1. INTRODUCTION

Online gambling services, including betting, qualify as electronically supplied services according to the definition in Article 7 of the VAT Implementing Regulation[1] and are as such mentioned as an example in point 4 of Annex II of the VAT Directive[2].

From 1 January 2015, the place of supply of those services, when supplied by a taxable person established within the EU, has shifted from the place where the supplier is established to the place where the consumer is established or resides, whenever they are supplied to a non-taxable person.

That change brings particular challenges for the gambling sector, as Article 135(1)(i) of the VAT Directive provides for an exemption on gambling services, but subject to the conditions and limitations laid down by each Member State.

For that reason, the Commission services have considered it necessary to draft a Working paper with the aim to clarify some doubts that have arisen among companies in the gambling sector, repeatedly asking the Commission for guidance.

2. SUBJECT MATTER

On 1 January 2015 services supplied electronically that were previously subject to VAT in the Member State where the supplier is established, have become taxable in the Member State of the consumer when supplied to non-taxable persons within the EU.

That implies that suppliers of those services have shifted from having to present their VAT returns and fulfil any other obligation according to the rules of the Member State where they are established to present their VAT returns and fulfil the obligations of any of the Member States to which they are supplying services.

To help companies to cope with this situation, a mini One Stop Shop (MOSS) has been put in place, so companies have only to register in one Member State where they are established (Member State of Identification) and present there their mini One Stop Shop VAT returns indicating the VAT due in each Member State where they are supplying services.

However, they still have to adapt to the different rules in those Member States. In most of the sectors involved, the change in the place of supply rules will imply mainly a change in the rate(s) that the suppliers have to apply. Nevertheless, in the gambling sector this change is more challenging as Article 135(1)(i) of the VAT Directive establishes an exemption on "*betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State*".

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1 Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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Brussels, 31 March 2015

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 844 REV

NEW LEGISLATION

MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED EU VAT PROVISIONS

ORIGIN:	**Commission**
REFERENCES:	**Articles 73, 135(1)(i) and 401**
SUBJECT:	**VAT 2015: VAT treatment of online gambling services**

Therefore, gambling companies have to deal with different conditions and limitations for the exemption depending on the Member State in which they are supplying their services, to the point that there will be forms of gambling that will be exempted in some Member States and not in others.

We are going to analyse in this Working paper what are the conditions and limitations that can be laid down by a Member State and when they fulfil the principle of fiscal neutrality.

It should in this context be borne in mind that these exemptions have been included in the VAT Directive, not based on a desire to afford those activities a more advantageous VAT treatment, but based on practical considerations, as gambling transactions do not lend themselves easily to the application of VAT[3]. Thus, we are also going to analyse a factor that presents particular difficulties for the taxation of these services and that is the taxable amount.

3. THE COMMISSION SERVICES' OPINION

3.1. Conditions and limitations for the exemption

As previously said, the exemption for gambling is based on the practical difficulties found to apply VAT to those transactions and not as an attempt to encourage or make those activities more affordable for the consumer.

In addition, as the Court of Justice of the European Union (CJEU) has repeatedly said, the terms used to specify exemptions must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

In that context, the CJEU considers that Article 135(1)(i) of the VAT Directive leaves much discretion to Member States in determining whether to exempt or tax gambling services, as they can freely fix the limits and conditions to that exemption. Furthermore, they are even free to prohibit activities of that kind, totally or partially, or to restrict them and to lay down more or less rigorous procedures for controlling them, up to a point that it is possible to restrict the permitted forms of gambling to some to which the practical problems invoked in terms of exempting these services are not found[4].

Therefore, Member States are free to decide whether the exemption on Article 135(1)(i) of the VAT Directive applies to all gambling services or to some of them, provided that the principle of fiscal neutrality is respected. They are also free to determine whether and under which conditions such activities can be performed in their territories.

However, it should be borne in mind that this freedom may hamper the activity of companies that supply gambling services across the EU, as they will be facing a different legal framework in each Member State. Thus, it would be advisable that clear guidance is published on the rules applicable regarding the conditions and limitations for gambling activities in the territory of each Member State with a view to facilitate compliance by

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3 CJEU, judgment of 10 June 2010 in case C-58/09, *Leo-Libera,* paragraph 24.
4 *Leo-Libera,* paragraphs 26, 29 and 30.

operators and to avoid litigation that would imply a burden for both operators and Member States. That guidance should include, at least, information about:

- Which types of games are permitted and which are forbidden.
- Which gambling activities require a license and what are the conditions for obtaining it.
- Which types of games are exempted from VAT and which are not.
- Which types of games are subject to other national taxes on gambling and who would be captured by such taxes and liable to pay the tax.

3.2. Principle of neutrality

The freedom of Member States in setting the limits and conditions for the exemption of gambling activities has to respect the principle of fiscal neutrality[5].

The principle of fiscal neutrality must be interpreted, according to the CJEU, as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of that consumer, is sufficient to establish an infringement of that principle, without actual existence of competition between the services in question being necessary[6].

Therefore, Member States can decide which gambling activities are exempted from VAT and which are not. However, once they have made that decision, they have to treat services that are similar, from the point of view of a typical consumer, in the same way.

Services are similar when they have similar characteristics and meet the same needs from the consumer's point of view, meaning that their use is comparable and that the differences which exist between them do not have a significant influence on the decision of the average consumer to use one service or the other[7].

Thus, factors such as the country where the supplier is established, the legal form of the person supplying the service, the category under which the games are classified for the purpose of their licence or the legal regime applicable to its control and regulation cannot be taken into account to determine whether a particular gambling service is exempted or not.

In that regard it is irrelevant whether the operation of such games is lawful or unlawful in so far as they can be considered "similar" or "competing". As the CJEU ruled in *Fischer*[8], a Member State may not impose VAT on the unlawful operation of a game of chance when the corresponding activity carried out by a licensed public casino is exempted. Therefore, games unlawfully operated should be treated, from a VAT point of view, in the same way as the equivalent activity carried out by a lawful operator.

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5 CJEU, judgment of 10 November 2011 in joined cases C-259/10 and C-260/10, *The Rank Group,* paragraph 41.
6 *The Rank Group,* paragraph 36.
7 *The Rank Group,* paragraph 44.
8 CJEU, judgment of 11 June 1998 in case C-283/95, *Fischer.*

However, differences in treatment can be made based on circumstances that are relevant for an average consumer when deciding whether to play one game or the other, such as the minimum and maximum permitted stakes and prizes, the chances of winning, the formats available or the possibility of interaction by the consumer[9].

3.3. Activity of commission agents

The CJEU analysed in *Henfling*[10] the activity of a betting company which operated through a network of local agents, who acted in their own name but on behalf of the betting company.

Those agents were responsible for collecting betters' stakes, registering the bets, issuing betting slips or tickets for betters and paying out winnings. Agents might refuse a bet without being obliged to give reasons for that refusal. Winning betters could only claim their winnings from the agents, not from the betting company itself. The remuneration of the agents was a commission based on a percentage of the stakes placed after deducting the amount of payments made.

Therefore, there was no legal relationship between the better and the betting company. Instead, there was a legal relationship between the agent and the better and another one between the agent and the betting company.

Under those given circumstances, the provision in Article 28 of the VAT Directive was applicable, meaning that the agent was deemed to have received and supplied the betting services himself.

The conclusion of the CJEU was that in such a case, the fiction created by Article 28 of the VAT Directive extended to the application of VAT exemptions, so if the supply of betting services supplied to the better was exempted, then that exemption also applied to the legal relationship between the principal (the betting company) and the commission agent (the local agents).

Thus, commission services supplied by an agent acting in his own name but on behalf of another person, covered by Article 28 of the VAT Directive, are exempted when they refer to an exempted gambling service.

3.4. Compatibility with other taxes

Article 401 of the VAT Directive states that that Directive "*shall not prevent a Member State from maintaining or introducing taxes on betting and gambling ... or, more generally any taxes, duties or charges which cannot be characterised as turnover taxes*".

As previously said, Article 135(1)(i) of the VAT Directive gives wide discretion for Member States to fix limitations and conditions on the exemption regarding betting and gambling.

That implies that Member States can freely decide what types of betting or gambling are exempted and what are taxed, provided that they respect the principle of fiscal neutrality.

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9 *The Rank Group*, paragraph 57.

10 CJEU, judgment of 14 July 2011 in case C-464/10, *Henfling*.

It also implies that Member States can apply other national taxes different from VAT on gambling activities.

As the CJEU ruled in *Metropol*[11], from Articles 401 and 135(1)(i) of the VAT Directive read in conjunction, we can infer that value added tax and a special national tax on games of chance may be levied cumulatively, provided that the special national tax cannot be characterised as a turnover tax.

Therefore, it is possible for a Member State to apply a special national tax not only on games of chance which are exempted from VAT but also on games which are subject to and not exempted from VAT, on the condition that that national tax cannot be characterised as a turnover tax.

3.5. Determining the taxable amount

The determination of the taxable amount is one of the factors that may give rise to difficulties when taxing gambling services.

According to Article 73 of the VAT Directive "*the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply*".

The problem lies in assessing whether the consideration obtained by the supplier includes all the amounts received from the players or whether in determining the taxable amount the amounts that are returned to the players as winnings can be deducted from the total consideration received.

For that purpose, we are going to analyse the case law of the CJEU.

Glawe[12] referred to gaming machines whose operation was regulated by law, with the amounts that had to be paid out as winnings being determined by mandatory statutory requirements. The machines had two different compartments, the cash box and the reserve box, and the operator who had access to the machine could only remove the contents of the cash box. Winnings were paid from the reserve box.

The stakes inserted were divided then into two parts: one served to replenish the reserve, and thus to pay out winnings, while the remainder entered into the cash box.

The CJEU concluded that since the proportion of the stakes which was paid out as winnings was mandatorily fixed in advance, it could not be regarded as forming part of the consideration received by the operator for the gaming service or any other service. Therefore, the taxable amount does not include the statutorily prescribed proportion of the total stakes inserted which corresponds to the winnings that have to be paid out to the players.

[11] CJEU, judgment of 24 October 2013 in case C-440/12, *Metropol*.
[12] CJEU, judgment of 5 May 1994 in case C-38/93, *Glawe*.

Town & County Factors[13] referred to a competition where the players had to indicate by a cross where the centre of the ball was in a photograph taken during a football match. Prizes were handed over to the competitors whose crosses were nearest to the place where the ball was placed.

In this case the CJEU concluded that the full amount of the entry fees received by the organiser of a competition constituted the taxable amount for that competition as the organiser had that amount freely at his disposal.

The CJEU held that that interpretation did not contradict the one in *Glawe*, as there were significant differences in the operation of both games. While in the case of gaming machines the operator had to pay a certain amount of the players' stakes received according to mandatory statutory provisions, and those stakes were kept technically and physically separated from the stakes that the operator could actually keep for himself, those same features were not displayed in the case of the competition in *Town & County Factors*, as the organiser of the competition had freely at his disposal the full amount of the entry fees received.

International Bingo Technology[14] referred to a company that organised bingo games. In this case, the percentage of the card price which was repaid as winnings to players was predetermined by legislation.

The CJEU ruled that the consideration actually received by the organiser of the game for the service supplied consisted in the card price after deduction of the portion of that price, fixed by legislation, which had to be paid as winnings to players, as that was the amount that the organiser actually had at his disposal. It maintained that that interpretation was consistent with the ruling in *Town & County Factors*, as the organiser of the bingo game could not make free use of the full amount of the card price.

It should be noted that in this case, as a difference with *Glawe*, the organiser had physically at his disposal the amounts that had to be returned to the players as winnings. However, the fact that those amounts were predetermined by legislation, implying an obligation for the organiser, was the decisive factor and justified excluding them from the taxable amount. In fact, the organiser was considered, in the words of the national court which referred the case to the CJEU, "a mere temporary custodian of the winnings".

Finally, *Metropol*[15] referred to gaming machines similar to those in *Glawe* but they presented a difference, as the compartments operated in a different way. The machines had a "hooper" where the money inserted by the players fell into. Once the hooper was full, the surpluses were diverted into the cash box. All changes in the contents of the hooper were recorded and taken into account when calculating the cash receipts.

The CJEU followed the same criteria as in *Glawe* and *International Bingo Technology*, that is to say the consideration received by the operator did not include the amounts that had to be paid to the players as winnings, as those amounts were also fixed by mandatory statutory requirements. That conclusion was not affected by the fact that the operator was able to access to hopper's contents at any time since any change in the hooper's contents

[13] CJEU, judgment of 17 September 2002 in case C-498/99, *Town & County Factors*.
[14] CJEU, judgment of 19 July 2012 in case C-377/11, *International Bingo Technology*.
[15] CJEU, judgment of 24 October 2013 in case C-440/12, *Metropol*.

was recorded, so the amount of the cash receipts which the operator could actually take for himself could be determined with accuracy.

From those rulings we can infer that the decisive element in determining the taxable amount is whether the operator supplying the gambling service can freely dispose of the amounts received. In that regard, it is not important whether he can physically access to the full amount paid by the players.

Therefore, whenever the operator is obliged to pay as winnings to players a certain amount of the consideration received from them due to legal or statutory obligations, and that amount is known by all parties involved before the service is supplied, then the consideration received by the operator includes the sums received from the players minus the amounts that have to be returned to them as winnings. Thus, the sums that the organiser of the game is obliged to hand over to the players as winnings cannot in such circumstances be included in the taxable amount of the gambling company.

That may be the case even if in a game there are no immediate winners, for instance when no player guesses the winning combination of numbers. For that to be so, it is however necessary that the full amount retained by the organiser, and earmarked for winners of each of the games, rolls over and is handed out to future winners of the game in its entirety.

If the organiser of the game is not obliged to return a predetermined amount of the stakes received from players to winners of the game, so that he is free to decide the prize or the amount that has to be paid as winnings, if he has the possibility to keep for himself the full amount of stakes received from players in cases where as a result of the game there are no winners, or, in general, if the amount of the prize is determined by circumstances or formulas other than a percentage, fixed by legal or statutory provisions obligatory for the game operator to comply with, of the amount of the stakes placed by the players, then the taxable amount would need to include the full sum received from the players, without deductions.

As the taxable amount is determined by what the taxable person actually receives as consideration from all players and not by what one particular service user pays in a specific case, it does not have to be determined transaction by transaction. It can be determined using cash receipts referred to a concrete period of time[16].

Given the fact that doubts could arise on the method for the calculation of the taxable amount applicable to a concrete gambling activity, the guidance on the rules applicable to gambling activities mentioned in point 3.1, should include information in that regard, specifying the method applicable to determine the taxable amount on the different gambling activities.

3.6. Calculation of taxable amount by companies operating in different Member States

As already stated, from 1 January 2015, the place of supply of gambling services has shifted to the place where the customer is established when supplied by electronic means to non-taxable persons.

[16] *Metropol*, paragraphs 38 and 39.

This change means that a company supplying such gambling services in different Member States has to calculate the consideration obtained in respect of the services which are taxable in each of those Member States, as that constitutes the taxable amount.

Doubts may arise in cases where to determine the taxable amount, the amount of the sums that have to be returned to the players as winnings must be deducted from the total sums paid by the players.

It could be thought in those cases that the taxable amount in each Member State is formed by the amounts received from players in that Member State minus the winnings paid to players in the same Member State. That could imply that when one game is played by players coming from different Member States, if the winners are concentrated in one Member State, it would then lead to a negative taxable amount in the said Member State.

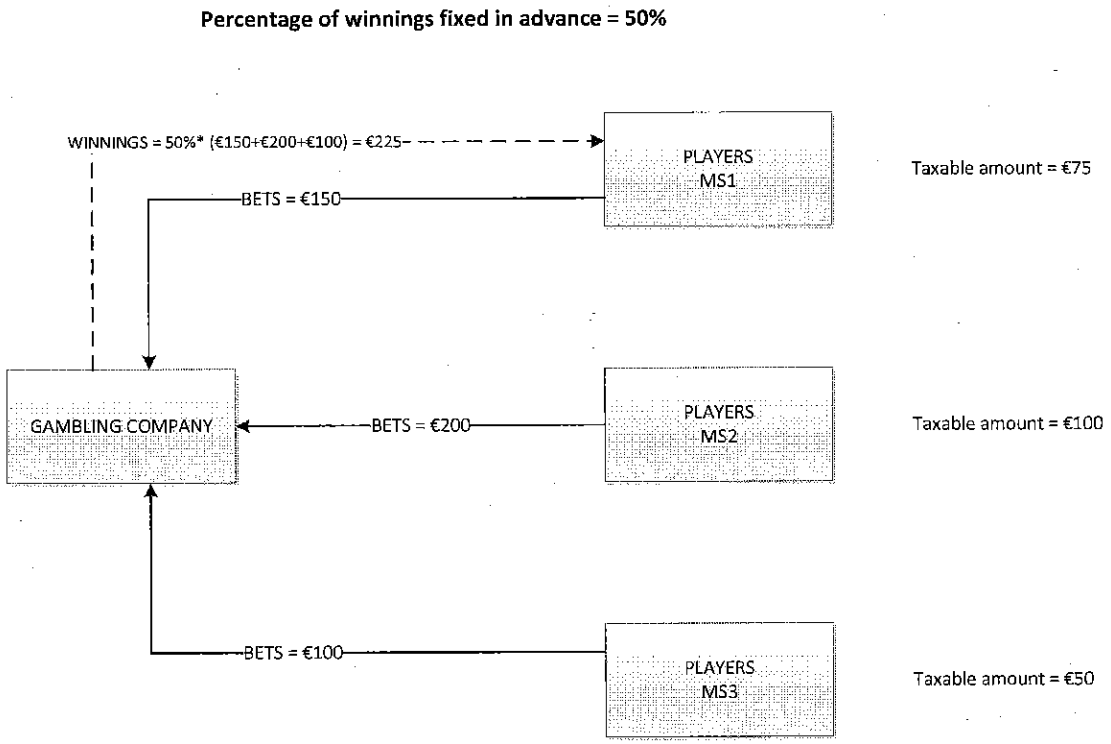
However, it should be noted that the condition for excluding from the consideration received by the organiser the sums that have to be paid out to the players as winnings, was that the percentage of sums received that had to be returned was known by all parties involved at the moment where the sums were first paid to the operator.

It has to be stressed that the ruling of the CJEU in *International Bingo Technology*[17] stated that "*the taxable amount for VAT does not include the portion of the card price fixed by legislation and* ***intended to be used*** *to pay winnings to players*". That implies that the amounts that have to be deducted are not the sums paid to winners in a particular Member State but rather the part of the sums received from players in that Member State which is intended to be used to pay winnings to players, as that amount does not constitute consideration received by the organiser of the game.

Thus, the consideration received by the organiser of games in each Member State, whenever there is an obligation to return to the players a certain amount of the consideration received from them due to legal or statutory obligations, and that amount is known by all parties involved before the service is supplied, includes the sums received from players in each individual Member State with deduction of the part of the sums received in that Member State that is intended to be used to pay winnings to players, irrespective of the sums actually paid out to players in that Member State.

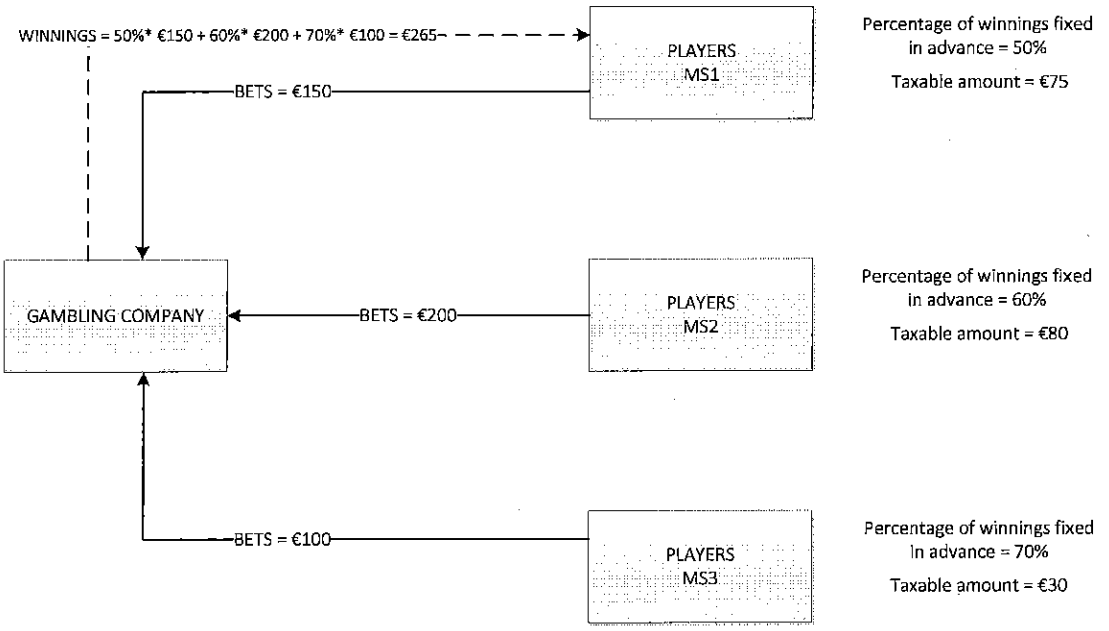
[17] CJEU, judgment of 19 July 2012 in case C-377/11, *International Bingo Technology*.

An example illustrating how to determine the taxable amounts when winners of the game are all concentrated in one Member State is featured below:



In this example, the organiser of the game is obliged to return as winnings EUR 75 of the stakes received from players in Member State 1, EUR 100 of the stakes received from players in Member State 2 and EUR 50 of the stakes from players in Member State 3. Therefore, the taxable amount in each of those Member States is the remainder amounting to what the organiser has at his disposal. The fact that the amounts that he is obliged to return to players as winnings is paid only to players in one Member State does not alter the calculation of the taxable amount in any of the Member States where the gambling company is operating.

The same happens in cases where the percentage of winnings fixed in advance is different in each of the Member States involved:

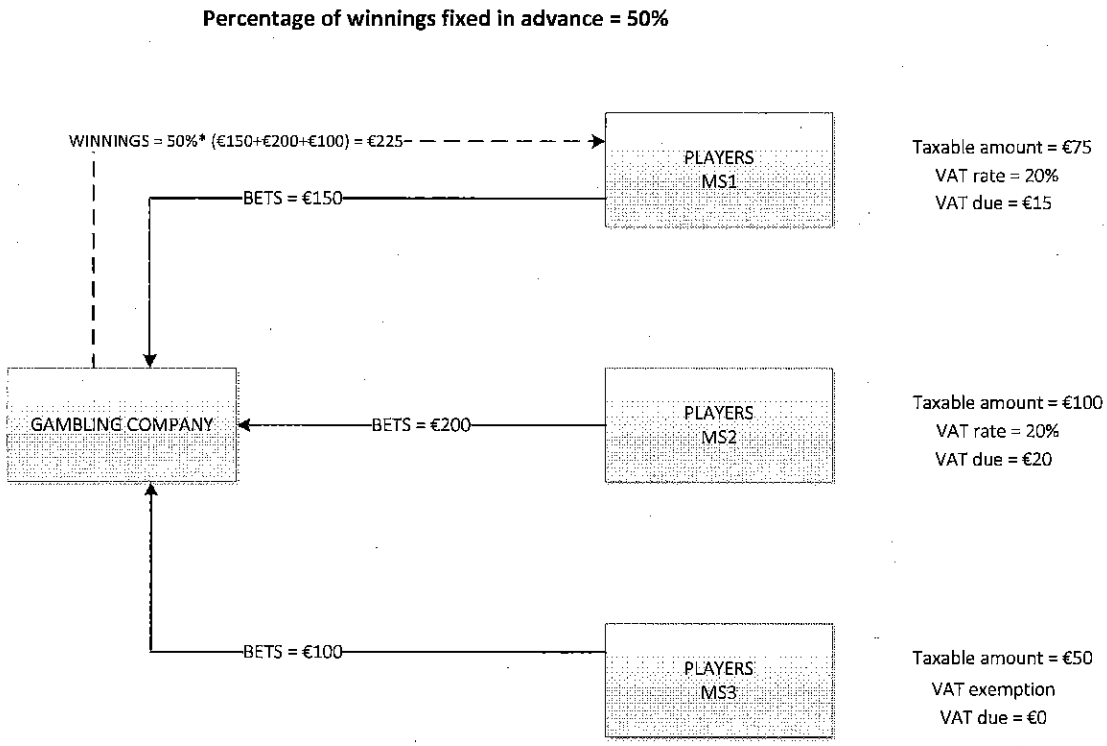


In this case, the organiser of the game has received EUR 150 from players in Member State 1. He is obliged to return to winners EUR 75 from that amount, so the taxable amount in Member State 1 is EUR 75. He has also received EUR 200 from players in Member State 2. From that amount he is obliged to pay back EUR 120, so the taxable amount in Member State 2 will be EUR 80. Finally, he receives from players in Member State 3 EUR 100 from which he has to return EUR 70 to winners. Therefore, the taxable amount in Member State 3 will be EUR 30. The operator fulfils his obligation returning to winners EUR 265. The fact that that amount is paid to winners in one Member State does not alter the consideration that the operator obtains in each of the Member States and thus does not alter the determination of the taxable amount in either Member State.

It should be borne in mind that the taxable amount is constituted by the consideration obtained by the taxable person and not by the money received by the Member State where the taxable person is operating or the net amount paid by the customers of the operator. The consideration obtained by the taxable person is determined by the sum attributable to the bets received minus the percentage of the sum of those bets that the operator is obliged to return to the players as winnings. That consideration is the same whether actual winnings are paid to players in that Member State or to players in another Member State.

It is also worth mentioning that if the taxable amount were to be determined by the sum of bets received in one Member State minus the amounts actually paid in that same Member State, then the Member States concerned would be also "gambling", facing the possibility of negative taxable amounts in their territory. Any such notion must therefore be discarded.

Finally, we would also like to feature an example where the game is exempted in one Member State, to illustrate that the analysis made does not change:



Similar difficulties in the calculation of the consideration obtained are not found when the taxable amount includes the full sum received from the players, without any deduction. In that case the taxable amount in each Member State will be the total sum received from players in that Member State.

3.7. Treatment of credits or bonuses

Gambling operators often give bonuses or credits for free to players as a way to encourage them to play or because they have reached a certain amount of money paid for gambling, so the player enjoys more credits than he has paid for.

It could be thought that those free credits or bonuses constitute a supply of services carried out free of charge and should then be taxed according to Article 26 of the VAT Directive. However, this situation is not different from other cases such as fidelity programmes where price discounts are given or promotion campaigns where products are offered for free when acquiring a certain number of the same product. Just like in these cases, the taxable amount has to be adjusted to take account of the free credits or bonuses which should be seen as price discounts or rebates granted to the customer not to be included in the taxable amount of the supply according to Article 79(b) of the VAT Directive.

Even if they would not have the features of a discount, as is the case with credits given for free to potential customers to encourage them to open an account with the gambling company, it should be noted that, as previously stated, the taxable amount is the consideration obtained by the gambling company from all players, and it does not have to

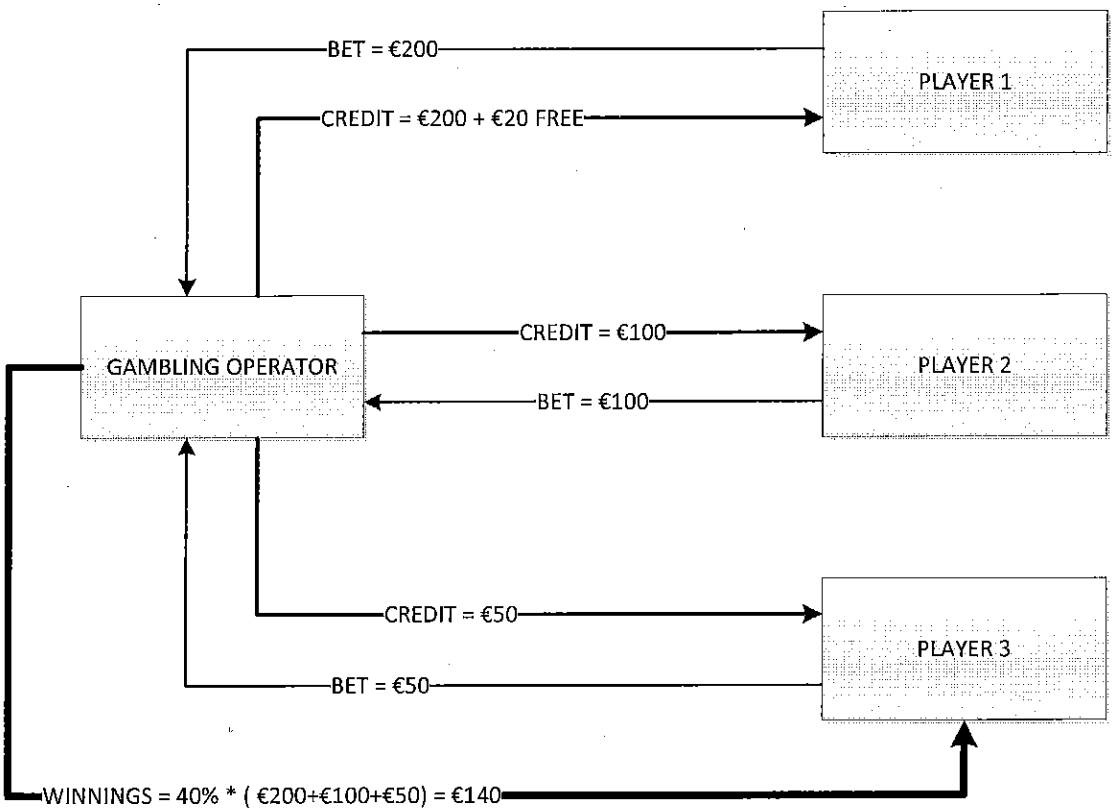
be determined transaction by transaction. Therefore, it seems difficult to invoke Article 26 being applied to a concrete transaction.

In addition, the taxable amount is formed by the amounts received from the players after deduction of the sums that have to be returned to them as winnings, whenever the operator is obliged to return an amount fixed by legal or statutory obligations. That calculation is not altered by the fact that the operator gives bonuses or credits for free to players, as the percentage of the winnings that has to be returned to the players refers to the amount of the stakes paid by them and not to the number of credits given to them. Bonuses and free credits have no incidence in that regard.

Therefore, bonuses or credits given for free to players do not give rise to separate taxation as a self-supply.

An illustration of the calculation of the taxable amount when credits are given for free to one of the players could be the following:

Percentage of winnings fixed in advance = 40%



The taxable amount would be formed by the stakes paid by the players (EUR 350) minus the amount that the operator is obliged to return to players as winnings (EUR 140). In this concrete case the taxable amount would be EUR 210.

3.8. Conclusions

Member States have wide discretion to decide which gambling activities are exempted from VAT or taxed and which requirements have to be met to be allowed to perform those activities, provided that the principle of fiscal neutrality is respected. To ease the activities of gambling companies operating in different Member States, it would be advisable to publish clear guidance on what activities are taxed or exempted in each Member State and the applicable limits and conditions. That guidance should include information about the activities that are allowed, the requirements to obtain a license to perform such activities, whether the activities are taxed or exempted from VAT and whether they are subject to other taxes (and in that case, which would be the tax obligations to be fulfilled by the supplier of the gambling services), and the method to determine the taxable amount applicable to each gambling activity.

The principle of fiscal neutrality implies that games that have similar characteristics and meet the same needs from the consumer's point of view must be treated in the same way from a VAT point of view. Differences that do not have a significant influence on the decision of the average consumer to use one gambling service or the other cannot be taken into account when establishing their VAT treatment.

In the case of commission services supplied by an agent acting in his own name but on behalf of a gambling company, covered by Article 28 of the VAT Directive, these services are exempted when they refer to an exempted gambling service.

Member States can apply a special national tax on games of chance, whenever that tax cannot be characterised as a tax on turnover. It can be applied to both games that are exempted from VAT and to games that are VAT-taxed. In the latter case VAT and the special tax may be levied cumulatively.

When the gambling company is obliged to return to the players a certain amount of the sums received from them due to legal or statutory obligations, and that amount is known by all parties involved before the service is supplied, then the sums that have to be returned to the players as winnings have to be deducted from the total sum received to determine the consideration obtained by the gambling company from the players which then constitutes the taxable amount of the gambling services. Where the company operates in several Member States, the consideration obtained in each of them will be formed by the sums received from players in that Member State with deduction of the part of the sums received in that same Member State that is intended to be used to pay winnings to players, irrespective of whether the sums are immediately paid to winners of that play or, when that play of the game has no winner, they are earmarked to be paid to winners of a future play of the same game, and regardless of whether the sums are actually paid out to players in that Member State or elsewhere.

If, in a particular Member State, the company is not under an obligation to return to the players a certain amount of the consideration received from them, the taxable amount will include the full amount received from the players in that Member State, without any deduction.

The application of Article 26 of the VAT Directive seems difficult to justify in the case of bonuses and credits given for free to customers. It is rather the case that bonuses and credits should be seen as discounts not to be included in the taxable amount of the supply according to Article 79(b) of the VAT Directive. That is so even in the case of credits given for free to potential customers, as the taxable amount is determined by what the taxable person actually receives as consideration from all players and not by what one particular service user pays in a specific case and it cannot be determined transaction by transaction. Bonuses or credits given for free to players are not taken into account when determining the sums that have to be returned to the players as winnings, so they do not have any influence on the consideration obtained by the gambling company. Therefore, they have no impact on the determination of the taxable amount.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on this matter raised by the Commission services.

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