EU VAT Treatment of Vouchers: Urgent Need for a Solution

In this article, the authors analyse the European Commission proposal on the VAT treatment of vouchers in the light of both the ECJ jurisprudence and the practical aspects of their tax treatment. The authors consider that, taking into account the increase in the use of vouchers to stimulate demand, an urgent and comprehensive EU-wide solution is necessary.

1. Introduction

In order to harmonize the VAT treatment of vouchers within the European Union, in 2012 the European Commission issued a voucher proposal (hereinafter “the Proposal”), with the aim of addressing inconsistencies that offer opportunities for tax avoidance or that may give rise to situations of double or non-taxation of cross-border transactions. Three years after its submission to the European Council, the negotiations are still ongoing and, although substantial progress has been made as regards the definition of vouchers, differing views between Member States and a need for more technical work on outstanding issues have precluded agreement.

For the purposes of this article, taking into account the directions of the European Council’s Working Party on Tax Questions to focus work on vouchers supplied to customers for consideration, it should be clarified that the

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2. See the ECOFIN Report to the European Council on Tax Issues of 11 of December 2014 in which it is stated (point 49 and 50) that: building on the work done by the Hellenic Presidency, the Italian Presidency proposed a step-by-step approach, with a first step aimed at targeting telecom vouchers and other vouchers with similar features in response to that need. (…) To bring its approach forward, the Presidency focussed its main efforts on:
   - a general definition of vouchers, with a clear distinction being made between Single-Purpose Vouchers (“SPV”) and Multi-Purpose Vouchers (“MPV”),
   - special rules on VAT chargeability depending on whether related to SPVs or MPVs,
   - taxable amount.

The report indicates that “a large majority of Member States has supported the approach undertaken by the Presidency recognizing the urgency of clarifying the legal situation for the purpose of national rules potentially affected by the new VAT rules above. It concludes that “though substantial progress has been made on the issues mentioned above, for some Member States further technical work appears necessary to bridge different views of Member States on more complex issues like distribution chain, non-redeemed vouchers, discount vouchers and so on. A few Member States issues of discount and free of charge vouchers, and of the distribution chain of vouchers, have not been analysed. Nevertheless, it must be noted that these issues represent important challenges that must also be addressed in the near future.”

2. The ECJ Jurisprudence and the Proposal

The VAT Directive does not provide a definition of the term vouchers, or special rules as regards their tax treatment. Up to now, national tax administrations refer to the general framework as laid down in the VAT Directive, ECJ decisions and to the basic principles of their national VAT system. This situation is causing problems, particularly in relation to cross-border transactions. The case law dealing with vouchers has been commented on by eminent
2.1. Definition of vouchers

Vouchers appear in various forms (tangible or intangible) and can be supplied to the customer (final consumer, taxable/non-taxable person) for consideration or free of charge, via different business promotional schemes. Stemming from case law, vouchers are, by their nature, no more than documents evidencing the obligation assumed by the supplier (of goods and services to which the voucher relates) to accept the voucher (instead of money) at their face value. However, in the Astra Zeneca UK Ltd case, the ECJ ruled that vouchers “confer a future right to goods or services that is as yet indeterminate as to its object” since those vouchers do not immediately transfer the right to dispose of property. Later on, in the Lebara case, the ECJ used the notion of the “transfer of right” to define vouchers.

In accordance with the case law, the Proposal defines the voucher as “an instrument carrying a right to receive a supply of goods or services and where there is a corresponding obligation to fulfil this right.”

Moreover, there is an obvious convergence between a voucher and means of payment, the VAT treatment of the supply of goods or services and where there is a corresponding obligation to fulfil this right. Accordingly, in the Lebara case the ECJ decided that the voucher (a phonecard), which provided for one type of service whose nature and quantity were determined beforehand, should be taxed at the initial sale and at its subsequent resale by distributors, acting in their own name and on their own behalf. Moreover, the ECJ ruled that there was no direct link between the issuer, also being the supplier, and the final user. Thus, the redemption of the voucher should not be taxed, implying that the issuance and first supply of the voucher as well as its redemption are considered to be one single transaction. Consequently, the voucher should only be taxed once at the time of issuance. However, it should be noted that the final supply of the phonecard by the distributor to the final user was subject to VAT.

2.2. Taxable event

According to the Proposal, where all information regarding the taxable status of the ultimate supply is known at the time of issuance of the voucher, the voucher qualifies as a single purpose voucher (hereinafter “SPV”) and a chargeable event occurs each time it is transferred down the distribution chain.

This treatment is consistent with the BUPA and Orfey Bulgaria cases where the ECJ ruled that VAT is chargeable at the moment the consideration for a future supply is received (prepayment) and that, in order to qualify for a prepayment, “all the relevant information concerning the chargeable event, namely the future supply of goods or services, must already be known and therefore, in particular, the goods or services must be precisely identified at the time the payment on account is made.” Accordingly, in the Lebara case the ECJ decided that the voucher (a phonecard), which provided for one type of service whose nature and quantity were determined beforehand, should be taxed at the initial sale and at its subsequent resale by distributors, acting in their own name and on their own behalf. Moreover, the ECJ ruled that there was no direct link between the issuer, also being the supplier, and the final user. Thus, the redemption of the voucher should not be taxed, implying that the issuance and first supply of the voucher as well as its redemption are considered to be one single transaction. Consequently, the voucher should only be taxed once at the time of issuance. However, it should be noted that the final supply of the phonecard by the distributor to the final user was subject to VAT.
It must also be stressed that the Proposal additionally requires that the supplier’s identity should be known at the time of issuance for a voucher to qualify as an SPV.19 The authors of this article are of the opinion, and Terra and Terra20 agree, that this causes an unnecessary complication and could result in different treatment between Member States.21

Furthermore, in case of uncertainty regarding the proper amount of VAT to charge at the time of issuance of the voucher, a voucher is defined as a multipurpose voucher (hereinafter “MPV”) under a negative definition given in the Proposal,22 and the chargeable event for the supply of the underlying goods and services is defined upon redemption of the MPV.

2.3. Taxable amount

The challenge lies in expressing the voucher as a consideration in monetary terms to define the taxable amount. The supplier of goods or services accepts a voucher as a consideration or part of a consideration.23

Regarding the supply of goods or services against an SPV, its taxable amount is defined in article 73 of the VAT Directive.24 This was validated by the ECJ in the Lebara Ltd case where it ruled that at each stage of the chain (the initial and subsequent sales of SPVs), the VAT was exactly proportional to the price paid (agreed price between supplier and distributor).25 The ECJ also ruled that on the final sale of the SPV to the final user, the VAT was exactly proportional to the price paid by that user to purchase the voucher, even when that price did not correspond to the face value of the voucher.26 That means that even if the price actually paid by the user to the last distributor was more or less than the face value indicated on the voucher, the taxable amount would be whatever the user actually paid.

Further to this finding, the authors believe that the Proposal should clarify that the taxable amount could also include any consideration obtained or to be obtained by the supplier not only from the customer but also from a third party as article 73 of the VAT Directive stipulates. Thus, in the case of an SPV, the conclusion could be drawn that the supplier could be paid partly by the customer and partly by a third party not linked to him directly but to the customer.

As far as it concerns the supply of goods or services against an MPV, one could argue that the assessment of the corresponding taxable amount requires the use of a fixed amount, an amount that is stable and known throughout the distribution chain, which could not be anything other than the “nominal value” of the voucher, usually corresponding to its “face value.”27 Nevertheless, it must be recalled that the ECJ ruled that the “consideration” is the value actually received, i.e. the subjective value, rather than “the value assessed by objective criteria.”28 However, the ECJ has not explicitly dealt with the taxable amount with respect to MPVs, a value which remains extremely difficult to define.

As vouchers are often sold to distributors at a price lower than their nominal value, analysis of settled case law dealing with (MPV) vouchers providing a discount on the sale price of the goods or services could be relevant. In the Argos Distributors Limited case,29 the ECJ ruled that when vouchers were sold by the issuer to the first buyer (in a distribution chain) at a discount, the taxable amount of the supply of goods or services made by the supplier30 by means of a voucher, or alternatively the consideration represented by the voucher and “received” by the supplier, should be the value actually obtained by the issuer upon the (first) sale of the voucher31 rather than the face value of the voucher.32

Similarly, in the promotional schemes presented in the Elida Gibbs Ltd case,33 where the goods manufactured by Elida Gibbs were sold to consumers by wholesalers or retailers against consideration consisting of both cash and money-off or cash-back vouchers (issued by Elida Gibbs), the ECJ ruled that in both promotional schemes, it is proposed to introduce a nominal value concept, a constant value fixed by the issuer of the MPV at the outset, and to treat any positive difference between this nominal value and the price paid by a distributor of the MPV as the consideration for a distribution service. Moreover, the nominal value is defined as everything received or to be received against a voucher by the issuer of the voucher. The nominal value of a MPV is a VAT inclusive figure. The amount of the VAT included will be known only on redemption when, on the basis of the VAT rate applicable to goods and services to be redeemed, it will be possible to split the nominal value between the VAT amount and the taxable amount. In the case where a customer has paid more than the nominal value, it means that a distributor has charged a margin and the customer would then have a right to a separate invoice for that difference (which will obviously not be reflected in the invoice for the supply). Where the customer has paid less than the nominal value it may mean that a distributor has made a loss but, in any case, the consideration received by the issuer does not change.34

27. According to the Commission’s explanatory memorandum on the Proposal, “it is proposed to introduce a nominal value concept, a constant value fixed by the issuer of the MPV at the outset, and to treat any positive difference between this nominal value and the price paid by a distributor of the MPV as the consideration for a distribution service.” Moreover, the nominal value is defined as everything received or to be received against a voucher by the issuer of the voucher. The nominal value of a MPV is a VAT inclusive figure. The amount of the VAT included will be known only on redemption when, on the basis of the VAT rate applicable to goods and services to be redeemed, it will be possible to split the nominal value between the VAT amount and the taxable amount. In the case where a customer has paid more than the nominal value, it means that a distributor has charged a margin and the customer would then have a right to a separate invoice for that difference (which will obviously not be reflected in the invoice for the supply). Where the customer has paid less than the nominal value it may mean that a distributor has made a loss but, in any case, the consideration received by the issuer does not change.

28. GA (154/80), para. 13 and Argos (C-288/94).

29. Argos (C-288/94).

30. Outlets or showrooms of the issuer, so that the issuer and the supplier was the same taxable person.

31. The face value of the voucher less the discount granted at the first purchase of the voucher.

32. Argos (C-288/94) and GA (154/80).

33. Elida Gibbs (C-317/94).
the taxable amount for the calculation of the VAT due for the supply of goods made by Elida Gibbs, in its capacity as a taxable person, should be the purchase price of the goods paid by the wholesalers or retailers minus the face value of the voucher that was refunded to either the wholesalers or retailers, or to the consumers respectively.

It should also be added that in the Astra Zeneca UK Ltd case, the ECJ declared that the sale of retail vouchers at a discounted price to employees in exchange for part of their cash remuneration constitutes a supply of services effected for consideration equal to that portion of their remuneration.34

In the Commission of the European Communities v. Federal Republic of Germany case35 and the Yorkshire Co-operatives Ltd case,36 the ECJ also ruled on the taxable amount of money-off vouchers issued by the manufacturers free of charge. While the Elida Gibbs case was related to the assessment of the taxable amount for the supply of promoted goods made by the manufacturer, these two cases dealt with the taxable amount for the calculation of the VAT due by the suppliers (retailers) of goods who accepted these vouchers as part of payment/consideration. The ECJ confirmed the approach used in Elida Gibbs and concluded that the face value of the voucher should be included in the taxable amount for the supply to the final consumer. Thus, the taxable amount should correspond to the full retail price, namely the “cash” paid by the final consumer plus the face value of the (money-off) voucher, reimbursed to the retailer by the manufacturer. In other words, this taxable amount could never be less than the sum of money actually received by the retailer for his supply and paid partly by the manufacturer (linked to the retailer) and partly by the consumer (linked to that retailer, not to the manufacturer).37

In the Chaussures Bally SA case, the ECJ ruled that “the method of payment used in the relations between the purchaser and the supplier cannot alter the taxable amount for the tax which the supplier, as a taxable person, has to pay to the revenue authorities.” Thus, for the MPV, in line with the analysis and reasoning of the above-mentioned settled case law, the authors tend to support the view that the taxable amount for the supply of the underlying goods and services supplied against a voucher should be equal to what is actually paid in order to obtain the voucher from the last distributor. This rule could be introduced as the primary rule for the definition of the taxable amount of the MPV. Also taking into account the reasoning of the Proposal, the use of the “nominal face value” of the voucher could be set as the secondary rule in the provisions, to cover cases where the consideration actually paid by the consumer is not known through the contractual arrangement, to the supplier of the goods or services that receives the voucher.

Furthermore, the authors believe that the contractual arrangements between the issuer of the voucher and the supplier, as well as the consideration received by the issuer of an SPV or an MPV and by the (actual) supplier of the goods and services from the final consumer, when they are different persons, must be clarified in the Proposal.

Finally, it should be noted that the ECJ ruled in Société thermale d’Eugénie-Les-Bains38 that not every payment falls within the scope of the term “consideration”: a deposit retained by a hotelier in the case of a “no show” is not subject to VAT since “it is regarded as compensation for the loss suffered as a result of client default and which has no direct link with the supply of any service for consideration.” The authors tend to believe that this line of reasoning should not be followed as regards vouchers, especially if they are considered as a “right” to obtain a good or a service. The customer provides a monetary consideration to obtain a voucher and the supplier of the voucher exercises a taxable economic activity, regardless of whether the customer indeed exercises the right to use the voucher and obtain the goods or services against the voucher.

3. Place of Supply and Contractual Arrangements in Cross-Border Situations

The supply of goods or services for consideration typically assumes a “legal relationship” between the provider of the goods or services and the recipient, pursuant to which there is a reciprocal performance.39 What is required is a direct link between the supply and the consideration received. In the case of vouchers though, different, often complex, contractual arrangements arise. The authors believe that particular attention should be given to cross-border transactions concerning vouchers where the parties involved are established in different Member States of the European Union or even outside the European Union. In this respect, it is also necessary that the rules in relation to the place of supply of goods and services are neutral and are taken into account when establishing rules for transactions involving vouchers.

This means that for each transfer of an SPV, the Proposal should clarify whether the general place of supply rules for the underlying supply as provided already in the VAT Directive apply (such as articles 31 or 44 of the VAT Directive). The Lebara Ltd case is an example of how to apply the place of supply rules concerning the distribution of phonecards.40 According to the case, “a telecommunications services operator which offers telecommunications services consisting in selling to a distributor phonecards which display all the information necessary for making international telephone calls by means of the infrastruc-

34. Astra Zeneca (C-40/99).
40. See, inter alia, E2: ECJ, 3 Mar. 1994, Case C-16/93, R. J. Tolman v. Inspecteur der Omzetbelasting Leeuwarden, E2: ECJ Case Law IBFD, ECR 1-743, para. 14 and Lebara (C-520/10), para. 27.
41. Lebara (C-520/10).
tured provided by that operator and which are resold by the distributor, in its own name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers, carries out a supply of telecommunications services for consideration to the distributor. On the other hand, that operator does not carry out a second supply of services for consideration, this time to the end user, where that user, having purchased the phonecard, exercises the right to make telephone calls using the information on the card.  

On the contrary, when referring to an MPV, only its distribution services are taxed in the supply chain and the amount paid for it or the face value is taxed only at the final redemption. According to the Proposal, in cases where distributors are acting in their own name, the consideration is the (positive) difference between the nominal value (face value) of the voucher and the actual price paid by the distributor for purchasing the voucher, inclusive of VAT. In the case of an intra-Community B2B transaction, the VAT, in principle, has to be paid in the place of supply of the services. This means that the VAT due with respect to the distribution services of a MPV is dependent on the country of supply of the service and, therefore, as the reverse charge is applicable and the recipient of the service has to account for the VAT on this transaction, the distributors must know what the applicable VAT rate is in the Member State of supply so as to calculate, based on the above-mentioned difference, the taxable amount and issue an invoice only for this amount excluding VAT. As Stroink concludes, this approach to the VAT treatment of the transfer of an MPV in the Proposal seems to work well in domestic situations. In cross-border situations, however, problems arise since complicated calculations are involved in the assessment of the taxable amount and tax neutrality is not always ensured.

4. Conclusions

Although the ECJ has provided clarification on the treatment of vouchers in several cases, these cases have dealt with specific issues and the outcome of the cases has not been uniformly applied in all Member States. Thus, the adoption of common rules as part of an EU Directive would increase legal certainty and reduce the risk of diverging interpretation among Member States. In reaching a compromise text on imposing harmonized rules in this technically complex sector, the authors conclude that the following actions must be taken into account:

- on the definitions of vouchers, since the use of vouchers and different payment technologies continue to evolve, a clear distinction between MPVs and means of payment will be indispensable;
- a provision that is consistent with the ECJ jurisprudence on the taxable amount both for SPV and MPV vouchers and which covers all practical situations must be adopted;
- the place of supply and contractual arrangements in cross-border situations must be clarified; and
- any change in the VAT treatment of vouchers must take into account the time needed by the business community for the adaptation of systems. A transitional period between the publication of the Directive and its entry into force is considered necessary.

42. Id., para. 43.
43. Stroink, supra n. 4, at pp. 33-34.