EU VAT Implementing Regulation

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1. INTRODUCTION

The VAT legislation of the EU Member States is supposed to be harmonized on the basis of the Sixth Directive. In reality, *the* Sixth Directive does not exist. The Directive comes in twenty language versions that, under the EC Treaty, are all "authentic" but, naturally, not identical. Apart from differences in nuance[2] and plain translation errors, concepts that exist in one language may not exist in other languages or they may have no real meaning.[3]

In addition, the legislators of the Member States seem to have one characteristic in common: particularly when they have to adapt the national VAT legislation to the provisions of the Sixth Directive for the first time, they seem to believe that the provisions existing at that time are already pretty well aligned with Community law. Once the Sixth Directive has entered into force in their jurisdictions, the national legislators generally do a far better job in transposing new amending Directives into national law, albeit that that transposition does not always take place on time: new provisions are usually transposed almost literally.

There are several mechanisms that aim to ensure that the national VAT legislation of the Member States is and remains in line with Community law. Unfortunately, none of those mechanisms are very effective. The most important harmonization mechanism consists of the interpretation by the European Court of Justice (ECJ) of the provisions of the Sixth Directive, as a result of preliminary questions referred to it by the national courts of the Member States, or infringement proceedings against Member States brought before the ECJ by the European Commission. Presently, the ECJ delivers some twenty VAT judgments per year, usually relating to very specific cases or circumstances. At that rate, it will take many decades before the most important aspects of the Sixth Directive have fully been harmonized.

Theoretically, another harmonization mechanism could have been the adoption of guidelines by the VAT Committee.[4] However, since the VAT Committee is an "advisory" Committee, its guidelines are not binding – not even on the Member States which adopted them – and, until 1996, those guidelines were not even published. From 1996, VAT Committee guidelines are published by a very limited number of Member States and, even if they publish them, the Member States may selectively do so.

In June 1997, the Commission launched a proposal to transform the VAT Committee from an advisory to a regulatory committee,[5] which, according to the Commission, would have achieved an immediate improvement to the functioning of the VAT system, because the VAT Committee's decisions would have legal force and would be officially published. However, the role of the VAT Committee, i.e. the representatives of the Member States, was far less prominent than the Commission suggested. Its role was effectively reduced to that of an assistant to the Commission, and it could only deliver an opinion on the measures drafted by the Commission within a time limit set by the chairman, who was also a representative of the Commission, in accordance with the urgency of the matter, which was probably also determined by the Commission. Only a majority opinion of the VAT Committee could temporarily stop the Commission; in the case of a dissenting opinion of the VAT Committee, the matter was referred to the Council.

After the Council had rejected the Commission's proposal, very few options remained to ensure a more harmonized interpretation of the provisions of the Sixth Directive. In 2004, a new Art. 29a was added to the Sixth Directive,[6] under which the Council is authorized to adopt implementing measures; on the basis of that power, on 17 October 2005, the Council adopted the first VAT implementing Regulation[7] consisting of some twenty guidelines unanimously adopted by the VAT Committee in the past.[8]

The provisions of the implementing Regulation can be categorized in various manners: in a consecutive order, in accordance with the successive articles of the Sixth Directive, as is done in the Regulation, or in categories according to their usefulness, as is done below. The first category is that of the "obvious" interpretations, which is fairly large. The other categories are those of the "remarkable interpretations" and "useful clarifications".

2. OBVIOUS INTERPRETATIONS

The following interpretations practically contribute very little or nothing to the uniform interpretation of the Sixth Directive because they relate to issues that should not even give rise to serious discussions.

1. Editor of the *International VAT Monitor*.
2. See, for example, 2.7.
3. For example, the expression "bodies governed by public law" in Art. 4(5) of the Sixth Directive does not have a clear meaning under UK law.
4. Set up under Art. 29 of the Sixth Directive, the VAT Committee is a platform for discussion of issues relating to the Sixth Directive for the purpose of achieving a common interpretation of the provisions of that Directive. It consists of representatives of the Commission and all Member States.
5. Proposal for a Council Directive amending Directive 77/388/EEC on the common system of VAT (the VAT Committee) submitted by the Commission on 26 June 1997, COM(97) 325 Final, OJ C 278/97, p. 6.
6. Under Council Directive 2004/7/EC of 20 January 2004 amending Directive 77/388/EEC concerning the common system of value added tax, as regards conferment of implementing powers and the procedure for adopting derogations, OJ L 27 of 30 January 2004.
7. Council Regulation (EC) 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax, OJ L 288 of 29 October 2005.
8. As regards the method of implementation, see the editorial in this issue.

2.1. VAT status of EEIGs

The interpretation that European Economic Interest Groupings (EEIGs)[9] which supply goods or services for consideration to their members or to third parties are taxable persons[10] is not particularly helpful. Since, under Art. 4 of the Sixth Directive, *any person* who independently carries out economic activities is treated as a taxable person for VAT purpose, it is obvious that the same principle applies to an EEIG that carries out economic activities. Its status as a taxable person does not preclude an EEIG's supplies from being exempt from VAT, for example, on the basis of the exemption for services rendered by "umbrella organizations".[11]

2.2. Options

Another obvious interpretation provides that the sale of an option, where such a sale is a transaction within the scope of the exemption laid down by Art. 13(B)(d)(5) of the Sixth Directive, must be treated as a service and that that supply of services is distinct from the underlying operation to which the service relates.[12]

Disregarding its unusual terminology,[13] that interpretation is of itself obvious because it only says that, firstly, the granting or transfer of an option, which is a right, is a service if it is exempt as a financial transaction and, secondly, that service is separate from the underlying transaction. Having said that, the question arises of to what category of options the options in question belong? That question will be examined in 3.1.

2.3. Assembly of machines

The view that the assembly of the different parts of a machine, all of which were provided to the assembler by his customer, must be treated as a service[14] consisting of work on goods[15] can hardly come as a surprise; who would seriously have thought that it constitutes a supply of goods or a service of a different nature?[16]

2.4. Organization of funerals

Under the place-of-supply rules laid down by Art. 9 of the Sixth Directive, all services that cannot be categorized as falling under the exceptions of Art. 9(2) must be treated as services that come under the main rule of Art. 9(1). Under the main rule, services are deemed to be rendered at the place where the service provider is established. Since funeral services as a whole cannot reasonably be considered as falling under any of the special rules included in Art. 9(2), the view that, insofar as they constitute a single service, services supplied in the framework of organizing a funeral fall within the scope of Art. 9(1) [17] is not an eye-opener.

2.5. Intermediary services

Equally obvious is that intermediaries may act on behalf of the supplier or the customer in the principal transaction.[18] Under the implementing Regulation, that interpretation formally only applies for the purposes of Art. 9(2)(e) of the Sixth Directive but there are no valid reasons why it should not apply for the purposes of, for example, Arts. 28b(E) and 15(14).

2.6. Platinum nobles

Goods are only exempt from VAT if the legislation explicitly contains a provision to that effect. For example, under Art. 13(B)(d)(4), transactions in coins used as legal tender are exempt from VAT, with the exception of collector's items.[19] Regardless of whether they are legal tender, bullion coins derive their value from the value of the precious metal of which they are made. That intrinsic value is much higher than the coin's face value, if any, and on that ground, bullion coins, including platinum nobles, are not covered by the exemption for coins used as means of payment. That conclusion[20] explicitly applies to platinum nobles[21] but, presumably, should also apply to all other bullion coins. Actually, Art. 15 of the implementing Regulation presumably expresses the view that the concept of "collector's items" in Art. 13(B)(d)(4) of the Sixth Directive also includes coins as "investment objects". It should be noted that, since they are not made of gold, platinum nobles do not qualify as exempt investment gold.[22]

9. Under Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), EEIGs are legal entities based on Community law to facilitate and encourage cross-border cooperation between natural persons, companies, firms and other legal persons for the purpose of creating, in respect of their economic activities throughout the Community, conditions analogous to those of a national market.
10. Art. 2 of the implementing Regulation.
11. Under Art. 13(A)(1)(f) of the Sixth Directive, an exemption applies to services supplied by independent groups of persons whose activities are exempt from or are not subject to VAT, for the purpose of rendering to their members, the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition.
12. Art. 3 of the implementing Regulation.
13. Instead of "sale of an option", use of the terms "assignment", "granting" or "transfer" of an option, and instead of "operation", use of the term "transaction" would have been more consistent with the terminology of the Sixth Directive.
14. Art. 3(2) of the implementing Regulation.
15. Art. 5 of the implementing Regulation.
16. A guideline to that effect was adopted by the VAT Committee in its 58th meeting of 23 June 1999. See the Annex to *International VAT Monitor* 3 (2002), p. 2.
17. Art. 4 of the implementing Regulation is an amended version of the guideline adopted by the VAT Committee in its 65th meeting of 19 June 2002. See *International VAT Monitor*, 4 (2003), p. 326.
18. Art. 9 of the implementing Regulation. A guideline to that effect was adopted by the VAT Committee in its 56th meeting of 13 and 14 October 1998. See the Annex to *International VAT Monitor* 3 (2002), p. 3.
19. Under Art. 13(B)(d)(4), an exemption applies to transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collector's items; "collector's items" shall be taken to mean gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest.
20. Art. 15 of the implementing Regulation.
21. Platinum nobles are bullion coins issued by the Isle of Man, which are of a purity of 99.9% platinum. The nobles series consists of platinum coins ranging from $^1/_{20}$ to 10 nobles.
22. Gold coins which are of a purity equal to or greater than 90%, and are minted after 1800, and are or have been legal tender in the country of origin, and are normally sold at a price which does not exceed the open market value of the gold contained in the coins by more than 80% are exempt from VAT under Art. 26b(A)(ii) of the Sixth Directive. The gold bullion coins issued by the Isle of Man in the angels, crowns, pounds and sovereigns series are, for 2006, exempt from VAT as investment gold, see *International VAT Monitor* 1 (2006), pp. 54 to 57 and OJ C 300 of 30 November 2005.

2.7. Distance selling threshold

Art. 22 of the implementing Regulation is beneficial to taxable persons, even though they may wonder what that benefit is. Distance sellers might have thought that it follows directly from Art. 28b(B)(2) of the Sixth Directive that, in respect of distance selling transactions, the place of supply compulsorily shifts from the Member State in which they are established to that in which their non-registered customers are resident, from the time the distance sellers exceed the distance selling threshold, i.e. in respect of the transaction by which they exceeded the distance selling threshold and any subsequent transactions taking place in the same and the following year.[23] That line of reasoning may be obvious to those who use a language version of the Sixth Directive other than the German. However, the Member States that use the German version initially took the view that, if the distance selling threshold was exceeded in the course of a current year, the place of supply changed with retrospective effect from the beginning of that year.[24]

To my knowledge, Germany and Austria have adapted their policy as regards the distance selling arrangements many years ago,[25] which means that, by now, the provision in question of the implementing Regulation should be totally redundant.[26]

Distance sellers who would have benefited from the shift of the place of supply with retrospective effect in accordance with the initial "German view", could have achieved that benefit by opting for taxation in the Member State of destination of the goods long before they exceeded the threshold.

3. REMARKABLE INTERPRETATIONS

3.1. Options (revisited)

As mentioned in 2.2., Art. 3 of the implementing Regulation provides that the granting or transfer of an option is a service, which, moreover, is distinct from the underlying transaction. Of itself, those conclusions are not spectacular. However, their usefulness can only be evaluated, if it is clear to what sort of options they refer and to what underlying transactions the options relate.

Since, in the framework of the interpretation, the granting and transfer of the options must be exempt under Art. 13(B)(d)(5)[27] of the Sixth Directive, the first impression is that Art. 3 of the implementing Regulation refers to share options. However, since transactions in both shares (as the "underlying transactions") and share options are covered by that exemption, it is of no use to know that transactions in share options are services and that they are distinct from transactions in the shares. Logically, Art. 3 of the implementing Regulation must refer to a situation in which the tax regime applicable to the granting or transfer of the option differs from that applicable to the "underlying transaction" or in which the nature of both supplies is different or in which the two transactions differ in both respects.

One of the examples in which the tax regime applicable to the granting or transfer of options differs from that applicable to the underlying transactions is that of the option to rent an immovable property.

It is not unusual for the owner of an immovable property ("landlord") to grant an option for the leasing of that property to a potential tenant.[28] If the potential tenant must pay a consideration for such an option, the landlord makes a supply which, under ECJ case law, cannot be exempt from VAT, at least not under the exemption for the leasing and letting of the property.[29] I cannot think of a valid reason why the granting or transfer of such an option would be covered by the exemption for financial instruments under Art. 13(B)(d)(5), which leads me to the provisional conclusion that Art. 3 of the implementing Regulation does not refer to options to lease. Moreover, there can not really be any doubt that, on the one hand, the granting of the option to lease and, on the other hand, the leasing of the immovable property are services.

Art. 3 of the implementing Regulation would make more sense if the underlying transaction was *excluded* from the exemption under Art. 13(B)(d)(5), such as transactions in documents establishing title to goods or in certain interests in immovable property, rights in rem, giving the holder thereof a right of user over immovable property, or shares or interests equivalent to shares, giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof. Those rights relating to immovable property may be treated as supplies of

23. Art. 22 of the implementing Regulation describes that situation in a far more elaborate manner.

24. Art. 28b(B)(2) reads: "However, ... Para. 1 shall not apply to supplies of goods dispatched or transported to the same Member State of arrival ... *where* the total value of such supplies, less VAT, does not in one calendar year exceed the equivalent in national currency of EUR 100 000."
The German version reads: "... Absatz 1 gilt jedoch nicht für Lieferungen von Gegenständen, die in ein und denselben Mitgliedstaat der Beendigung des Versands oder der Beförderung versandt oder befördert werden, *wenn* der Gesamtbetrag dieser Lieferungen – ohne Mehrwertsteuer – im laufenden Kalenderjahr den Gegenwert von 100 000 ECU in Landeswährung nicht überschreitet."

25. A guideline to that effect was adopted by the VAT Committee in its 54th meeting of 16, 17 and 18 February 1998. See the Annex to *International VAT Monitor* 3 (2002), p. 7.

26. Unless the national legislation of one or several of the Member States that acceded to the European Union on 1 May 2004 was based on a language version of the Sixth Directive that was translated from the German version.

27. Under Art. 13(B)(d)(5), an exemption applies to: "transactions, including negotiation, ... in shares, interests in companies or associations, debentures and other securities, excluding documents establishing title to goods, and the rights or securities referred to in Art. 5(3)".

28. See, for example, ECJ judgment of 9 October 2001 in *Mirror Group plc v. Commissioners of Customs & Excise*, Case C-409/98, [2001] ECR-7175, albeit that, in that case, not the potential tenant, but the landlord paid the consideration.

29. Even though, in its judgment in *Lubbock Fine*, the ECJ has interpreted the exemption for the leasing and letting of immovable property very broadly, in the sense that it also covered the surrender of a lease, the scope of that exemption is, on the other hand, also limited, in the sense that Art. 13(B)(b) of the Sixth Directive only applies to the grant of leases of property and, under Para. 24 of the ECJ judgment in *Cantor*, "not to transactions which are merely based on the leases or are *ancillary* thereto". Note the use of the word "ancillary" in this context. In *CPP*, the ECJ declared that "ancillary" supplies follow the VAT regime applicable to the principal supply. See ECJ judgments of 15 December 1993 in *Lubbock Fine and Company v. Commissioners of Customs & Excise*, Case C-63/92, [1993] ECR I-6665, of 9 October 2001 in *Cantor Fitzgerald International v. Commissioners of Customs & Excise*, Case C-108/99, [2001] ECR I-7257, and of 25 February 1999 in *Card Protection Plan Ltd. v. Commissioners of Customs & Excise*, Case C-349/96, [1999] ECR I-973.

goods. If they are, it would make sense to take the view that options relating to those underlying transactions are separate services, but it is not immediately clear on what ground transactions in options relating to those goods would be exempt under Art. 13(B)(d)(5). Besides, the supply of immovable property and rights relating thereto are generally also exempt from VAT.

Finally, Art. 3 of the implementing Regulation could apply to transactions in options relating to transactions in documents establishing title to goods or, more generally, options relating to the trade in commodities. Transactions in documents establishing title to goods will commonly be treated as supplies of goods, which would explain why Art. 3 provides that the options relating thereto must be treated as services. In the second place, transactions in those goods are not exempt, which would explain why the options are "separate from the underlying transactions". The result would be that transactions in commodities (as the "underlying transactions") are subject to VAT as supplies of goods, whilst options relating thereto are exempt services. However, the question is on what ground those services are exempt on the basis of Art. 13(B)(d)(5) of the Sixth Directive.

In conclusion, the clarification provided under Art. 3 of the implementing Regulation could use further clarification, in particular as regards the options concerned.

3.2. Translation services, assignment of TV broadcasting rights and refund applications

The implementing Regulation provides that, where a body established in a third country assigns television broadcasting rights in respect of football matches to a taxable person established in the Community, that transaction is covered by the first indent of Art. 9(2)(e) of the Sixth Directive.[30] Since the first indent of Art. 9(2)(e) does not contain any limitations as regards the place of establishment of the service provider, that provision of the implementing Regulation must be interpreted as meaning that assignments and transfers of broadcasting rights are rights similar to copyrights, patents, licences and trademarks.

Similarly, the view that applying for and receiving VAT refunds on behalf of non-resident EU traders under the procedure laid down by the Eighth Directive, are covered by the third indent of Art. 9(2)(e) of the Sixth Directive[31] implies that the same applies to filing refund applications and receiving refunds on behalf of non-EU traders under the Thirteenth Directive.

Finally, the implementing Regulation provides that translation of texts is covered by Art. 9(2)(e),[32] without specifying what section of Art. 9(2)(e) is actually applicable to those translation services.

Where they are established in the European Union, service providers will definitely welcome the view that translation services, assignments of broadcasting rights, and applying for and receiving VAT refunds are treated as services that are deemed to be rendered at the place where the customer is established because, under that interpretation, they are relieved of the obligation to charge VAT to their non-resident customers. The non-resident customers are also relieved of the necessity to apply for a refund of that VAT.

On the other hand, particularly in respect of translation services, EU customers with no or a limited right to deduct input tax will be less enthusiastic about that "interpretation" of the place-of-supply rules, especially if they had selected a low-VAT country from which those services are rendered to them. Under the new Regulation, those customers will have to account for high and non-deductible European VAT on the value of the received services. That increase in their VAT burden may give rise to interesting judicial proceedings.

The above provisions have been included in the category of remarkable interpretations because, in view of the ECJ's interpretations of the place-of-supply rules until now, serious doubts exist that the ECJ would ever have taken the view that, for VAT purposes, those services are "advisory" services, data processing, transfers of industrial property rights or any other service listed under Art. 9(2)(e). In other words, the question arises of whether or not the views that translation services and applying for and receiving VAT refunds and, to a lesser extent, the assignment and transfer of broadcasting rights are "implementing measures" or entirely new provisions.

In this respect, it should be noted that, under the provisions of the present Sixth Directive, the Council may authorize individual Member States to deviate from its provisions. However, even if they had been adopted by the Council in accordance with the procedure laid down by Art. 27 of the Sixth Directive, the ECJ has always examined those deviations very critically and has declared them invalid where the ECJ found them contrary to the general principles laid down by the Sixth Directive. It remains to be seen how the ECJ will respond to complaints of taxable persons who claim that some of the provisions of the implementing Regulation actually constitute deviations from the provisions of the Sixth Directive or new arrangements and, on that ground, should be declared invalid.

If the question of whether or not translation services can be classified as Art. 9(2)(e) services will ever be referred to the ECJ, I will not bet any money on the outcome that the Court will uphold that view as an acceptable interpretation (implementing measure) of the Sixth Directive. If they are to be treated as Art. 9(2)(e) service, it should at least be clear under what indent of subsection (e) those services fall.

4. USEFUL CLARIFICATIONS

4.1. Means of transport

Under the eighth indent of Art. 9(2)(e) of the Sixth Directive, movable tangible property is deemed to be hired out at the place where the customer is estab-

30. Art. 7 of the implementing Regulation. The first indent of Art. 9(2)(e) covers transfers and assignments of copyrights, patents, licences, trademarks and similar rights.
31. Art. 8 of the implementing Regulation. The third indent of Art. 9(2)(e) covers services of consultants, engineers, consultancy bureaus, lawyers, accountants, and other similar services, as well as data processing and the supplying of information.
32. Art. 6 of the implementing Regulation.

lished. However, all forms of transport have been excluded from that rule.

Under the Proposal for a Nineteenth Directive,[33] a fourth paragraph was to be added to Art. 9, providing that the expression "forms of transport" in that article includes pallets and containers ("things without wheels"), and equipment and apparatus ("non-motorized things with wheels") capable of being drawn or pushed in order to perform a contract for transport or towing. Although the Nineteenth Directive has never been adopted, some Member States take the view that pallets and containers are forms of transport within the meaning of Art. 9(2)(e). That view is definitely not generally accepted. On the other hand, the Member States also obviously could not agree that it must be rejected: the implementing Regulation is silent in this respect. The only point of agreement was the view that non-motorized things with wheels, more specifically, trailers, semi-trailers and railway wagons, are forms of transport.[34] That clarification is useful, even though, unlike the definition of means of transport in Art. 28a(2)(a), the definition in Art. 9(2)(e) does not require that the land vehicles are motorized.

The criteria applicable to "forms of transport" within the meaning of Art. 9(2)(e) are also not applicable to the "means of transport" within the meaning of Art. 15(2). Under Art. 15(2), goods transported by the purchaser himself to a destination outside the Community for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use are excluded from zero rating. In this framework, Art. 16 of the implementing Regulation clarifies that "for private use" includes use for non-business purposes by persons other than natural persons, such as bodies governed by public law and associations.

4.2. Vocational training and retraining services

Under Art. 13(A)(1)(i) of the Sixth Directive, vocational training or retraining services provided by bodies governed by public law having such as their aim, or by other organizations defined by the Member States concerned as having similar objects, are exempt from VAT and, under Art. 14 of the implementing regulation, those services include instruction relating directly to a trade or profession as well as any instruction aimed at acquiring or updating knowledge for vocational purposes. The duration of a vocational training or retraining course is irrelevant for this purpose. That interpretation is useful in that it puts an end to discussions of whether or not, for example, one-day seminars for professionals must be considered as vocational training: they are!

The potential extension of the scope of the exemption will not be welcomed by businesses that send their employees to seminars for professionals and, previously, could deduct the VAT charged to them on the admission fee.

However, there is still an important element in Art. 13(1)(i) that will give rise to application of different tax regimes to seminars in the Member States, i.e. the condition that services must be provided by ... other organizations "defined by the Member States concerned as having similar objects" still leaves the Member States a considerable discretion to limit or extend the scope of the exemption.

4.3. E-services

The non-exhaustive list of electronically supplied services ("e-services") and, to a lesser extent, that of services not qualifying as e-services[35] are useful clarifications of the concept of e-services. The view that radio and television broadcasting services and telecommunications services, which are separate categories of Art. 9(2)(e), are not e-services is rather obvious, and the conclusion that goods, such as CD-ROMs, CDs, DVDs and floppy disks, and printed books, newsletters, newspapers or journals, audio and video cassettes, and games on a CD-ROM are not services is almost insulting. The VAT Committee apparently did not want to take any risk of any possible misunderstanding about the concept of e-services.

4.4. Taxable amount in the case of payment with credit or debit cards

Art. 13[36] of the implementing Regulation provides that, where a supplier of goods or services, as a condition of accepting payment by credit or debit card, requires the customer to pay an amount to himself or another undertaking, and where the total price payable by that customer is unaffected irrespective of how payment is accepted, that amount constitutes an integral part of the taxable amount for the supply of the goods or services. Since that article entered into force on 1 January 2006, i.e. six months before the other articles of the implementing Regulation entered into force, it must be assumed that at least one of the Member States was in a terrible hurry to put an end to a tax avoidance scheme described in a recently published article.[37] I strongly suspect that the Member State in question was the United Kingdom and that the tax avoidance scheme was the "merchant acquirer" structure applied by Debenhams Plc in common with many other retailers in the United Kingdom. Under that arrangement, the customers of the retailer, Debenhams, were "required" to accept that 2.5% of their payment went, not to the retailer, but to a separate card-handling company set up by the retailer to process card payments. This 2.5% payment was treated as the consideration for an

33. Amended Proposal for a Nineteenth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC – Common system of value added tax, submitted by the Commission to the Council on 6 July 1987, COM(87) 315 Final.

34. Art. 10 of the implementing Regulation.

35. Arts. 11 and 12 of the implementing Regulation, which are the amended versions of the guidelines adopted by the VAT Committee in its 67th meeting of 8 January 2003, see *International VAT Monitor* 3 (2003), pp. 220-223.

36. Art. 13 of the implementing Regulation is an amended version of the guideline adopted by the VAT Committee in its 65th meeting of 19 June 2002, see *International VAT Monitor* 4 (2003), p. 327.

37. Ine Lejeune and Bert Mesdom, Taxable Amount in the Case of Credit Card Payments in the Light of the New EU Regulation, *International VAT Monito*r 1 (2006), p. 23. Unlike the authors, I consider the Debenhams scheme and similar types of value shifting schemes to be VAT avoidance schemes, because I do not see why a supplier of goods should grant a discount to customers on the mere ground that they have to pay a card-handling fee to a "third party".

exempt financial service, whereas the supply of goods and services made by the retailer was subject to VAT.

In order to keep the price to be paid by the customers the same whether they paid by card or cash, those paying by card were given a 2.5% discount on the goods and services but had to pay the card-handling charge.

Overturning the High Court's judgement, the Court of Appeal[38] ruled that the value of the retailer's supply, and hence the amount on which VAT was due by the retailer, was the full 100% paid by the customer and not just the 97.5% retained by the retailer.[39] The Court of Appeal ruled that the card company did not provide any exempt services to the customer and that the 2.5% was a cost of the retailer's sale to the customer, rather than payment for a separate supply made by the card company to the customer. In first instance, the VAT Tribunal had also found in favour of Customs & Excise.[40] Customs & Excise or, presently, Revenue and Customs, must have feared that there was a risk that, in highest instance, the House of Lords might agree with the High Court and rule in favour of Debenhams. However, that fear turned out to be unfounded because, only two months before the entry into force of Art. 13 of the implementing Regulation, the House of Lords refused to grant Debenhams leave of appeal.

4.5. Value of goods exported in the personal luggage of travellers

Under the retail export scheme,[41] goods purchased and exported by non-EU travellers are relieved from VAT on a number of conditions, one of which is that the total value of the supply exceeds a threshold of EUR 175. The implementing Regulation prescribes that the "total value of the supply" must be based on the invoice value, i.e. the threshold is EUR 175 per invoice. That invoice may include all goods supplied by the same taxable person to the same customer.[42] However, that clarification will not ensure that the retail export scheme is harmonized throughout the entire European Union because Member States are allowed to set the threshold at a lower amount.

4.6. Import documents to include electronic versions thereof

The only provision that is unambiguously to the benefit of taxable persons is that under which, for deduction purposes, customs documents must be taken to include the electronic versions thereof.[43] However, even that concession is conditional because it only applies if the electronic customs documents enable the Member States to check the exercise of the right to deduct input tax. Note that the concession does not apply to refund applications made by non-resident taxable persons under the Eighth or Thirteenth Directive (see 5.).

4.7. Investment gold

Definition of the "weights accepted by the bullion markets" for the purposes of the special scheme for investment gold is definitely useful.[44] The bullion markets appear to be quite flexible in accepting different weights because they range in 11 steps from 2 grams to 12.5 kilograms and, in addition, a number of weight categories in exotic units. On the other hand, the clarification of any arrangement cannot be more useful than the arrangement itself. Disregarding the United Kingdom, the arrangements for investment gold do not seem to be of great importance.

Each year, the Member States must inform the Commission of the gold coins meeting the criteria for investment gold before 1 July. Under the implementing Regulation, the "price" and "open market value" of the coins are those on 1 April or, if 1 April does not fall on a day on which those values are fixed, the values on the next day on which they are fixed.

4.8. Special scheme for non-EU providers of e-services

Under Art. 26c of the Sixth Directive, non-resident providers of e-services to non-taxable customers in the European Union may use a special scheme, under which they are registered in a single Member State in respect of supplies made to non-taxable persons in the entire European Union. Instead of being grateful that a handful of non-resident services providers voluntarily remit 15 to 25% of their turnover to the tax authorities in the European Union, the VAT Committee seems to feel that it is in the position to accentuate[45] the conditions and restrictions applicable under that special scheme by providing that:

– where such service providers do not fully comply with the arrangements, they are to be excluded from the special scheme with immediate effect;
– they cannot include corrections of amounts of VAT due through returns relating to subsequent tax periods;[46] and
– they may not round (up or) down their VAT returns to the nearest whole monetary unit.

By accentuating the conditions for that one-stop shop scheme, the Member States definitely do not encourage non-resident service providers to register in the European Union.

On the other hand, the implementing Regulation also contains rules on how the Member States must deal with VAT overpaid by those service providers.

4.9. Supplies made to non-registered entities in excess of the acquisition threshold[47]

Where they purchase goods from another Member State, taxable persons who carry out only supplies of

38. Judgment of 18 July 2005, in *Debenhams Retail plc v. Revenue and Customs Comrs,* Case C3/2004/2013, [2005] EWCA Civ 892; [2005] STC 1155.
39. *International VAT Monitor*, 5 (2005), p. 411.
40. *International VAT Monitor*, 4 (2003), p. 357.
41. Art. 15(2) of the Sixth Directive.
42. Art. 17 of the implementing Regulation.
43. Art. 18 of the implementing Regulation.
44. Art. 19 of the implementing Regulation. A guideline to that effect was adopted by the VAT Committee in its 57th meeting of 16 and 17 December 1998. See the Annex to *International VAT Monitor* 3 (2002), p. 6.
45. Art. 20 on the implementing Regulation is an amended version of the guidelines adopted by the VAT Committee in its 67th meeting of 8 January 2003, see *International VAT Monitor* 3 (2003), pp. 220-223.
46. Instead, the original return must be amended.
47. Art. 21 of the implementing Regulation.

goods and services in respect of which VAT is non-deductible, for example, schools, generally do not have to account for VAT on the intra-Community acquisition of the goods supplied to them. Since those customers are not registered and, consequently, cannot give a VAT identification number to their non-resident suppliers, the latter must charge the VAT applicable in their own Member State. That situation changes when the customer exceeds the acquisition threshold of, in principle, EUR 10,000 per year.

For example, a school in the Netherlands which purchased goods in a particular year of a value of several hundred thousands of euro in Germany (VAT rate 16%) and the United Kingdom (VAT rate 17.5%) should have applied for registration in the Netherlands and obtained a Dutch VAT identification number before it made the purchases, because the supplies made in Germany and the United Kingdom must be treated as zero-rated intra-Community supplies of goods. The school must account for VAT on the intra-Community acquisition of the goods in the Netherlands. However, if the school had overlooked that VAT obligation and could not give a VAT identification number to its German and UK suppliers, the latter have no option but to charge VAT to it at the rates of 16% and 17.5%, respectively.

The original issue discussed by the VAT Committee was whether or not, under the above circumstances and on the assumption that the school had not purposively failed to register in the Netherlands,[48] the Dutch tax authorities could accept the school's oversight and, if not, whether or not the school, through the Dutch tax authorities, could receive a refund of the German and UK VAT directly from the German and UK authorities.

The VAT Committee answered both questions in the negative.[49] Under Art. 21 of the implementing Regulation, the school must account for VAT in the Netherlands on the total value of the acquisition and it can only hope that it will be able to persuade its German and UK suppliers to refund to it the VAT that initially had been paid, which implies that, in turn, the German and UK suppliers would have to apply for a refund of the initially remitted VAT to their respective local authorities.

Formally, that procedure is totally in line with the system of the Sixth Directive. It can only be hoped that, by the time the school has persuaded its suppliers of the fact that it had initially made a mistake, the statute of limitation for refunds had not expired in the two Member States. If the German and UK suppliers are not able to recover the initially remitted VAT from their local authorities, they will not be inclined to refund it to their customer.

5. NOT INCLUDED IN THE REGULATION

Comparison of the provisions of the implementing Regulations with those contained in the Proposal, and those that were published by the Member States in recent years, provides a useful insight into the topics on which, in the end, the Member States could not come to a unanimous view.

Not included in the implementing Regulation are the clarifications included in the Proposal to the effect that:

– where the service provider has established his place of business in one Member State and has a fixed establishment in another, the place of supply under Art. 9(1) of the Sixth Directive is the place where the supplier has established his business, except where the supply is effectively made from his fixed establishment;
– radio and television broadcasting services[50] must be interpreted as transmissions by wire or air, including via satellite, intended for reception by the public, even when they are simultaneously broadcast over the Internet or similar electronic networks, and that those services exclude cessions of broadcasting or transmission rights, and the leasing of technical equipment or facilities utilized in providing a broadcast;
– the concept of e-services includes web-based broadcasting that is only provided over the Internet or similar electronic network, and is not simultaneously broadcast over a traditional radio or television network;
– air traffic control services provided in airport zones are zero rated under Art. 15(9);
– the compensation percentages under the flat-rate scheme for farmers[51] must be based on average percentages derived from statistics for the last three years for which statistics are available; and
– the transfer to another Member State of a new means of transport by a private individual, in the framework of the transfer of his habitual residence to another Member State, is not a taxable transfer of goods that gives rise to a taxable intra-Community acquisition in the Member State of destination, unless there is evidence that such a transfer was envisaged at the time the means of transport was purchased.

Other guidelines adopted by the VAT Committee since 1996[52] and not included in the implementing Regulation are the views that:

– electronic media including text or spoken word are not included in Annex H, category 6,[53] i.e. cannot be subject to the reduced rate applicable to books and similar printed matter;
– services supplied by a legal person (company) as a member of a company's board of directors are economic activities subject to VAT;
– the option, under which a Member State may regard exempt activities carried out by bodies governed by public law as being outside the scope of

48. Which could be derived from the fact that the Dutch rate of VAT was not significantly higher than those applicable in the Member States from which the supplies were made.
49. A guideline to that effect was adopted by the VAT Committee in its 54th meeting of 16, 17 and 18 February 1998. See the Annex to *International VAT Monitor* 3 (2002), p. 6.
50. As referred to in the eleventh indent of Art. 9(2)(e).
51. Art. 25(3) of the Sixth Directive.
52. The following list only includes summaries of guidelines which have been published by one of the Member States. Unless indicated otherwise, the guidelines were published in the Annex to *International VAT Monitor* 3 (2002).
53. Guideline adopted by the VAT Committee in its 65th meeting of 19 June 2002, see *International VAT Monitor* 4 (2003), p. 327.

VAT,[54] affects the place of taxation of certain expenditure[55] incurred by such bodies in public law;
- payments made by a football club to a player's original club (a payment required by law and intended to compensate for expenditure incurred in training and developing the player) after the original contract had expired or had been terminated constitute services that are subject to VAT, even if the old club no longer has any rights over the player;
- for tiling, papering and parqueting, the place of supply is the place where:
  - the immovable property is situated in accordance with Art. 9(2)(a);
  - installation or assembly takes place in accordance with Art. 8(1)(a); or
  - where the goods are located at the time of supply in accordance with Art. 8(1)(b),

  which means that, in respect of intra-Community transactions, the different interpretations lead to differences regarding the obligation to submit a recapitulative statement;
- supplies of goods, in the framework of which the supplier also carries out certain services, such as the plugging in of a machine or connecting a water pipe to an existing tap and the drainpipe to the outlet, are single supplies without installation or assembly, and that these services are ancillary;
- the construction of houses constitutes a supply of services connected with immovable property which, under Art. 5(5), may be considered to be a supply of goods which is taxed at the place where the work is carried out, and that the dispatch or transport of materials by the construction firm from one Member State to another for the purposes of the construction of a building in the Member State of arrival of the materials constitutes a taxable transfer followed by an intra-Community acquisition of the goods;
- supplies of machines, even if they are assembled following specific requirements of the customer, are supplies of goods, regardless of what the constituting elements of the produced machines are, and that, where the supplier produces machines and installs or assembles them at the location requested by his customer, the transaction is a supply of goods with installation or assembly;
- as regards supplies on board aircraft of goods to be carried away, where the "part of a transport of passengers effected in the Community" includes stopovers between the points of departure and arrival, this transport is regarded as a single journey on the condition that, except in the case of force majeure, the means of transport used and the flight number remains the same throughout the journey and each stopover is of a short duration;
- in the framework of a fair or similar exhibition, where the supply made to the exhibitor is a complex package of services for an all-in price, the whole package is a single service subject to VAT in the Member State in which the fair or exhibition is located, either on the grounds of Art. 9(2)(a) or Art. 9(2)(c);
- the tracing of heirs falls within the scope of the third indent of Art. 9(2)(e), either as a "similar service" or as the supply of "information";
- interpretation services are covered by Art. 9(2)(e);
- where the place of supply of services is deemed to be the place where the service provider has established his business, his fixed establishment is only relevant if it is obvious that the service is effectively supplied from that fixed establishment, and that, in order to simplify control procedures, the Member States might create a rebuttable presumption (*juris tantum*) under which, once a non-resident trader is established and registered with a VAT registration in their territory, the service is considered to be rendered from that fixed establishment;
- partial or total subcontracting of work on movable tangible property does not alter the intrinsic nature of the service rendered by the main contractor in his relationship with his customer, which therefore still ranks as work on goods, even where the work is not "physically" carried out by the main contractor who has undertaken to carry out the work and for which he bears full contractual responsibility vis-à-vis the customer;
- in the case of partial subcontracting, where the conditions under Art. 28b(F) are not met[56] in the relationship between the main contractor and final customer, the place of the supply of the service by the main contractor (including the work carried out by the subcontractor or subcontractors) in its entirety is the place where his own part of the work is physically carried out;
- the transfer of football players is subject to VAT at the place where the customer has established his business or has a fixed establishment to which the service is supplied;
- a reduced VAT rate may be applied to goods specifically designed for disabled people (medical equipment, aids and other similar appliances) which are normally purchased or used only by (permanently or temporarily) disabled people to alleviate or treat their complaints, not to goods normally used for other purposes (e.g. cordless telephones) nor to medical equipment and aids designed for general use and not specifically for disabled people (e.g. X-ray equipment);
- exemptions prevail over zero rates applicable to exports or intra-Community supplies of goods;
- services rendered by a Member State's "public" postal service can only be exempt from VAT when it operates within that country;
- the main element which serves to identify a television body as a public television body is public funding (public authority subsidies or licence fees) and that other characteristics include special obligations, such as coverage of a certain territory or a linguistic area;
- the broadcasting of programmes for which radio or television bodies receive funding through licence money and subsidies constitutes the only non-commercial activity of public radio and television bodies, albeit that the sale of television programmes

54. See Art. 4(5) of the Sixth Directive.
55. Presumably, Art. 9(2)(e) services.
56. Under Art. 28b(F), the customer must be identified in a Member State other than that in which the work was physically done and, after the work was done, the goods must be dispatched or transported out of the Member State in which the work was done.

must always be taxed, even if the transaction takes place between public bodies;
- "personal luggage" means the whole of the luggage which a traveller is in a position to submit to the customs authorities on his/her departure, as well as that which he/she has presented in advance to the customs authorities, subject to proof that such luggage was registered as accompanied luggage, at the time of his/her departure, with the company which is responsible for conveying him/her;
- the fact that goods are removed from VAT warehousing arrangements of itself does not constitute a taxable transaction, that, when goods are removed from VAT warehousing arrangements, the amount of VAT due on the stored goods must be the same as if the zero rate had not applied, that, where goods have been supplied under VAT warehousing arrangements, the supply resulting in their removal from the warehousing arrangements no longer qualifies for zero rating, that application of the normal rules to that supply makes any other corrective measures superfluous and that, where the removal from the warehousing arrangements was not connected with a supply of the stored goods, corrective measures must be taken if the goods remain within the territory of the Member State that authorized the warehouse;
- goods subject to excise duties cannot give rise to exclusive placing under VAT warehousing arrangements, and that places approved as tax warehouses for excise duty purposes can be recognized in parallel as VAT warehouses;
- in order to preserve the general VAT principle of taxation at each stage of production and distribution, recourse to warehousing arrangements other than customs warehousing should not be automatic and that, in this respect, the condition that the goods may not have been "intended to be supplied at the retail stage" must be interpreted, not only with regard to the nature of the goods, but also taking into account their possible different destinations, such as export or use in a production process as opposed to distribution for retail sale and that, under no circumstances may retail stock be kept in a VAT warehouse;
- under Art. 3(a) of the Eighth Directive, taxable persons may not obtain a refund of VAT if the original paper copies of the import documents are not attached to the application, which does not prevent the customs administration from certifying as original a print-out of data transmitted electronically, although it should be recognized that applicants do not keep, in the Member State of refund, any records that include the originals, which would enable the authorities to carry out a check at a later date;
- the exemption for investment gold is restricted to supplies of goods and does not cover transactions qualifying as supplies of services, and that, where investment gold represented by certificates for allocated or unallocated gold is physically located in another Member State than that in which the certificate is handed over to the customer, Member States are allowed to release the supplier from his obligations in the Member State in which the gold is physically located, provided that he is carrying out in that Member State none of the transactions referred to in Art. 22(4)(c);[57] and
- exemptions[58] continue to apply when goods are dispatched or transported from the supplier's Member State to another Member State and are subject to an intra-Community acquisition in the Member State of arrival,[59] and that, under those circumstances, the intra-Community acquisition is exempt from VAT.

6. FUTURE DEVELOPMENTS

Some people hope or believe that this first implementing Regulation will soon be followed by other implementing Regulations. In this respect, I am less optimistic.

In the first place, I must conclude that almost 30 years of VAT Committee meetings[60] have resulted in only a handful of interpretations, a large part of which have very limited value. It obviously is easier for the Member States to agree on guidelines if they are not binding as compared to the binding provisions of a Regulation.

In the second place, it may be expected that the Council and the Commission will await the ECJ's response to the experiment of providing binding interpretations of a Directive by means of an implementing Regulation. In addition to the conclusion that not all provisions of the implementing Regulation merely implement the provisions of the Sixth Directive, the implementing Regulation also lacks the characteristic that the provisions of Regulations must be of a more general nature.

It would indeed be positive if more clarity existed, of concepts used in the Sixth Directive. The ECJ has frequently established that concepts used in the Sixth Directive have not been defined and, therefore, must be interpreted on the basis of other provisions of Community law. That procedure entails the risk that concepts adopted in 1977 are given a meaning derived from legislation that was adopted twenty or thirty years later and, consequently, may be given a meaning that deviates from the legislator's initial intention. That risk may also be considered as an advantage in that Community legislation is continuously adapted to changes in the Community's legal environment.

If the Commission and the Council want to ensure that Community law is interpreted in accordance with their intention existing at the time the legislation was adopted or, at least, keep records of their original intentions, Community legislation, not only the initial proposal, should be accompanied by an Explanatory Memorandum in which the Commission and Council explain the details and circumstances of the legislation.

57. Art. 22(4)(c) refers to intra-Community supplies and acquisitions of goods.
58. "True" exemptions, i.e. exemptions without the right to deduct input tax.
59. Presumably, the guideline implies that true exemptions take precedence over zero rates applicable to, inter alia, intra-Community supplies of goods. That guideline is a more comprehensive version of a guideline summarized above.
60. The first meeting took place in November 1977 and, since that time, two or three meetings have taken place every year.

Such an Explanatory Memorandum could be made an integral part of the Directive or Regulation in question by including a provision that refers to the Explanatory Memorandum. Alternatively, the preambles to Directives and Regulations could be used for those purposes. If you read recitals 4-18 of the preamble to the implementing Regulation and, subsequently, the Arts. 2-22 of the Regulation itself, you must inevitably get the distinct impression that you have read everything twice. Unfortunately, that impression is fully correct, albeit that some recitals are mere summaries of the provisions of the Regulation.

I realize that certain provisions of Directives and Regulations are intentionally left vague, in order that agreement can be reached between the 25 parties that must vote in favour of their adoption. Occasionally, the wording of specific provisions in certain language versions of Directives even intentionally deviates from that of the other language versions for the sake of achieving an "agreement". However, if Community law allows the individual Member State to interpret its provisions very differently, there should not be too much emphasis on the fact that the European VAT system is *harmonized*. Harmonization should not be the sole responsibility of the ECJ and, if it is, it is an extremely slow process.