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VAT treatment of online gambling services

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Summary

Online gambling as a field has created a variety of legal challenges in the EU. One of the challenges is the application of VAT on online gambling services. The topics which have been concerning EU Member States in relation to VAT and online gambling are the scope of electronically supplied services in relation to online gambling, the taxable amount of online gambling, and the correct implementation of the exemptions on gambling under the VAT Directive.

The scope of gambling in the EU has to be evaluated in the light of the gambling laws of the Member States since there is a lack of harmonization on the EU level on the definitions of gambling and games of chance. The scope of electronically supplied services is also defined broadly which requires a detail-oriented approach, especially, regarding whether the human intervention in the supply of gambling services is more than minimal.

The determination of taxable amount for VAT purposes could also prove to be difficult due to the large variety of online gambling games that are available online. The exemption from the VAT for gambling and exclusion of that exemption for electronically supplied services under the VAT Directive could lead to infringement of the principle of fiscal neutrality if similar supplies are taxed differently for VAT purposes. The point of view of the average consumer is the decisive element in evaluating whether two supplies are considered similar and whether the principle of fiscal neutrality is infringed. The pending case-law of the CJEU will clarify the VAT treatment of two similar supplies of gambling where one of the supplies is provided offline and the other online.

Preface

The writing of this thesis has come to an end. I would like to thank my wonderful tutor, Mariya Senyk, for the feedback I have received during this process. I would also like to thank Giorgio Beretta and Ramona Azzopardi for their assistance regarding the writing of this thesis. Lastly, I would like to thank everyone who has been a part of my journey in this fantastic master's programme. Special thanks to the lecturers and my colleagues who have helped me a lot during this programme.

Abbreviation list

AG	Advocate General
CJEU	Court of Justice of the European Union
EU	European Union
p	Page
pp	Pages
Para	Paragraph
TFEU	Treaty of the Functioning of the European Union
VAT	Value-added-tax

1. Introduction

1.1 Background

The rise of digitalization and the development of the internet has changed the gambling industry around the world. In addition to traditional gambling inside casinos and in sports events, online gambling has created an alternative to satisfy the thirst for gambling. In 2022, European Union's (EU) total gambling market revenue was €108,5 billion whereof the share of offline and land-based gambling was €70.3 billion leaving online gambling with €38.2 billion.¹ These numbers indicate that gambling which occurs outside the internet is heavily the most popular form of gambling. However, online gambling is a relatively new concept² and the fastest-growing area in the gambling market inside the EU.³ Since 2019, the revenue of online gambling in the EU has increased by 12,5% compared to the decreased 4,8% revenue of offline gambling.⁴ Covid-19 pandemic is a key factor behind these numbers, but it is estimated that the popularity and the revenue of the online gambling will grow faster than offline gambling.⁵ The reason behind the increased popularity of online gambling has been explained due to the constant evolvement of the online gambling industry. Regularly changing websites, a wider variety of games, and greater combination of bets provide more unique opportunities for customers than traditional gambling.⁶

Above mentioned factors are also the reason why the taxation of online gambling is challenging. When it comes to value-added tax (VAT), the EU has taken the approach that for VAT purposes, online games of chance and gambling games are considered as electronically supplied services and thus, subject to VAT.⁷ What is problematic here is that when it comes to offline gambling, VAT Directive also states that Member States shall exempt "*betting, lotteries, and other forms of gambling, subject to the conditions and limitations laid down by each Member State*".⁸ This creates a threat and a possible infringement of the principle of fiscal neutrality if similar gambling games are treated differently for VAT purposes when the

¹ European Gaming & Betting Association. *European Online Gambling Key Figures 2022 Edition* (2022). Retrieved from <https://www.egba.eu/uploads/2023/02/230203-European-Online-Gambling-Key-Figures-2022.pdf>, April 4, 2023.

² The first form of online gambling occurred in 1995 in Liechtenstein when people purchased lottery tickets online. See Williams, R. J. and Wood, R. T. (2007). *Internet Gambling: A Comprehensive Review and Synthesis of the Literature*. Report prepared for the Ontario Problem Gambling Research Centre, Guelph, Ontario, CANADA. July 20, 2007.

³ Nicolae Sfetcu, "Gaming Guide - Gambling in Europe", MultiMedia Publishing (2016), ISBN 978-606-9041-46-8, p. 592.

⁴ European Gaming & Betting association, *supra nota* 1.

⁵ *Ibid.*

⁶ Casabona, S. (2014). *The EU's online gambling regulatory approach and the crisis of legal modernity*. EU Centre in Singapore, Working Paper No.19, Retrieved from <https://aei.pitt.edu/47671/1/WP19-Online-Gambling-Regulations.pdf>, April 4 2023.

⁷ Council Directive 2006/112/EC, ANNEX II, (4).

⁸ Council Directive 2006/112/EC, Article 135, 1 (i).

only difference is where the activity is pursued.⁹ Due to the non-harmonization of gambling laws on the EU level, Member States have wide discretion to decide which elements constitute a game of chance or gambling and which gambling activities are exempted from VAT provided that the principle of fiscal neutrality is respected.¹⁰ Without proper guidelines, it could be difficult for gaming providers who operate in several Member States to have an understanding whether their activity is legal, whether their services are exempted from VAT and what is the taxable amount applicable to each type of gambling activity.¹¹

1.2 Aim

The aim of this thesis is to cover which online gambling services are subject to VAT, analyse the taxable amount for VAT purposes of those services, and address the principle of fiscal neutrality regarding the exemption of gambling services under Article 135 (1) (i) of the VAT Directive. This paper will analyse the scope of gambling and electronically supplied services, more precisely, which types of gambling services are subject to VAT, and which are exempted under Article 135 (1) (i) of the VAT Directive. Lack of harmonization for the terms “gambling” and “game of chance” does not provide clear guidelines for gambling providers which types of games are considered as gambling and therefore either subject to VAT or exempted. Furthermore, the determination of the taxable amount of online gambling services and legal analysis of the settled case-law relating to this field will be conducted. Lastly, this thesis aims to answer the question on whether the principle of fiscal neutrality is violated in situations where offline gambling enjoys different VAT treatment than similar online gambling services. The aim and the research questions of this paper can be formulated as:

What is the scope of EU VAT and the taxable amount for VAT purposes in the context of online gambling services? What legal challenges does it cause for the service providers and Member States? Is there a violation of principle of fiscal neutrality when similar gambling services are taxed differently for VAT purposes?

1.3 Method and material

To answer the research question of this paper, an analysis of what is meant by “gambling”, or “game of chance” will be conducted. It is crucial for the aim of this paper to clarify the scope of the online games that will be covered in this paper. Since there is no sector-specific EU legislation defining these terms, EU countries have the competence to organise their gambling services, as long as they are not violating the fundamental

⁹ See for example, Case C-481/98 *Commission v France* [2001], para 22, Case C-498/03 *Kingscrest Associates and Montecello* [2005], para 41, Case C-41/09 *Commission v Netherlands* [2011], para 66.

¹⁰ B.J.M. Terra & J. Kajus, in *Commentary on European VAT* (L. Alarcón Díaz ed., IBFD 2022), Global Topics IBFD., Chapter 9 – exemptions, 9.3.5. Betting, lotteries and gambling (Article 135(1)(i)).

¹¹ *Ibid.*

freedoms established under the Treaty on the Functioning of the European Union (TFEU).¹² Therefore, this paper will cover examples from the gambling legislation of the Member States to have a better understanding which elements constitute gambling and games of chance. Another reason why the determination of gambling is important for the purposes of this research is that the freedom to lay down own gambling laws has caused diverse treatment and the forms of gambling that are exempted from VAT vary between Member States.¹³ Therefore, the suppliers of online gambling services must be aware of the national legislation of each Member State regarding gambling in order to find out whether their games are considered as gambling under the laws of each Member State and if so, what is the VAT treatment of those games.¹⁴

The scope of electronically supplied services will be analysed based on the criterion set in Article 7 (1) of the Implementing Regulation¹⁵ and with the assistance of the working papers of the VAT Committee regarding this topic. The analyse will mainly focus on the criterion for minimal human intervention since it has caused a lot of controversies whether certain types of online gambling games exceed the minimal human intervention and therefore should be excluded from the scope of electronically supplied services.

The focus for determining the taxable amount of VAT for online gambling services will be the interpretation of Article 73 of the VAT Directive¹⁶, more precisely, what is the actual consideration obtained by the gambling supplier which constitutes the taxable amount for VAT purposes. The methodology used for this will be the settled case-law of the Court of Justice of the European Union (CJEU) and the working papers of the VAT Committee. When it comes to the principle of fiscal neutrality, the focus will be on the case-law of the CJEU regarding the different VAT treatment for similar gambling services and the compliance of the national gambling laws with the EU VAT law and the principle of fiscal neutrality.

1.4 Delimitation

Gambling as a field is vulnerable to several legal issues and through the years the CJEU has ruled in a lot of cases related to different legal concerns around gambling inside the EU. Freedom of establishment¹⁷, monopolies and licenses¹⁸, and the principle of proportionality¹⁹ are just the tip of the iceberg of the legal issues arising from the field of gambling. However, this

¹² European Commission. *Online gambling in the EU*. Retrieved from https://single-market-economy.ec.europa.eu/sectors/online-gambling_en, April 6 2023.

¹³ van Brederode, R. F., & Krever, R. (2019). Current and recurring issues with taxing financial services under VAT. *Bulletin for International Taxation*, 73(6/7), pp 339-346.

¹⁴ *Ibid.*

¹⁵ Council Implementing Regulation (EU) No 282/2011, Article 7 (1).

¹⁶ Council Directive 2006/112/EC, Article 73.

¹⁷ See for example cases C-275/92 *Schindler* [1994], C-311/19 *BONVER WIN* [2020], C-98/14 *Berlington and others* [2015]

¹⁸ See for example cases C-3/17 *Sporting Odds* [2018], C-347/09 *Dickinger and Ömer* [2011]

¹⁹ See for example cases C-42/07 *Liga Portuguesa* [2009], C-46/08 *Carmen Media Group* [2010]

thesis is mainly focused on which online gambling services are subject to VAT and the legal issues of the industry related to EU VAT law. For the purposes of finding an answer to the research question of this thesis, other areas and topics will also be touched upon but with a limited scope and the main focus will still be on the VAT. This paper seeks to clarify more the scope of online gambling services subject to VAT and the application of VAT to such services rather than determining the legality of providing those services or the legality of gambling in general.

Lastly, even though EU VAT law is the main focus of this thesis, topics covered in this paper will be mainly written from the perspective of private companies meaning the EU countries which apply state-owned online gambling monopolies will be left out of the scope of this paper since private companies are not allowed to provide online gambling services inside the territories of those countries. Finland and Norway are currently the only two countries inside the EU that apply state-owned monopolies over online gambling.²⁰ It is important to keep in mind, however, that even though private companies are not allowed to provide gambling services in Finland and Norway, it does not mean that Norwegian or Finnish residents cannot participate in online gambling provided by companies established in other countries. For example, in Norway, it is estimated that approximately half of all online sports betting and casino games take place outside the monopoly.²¹ In the light of VAT, this is a relevant factor to keep in mind due to the fact that under the VAT Directive, the place of supply for electronically supplied services shall be the place where the customer has his/her permanent address.²²

1.5 Outline

This thesis will be structured in the following way. Firstly, this paper will clarify the scope of online gambling services subject to EU VAT by concluding an analysis of what are the definitions of gambling and electronically supplied services in order to create a framework on where the rest of this thesis will be based on. Following that chapter, this thesis will present the analysis of the taxable amount of online gambling services showcasing all the relevant factors that the online platforms that provide gambling services have to take into account regarding the taxable amount for VAT. Subsequently, legal issues concerning the principle of fiscal neutrality from this field are presented and analysis will be provided. Lastly, the final part of the paper will conclude the key findings of this paper.

²⁰ European Gaming & Betting Association. *Analysis: Multi-Licensing Has Become Europe's Preferred Online Gambling Regulation, But Few Monopolies Remain* (2021). Retrieved from, <https://www.egba.eu/news-post/analysis-multi-licensing-has-become-europes-preferred-online-gambling-regulation-but-few-monopolies-remain/>, April 10, 2023.

²¹ Gambling Insider, Carl Fredrik Stenström: *When the remedy becomes more important than the goal* (2023). Retrieved from, <https://www.gamblinginsider.com/in-depth/19949/carl-fredrik-stenstrm-when-the-remedy-becomes-more-important-than-the-goal>, April 10 2023.

²² Council Directive 2006/112/EC, Article 58.

2. The scope of online gambling subject to VAT

2.1 Chapter introduction

The purpose of this chapter is to go through the scope of online gambling by analysing the definitions of gambling, a game of chance, and electronically supplied services under EU VAT law. This chapter aims to clarify which elements constitute online gambling that is subject to VAT under the VAT Directive.

First, the general definitions of gambling and games of chance and their relationship is presented. Secondly, some examples from the Member State's gambling laws will be pointed out to see how much they differ from each other if at all. Lastly, the scope of electronically supplied services under the EU VAT law will be analysed, and critical analysis of whether all online gambling services fall within that scope.

2.2 Gambling and Games of Chance

As mentioned, the Annex II of the VAT Directive provides an indicative list of the electronically supplied services subject to VAT where games of chance and gambling games are mentioned separately.²³ This could indicate that these two concepts differ from each other. Are all gambling games considered games of chance?

Generally, the word “gambling” refers to a situation where a player stakes money for a prize, and the random event will decide what will be the return of the money that was staked. The gamble is created when you are willing to risk some value in the hope of getting something of even greater value. In the last sentence, the random event refers to chance which exists in almost every gambling game.²⁴ The element of chance and its relevancy regarding the outcome of the game varies amongst different gambling games. Some gambling games such as lottery and roulette are purely based on chance while other gambling games such as poker and backgammon are also subject to other elements such as skill.²⁵

This leads us to a game of chance. As the name indicates, a game of chance refers to a game whose outcomes are partly or wholly subjected to chance.²⁶ From a legal point of view, it is important to distinguish games of chance and games of skill since the elements of chance and skill are the key factors

²³ Council Directive 2006/112/EC, Annex II (4).

²⁴ Sfetcu, Nicolae, *supra nota* 3. pp. 13-16.

²⁵ Ibid.

²⁶ Ibid.

that determine the legal status of the games.²⁷ In other words, if the outcome of the game is based more on the skill of the participants than chance the game is considered a game of skill rather than a game of chance.²⁸ What makes it difficult to make that distinction is that there are very few games that are purely based on skill or chance.²⁹ Lottery for example, is purely based on chance since you cannot contribute to the outcome of the drawn numbers at all and on the other hand, the outcome in chess is purely based on the skill of the players. Therefore, mixed games where both chance and skill exist are the most popular games and sometimes it could be difficult to define whether they are games of skill or chance.³⁰ The classification has been done by analysing which of the two elements dominate the other. The usual approach by the courts in many cases regarding the definition of gambling has been that games that are predominantly dependent on chance should be considered gambling.³¹ Predominantly in this context means that the influence of skill should be weighed against the influence of chance and if another element has a 50% influence over the other it dominates the outcome of the game.³²

The problem is, however, how do you define how much the element of chance influences the outcome of the game and how do you actually compare it with the influence of skill?³³ There is no clear answer to that question. There are different methods to apply for this classification but since there is no universally accepted criterion that separates games of skill from games of chance, it is up to the courts and the legislators to decide how to differentiate those two games.³⁴

2.2.1 Is there a difference between gambling and games of chance?

From the legal perspective, gambling and games of chance are often in the same classification when it comes to the legality of those concepts. This is very logical since there is no denying that the element of chance does exist in gambling. The whole idea behind gambling is that you are willing to take a risk to gain more value and there is never a guarantee that you will gain profit out of your gamble, that is always subject to a certain amount of chance. However, there are games that fall inside the scope of gambling, but it could be challenged whether the outcome of those games is predominantly based on chance.

²⁷ Jörg Bewersdorff, "Luck, Logic, and White Lies: The Mathematics of Games". CRC Press (2021). ISBN 100037209X, 9781000372090, available in Google Scholar, https://scholar.google.com/scholar_lookup?title=Luck%2C%20logic%2C%20and%20white%20lies%3A%20the%20mathematics%20of%20games&publication_year=2004&author=J%20Bewersdorff, Part IV, 48 – Games of Chance and Games of Skill

²⁸ Ibid.

²⁹ Duersch, P; Lambert, M; Oechssler, J. (2020). Measuring skill and chance in games. European Economic Review, Volume 127, pp 1-2.

³⁰ Ibid.

³¹ Ibid.

³² Van Der Genugten, B; Borm, P. (2016). Texas Hold'em: A game of skill. International Game Theory Review, Volume 18, Issue 3, pp 1-2.

³³ Duersch, P; Lambert, M; Oechssler, J. *supra nota* 27.

³⁴ Ibid.

Poker is one of the most popular forms of gambling around the world with a multi-billion-dollar industry and is a perfect example of this controversial debate about whether the outcome of the game is based on skill or chance.³⁵ Poker is a traditional example of gambling where the players wager money in order to take away other participants' money and the outcome of the game is always subject to chance since the players cannot decide the cards they are given. However, many studies have shown that experienced and skilled players are the most successful players in poker and made the conclusion that poker should be considered a game of skill.³⁶ Even though the playing cards in the game players are given are purely subject on chance, according to studies, skilled players have more self-control, they are more aggressive, and they are better at calculating probabilities compared to average players which gives skilled players an advantage in the game.³⁷

As mentioned before, different gaming acts typically have the same characteristics meaning that games of chance and gambling are usually in the same classification regarding whether they are legal or not.³⁸ Although poker can be considered a game of skill based on the nature of the game it does not exclude the element of chance in the game. Therefore, a key hypothesis regarding the gambling laws of the Member States is that poker is not legislated separately but it falls under the scope of games of chance. Based on the considerations above, since gambling is always subject to the element of chance, it would need to be legislated separately which type of gambling games are considered as games of skill. Otherwise, all games which share the characteristics of gambling can be classified as games of chance and thus subject to VAT on the condition that they are electronically supplied services.

2.3 How are gambling and games of chance regulated in the EU Member States?

Since there is a lack of harmonization of gambling laws on the EU level, Member States are free to regulate their own gambling laws, meaning that the scope for gambling could be different amongst Member States. This chapter of the paper brings up some examples from the gambling legislation of different Member States with a comparative approach. The aim is to see if there are any major differences that the gaming providers willing to operate in these Member States need to consider in order to operate their businesses legally. This paper covers online gambling so to answer the research question of this paper, it would be ideal to take a look at the laws of the Member States where online gambling is the most popular form of gambling amongst EU countries. These countries are Romania, Sweden, Latvia, and Lithuania.³⁹

³⁵ Hergeux, J; Smagghue, G. (2023). The dominance of skill in online poker. *International Review of Law and Economics*, Volume 74, pp 1-5.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Van Der Genugten, B; Borm, P, *supra nota* 30.

³⁹ European Gaming & Betting Association, *supra nota* 1.

2.3.1 Romania

Under the Romanian gambling laws, gambling occurs if the game is considered a game of chance.⁴⁰ Game of chance has to have the following cumulative characteristics in order to be classified as such. There has to be a participation fee, a random selection of the results on which the game is based, monetary winnings, and public offering of the respective game by the organizer to the participants.⁴¹ As mentioned in the previous chapter, this is a definition which leaves a lot of room for interpretation, and it does not clearly define how it is estimated whether the game is based on chance or skill. However, Romanian gambling laws also provide lists of games that are considered games of chance, and which are not.⁴² For example, lottery games, betting, poker, and slot machine-type games are inside the scope of games of chance and on the other hand, games which do not involve any participation fee and where players are required to demonstrate knowledge and skills are outside the scope.⁴³ Even though it could be difficult in some particular games such as poker to evaluate whether the demonstration of knowledge and skill would be enough to exclude it from the scope, providing a precise list of games which are considered as games of chance is an excellent way to erase the uncertainty about the legal status of the games.

2.3.2 Sweden

In Sweden, gambling is governed under the Swedish Gambling Act.⁴⁴ Under the Swedish Gambling Act, gambling is defined as lotteries, betting, combination gambling, and pyramid schemes.⁴⁵ Lotteries refers to activities in which the participants have a chance to win a prize and the outcome of the game is purely based on chance.⁴⁶ Combination gambling means gambling in which the participants have a chance to win a prize and the likelihood of winning is dependent on a combination of skill and chance.⁴⁷ Even though the Swedish Gambling Act does not provide a similar list of the names of the games which are considered as games of chance like the Romanian Act, the characteristics of different types of games is still provided which offers relatively well-rounded understanding about the scope of gambling. When the scope of gambling includes games where the outcome is based on both chance and skill it automatically excludes games that are purely based on skill out of scope. This means that for mixed games where both of the elements exist in the game, it is irrelevant which one of the two is predominant since all mixed games are considered as gambling in Sweden. Like in Romania, even though the approach is a bit different, the outcome is the same. Under the current regulations, there should not be uncertainty for the gaming providers about which games are considered gambling and which are not.

⁴⁰ EMERGENCY ORDINANCE no. 77/2009 on the organization and operation of gambling games. Article 3.

⁴¹ Ibid.

⁴² EMERGENCY ORDINANCE no. 77/2009. *supra nota* 38, Articles 10 and 11.

⁴³ Ibid.

⁴⁴ Spellag (2018:1138).

⁴⁵ Spellag (2018:1138). 2 kap. Uttryck i lagen, 1§.

⁴⁶ Spellag (2018:1138). 2 kap. Uttryck i lagen, 3§ (12).

⁴⁷ Spellag (2018:1138). 2 kap. Uttryck i lagen, 3§ (9).

2.3.3 Latvia

Latvian gambling laws regulate gambling as a game in which a natural person may acquire a prize fully or partially dependent on chance or previously unknown circumstances, in exchange for a bet.⁴⁸ In addition, in order to be considered as gambling, games provided through machines must have a reward price which exceeds 15 euros.⁴⁹ Game of chance, on the other hand, is defined as gambling in which the results partly or fully depend upon chance and in which the player participates in the game by answering a question or otherwise according to the game rules.⁵⁰ Like in Sweden, it is irrelevant regarding the legal status of the game, which one of the elements of chance or skill is predominant as long as they both exist in the game. Like previous countries, Latvian gambling laws provide a list of definitions for different types of games which should clarify the scope of the gambling for the gaming providers who are willing to operate inside the country.⁵¹

2.3.4 Lithuania

Under the Lithuanian gambling laws, gambling refers to games in which the participants are willing to risk the amount of money paid for the bet and the gain or loss in the game depends on chance.⁵² The wording of this definition differs slightly from the laws of Sweden and Latvia. There is no mentioning whether the game has to be fully or partially dependent on chance which leaves room for interpretation. The definition of gambling in Lithuanian law and the wording of it would suggest that in order for the game to be considered gambling, the outcome in the game has to be predominantly based on chance rather than skill. Once again, we are facing the key question of how it is possible to estimate and analyze how big the influence of chance in the game is and whether it is a more dominant element than skill. Articles 2 and 3 of the Lithuanian gambling law could work as a helping tool for clarifying the scope of gambling since they are providing definitions for different types of games which are considered gambling. This should give an indication for the gambling providers which are the characteristics of the games that are falling inside the scope of gambling in Lithuania even though there is no separate list of games of skill.

2.3.5 Conclusions over the gambling laws of the Member States

Based on the gambling laws of the four EU Member States presented above, certain conclusions can be drawn about the scope of gambling. Firstly, there seemed to be a common line between the basic characteristics and the nature of gambling. There were three main characteristics of gambling which were mentioned in every Member State's gambling laws. Those characteristics were consideration, prize, and chance. Consideration refers to a bet which the participants are willing to risk in order to win a prize. The faith of the bet is determined by the element of chance which occurs in the game. There were differences, however, regarding the element of chance, more precisely,

⁴⁸ Latvian Law on Gambling and Lotteries 2006. Section 1.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Gaming Law of the Republic of Lithuania. No. IX-325. Article 2 (1).

whether it is relevant that the element of skill also exists in the game. Under the Swedish and Latvian gambling laws, all mixed games are inside the scope of gambling, and in Romania and Lithuania, the element of chance has to have more influence over the element of skill. Despite the fact that there was a slightly different approach to mixed games amongst these Member States, all of the countries had provided a list of games or types of games that fulfill the criteria for gambling. This means that even though not every version of gambling was mentioned separately in the lists, many games could still be classified based on the characteristics of the game. For example, poker or its variables are not mentioned in the Latvian regulation. However, card games are listed in the list of games considered as gambling⁵³ which naturally means that poker falls inside of that category.

Even though every Member State has the right to regulate its own gambling laws, examples from the four mentioned countries' gambling laws have shown that gambling and games of chance are regulated very similarly. It is important to notice that the sample size of this particular research was only four countries, meaning that there could still be a larger amount of variety amongst the gambling laws of other Member States. However, these four countries still give a good indication of the scope of gambling in the EU. It remains to be seen whether the EU will harmonize the gambling laws in the future and if so, what will be the definition of gambling and games of chance.

2.4 The scope of electronically supplied services.

The previous part of this chapter analyzed the scope of gambling and games of chance in the EU. Since the VAT Directive categorizes gambling and games of chance as electronically supplied services⁵⁴ this chapter analyzes the scope of electronically supplied services and aims to find an answer to the question of whether all online gambling games can be considered as electronically supplied services under the EU VAT law. In EU VAT Law, electronically supplied services are defined in Article 7 of the Implementing Regulation.⁵⁵ Under Article 7 (1), “*electronically supplied services shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology*”.⁵⁶ In addition, the Implementing Regulation provides illustrative lists of supplies which particularly are and which are not regarded as electronically supplied services. The positive list of the services is found in Article 7(2) and the negative list in Article 7(3) of the Regulation.⁵⁷ Since neither of those lists includes online gambling in particular, to find an answer to the question set in the beginning of this chapter, the wording of Article 7 (1) needs to be analyzed in a detailed manner. The definition of electronically supplied services consists of four conditions and the way Article 7 (1) is formulated requires that all four

⁵³ Latvian Law on Gambling and Lotteries 2006, *supra nota* 46. Section 5.

⁵⁴ Council Directive 2006/112/EC, ANNEX II, (4).

⁵⁵ Council Implementing Regulation (EU) No 282/2011, Article 7.

⁵⁶ Council Implementing Regulation (EU) No 282/2011, Article 7 (1).

⁵⁷ Council Implementing Regulation (EU) No 282/2011, Article 7 (2), (3).

conditions have to be taken into account equally when the classification of a particular service is assessed.⁵⁸

The first condition for a service to be considered an electronically supplied service under Article 7 (1) is that the service is delivered over the Internet or an electronic network. The subject of this analysis is online gambling which in simple terms means any kind of gambling which is provided on the Internet through different websites. Therefore, online gambling fulfills the first condition of the Article.

The second condition refers to services where their nature renders supply that is essentially automated. Automation in this context is the application of machines to tasks that would otherwise be impossible.⁵⁹ In other words, when the supply is automated it means that the system or technique via which it is being delivered is automated through the use of computers which requires less human intervention.⁶⁰ Online gambling fills also this condition. That is because whether it is an online roulette, bingo, or a slot game, all those games occur online and the game itself is automated through the use of computers. The game itself is operated and decided by computers. For example, every online slot game uses a random number generator to create random sequences every millisecond of the day, and the outcome of the game is based on those sequences.⁶¹

The third condition refers to services whose nature makes it impossible to ensure in the absence of information technology. In the context of online gambling, this condition is also uncontested. According to the Working Paper of the VAT Committee, this condition refers to services that by their nature could not be assessed theoretically.⁶² It is mentioned however, that there are services that are capable of being delivered both online and offline such as teaching and movies.⁶³ Since the topic of the analysis is online gambling, there simply cannot be any other place where the service is provided than the Internet and thus, the games cannot be assessed theoretically. Therefore, online gambling falls inside this condition as well.

2.4.1 Minimal human intervention

According to the fourth condition of Article 7 (1) of the Implementing Regulation, in order for a service to be qualified as electronically supplied service, it must be provided with minimal human intervention. This is a broad definition that requires more in-depth analysis than other conditions in the context of online gambling. That is because minimal human intervention could be interpreted in different ways, and it could be difficult to estimate whether certain types of online gambling games are in compliance with this condition. The criterion for minimal human intervention has been the subject of several VAT Committee working papers and VAT Committee guidelines because it is important that EU

⁵⁸ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 843. pp 3-6.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Chesterfield, C. *How Do Online Slots Work?* (2019). Retrieved from <https://vocal.media/gamers/how-do-online-slots-work>, April 27, 2023.

⁶² VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 843. pp 3-6.

⁶³ Ibid.

Member States apply this criterion similarly.⁶⁴ Otherwise, there could be a situation of either double taxation or non-taxation if the Member States apply this criterion in a different manner.⁶⁵

The wording of Article 7 (1) states that the human intervention in the supply of an electronically supplied service must be minimal. The reason for this is that electronically supplied services involve to a certain extent human intervention.⁶⁶ Regarding online gambling, the main issue here is to determine when is the human intervention in online gambling actually minimal so the service will qualify as electronically supplied service and therefore subject to VAT because as mentioned above, online gambling fulfills all other conditions set in Article 7 (1) of the Implementing Regulation. It is important to make limitations on when the level of human intervention exceeds the limit that could be qualified as minimal as it excludes these services outside the scope of electronically supplied services.⁶⁷

The CJEU in its rulings has not provided any clarification on what constitutes minimal human intervention regarding services provided through the Internet. In *Geelen* the CJEU ruled that the offer of live interactive erotic webcam sessions does not fall within the scope of electronically supplied services.⁶⁸ However, the reasoning was not actually based on the fact that the service at issue had exceeded the minimal human intervention. The reason was that the VAT Directive was not intended to apply in a case such as in the proceedings where the erotic live webcam sessions had been supplied to recipients who were all located in the Member State of the supplier of those services.⁶⁹ If the circumstances in the case had been different, it would have been interesting to see what would have been the CJEU's approach to the minimal human intervention regarding the webcam sessions. The assumption is that the human intervention in the live webcam sessions would have been more than minimal since the persons behind the camera are constantly interacting with the customers. In the cases *Commission v Luxembourg*⁷⁰ and *Commission v France*⁷¹ the CJEU ruled that the supply of electronic books clearly meets the definition and conditions of electronically supplied services including minimal human intervention. This is a very logical standpoint since the supply of electronic books does not require human interaction between the supplier and the recipient like in *Geelen*. Therefore, the rulings of CJEU do not clearly clarify what is actually the limitation of human intervention in electronically supplied services. The working papers of the VAT Committee have tried to clarify this more and therefore, despite the fact that they are soft law, may be the most accurate source from the EU level when it comes to the clarification of the scope of electronically supplied services. The particular

⁶⁴ Merkx, M.M.W.D. (2017). VAT and E-Services: When Human Intervention Is Minimal. International VAT Monitor 2018. Volume 29, No. 1, pp 1-2.

⁶⁵ Ibid.

⁶⁶ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 4-6.

⁶⁷ Ibid.

⁶⁸ Case C-568/17 *Geelen* [2019] para 59.

⁶⁹ Ibid.

⁷⁰ Case C-502/13 *Commission v Luxembourg* [2015], para 43.

⁷¹ Case C-479/13 *Commission v France* [2015], para 36.

question that the working papers of the VAT Committee are trying to provide an answer to is what are the characteristics of online gambling services that are provided with minimal human intervention.

2.4.2 Working papers of the VAT Committee regarding minimal human intervention in online gambling

Regarding the criterion of minimal human intervention, the working papers of the VAT Committee underline the relationship between the supplier and the customer.⁷² When it comes to online gambling, the parties of this relationship are the gambling operator and the gambler. The reason for this is that the gamble itself can be dependent on the outcome of the sports event which means the winners or losers of the betting activity are determined by real athletes.⁷³ Therefore, sports betting would otherwise always exceed the minimal human intervention since real athletes decide the outcome of the bet. It is the view of the VAT Committee that since the supply of the sporting event is not the activity of the gambling provider, the fact that a sporting event is performed with human intervention must not have relevance regarding the qualification of online betting activity as an electronically supplied service.⁷⁴

In the context of other types of online gambling games such as poker and roulette, the relationship under the evaluation regarding minimal human intervention is between the players and the dealer.⁷⁵ The interaction with the dealer is the key difference between online gambling and offline gambling. The players who are playing online can play the games just like they would be played in a land-based casino except there is no interaction with the dealer or with the other players.⁷⁶ Online players go through the same stages of the game as players in the casino, the outcome of the online games is dependent on the same variables as it would be if the games are taking place in the casino. However, that does not mean that there is the same level of human intervention between those two concepts. The activity of the supplier of online gambling is often fully automated and does not require humans to spin the roulette wheel or deal playing cards which would mean that the minimal human intervention is not exceeded.

The rise and development of online gambling have created new alternatives not only for offline gambling but also for the traditional versions of online gambling where everything is automated and there is no interaction with the dealer or other players. One variant which is also problematic for the criterion of minimal human intervention is called live casino. As the name indicates, live casinos are online games played with real human dealers who are broadcasted to customers in real-time.⁷⁷ Live casinos provide a realistic

⁷² Merkx, M.M.W.D. (2017) *supra nota* 62.

⁷³ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 4-6

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ SIDE-LINE. *The phenomenon of the popularity of a live casino and how it works.* (2023). Retrieved from <https://www.side-line.com/the-phenomenon-of-the-popularity-of-a-live-casino-and-how-it-works/>, May 2, 2023.

feeling since it demonstrates the surroundings of a real casino with human dealers even though the players play the games online.⁷⁸

What makes live casinos problematic regarding electronically supplied services is that online games where human dealers, for instance, deal the playing cards or spin the wheel could possibly exceed the minimal level of human intervention. However, it is important to separate two different scenarios. The fact that some particular online gambling game is being broadcasted live and hosted by a human dealer does not automatically mean that the service exceeds the minimal human intervention.⁷⁹ According to VAT Committee, the qualification of live casinos as electronically supplied services, once again, depend on the interaction between the dealer and the players.⁸⁰ If the entire process whether it is casino-type game or game against other players is automated and the service provider's staff cannot impact the transaction nor intervene in the process, the game does not exceed the minimal human intervention and thus, is considered as electronically supplied service.⁸¹ In addition, the existence of help and assistance service such as live chat for the players does not constitute human intervention for the purposes of the definition of electronically supplied services.⁸² This refers to live customer service which aims to help players to understand the terms and conditions and assist with the technical issues arising from the games. The reasoning behind this classification is that the activity of a dealer could be completely disconnected from the players. Even though there would not be any players online, the dealers would still continue their activity at certain intervals making the interaction with the players non-existent meaning that there is no human intervention in the game.⁸³

The VAT Committee has also classified live casino games where human intervention is considered to be more than minimal. A live casino service where the players interact with the dealer so that the players can give instructions to the dealer and the dealer is able to respond to them does not fulfill the criterion for minimal human intervention.⁸⁴ In such services, the Internet does not only work for a live stream for the game, it works also as a communication platform which includes human intervention. A similar classification applies to interactive teaching services where the lecturer is delivering course content to students through the Internet.⁸⁵ The key element which evaluates the human intervention in live casino games is therefore the communication between the dealer and the players. There exists minimal human intervention if the human dealer is purely working for the gambling operator by spinning the wheel of fortune or dealing with the playing cards. There has to be live interactive communication between the players and the dealer so that the supply of online gambling games exceeds the level of human intervention. This would mean that under the EU VAT laws, these

⁷⁸ Ibid.

⁷⁹ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 4-6

⁸⁰ Ibid.

⁸¹ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 919, p 12.

⁸² Ibid.

⁸³ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 4-6

⁸⁴ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 919, p 12.

⁸⁵ Ibid.

types of games where minimal human intervention is exceeded, would not be considered as electronically supplied services. This leads to an interesting question what would be the classification of these games for VAT purposes? If the online game fulfills the elements of gambling but exceeds the minimal human intervention, does it mean that game is exempted from VAT since it is not considered as electronically supplied service? Since neither the VAT Directive nor the Implementing Regulation particularly mention online gambling separately from the scope of electronically supplied services, this would probably lead us to Article 135 1 (i) which would mean that these games shall be exempted from VAT subject to conditions and limitations laid down by each Member State.⁸⁶

Lastly, it is worth mentioning that according to VAT Committee, preparatory activity, or modifications to the game by the supplier while the game is being played does not require more than minimal human intervention.⁸⁷ What is more important regarding the requirement of minimal human intervention is the way in which each individual service is supplied to the customer.⁸⁸ Sports betting works as a perfect example to demonstrate the preparatory activity or the modification of the service while being supplied. In sports betting, the determination of odds and updating them is a relevant part of the whole process. This is done by the supplier. The supplier of sports betting has trading, pricing, and risk management teams who monitor the bets that are being placed and update the odds based on the probabilities and bets of the other players.⁸⁹ This means that the odds regarding the sporting event are constantly changing before the event but also during the event based on how the event is going. However, the activity of the supplier focuses more on the whole environment of the game rather than the individual bets made by the players meaning that once the bet is placed by the player the relationship between the player and the supplier becomes automated.⁹⁰ Even though the outcome of the sports betting is based on the performances of real athletes, it is irrelevant regarding the requirement of human intervention, due to the fact that the relevant factor is the relationship between the supplier and the customer which in the context of sports betting does not require more than minimal human intervention.

2.5 Chapter summary

This chapter analyzed the scope of online gambling services which are subject to EU VAT. The aim was to clarify which types of games are subject to VAT and which are not. Under the VAT Directive, there are two requirements for online gambling services to be subject to VAT. Firstly, the game has to be considered as gambling or a game of chance. Secondly, the game has to fulfill the criterion for electronically supplied service under Article 7 (1) of the Implementing Regulation. Based on the gambling laws of four example Member States, game is considered as gambling if it includes consideration, prize, and the element of chance. The criterion for

⁸⁶ Council Directive 2006/112/EC, Article 135, 1 (i).

⁸⁷ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 4-6

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

electronically supplied services under Article 7 (1) of the Implementing Regulation consists of four conditions. The most controversial condition regarding online gambling services is whether there is more than minimal human intervention included in the supply. According to the guidelines of the VAT Committee, the defining factor of whether there is minimal human intervention in the supply of online gambling services is the interaction and the relationship between the supplier and the customer.

3. The taxable amount of online gambling services

3.1 Chapter introduction

The purpose of this chapter is to present an analysis of the taxable amount of online gambling services subject to VAT. The determination of the taxable amount is one of the challenging areas in the field of gambling and has raised doubts by the Member States on the way the taxable amount should be determined for certain types of gambling games.⁹¹ The challenge of determination of the taxable amount arises from the VAT Directive. According to Article 73 of the Directive, *“In respect of the supply of goods or services, 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”*.⁹² What makes this problematic in the context of online gambling is that when the taxable amount shall include everything which constitutes the consideration obtained by the supplier, it means that the money players are wagering should be part of the taxable amount. What is important here is that in games where the players are playing against each other such as in poker, the prize money of the single game is formed by the money wagered by all the players in the table and the winner of the game wins the money of other players. The problem for the gambling provider in this scenario is the assessment of whether the taxable amount for VAT is the total amount of consideration that the players have wagered or whether the winnings returned for the players can be deducted from the taxable amount.⁹³ The problem with the first option is that the stakes on the table, in other words, winnings of the players cannot include tax.⁹⁴ Players’ winnings they receive from the game cannot be deducted from them unless the players will see the whole time the real amount they are going to receive if they win the game or hand. The problem with the second option is that it is incompatible with Article 73 of the VAT Directive since the winnings would be deducted from the taxable amount.

This chapter will present the settled case-law of the CJEU regarding the taxable amount of different types of gambling services and with the assistance of the working papers of the VAT Committee, try to answer the question of what should be the taxable amount of online gambling services for VAT purposes.

⁹¹ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 844. pp 6-15

⁹² Council Directive 2006/112/EC, Article 73.

⁹³ Ibid.

⁹⁴ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 7-13.

3.2 Case-law of the CJEU

3.2.1 C-38/93, *Glawe*

Glawe is an example of a situation that was presented above where the legal issue concerns whether the taxable amount should be the total amount of consideration obtained by the supplier or shall the winnings of the players be deductible from the taxable amount. In this case, the applicant is a German company who installs and operates gaming machines in bars and restaurants.⁹⁵ The gaming machines must be set in a way that they pay out as winnings 60% of all coins inserted and the rest 40% of the stakes inserted were held in a separate cash box which the supplier can keep himself.⁹⁶ The German tax authority took the view that the taxable amount for VAT under the Sixth Directive should be the total stakes inserted into the machines in that year.⁹⁷ The plaintiff argued that the taxable amount should only be the 40% of the stakes which the company retained for itself and the winnings paid out to the players should be excluded from the taxable amount.⁹⁸ The question referred to the CJEU was whether the taxable amount for the purposes of the Sixth Directive is the total stakes inserted without deduction of the winnings paid out to players.⁹⁹

The Advocate General (AG), states in his opinion that the argument by the German Government that the amount obtained by the supplier is the stake inserted into the machine is inconsistent with the commercial reality of the transaction and with the aims and basic principles of the Sixth Directive.¹⁰⁰ According to AG, VAT is intended to be charged in proportion to the actual turnover which the supplier earns from his supplies of goods and services.¹⁰¹ For all practical purposes, the supplier's turnover must be the amount he is actually able to remove from the machine.¹⁰² Since the provider of the gaming machines earns the 40% of the stakes from the total amount of stakes, he cannot be taxed from the stakes he cannot keep. Therefore, the AG concluded that the taxable amount in the circumstances as in this case does not include the proportion of the stakes inserted which is paid out as winnings to players.¹⁰³

The CJEU took the same view as the AG on what are the stakes that can be obtained by the supplier. According to CJEU, only the coins that are in the cash box can be kept by the supplier and since the proportion of the stakes which is paid out as winnings is mandatorily fixed in advance, it cannot be regarded as forming part of the taxable amount for VAT.¹⁰⁴ Therefore, the CJEU ruled that in the case of gaming machines, the taxable amount does

⁹⁵ Case C-38/93 *Glawe* [1994], para 3.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* para 4.

⁹⁸ *Ibid.* para 5.

⁹⁹ *Ibid.*

¹⁰⁰ Opinion of AG Jacobs in Case C-38/93 *Glawe* [1994], para 18.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.* para 26.

¹⁰⁴ Case C-38/93 *Glawe* [1994], para 12.

not include the proportion of the total stakes inserted which corresponds to the winnings paid out to the players.¹⁰⁵

3.2.2 C-498/99, *Town & County Factors*

Town and County was a British company which organised weekly competition where the participants had to indicate by a cross the location of the football from the photograph taken during a football match from which the ball had been blanked out.¹⁰⁶ Competitors could put up to 900 crosses on the photograph, but the amount of the entry fee was dependent on the number of crosses marked.¹⁰⁷ The competitor whose cross is nearest to the place where the football was located at the time the photograph was taken, wins the first prize.¹⁰⁸ The prize money was financed by the entry fees received and prior to the judgment of *Glaiwe*, the organiser had calculated the VAT it was liable for on the total amount of entry fees received.¹⁰⁹ After the judgment of *Glaiwe* the organiser considered that it was liable for VAT only in respect of the amount it could keep from the entry fees meaning that the amounts rewarded as winnings should be deducted from the taxable amount.¹¹⁰ The authorities decided that the organiser was liable for VAT on the full amount of the entry fees received against which the organiser appealed. The questions referred to CJEU shared the same legal problem as in *Glawe*, whether the taxable amount for the purposes of VAT should be the amount of the entry fees or the amount of the entry fees with the deduction of the proportion that goes to the winners.¹¹¹

According to AG, the key difference in the circumstances of this case and in *Glawe* was the possibility to dispose the stakes received by the supplier. In *Glawe*, the stakes that the supplier actually received were technically separated from the stakes that were paid out as winnings unlike in this case where no such splitting of the stakes takes place.¹¹² Under the circumstances of this case, the supplier receives the entire sum of the entry fees and has the ability to dispose it which according to AG, constitutes the total amount of the entry fees obtained by the supplier the taxable amount for VAT.¹¹³

The CJEU agreed with the AG by stating that the organisation of the competition, in this case, differ in essential points from the circumstances in *Glawe*.¹¹⁴ Similarly with the AG, the CJEU argued that since the organiser of the competition has freely at his disposal the full amount of the entry fees received, the taxable amount for VAT should also be the full amount of the fees received by the organiser of a competition.¹¹⁵

¹⁰⁵ Case C-38/93 *Glawe* [1994], para 13.

¹⁰⁶ Case C-498/99 *Town & County Factors* [2002], para 7.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* para 10.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* para 15.

¹¹² Opinion of AG Stix-Hackl in Case C-498/99 *Town & County Factors* [2002], para 84.

¹¹³ *Ibid.* para 103.

¹¹⁴ Case C-498/99 *Town & County Factors* [2002], para 29.

¹¹⁵ *Ibid.* para 31.

3.2.3 C-377/11, *International Bingo Technology*

International Bingo is a company organising bingo games. International Bingo collects and pays tax which corresponds to a portion of the card price which the organisation collects from each of the sold cards.¹¹⁶ The percentage of the card price which was repaid as winnings to players was predetermined by legislation. For the purposes of calculating the taxable amount for VAT, the company had deducted from its turnover the amount of winnings which it distributed to the players of the game.¹¹⁷ The tax authorities disagreed with this and decided that the amount of winnings paid to the winners should be included in the amount of turnover when calculating the taxable amount for VAT.¹¹⁸ The questions referred to the CJEU was whether the taxable amount for VAT includes the portion of the card price fixed in advance by legislation which is intended to be paid as winnings and whether these portions fixed in advance should form part of the turnover which must be included in the calculations of the taxable amount.¹¹⁹

Regarding the first question, the CJEU held that in the light of the judgment in *Glawe*, since the portion of the card price paid as winnings is fixed in advance by the legislation, it cannot be considered as forming part of the consideration received by the supplier because the consideration obtained by the supplier consists only the amount of consideration that the supplier has the possibility to keep himself.¹²⁰ Therefore, the portion of the card price fixed in advance must be excluded from the taxable amount.¹²¹ Consequently, the CJEU ruled that since the fixed price paid as winnings cannot form a part of the taxable amount for VAT, neither it cannot be regarded as forming part of the turnover when calculating the taxable amount.¹²²

3.2.4 C-440/12, *Metropol*

In *Metropol*, there were a total of 9 questions referred to the CJEU but this part will only focus on the question related to the taxable amount of slot machines where the legal issue is similar to previous cases presented above. The slot machines at issue in this case were located in Germany and had been developed from the machines in *Glawe* in such way that the compartments of the slot machines worked differently. In *Metropol*, the slot machines had a hopper which was a device for holding and dispensing coins.¹²³ When the hopper got full, all the coins were automatically diverted into the cash box and all coins which entered into the cash box were counted electronically.¹²⁴ Any changes in the hopper, as well as any withdrawals from the machines, were noted by the company each month using an

¹¹⁶ Case C-377/11 *International Bingo Technology* [2012], para 12.

¹¹⁷ *Ibid.* para 14.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* para 22.

¹²⁰ *Ibid.* para 26.

¹²¹ *Ibid.* para 29.

¹²² *Ibid.* para 39.

¹²³ Case C-440/12 *Metropol* [2013], para 14.

¹²⁴ *Ibid.*

electronic monitoring device.¹²⁵ Another difference between the machines with the hopper and the machines in *Glawe* was that the operators had the access to the contents of hoppers at any time.¹²⁶ The question referred to the CJEU was whether the Article 73 of the VAT Directive was to be interpreted as precluding a national provision or practice whereby, in the operation of gaming machines, the cash receipts from those machines are used, after a set interval, as the basis for the assessment of the taxable amount.¹²⁷ The CJEU continued with the same reasoning as in the previous cases presented by stating that the taxable amount is determined by what the taxable person actually receives as consideration and not by what one particular customer pays in a specific case.¹²⁸ The machines at issue work technically in a same way as in *Glawe* meaning that the consideration actually received by the supplier is subject to mandatory statutory requirements meaning that there is only a proportion of the stakes that the supplier can keep himself.¹²⁹ Although the hoppers represent a new technical development in gaming machines in principle they perform the same task as the cash boxes which were inserted into the machines in *Glawe*.¹³⁰ In addition, it is irrelevant regarding the assessment of the taxable amount that the operators can access these hoppers at any time, contrary, the amount that the operators can keep can be determined with accuracy.¹³¹ Therefore, the CJEU ruled that the German provisions and practices regarding the operation of gaming machines is in compliance with Article 73 of the VAT Directive.¹³²

3.3 How to determine the taxable amount in online gambling?

The rulings of the CJEU regarding the taxable amount of gambling services provide clarification when it comes to the interpretation of Article 73 of the VAT Directive. Even though all of the presented case-law were dealing with land-based gambling, the VAT Committee has used these rulings in their Working Papers related to online gambling services which would indicate that the rulings in these cases are also applicable when calculating the taxable amount in online gambling. The general rule underlined by the CJEU was that in determining the taxable amount, the consideration obtained by the supplier shall be the amount the supplier can freely dispose. When the supplier is obliged by legal or statutory obligation to pay sums to players as winnings, those sums cannot be included in the taxable amount of the gambling provider since it cannot freely dispose them.¹³³ The suppliers shall deduct the amounts paid or intended to be paid as winnings from the taxable amount of their online gambling services. On the other hand, if the gambling provider does not have any statutory or legal obligations to pay a

¹²⁵ Ibid.

¹²⁶ Case C-440/12 *Metropol* [2013], para 21.

¹²⁷ Ibid. para 34.

¹²⁸ Ibid. para 38.

¹²⁹ Ibid. para 42.

¹³⁰ Ibid. para 43.

¹³¹ Ibid.

¹³² Ibid. para 44.

¹³³ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 844. pp 6-15

fixed percentage of the stakes received to players as winnings meaning that the provider has the possibility to keep for himself the full amount of stakes, then the taxable amount should also be all of the stakes received by the supplier without any deductions.¹³⁴ This rule is also applicable in games where no winner is found because that would also mean that the supplier is able to keep all the stakes by himself.¹³⁵ The ruling of the CJEU in *Metropol* also confirmed that the taxable amount does not have to be determined by each transaction made to the supplier, it can be determined by using cash receipts over a certain period of time like in *Metropol* when the cash boxes in the machines were checked every month.¹³⁶

In addition to the above-mentioned considerations, the VAT Committee has also added one possible scenario when it comes to determining the taxable amount of online gambling services. In games where the participants compete against each other, such as in poker, the supplier is not bound by any legal provisions to pay a fixed sum to the players. That is because the outcome and the sums paid as winnings are formed by the stakes of all players and the winner can be anyone in the table depending on the events in the game. Thus, the operator of these games does not receive any consideration from these games since the stakes on the table are going to the winner. In these types of games where the participants compete against each other, the only consideration that the supplier receives for organising these games is a commission fee agreed in terms and conditions with the players which entitles them to participate in the game.¹³⁷ Therefore, it is the view of the VAT Committee that in the light of the settled case-law of the CJEU, since the commission fee is the only consideration obtained by the supplier for organising these types of games, it should be the amount where the taxable amount is calculated.¹³⁸

Lastly, the VAT Committee notes that there exist online gambling games which are by their nature different than the games that have been part of the rulings of the CJEU. In other words, there are games where the supplier is obliged to pay a certain amount of the sums to players as winnings, but that obligation does not result from a legal or statutory provision.¹³⁹ Sports betting is a typical example of these types of games. The supplier of sports betting is obliged to pay a certain amount back to the participant if the participant's bet is successful, but the amount paid as winnings is not fixed in advance by legal provisions, it is dependent on the odds and the amount wagered. Therefore, the VAT Committee views it necessary for the Member States to clarify and agree, on what should be considered a taxable amount in these games.¹⁴⁰

¹³⁴ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 844. pp 6-15

¹³⁵ Ibid.

¹³⁶ Case C-440/12 *Metropol* [2013], para 43.

¹³⁷ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 882. pp 7-13

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

3.3.1 Taxable amount in online gambling in Malta

Due to the fact that the VAT Committee guidelines are not binding, it would enrich this chapter to also have a practical example of the guidelines of a Member State regarding the taxable amount of online gambling services. Malta is considered a leading country in the industry of online gambling.¹⁴¹ It is estimated that 10% of the world's online gambling companies are registered in Malta meaning that a significant portion of the global revenue of the industry is created by the businesses registered there.¹⁴²

Maltese guidelines on the taxable amount of gambling services are consistent with the case-law of the CJEU. According to the guidelines, a consideration that constitutes the taxable amount for VAT can be construed in two different ways.¹⁴³ The first option refers to games where the supplier receives a commission or participation fee.¹⁴⁴ In these games, that commission or participation fee shall be deemed to be inclusive of the VAT chargeable¹⁴⁵ like it was presented also by the VAT Committee. The second option refers to the judgment of *Glawe* where the consideration received by the operator shall, for the purposes of determining the taxable value be the revenue obtained by the supplier less the amounts paid out to players as winnings.¹⁴⁶ What should be excluded from the taxable amount under the guidelines are any amount of the commission or participation fee received by the supplier which is contributed to a jackpot pool as well as bonuses and other incentives provided by the supplier.¹⁴⁷ Therefore, the decisive element regarding the games where the supplier receives a commission or participation fee is whether that fee is going to be included in a common pot for which every participant compete. In the Maltese guidelines, there is no particular mention of games that were referred by the VAT Committee, namely, games where the supplier is obliged to pay winnings for the participants, but the obligation is not a result of a statutory or legal provision. The Maltese approach to determining the taxable amount for these games is that the taxable amount should be the amount that the supplier can dispose less the amounts paid as winnings. Whether it is a participation fee, or the total amount of stakes obtained by every player of the game, the consideration that the supplier can freely dispose shall be the basis for the taxable amount for VAT.

¹⁴¹ XACE. *Malta Online Gambling Statistics 2021*. Retrieved from <https://www.xace.io/payments/malta-online-gambling-statistics-2021>, May 8, 2023.

¹⁴² Ibid.

¹⁴³ Guidelines for the determination of the taxable value of gambling and betting services. No. 1294, VALUE ADDED TAX (CAP.406) Available in https://cfr.gov.mt/en/vat/guidelines_to_certain_VAT_Procedures/Documents/19.%20Guidelines%20on%20Gambling%20and%20Betting%20Activities.pdf.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

4. Fiscal neutrality and online gambling

4.1 Chapter introduction

The purpose of this chapter is to assess the role of the principle of fiscal neutrality in the VAT treatment of online gambling services. According to settled case-law of the CJEU, the principle of fiscal neutrality precludes treating similar goods and supplies of services which are in competition with each other, differently for VAT purposes.¹⁴⁸ The concerns over the principle of fiscal neutrality in relation to online gambling services became more relevant in 2015, when electronically supplied services became taxable in the Member State where the consumer is established, has his permanent address or usually resides, when supplied to non-taxable persons inside the EU.¹⁴⁹ This has meant that the suppliers of electronically services in more than one Member State have had to fulfil the obligations of every Member State in which they are operating.¹⁵⁰ In the gambling sector, what has made this change even more challenging is Article 135 (1) (i) of the VAT Directive¹⁵¹, which lays down an exemption from VAT in respect of betting, lotteries and other forms of gambling subject to the conditions and limitations laid down by the Member States.¹⁵² This could lead to a situation where similar gambling games are treated differently for VAT purposes in different Member States. This could mean in the context of online gambling that online gambling services considered as electronically supplied services, could have a different VAT treatment compared to similar games which are provided offline. This chapter is going to analyze whether the principle of fiscal neutrality is violated by the Member States when they have implemented Article 135 (1) (i) of the VAT Directive and what should the conditions and limitations be in order for them to be in compliance with the principle of fiscal neutrality. The methodology will be the settled case-law of the CJEU regarding this manner. Lastly, this chapter will analyze the pending case-law which deals with the relationship between the principle of fiscal neutrality and gambling.

4.2 Case-law of the CJEU regarding the principle of fiscal neutrality and gambling.

4.2.1 C-58/09 *Leo-Libera*

Leo-Libera was a German company who operated gaming halls equipped with gaming machines.¹⁵³ The company lodged a complaint against a

¹⁴⁸ Case C-259/10 *Rank Group* [2011], para 31.

¹⁴⁹ Council Directive 2006/112/EC, Article 58 (1).

¹⁵⁰ VALUE ADDED TAX COMMITTEE. WORKING PAPER, NO 844. pp 6-15

¹⁵¹ *Ibid.*

¹⁵² Council Directive 2006/112/EC, Article 135 (1) (i).

¹⁵³ Case C-58/09 *Leo-Libera* [2010], para 10.

decision by the German Tax Authority where the company's supplies were not classified as exempt from VAT.¹⁵⁴ The company argued that in accordance with Article 135 (1) (i) of the VAT Directive, betting and lotteries cannot be the only forms of gambling that should be exempted from VAT, the exemption should also apply to other forms of gambling as the wording of the Article states.¹⁵⁵ Therefore, the company argued that the VAT treatment of their supplies infringes the principle of fiscal neutrality since it puts them at disadvantage compared to public casinos.¹⁵⁶ The question referred to the CJEU was whether Article 135 (1) (i) of the VAT Directive must be interpreted as meaning that the Member States are allowed to exempt from VAT only certain forms of gambling.¹⁵⁷ The CJEU ruled that the principle of fiscal neutrality cannot be interpreted as precluding one form of gambling from being exempt from the payment of VAT while another form is not, in so far, as the two forms of gambling are not in competition with each other.¹⁵⁸ The CJEU ruled that the national legislation at issue does not provide different VAT treatment for gambling services which may be regarded as being in competition with each other.¹⁵⁹ Therefore, the CJEU ruled that the national legislation which exempts only certain forms of gambling does not infringe the principle of fiscal neutrality.¹⁶⁰ The ruling of the CJEU does not, however, clarify the criterion for being in competition with each other in the field of gambling. The only indication regarding the competition between two supplies is that in this case, under the national legislation, the supply of services of gaming machines was not exempt from VAT and for instance, gambling which occurs in public casinos was exempt.¹⁶¹ The conclusion is that the CJEU interpreted gambling which is under the national legislation subject to VAT is not in competition with gambling which is exempted from VAT.

4.2.2. Joined Cases C-259/10 and C-260/10 Rank Group

Rank group is a VAT group that operated bingo clubs and casinos in the United Kingdom in which the customers had the opportunity to play mechanised cash bingo and slot machines.¹⁶² Rank group brought two separate complaints to tax authorities to obtain repayment of the VAT paid over their supplied services based on the argument that different types of mechanised cash bingo and slot machines were treated differently for VAT purposes.¹⁶³ The basis for the infringement of the principle of fiscal neutrality were that the services were comparable and identical from the consumer's point of view which should have meant that their VAT treatment must not be different.¹⁶⁴

¹⁵⁴ Case C-58/09 *Leo-Libera* [2010], para 10.

¹⁵⁵ *Ibid.* para 12.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* para 21.

¹⁵⁸ *Ibid.* para 35.

¹⁵⁹ *Ibid.* para 36.

¹⁶⁰ *Ibid.* para 39.

¹⁶¹ *Ibid.* para 8.

¹⁶² Case C-259/10 *Rank Group* [2011], para 13.

¹⁶³ *Ibid.* para 15.

¹⁶⁴ *Ibid.*

The relevant questions referred to the CJEU which are related to the topic of this chapter were firstly, whether the different VAT treatment of two supplies of services which are similar from the consumer's point of view and which meet the same needs of the consumer constitute an infringement of the principle of fiscal neutrality or whether such infringement requires in addition the competition between the supplies which was set in *Leo-Liberia*.¹⁶⁵ Secondly, whether or not, in the light of the principle of fiscal neutrality, the VAT treatment of two types of similar slot machines, must be based on the characteristics and the interaction between the player and the slot machine.¹⁶⁶

Regarding the first question, the CJEU ruled that if two supplies are considered similar, it already entails that they are in competition with each other.¹⁶⁷ Therefore, the actual existence of competition between two supplies does not constitute an additional condition for infringement of the principle of fiscal neutrality.¹⁶⁸ The difference in treatment for VAT purposes of two supplies of services which are similar from the point of view of the consumer and meet the same needs of the consumer is sufficient enough to infringe that principle without any additional conditions being necessary.¹⁶⁹

Regarding the second question and how to determine whether two supplies are similar, the CJEU ruled that two supplies of services are similar when they have similar characteristics, 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.¹⁷⁰ Different VAT treatment cannot be based on differences in the details how the games are structured, if the games fall into a same category.¹⁷¹ The determination whether games of chance which are taxed differently are similar, must be made from the point of view of the average consumer and take account all the elements in the game which could have an influence on the average consumer to play one game or the other.¹⁷² Therefore, according to the CJEU, the decisive element that determines whether two supplies which are taxed differently are similar meaning that the principle of fiscal neutrality is violated, is based on how the average consumer views the games. The methodology to assess this is that, from the point of view of the average consumer, whether the games are comparable, meet the same needs, and all other relevant characteristics of the game that could influence the decision-making of the average consumer *inter alia*, the prize and the chances of winning. However, what remains to be clarified from the settled case-law of the CJEU is the definition of the average consumer. Does the term "average consumer" refer to a person who is an average consumer in the field of gambling or in general and does the definition of who is an average consumer differ across the Member States?

¹⁶⁵ Joined Cases C-259/10 and C-260/10 *Rank Group* [2011], para 31.

¹⁶⁶ *Ibid.* para 52.

¹⁶⁷ *Ibid.* para 33.

¹⁶⁸ *Ibid.* para 34.

¹⁶⁹ *Ibid.* para 36.

¹⁷⁰ *Ibid.* para 44.

¹⁷¹ *Ibid.* para 55.

¹⁷² *Ibid.* para 56.

4.3 Pending case-law

Case C-73/23 *Chaudfontaine Loisirs* is currently pending in the CJEU, and it deals with the relationship between the principle of fiscal neutrality and the VAT treatment of online gambling services. The applicant has challenged the different VAT treatment between gambling services provided by public company which are exempt from VAT and online gambling services provided by various private companies which are subject to VAT.¹⁷³ The applicant argues that the services provided by two different operators are in competition with each other and the services provided by the public company are similar to the games provided by private operators.¹⁷⁴ The Belgian State argues that the services provided by the public company are not similar to online gambling provided by private operators and thus, the principle of fiscal neutrality has not been infringed.¹⁷⁵ The argument is based on the fact that under the national legislation, lotteries are a distinct category of gambling and the public company enjoys a statutory monopoly in Belgium which also from the legal point of view, distinguishes other forms of gambling provided by the public company from the gambling services provided by the private operators.¹⁷⁶ In addition, the Belgian State recalls the discretionary power of the Member States to exempt only certain categories of games from VAT.¹⁷⁷

In the light of the settled case-law regarding this matter, the referring court found it difficult to interpret the EU law and decided to refer *inter alia* two questions related to the interpretation of Article 135 (1) (i) of the VAT Directive.¹⁷⁸ The referring court asks do Article 135 (1) (i) of the VAT Directive and the principle of fiscal neutrality permit a Member State to exclude the exemption provided in that Article to only gambling which is provided electronically while gambling which is not provided electronically remains exempt from VAT.¹⁷⁹ The second question is almost identical with the first one but it is focused on the VAT treatment of lotteries rather than gambling in general like in the first question.¹⁸⁰

This case is very interesting and important regarding the future of VAT treatment of online gambling in the EU. The legal issue in this case concerns the possible infringement of the principle of fiscal neutrality when similar games are taxed differently for VAT purposes. The practical difference between the two supplies is the place of supply when one is supplied offline and the other online. An interesting part here is what is going to be the CJEU's approach to the question of whether online and offline gambling can be considered similar. In *Leo-Libera*, the CJEU ruled that the different VAT treatment is justified if the two supplies are not in competition with each other. There are two possibilities to provide gambling, either online or offline meaning that online and offline gambling

¹⁷³ Request for a preliminary ruling. Case C-73/23 *Chaudfontaine Loisirs* [2023], para 11.

¹⁷⁴ *Ibid.* para 12.

¹⁷⁵ *Ibid.* para 18

¹⁷⁶ *Ibid.* para 19.

¹⁷⁷ *Ibid.* para 20.

¹⁷⁸ *Ibid.* para 31.

¹⁷⁹ *Ibid.* para 41.

¹⁸⁰ *Ibid.*

suppliers are fighting for the same customers. Another question is whether online poker and offline lottery are in competition with each other since they represent completely different games. However, the facts of the case indicated that the public company at issue also provides online gambling which is not restricted to only lotteries. This would suggest that the services provided by both public and private operators are indeed in competition with each other.

In *Rank Group*, it was ruled that the similarity of two supplies depends on how the average consumer views them. Do the average consumers view that online and offline gambling are similar from their point of view? Logically, it could be argued that they do not since it should have an influence on the average customer whether the service is supplied online or offline. When gambling is provided online, the consumer can play the games from home without going to casinos or other land-based places to gamble. In addition, online gambling provides different visual experiences and a larger variety of games than offline gambling. That should have an influence on the average consumer. However, whether it is roulette or poker, the fundamentals of the game are still the same despite the fact where the game is supplied. The game is structured in the same way and the same rules are applied on both occasions, meaning that there could also be an argument that both versions meet the same needs of the average consumer.

Based on the settled case-law, the ruling of this case will need the analyse and interpretation of how the average views online and offline gambling and whether the different taxation for VAT purposes of these concepts establish the infringement of the principle of fiscal neutrality. This case is important regarding the VAT treatment of online gambling services since it clarifies more the legal relationship between online and offline gambling as well as the correct implementation of Article 135 (1) (i) of the VAT Directive.

5. Conclusion

Online gambling has revolutionized the gambling industry in many ways. The rise of online gambling has forced Member States to amend their gambling laws to be compatible with the modern gambling industry. The EU has not harmonized gambling laws which has left a wide discretion to the Member States to freely regulate their gambling laws in so far as the principle of fiscal neutrality is respected. Gambling and games of chance could thus have a different definition amongst the gambling laws of the Member States. The first chapter of this paper focused on clarifying the scope of EU gambling by pointing out examples from the gambling laws of the Member States. The result was that gambling was regulated relatively similarly and major differences were not found.

The VAT Directive classifies online gambling as electronically supplied services if the gambling service fulfills the conditions set in the Implementing Regulation. In the context of online gambling, the most controversial condition is whether the minimal human intervention is exceeded during the supply. This was analysed based on the settled case-law of the CJEU and with the assistance of the Working Papers of the VAT Committee. The decisive element of whether human intervention is more than minimal is the interaction between the supplier and the consumer. The development of online casinos has made the assessment of minimal human intervention even more challenging. The VAT Committee has published a list of games where the human intervention is minimal and on the other hand, where it exceeds the limit. Different forms of online gambling were also part of that list. Online gambling is developing rapidly compared to offline gambling. The VAT Committee's list was published in 2017 meaning that it could be beneficial to check whether new updates would be required to keep up with the developments in the industry.

One of the challenges brought up by the Member States regarding the VAT treatment of online gambling services is the determination of taxable amount of those services. Article 73 of the VAT Directive has been proved to be difficult to interpret in the context of online gambling. Under the settled case-law, the taxable amount in gambling should be the amount that the supplier can freely dispose rather than the total amount of consideration received. Online gambling creates difficulties also in this manner due to a large variety of different games which could make the determination of the taxable amount difficult. The VAT Committee has suggested Member States clearly clarify the rules on what are the stakes that should be considered to be included in the assessment of the taxable amount. Once again, this could be the field that is going to be evolving in the future once new forms of online gambling will be developed and new challenges regarding this field will be created.

Article 135 (1) (i) of the VAT Directive provides an exemption from VAT for gambling which leaves much discretion to Member States in determining the limits and conditions on which different types of gambling services are exempt or subject to VAT. Since under the VAT Directive electronically supplied services are subject to VAT, it creates a possible

infringement of the principle of fiscal neutrality if similar services are taxed differently for VAT purposes. Under the settled case-law, the similarity of two supplies and the possible infringement of the principle must be assessed from the point of view of the average consumer. The different tax treatment is justified if, from the point of view of the average consumer, the supplies are not similar, and they do not meet the need of the consumer in a similar way. The scope of the average consumer is not defined by the CJEU and what is meant by that term could be the subject of future research.

The future of VAT treatment of online gambling services could be shaped by the pending case-law where the possible infringement of the principle of fiscal neutrality regarding the VAT treatment of similar online and offline gambling will be evaluated by the CJEU. Online gambling will be developed also in the future and new legal challenges regarding the VAT treatment of those services will rise. In the time scope of this thesis and the resources given, this paper focused on the scope of online gambling services subject to VAT and the legal challenges arising from that field. Future research will present the evolution of the industry and how the VAT legislation regarding the field of online gambling will be amended in the more digitalized world.

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