bringing a service outside the definition of 'electronically supplied services'.

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<sup>10</sup> section 2.2 paras. 7 and 8 of Working Paper 919

<sup>11</sup> For example: technical/IT staff who set up, maintain and update the online presence of the service provider and the functionality of the system; and customer care / help desk personnel.

<sup>12</sup> Referred to in Working Paper 919, page 3

<sup>13</sup> See Guideline resulting from the 103rd meeting of 30 March 2015 Document D – taxud.c.1(2015)4128689 – 862, page 193, para 3.1(2)

Whilst we recognise the practical complexities of determining the place of supply of services in situations where there *may be* more than minimal human intervention (for example, where customers are granted access to a course and there is a possibility to ask questions but this option is not always exercised), we question whether the mere possibility to interact with the supplier should be sufficient to change the place of supply of that service, whether or not the interaction actually takes place. In our view, to the extent that this is the preferred interpretive approach, then it should be applied consistently in other scenarios, where relevant.

### **3. General comments on the interpretation of the definition of 'Electronically Supplied Services' and of the European Commission VAT Committee Guidelines on the subject matter**

In the assessment of the notion of 'minimal human intervention', the drawing of parallels between one service and another, disregarding the specific characteristics of the activities, and in particular the role of individuals in the supply, may not necessarily lead to an outcome intended by the Directive.

For example, in Working Paper 882, a 'human intervention' comparative analysis is run between music download services and online sports betting services. In the former scenario, the Working Paper explains, the supplier of music downloads "...classifies the songs in different styles, creates playlists, highlights new songs...", activities which require human involvement. However, the client purchases the song (download) without the requirement of human intervention, therefore the service is classified as an electronically supplied service. Working Paper 919 applies the same reasoning to online sportsbetting services, equating the role of individuals in setting odds with that of the individuals who catalogue songs and create playlists, and considers the human intervention in the supply to be minimal.

This analysis raises two key issues:

- (a) Working Paper 919 presents a generalised classification of music download services as electronically supplied services, on the basis that the human intervention is merely minimal and the supply is essentially automated. Such a classification by service-type does not consider the possibility that a given music download service may not necessarily have the characteristics described in Working Paper 882. Therefore, the conclusion may be different if, for example, the supplier creates tailor-made playlists, whether upon a direct request by a client or on the basis of a study of market trends, and the human involvement of staff is intrinsic to the service being requested by and delivered to the client. It follows therefore that it would not be appropriate to classify services as 'electronically supplied services' or otherwise merely by reference to the category of activity/sector to which it belongs, without taking into consideration the specific features of the service.
- (b) A comparison is being made between two activities which differ intrinsically, and whose only similar feature is the fact that they are delivered over the internet. The analysis does not consider that online sportsbetting services is, in effect, a conventional book-

making service,<sup>14</sup> and that the setting of the odds and other related functions carried out by individuals cannot reasonably be equated to the preparatory function of categorising songs, but is in effect ‘the service’ itself.

We understand that an online sportsbetting service enables players to place a bet on the outcome of an event at the odds offered by the supplier. The role of individuals in monitoring events, setting odds, and effecting risk management strategies reflects the consolidated function of a traditional bookmaker, rendering the service significantly dependent on human intervention, and therefore not meeting the criteria of the definition of an electronically supplied service. In this case, the internet is merely a medium via which a bet is placed, equally interchangeable with other media. Of course, the analysis would be different if the bookmaking function were to be wholly automated, akin to an RNG game.

In practice, businesses rely on an individual Member State’s determination on the notion of ‘electronically supplied services’, as well as on any guidance provided by the VAT Committee. Harmonisation of interpretation is key to ensuring that situations of double taxation or non-taxation do not arise. Insofar as the VAT Directive provides a special rule for the place of supply of ‘electronically supplied services’, which is defined by reference to particular characteristics, it would not be accurate to assume that all services delivered over the internet meet the definition. Any guidance on the definition should be consistent and should draw on features of the services and/or the relevant aspects of ‘human intervention’, with due attention given to the particular characteristics of given services which may impact the classification.

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<sup>14</sup> Working Paper 919, page 10