E-commerce taxation

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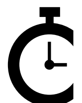

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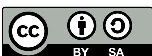

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Introduction

The first module in the *Taxation and the Internet* course focuses on the taxation of e-commerce, that is to say the tax regime for e-procurement (both direct and indirect taxation) and electronic payment.

The first three sections of the module aim to cover matters relating to the direct taxation of e-commerce. First of all, we will analyse the problems involved in classifying income from e-commerce, focusing on the distinction between how royalties and company profits are treated. Following that, we will tackle a different issue: determining the tax residence of the parties involved in e-commerce transactions. We will analyse the different ways in which tax liability functions between different countries, focusing in particular on the registered address of the parties involved and the problems with applying this to the field of e-commerce. In the third section, which covers direct taxation, we will go into the difficulties involved in applying the concept of a permanent establishment to e-commerce.

Indirect taxation on e-procurement is covered in the three subsequent sections in the module. The fourth section studies the location of e-commerce transactions and VAT, covering both the changes in legislation and current regulations. Following this, we will study the special regime for e-commerce in terms of VAT, in other words, the VAT regime that applies to services supplied online. The final section aims to cover the VAT rates for services supplied online, including the controversial decision not to apply super-reduced VAT rates to electronic books.

The penultimate section in the module looks into taxes on electronic payments, paying special attention to stamp duty on electronic documents, and taxation of electronic payments. Finally, the last section tackles the taxation of certain digital services.

Objectives

The main learning objectives while studying this topic are as follows:

1. To identify the main problems involved with classifying income from e-procurement, the tax regime for goods and copyright relating to intellectual property rights, and the tax processes for royalties in this area.

2. To appreciate the criteria applied to determine the tax residence of the parties involved in e-procurement and the types of tax liability in other countries.

3. To understand the special characteristics and difficulties of applying the concept of permanent establishments to e-commerce.

4. To understand the different regulations governing the location of e-commerce transactions for VAT purposes, changes to the corresponding legislation, and current regulations.

5. To differentiate between the rights and responsibilities that apply to the special regime for VAT on e-commerce, in relation to the electronic services offered by operators outside the EU and end consumers who reside in the territory of application of the tax.

6. To have a good grasp of the guidelines and criteria used to interpret VAT rates for services supplied online, especially in relation to the decision not to apply super-reduced VAT rates to electronic books.

7. To understand tax regulations for electronic payments, stamp duty on electronic documents and taxation for different types of electronic payment, as well as the taxation of certain digital services.

1. Classifying income

It is very important to differentiate the taxation issues that may arise as a result of e-procurement of goods or services when they are not supplied over the internet (**supplied offline**) from those that may arise when the goods or services are acquired and supplied over the internet (**supplied online**).

Understanding the difference

The reason for the difference is that the first example, under most circumstances, involves goods or services that are unrelated to intellectual property rights. It normally involves procuring material goods, which are transported using conventional means from the supplier's location to the end consumer's. Otherwise, this category involves providing some kind of professional service, in the strict sense of the term, and procuring the service over the internet. In contrast, the second example (goods and services that are available and supplied over the internet), always involves intellectual property rights.

1.1. Intellectual property rights

The biggest problems arise for goods that are **supplied online**, an area which requires considerable effort to interpret and classify. It is in this field that ICT has made the biggest steps forward; goods can be transferred electronically, which means that goods or services can be transferred directly from the supplier to the consumer, thanks to innovations that make it possible to digitise certain products and services. In contrast, e-procurement that does not lead to this situation (goods **supplied offline**) has less complicated taxation solutions, and there is no need to carry out complex categorization operations.

Recommended reading

R. Oliver Cuello (1999). *Tributación del comercio electrónico*. Valencia: Tirant lo Blanch.

Goods or copyright linked to intellectual property rights

Nevertheless, it should also be noted that the object of offline e-procurement may also consist of goods linked to intellectual property rights. An example would be purchasing a computer program on a CD-ROM, rather than the consumer downloading the information directly onto their computer. What normally occurs in the field of e-commerce is that, when dealing with goods or rights linked to intellectual property rights (computer programs, literary or musical works, etc.), these goods are normally transferred from the supplier's computer to the end consumer's.

The sale of **material goods** over the internet does not cause any serious problems concerning the objective categorization of e-procurement, with regards to direct taxation. It simply means applying the regulations for corporation tax, income tax or non-resident income tax to the income obtained, which tax profits from sales or services provided.

Problem-free categorization of income

Under these circumstances there are no problems categorizing income. It is clear that they are not goods or rights related to intellectual property rights, which means there is no need to ask ourselves whether we are dealing with licensing, which results in royalties. This is not the case if the object of the e-procurement is goods or rights related to intellectual property that are not transferred over the internet. In this case, it is impor-

tant to keep in mind the applicable tax regime for e-procurement of goods and services over the internet.

It can be concluded that, with this kind of offline provision, the use of electronic means is inconsequential, as regards the objective categorization of e-procurement. This means that, regarding the objectivity element, for the conclusions of such contracts it does not make any difference whether a traditional paper document is used, or whether it is done electronically.

Example

A Spanish company purchases computer equipment over the internet from a German company (including computer screens, printers, etc.), which will be transported by conventional means.

This situation does not involve income obtained in Spain. Given that it is a situation involving an international purchase, art. 7 of the convention on double taxation avoidance (DTA) between Spain and Germany applies. Business profits will be taxed in the country of residence of the taxpayer, unless there is a permanent establishment in the country where the income arose, which is not the case here.

The situation is different for **provisions online**. One of the main taxation issues in relation to e-commerce is regarding the categorization of income when the good or service is sent online, i.e. transferred over the internet.

Recommended reading

J. Calvo Vérgez (2009). *Fiscalidad del comercio electrónico: imposición directa e indirecta*. Madrid: Instituto de Estudios Fiscales.

In this situation, the conditions for acquiring the electronic product may involve a copyright transfer for the right to use the intellectual property of the product (which for taxation purposes is called a **licence agreement**), or a straightforward purchase of the right to use the product (which involves **purchasing** the products in an electronic format). The taxation consequences of the different classifications of types of income are very important when e-commerce is carried out between parties residing in different countries, without any permanent establishment.

The taxation consequences of income categories

If the circumstances involve a licence agreement, then royalties apply, which, according to Non-Resident Income Tax Act (LIRNR) art. 13.1.f.3, are considered income arising in Spain, and are taxed accordingly in Spain. As we will see further on, if there is a double taxation agreement in place, then the tax should be shared between the country of residence and the country of source.

If, on the other hand, the income for non-residents comes from international purchases, then this income will not be considered to be obtained in Spanish territory, in accordance with LIRNR art. 13.2, and consequently, no tax will be applied in Spain. Similarly, the DTAs outline taxation in the seller's country of residence.

Therefore, the categorization of taxes on income from selling computer programs requires reviewing each purchase agreement to distinguish between licence agreements and situations that involve transferring the intellectual property rights of the same. In the first case, the licence agreement for the product involves a simple **purchase**, where the objective is to acquire a product and the right to use it, under the limitations imposed by the law. In the second case, ownership of use rights and of intellectual property rights is transferred, which involves **royalties**.

Partial copyright transfer

The concept of royalties always applies to the partial transfer of copyright (the author retains ownership of the copyright and transfers partial rights to it), as total copyright transfer qualifies as a business profit.

The concept of royalties

Transactions that generate royalties consist of transferring the right to use a good or a copyright (not real estate). In the absence of a definition of *royalties* in Spanish regulations, we must resort to the double taxation agreements: they state that royalties are income derived from the transfer or lease of goods (in particular, business equipment), intellectual property rights, similar intangible assets without registered protection (operational techniques and know-how), as well as other assets or rights, businesses, mines and even so-called technical assistance.

1.2. How royalties are taxed

Royalties are taxed as follows: **If Spain has not signed a DTA**[1] with the country of the non-resident, then taxes will be paid in Spain at the general rate of 24%. If the taxpayer resides in a country with which **Spain has signed a DTA**, then the countries should comply with what is agreed therein, as the tax rate is always lower than the previously mentioned amount.

(1) Art. 25.1.a LIRNR.

The problems involved in the tax categorization of income from marketing goods that entail intellectual property rights, which are usually computer programs, are mostly encountered in international commerce. The **usual stance** is to remove the tax on royalties in the country of origin, or in other words, the source country. The position among the majority of OECD member states is not only to exclude the full transfer of copyright from royalties (which is obvious), but also to exclude the partial transfer of copyright from royalties.

Art. 12 of the OECD's DTA model

Art. 12.1 of the OECD’s model double taxation agreement establishes a general criterion for exemption from paying royalties in the source country. This means a general guideline is established favouring taxation in the seller’s country of residence, although in exceptional circumstances there may be allowances for countries who sign an agreement to tax some of the royalties in the source country. Many DTAs, aside from the aforementioned general principle, establish a shared taxation regime, affording the source country limited rights to apply tax. This is how Spain has negotiated such agreements, in order to safeguard the company’s interests as a net importer of technology.

None of the double taxation agreements for income and assets signed by Spain, nor any of the international agreements specifically related to taxation, include specific regulation on e-commerce. Except for agreements with Bulgaria and Hungary, all of the DTAs signed by Spain recognize the **right of the source country to apply tax**. When dealing with royalties, just as for dividends and interest, applying a shared tax regime means that the taxation in the source country is set a maximum rate, and there is not a specific tax rate. The taxation limit may not be exceeded, although a lower rate may be applied. The applicable rates according to the agreements signed by Spain range from 5% to 20%, with an average rate of around 10%.

Recommended reading

A. García Heredia (2014). "Fiscalidad de los cánones en el comercio electrónico". *IDP, Revista de Internet, Derecho y Política* (no. 18).

Exceptions to the OECD model DTA

Spain, like other technology deficit countries, has maintained exceptions to the OECD's model DTA in order to preserve their partial fiscal sovereignty over this type of income earned by non-residents. This means that, when signing a DTA with another country, Spain reserves the right to tax royalties at source.

In the absence of specific rules on e-commerce in the DTAs signed by Spain, it is important to understand the interpretation of the **commentary to the OECD model**, without forgetting that this is not a directly applicable rule, but rather an opinion which can then be interpreted. In the OECD Ministerial Conference held in Ottawa in 1998, a new wording was given to comments 12-17 on art. 12 of the OECD model DTA. The new wording omits the controversial references to "personal or commercial use" and aims to clarify the dividing line between "acquiring partial copyright" (royalties) and acquiring a copy of the computer program (business profits on international sales).

Commentary on the OECD model DTA

According to this commentary, royalties apply when obtaining a program means getting hold of the right to 'use' economically significant intellectual property rights, while the party transferring the rights maintains ownership of them.

According to the commentary, when acquiring a licence to copy or distribute software, or to modify it and use it publicly, the party is paying to "use" the intellectual property rights, and consequently, this involves royalties. Royalties also apply when the buyer is purchasing information about programming languages that can be equated to know-how. In such cases, what is really being sold is the right to use information of an industrial, commercial or scientific nature, which is viewed as being similar to transferring technology.

In contrast, when the object of the transfer is the use of a computer program without any intention of marketing it, which is a frequent occurrence when buying just one copy, then this involves a purchase, which generates business profits for the seller (whether the program was purchased in a physical format or by downloading the product online is incidental).

Consequently, the main criterion used by the OECD when analysing whether royalties apply is to determine the key reason for making the payment (paragraphs 17.1 to 17.4 of the commentary to art. 12). In this analysis, the OECD distinguishes between tangible goods (digital products such as software, images, sounds and texts) and intangible goods (copyright of the digital product). In the OECD model, royalties only arise from a transfer of use of an intangible good, i.e. the copyright of a certain item.

Example

A Spanish company purchases a computer program to manage their warehouse stock, buying it from the website of an American company and downloading it online.

This situation does not involve income obtained in Spain. The fact that the program is bought in a digital format does not mean that this is a transfer of intellectual property rights (royalties). Rather, this case is simply an international purchase (business profits). Art. 7 of the DTA between Spain and the USA applies, which means the business profits will be declared in the country of residence of the taxpayer, unless there is a permanent establishment in the country where the income was earned, which is not the case here.

Finally, the OECD document "**Characterization of e-commerce transactions**" of 1 February 2001 may also be useful, in which an analysis of a total of 28 categories is carried out, concerning typical e-commerce transactions. The vast majority of these transactions are categorized as business profits, which means they fall under art. 7 of the model DTA, which specifies taxation in the country of residence of the seller or service provider, unless there is a permanent establishment in the source country.

OECD document of 1 February 2001

The e-commerce transactions that are categorized as business profits (art. 7 of the model DTA) are as follows:

- electronic purchases of tangible goods (goods that are not transferred over the internet, but rather are supplied offline);
- electronic purchases of digital products (goods that are transferred over the internet, i.e. supplied online);
- updates and add-ons for digital products;
- temporary software licences;
- single-use software;
- application hosting under a separate licence agreement or in a joint contract – in this type of contract, the client purchases the right to access one or more programs from a software house;
- application service providers (ASPs) or payments for ASP licences – these offer the client access to software that cannot be copied or used for means other than those stipulated in the contract;
- website hosting – the supplier offers space on their computer for the customer to house their website;
- software maintenance;
- data warehousing – the supplier offers space on a server for the client to store data;
- online technical support;
- data retrieval;
- exclusive information sending;
- advertising;
- electronic access to professional consultants;
- periodical sending of information;
- online shopping portals;
- online auctions;
- commissions for commercial web traffic;
- sharing audiovisual content on websites;

- carriage fees;
- website subscriptions for online downloads.

According to art. 12 of the model DTA, royalties only apply in the following cases:

- E-procurement of copyright for economic gain, in which the client directly downloads the product.
- Technical information. In these cases, the customer purchases undisclosed technical information about a product or a manufacturing process. The payment is for the know-how.
- Subscription to interactive websites. Here we must distinguish two types of transactions: the subscription fee is a payment for a service (art. 7 of the model DTA), but the payment to the supplier for the copyright of the content offered, obviously constitutes royalties (art. 12 of the model DTA).
- Purchasing content. Constitutes payment for partial transfer of copyright (art. 12 of the model DTA). However, if the copyright is transferred in full, this is classed as business profits (art. 7 of the model DTA).

Example

A Spanish company buys the latest version of a database from a French website, in order to market it in Spain. The database is downloaded from the internet.

In this case we are dealing with income subject to non-resident income tax, earned by a non-resident without a permanent establishment. Given that this scenario involves the transfer of intellectual property rights for commercial use, art. 12 of the DTA between Spain and France (on royalties) applies, meaning that this type of income is subject to shared taxation; it is taxed in the country of residence (France), but also partly in the source country (Spain). According to the DTA between Spain and France, the tax rate is 5%.

2. Determining the tax residence of each party involved

2.1. Criteria countries use for tax liability

Regulations usually establish two possible forms of linking wealth to the power countries have to apply tax: personal criteria (the actual tax **residence**), based on circumstances relating the owner to the country; and the criteria of territoriality (the tax territory of the **source of income**), based on the connection between said income and the country's territory.

Recommended reading

R. Oliver Cuello (2009). "Fiscalidad internacional y comercio electrónico". *Revista Internet, Derecho y Política* (no. 9).

The criteria for tax territory

In reality, the concepts of tax residence and territory are not opposed, as the criteria for residence, far from being different, is a manifestation of tax territory. Personal criteria, strictly speaking, are criteria that refer to personal circumstances, such as nationality, for example. However, the criterion of nationality is reserved in modern law to refer to the status of persons, and is not applied to the requirements of tax law, according to which the distribution of the burdens of public spending should be set based on those persons enjoying their benefits, on an impartial basis.

For this reason, according to the general provisions of art. 31 of the Spanish Constitution, "everyone" should help support public costs. Therefore, the duty to contribute belongs not only to people with Spanish nationality, but also to people with other nationalities. This means that it is the criteria of territory (in a broad sense) that decides the applicable law. This criteria applies in the case of criminal law, for police and public safety laws, and in the case of tax laws. However, some countries (such as the US, for example) continue to use the criteria of nationality to determine their scope of tax regulation.

The most important and frequent conflict of international double taxation is in terms of personal (actual residence) and territorial criteria (which territory is the source of the income). The combined use of the two criteria can mean that the taxpayer could owe tax to two or possibly more countries, for the same income.

The **tax residence** is the component that is most commonly used to link the country and the taxpayer in tax systems. Tax residence in a particular country refers, in terms of natural persons, to temporary residence, economic interests or a family home in a certain territory. In the case of organizations, it refers to the company offices or headquarters, although this does not cover all circumstances.

The primacy of the country of residence criterion over that of source country

The consensus reached at the time between international organizations, notably the OECD, generally establishes the primacy of the personal criterion to determine tax liability, and therefore the primacy of the country of residence over the source country. From this perspective, the legal approach to double taxation agreements is essentially

that, based on the primacy of the country of residence, the agreement will establish the circumstances in which the source country may tax the income earned in its territory by residents from the country of residence.

However, as stated by certain doctrines, the system is currently undergoing a crisis, as well as a process to revise the current criteria on the taxation power of each country. According to this line of thinking, the lack of a physical location of e-commerce transactions means there is a need to review the traditional tenets of international taxation and, in certain circumstances, begin to implement a system based on the tax territory (in the strictest sense). The idea is that the only way to keep taxing the corresponding business incomes is through tax territory criteria, such as the residence of the payer. Some authors even suggest replacing the tax residence principle with a source country system for future tax regimes.

In **e-procurement**, conflicts arise when the tax residences of the parties involved correspond to different countries; especially when organizations are considered to be residents of both countries according to the national regulations of both countries. In such situations, there are problems with deciding on a location for the parties involved in e-commerce, and there are some issues in particular with determining the tax residence of the supplier and provider.

2.2. Defining the 'place of effective management'

The DTAs signed by Spain employ the '**place of effective management**' criterion for situations in which the national criteria for both countries consider that organizations are resident in both.

However, modern technology means it is possible for a place of effective management to be located simultaneously in different parts of the planet, if the **place where the board of directors meet** is considered as one of the criteria, and meetings are conducted via video-conferences. It could also be argued that this is not quite the revolutionary change it appears. Situations that are resolved today via video conferences used to be resolved via telephone calls.

Moreover, when determining the location of the parties involved in e-commerce, it is not reliable to base this on the criterion of the **place indicated on the website** as the residence of the supplying company, since this can easily be manipulated by said entities so that they are located in a country where the applicable DTA further limits the taxing power of the source country.

We must also mention the complications involved in finding out who is responsible for a website and where they are physically located, because the **domain names** on the internet do not necessarily correspond to a known physical location.

Furthermore, not only are there problems locating the address of a seller or provider using the internet to transmit goods or services, there are also significant issues involved in locating the recipient of said goods or services, taking into account the potential **anonymity of internet users**. This facilitates use of

the internet as a means to carry out activities outside of any specific territory, making it difficult to tax income without having details of the corresponding taxpayers.

3. Applying the concept of a permanent establishment

3.1. Income obtained through a permanent establishment

A **permanent establishment** is an economic operation in the territory of a country (source country), but not legally autonomous and dependent on a person or entity resident in another country (country of residence).

The permanent establishment constitutes an autonomous entity for the purposes of taxation in the source country (the principle of separate taxation), and is seen by said country as an independent centre of tax liability for the income earned by the party on their territory, in such a way that it constitutes a specific type of liability, similar in scope to personal liability. This is the phenomenon known as the 'personalisation of the permanent establishment'.

Defining a permanent establishment

Taxation of non-residents in Spain varies considerably depending on whether or not they have a permanent establishment in Spanish territory, which means the concept is particularly important. Non-residents are considered to operate in Spain through a permanent establishment under the following circumstances:

1) when the non-resident in Spain has, in any capacity and either continuously or habitually, a workplace or facility of any kind in which all or part of his or her work is carried out;

2) when acting in Spain through a representative authorized to conclude contracts on behalf of the non-resident person or entity, provided that this is a habitual occurrence.

All **income obtained through a permanent establishment** in Spain will be taxed in full, regardless of its provenance. The taxable base of a permanent establishment will be determined in accordance with the provisions of the Spanish law on corporate tax. In this case, the regime for offsetting negative taxable bases applies, with certain exceptions.

In contrast, **any income not obtained through a permanent establishment** should be taxed separately, for each total or partial accrual of income subject to tax. Taxation is on a transaction by transaction basis, which means there is no compensation between capital gains and losses. In general, the taxable base consists of the full amount accrued, i.e. without any expenses deducted.

Determining the existence of a permanent establishment is particularly important in **e-commerce transactions**, as DTAs signed by Spain (in accordance with the OECD model double taxation agreement, art. 7) state that business

profits can only be taxed in the country of residence of the taxpayer, unless they are obtained through a permanent establishment, in which case the income should be taxed in the source country.

The concept of a permanent establishment normally requires a **fixed place of business**[2] and its purpose is simply to allow the source country to tax the income generated in this fixed workplace. This concept, which relies on a physical presence in the country in which the economic activity takes place, is in jeopardy because of the way new technologies have made it possible to operate in another country.

(2) Art. 13.1.a LIRNR.

Permanent establishments in the OECD model DTA

The first paragraph of art. 5 of the OECD's model convention states that "For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on".

A careful reading of art. 5 of the OECD's model convention and of the comments on the same would leave one inclined to exclude from its scope the mere installation of electronic devices, without a physical presence to represent one of the key elements of the permanent establishment.

3.2. The permanent establishment in e-commerce

It is particularly interesting to analyse whether or not a **website hosted on a server** in the customer's country may constitute a permanent establishment. The source country could try to tax the income earned on the basis that the website is 'a fixed place of business', or by arguing that a website that accepts customer orders is the equivalent of a representative whose regular activity consists of concluding contracts on behalf of the principal party.

However, in our opinion it is difficult to consider that a server or a website hosted on a server located in the buyer's country could be considered a permanent establishment by virtue of similarity to a 'fixed place of business'. The server is only enabling the company to establish an internet connection, and this service is carried out for the selling company (in addition to facilitating the commercial trading activities of other customers, and not only the company), and there is no control over the transactions carried out over the server.

Another debated issue is whether an **internet service provider** has a permanent establishment in another country as a result of its internet access to that country's network. For the same reasons, it is difficult to argue the case for a permanent establishment. If there are staff in the other country whose job is to attract customers to said provider, it would be easier to categorize it as a permanent establishment.

As for whether the seller's server or website hosted in the buyer's country can be considered a permanent establishment, for its similarity to an **agent** acting on behalf of the company in another country with the power to conclude contracts for it, it should be noted that there are no agents on the internet, as the contracts are concluded between the business and the client electronically. Furthermore, it should be highlighted that in the OECD's model convention, a "person" is mentioned when defining an agent, which means that, in accordance with a strict interpretation, it is not possible for a computer to be a permanent establishment.

In the OECD report on "**Clarification on the application of the permanent establishment definition in e-commerce: changes to the commentary on the model tax convention on art. 5**" (22 December 2000), paragraphs 42.1 to 42.10 were added immediately after paragraph 42 on the comments on art. 5 of the model DTA, under the title "Electronic Commerce".

According to these new comments, "a distinction needs to be made between computer equipment, which may be set up at a location so as to constitute a permanent establishment under certain circumstances, and the data and software which is used by, or stored on, that equipment".

In accordance with this interpretation, a **website hosted on a server** would not constitute a permanent establishment, as it falls into the second category, while computer equipment (for example a **server**) would constitute a permanent establishment in the buyer's country, if it were owned by the seller's company. However, simply hosting a website on an internet service provider's server does not constitute a permanent establishment.

Example

A Spanish company purchases a computer program over the internet, which is downloaded from the website of an American company. The American company employs a Spanish internet services company to host its website. However, it does not have any premises on Spanish territory.

The DTA between Spain and the USA (art. 5) does not include any specific mentions of a permanent establishment in terms of e-commerce. It refers instead to the concept of a fixed place of business. The commentary to art. 5 of the OECD model tax agreement should be studied for interpretative criteria. According to the OECD's criteria, a hosting contract does not represent a permanent establishment. This means that if there is no permanent establishment, the income was not earned in Spain. It is an international purchase, and art. 7 of the DTA between Spain and the USA applies, which taxes business profits in the country of residence of the taxpayer.

The commentary to art. 5 of the DTA highlights the irrelevance of **human intervention** with said computer equipment to determine whether or not we are dealing with a permanent establishment, which means that such transactions are treated in the same way as certain other automatic activities that do not require human intervention.

Case by case analysis

The new commentary to art. 5 of the model DTA makes it clear that a case-by-case analysis is needed to see whether a company's transactions are carried out totally or partially by a specific server.

It is not considered a permanent establishment when the activity carried out by the computer is merely **preparatory or auxiliary**. This business activity must not be the company's main activity. Examples would be: links, advertising, mirror servers, market research and the supplying of information. Furthermore, it is noted that, as a general rule, the internet service provider cannot be considered a permanent establishment of the company that owns the website, because the former does not have the authority to conclude contracts on behalf of the company. In conclusion, the internet service provider cannot be considered an agent of the company.

Interpretation by the Spanish tax administration

However, it is worth remembering that Spain is holding back on its right to apply this commentary until the OECD reaches definitive conclusions. In fact, the Spanish authorities already hold the consideration that a company has a permanent establishment purely as a result of it selling its products from a website whose maintenance is performed in Spain (Resolution of the Central Financial Administrative Court of 15 March 2012, in the case of Dell). This standpoint goes beyond the position held by the OECD, which considers a permanent establishment to be held by a company with a server at its own disposal but not by a company that simply has a website.

4. The location of e-commerce transactions in relation to VAT

4.1. Changes in legislation

The provisions of VAT Directive 77/388/EEC, of 17 May 1977, applied to the location of taxable events in e-commerce, and prevented services supplied online that were consumed in EU territory from being properly taxed, **distorting free competition** in this industry. Such provisions led to discrimination, since electronically supplied services from within EU territory were always subject to VAT, regardless of the place of consumption. However, the services supplied by operators acting in countries outside the EU were not subject to tax, even if the place of consumption was within the EU.

Recommended reading

A. M. Delgado García (2011). "El IVA en el comercio electrónico". *Revista Técnica Tributaria* (no. 92).

Therefore, in order to ensure a well-functioning internal market and to remove the issues identified, it was necessary to ensure that services supplied online were subject to taxation in the EU, as long as they were provided for valuable consideration and were consumed by customers in EU territory. Similarly, it was necessary to establish that services consumed outside EU territory would not be subject to tax. In order to do this, the **regulations concerning the location of taxable events** in electronically supplied services needed to be updated.

To this effect, **Council Directive 2002/38/EC**Council Directive 2002/38/EC of 7 May 2002 was approved, amending the aforementioned Directive 77/388/EEC. In accordance with the principle of taxation at destination, Directive 2002/38/EC established that services supplied online from countries outside the EU provided to persons within EU territory, or from within the EU to recipients established in countries outside the EU, should be subject to taxation in the country of residence of the recipient.

Directive 2002/38/EC

Thus, art. 1 of Directive 2002/38/EC introduced new criteria to art. 9 of Directive 77/388/EEC for the location of certain electronically supplied services. This meant that if the service provider was a businessperson or professional established within EU territory and the recipient was also a taxpayer resident in EU territory, the transaction would be subject to VAT in the Member State of destination, with the businessperson receiving the service acquiring the condition of taxable person.

Moreover, if the recipient was a final consumer residing in EU territory, the operation would be subject to VAT in the source Member State, with the taxpayer being the provider of the service, established within EU territory. Also, if the recipient was a businessperson or professional or final consumer established in a country outside the EU, the transaction would not be subject to VAT, with taxation occurring in the country of consumption.

Accordingly, if the service provider was a businessperson or professional established in a country outside the EU, and if the recipient was a businessperson or professional resident in the EU, then the transaction would be subject to VAT in the recipient Member State,

with the party receiving the service acquiring the condition of taxable person, and no taxation applied to the party providing the service from outside the EU.

Finally, if the recipient of the service was a consumer residing in the EU, the transaction would also be subject to VAT in the recipient Member State, with the party providing the service from outside the EU also acquiring the status of taxpayer. In this case, a new special regime was created for services supplied online by non-EU operators. Under this special regime, the possibility to register with a single Member State (chosen freely) was offered to any non-EU operator supplying services electronically to persons not subject to VAT in the territory of application of the tax, regardless of whether the activities were carried out in several Member States of the EU. However, for every service provided by the non-EU operator, the VAT rate corresponding to each of the Member States must be applied to each client (individual) according to their tax residence.

Finally, Directive 2002/38/EC states that non-EU operators who opt to apply these special arrangements have the right to a tax refund in relation to the goods and services used in their business activities, from the Member State that applied the tax. It was also established that non-EU operators should submit an electronic VAT declaration to the Member State where they had registered, detailing their total sales in each EU Member State. When the tax authorities of the Member State receive this tax declaration, they should proceed to reallocate the revenue to each of the Member States where the services were provided.

In Spain, domestic law incorporates the provisions of Directive 2002/38/EC by means of **Law 53/2002, of 30 December**, on fiscal, administrative and social measures. The main amendments to the Value-Added Tax Act (LIVA) included a new definition of the special rules established for determining the location of services supplied, rewording LIVA art. 70, and including a specific criterion for services supplied online. There was also a new chapter VIII added to section IX of the LIVA (arts. 163 bis to 163 quáter), with regulations on a special regime for services supplied online, applicable to non-EU operators.

Regulatory amendments

The above legal provisions were the object of regulatory implementation through Order HAC/1736/2003, of 24 June, which approved the special regime for VAT on services supplied online. Additionally, Order HAC/665/2004, of March 9, amended regulation on certain aspects of VAT revenues from non-EU operators supplying electronic services to final consumers.

Continuing the legislative developments in this area, the adoption of **Directive 2006/112/EC**, of 28 November 2006, should be noted, which governs the common VAT system, in force since 1 January, 2007.

Directive 2006/112/EC

This directive reworked the structure and wording of the previous Directive 77/388/EEC, in order to provide further clarity and reasoning, as well as taking up certain provisions still applicable from Directive 67/227/EEC of 11 April 1967, on the harmonization of legislation of Member States concerning turnover taxes. However, Directive 2006/112/EC did not introduce any new regulations regarding the location of the taxable event for services supplied online, with the modifications doing little more than listing the precepts relating to this matter.

To continue with the description of the regulatory framework for the location of the taxable event in e-commerce, we must refer to the **Law 2/2010, of 1 March**, which merges certain directives in the field of indirect taxation.

Law 2/2010, of 1 March

The aim of the reform introduced by this law is to merge Spanish law with the so-called 'VAT package', consisting of the three following directives: Directive 2008/8/EC, of 12 February 2008, amending Directive 2006/112/EC in terms of the place the service is pro-

vided; Directive 2008/9/EC, of 12 February 2008, which established detailed rules for refunding VAT, as provided for in Directive 2006/112/EC, on taxable persons not registered in the Member State that will provide the tax refund, but instead established in another Member State; and Directive 2008/117/EC, of 16 December 2008, amending Directive 2006/112/EC on combating tax evasion connected with transactions between parties in different EU Member States.

Regarding the location of the provision of services, the new system introduced by Law 2/2010 is based on special regulations (LIVA art. 70) and general regulations (LIVA art. 69). The new regulation aims to systematize and clarify the rules on the location of the taxable event when providing services, and it is important to note that there are no changes in terms of the location rules regarding e-commerce operations.

Specifically, LIVA art. 69.1 notes that the services are deemed to be provided in the territory of application of the tax (TAI, by its Spanish acronym), subject to the provisions of LIVA arts. 69.2, 70 and 72, under the following circumstances: 1. "When the recipient is a businessperson or professional acting as such, and has the headquarters of their business activity in said territory, or has a permanent establishment in that territory, or their domicile or habitual residence, provided that the services are received at this headquarters, fixed establishment, domicile or habitual residence, regardless of where the service provider is registered and where the services are supplied from". 2. "When the recipient is not a businessperson or professional acting as such, as long as the services are provided by a businessperson or professional and their place of business or fixed establishment where the services are supplied from (or failing that, their domicile or habitual residence) is in the territory of application of the tax." According to LIVA art. 3, the "territory of application of the tax" is the Spanish territory, except the Canary Islands, Ceuta and Melilla.

However, by way of an exception from the provisions of LIVA art. 69.1.2, the TAI does not cover a number of services listed in LIVA art. 69.2, when the recipient of the services is a private individual and is established or has a domicile or habitual residence outside the EU. These services include "services supplied online" (LIVA art. 69.2.m).

Finally, LIVA art. 70.1 establishes that certain services will be deemed to have been supplied in the TAI, including "electronically supplied services from a headquarters or permanent establishment or, failing that, the domicile or habitual residence of a businessperson or professional who is outside the EU, when the recipient is not a businessperson or professional acting as such, provided the latter is established or is a resident in the territory of application of the tax. For the purposes of these provisions, it is presumed that the recipient of the service is established or a resident in the territory of application of the tax, when payment for the service is carried out via a bank account opened in a bank located in that territory" (LIVA art. 70.1.4).

Taxation by means of VAT applied to services supplied online was the object of significant modifications under **Law 28/2014, of 27 November**. This regulation introduced significant changes as regards the location of these services and e-commerce transactions in which the product is transferred online.

Amendments introduced by Law 28/2014, of 27 November

As indicated in the preface to the aforementioned Law 28/2014, of 27 November, the regulation comes in response to the need to adapt the text of VAT Law 37/1992, of 28 December, to Council Directive 2006/112/EC, of 28 November 2006, with regards to the common system for this tax under the wording given by Directive 2008/8/EC, of 12 February. This concerned the location of provisions of services and introduced various new rules, including some governing the location of telecommunications, broadcasting, and electronic services that are provided to recipients who are not businesspeople or professionals acting as such, i.e. individuals and end consumers. These new location regulations entered into force as of 1 January 2015.

Thus, as stated in the same preface to Law 28/2014, the most important change introduced relates to the new laws for the location of provisions of services that are performed online when the recipient is an individual or end consumer. In such circumstances, these services become taxable in the place where the recipient of the service is established or has their domicile or habitual residence, regardless of where the service provider is established. Following this legal reform, the implication is that all services provided online will be taxed in the Member State where the recipient is established, regardless of whether

they are an individual or businessperson or professional, and regardless of whether the service provider is a businessperson established inside or outside of the European Union.

Prior to this reform, the provision of electronic services to end consumers by EU businesspeople was taxed in the provider's country, while if the provider was a businessperson established outside the EU, the service was localised wherever the recipient was established. As mentioned above, under the new regulation – in force as of 1 January 2015 – when the electronic services are provided to someone who is not a businessperson or professional acting as such (an individual or an end consumer), said services are now taxed in the place where the recipient is established, regardless of the place where the service provider is situated or established, in other words, regardless of whether the service provider is a businessperson established inside or outside of the EU.

4.2. E-procurement of material goods

In the case of e-procurement of **material goods** that are not transferred over the internet, there are no great problems related to classifying the transactions due to the item having been ordered online. The goods are delivered and transported by conventional means and not in a digital format over the internet.

VAT, therefore, should apply, as appropriate, to any of the following **types of transaction**: domestic transactions, purchases from other countries in the EU, distance sales, imports and exports.

Types of VAT

When dealing with the electronic sale of material goods that do not have to be transported from another country and are available to the buyer on Spanish territory, the tax system for domestic transactions involving the supply of goods is applied, subject to the corresponding tax rate determined by Spanish law (LIVA art. 68.1).

In the event that the electronic purchase is for material goods from a country within the EU, this is simply an EU intrastate purchase. In this situation, the recipient (the taxable person) will have to apply (as above) the Spanish VAT rate (LIVA art. 71).

If the same electronic purchase is for a material good that is from a country outside the EU, the recipient is not a taxable person, and the distance sales regime applies. According to this regime, private individual consumers can purchase any kind of goods indirectly, without any physical movement, but rather through catalogues, advertisements, etc., with taxation at the source, if the turnover for the supplier does not exceed certain limits per calendar year.

The criteria for the territorial location of distance sales varies depending on the volume of transactions carried out by the taxpayer during the preceding calendar year, or during the current year, and sent to a particular Member State. If such transactions, with a destination in the Spanish territory in terms of VAT, are in excess of 35,000 euros, then the shipment of these goods shall be deemed located in the recipient country and subject, therefore, to Spanish VAT. Otherwise, if the volume of transactions is lower, the supply of goods will be located in the original Member State where the taxpaying seller is located, unless the taxpayer exercises the option to locate the transaction in the recipient country, where the buyer resides or is established (LIVA art. 68.3).

Finally, if the product or material good in the electronic transaction comes from a country outside the EU, its entry in Spain will constitute an import subject to VAT, with the corresponding tax paid in customs (art. 18). If it is an export, the transaction will be tax exempt (LIVA art. 21).

With regards to e-procurement for the provision of services (not made over the internet), there are no problems related to VAT taxation. That is, the use of online means to procure these services requires no special treatment that differs from the traditional procurement system based on paper documents. The provisional rate for such operations is therefore applied, taking into account the regulation on the location of the taxable event. LIVA

art. 69 establishes general rules for the supply of services. Moreover, as discussed below, LIVA art. 70 establishes a series of special regulations to determine the location of certain services.

According to the LIVA, the classification 'delivery of goods' also includes the supply of a **standardized computer products**[3] delivered in any physical format. For this purpose, standardized computer products are considered to include any such products that do not require substantial modification for use by any user.

(3) Art. 8.2.7 LIVA.

The LIVA determines the classification of service provision to include the supply of computer products when this does not include delivering goods. The delivery of the corresponding storage medium is considered as an accessory to the services. In particular, service provision includes providing **computer products that were made to order** for the recipient, according to the corresponding specifications, as well as computer products that are subjected to substantial adaptation in order to be used by the recipient[4].

(4) Art. 11.2.16 LIVA.

Supplies of products that, by virtue of these precepts, shall be considered as provisions of services, will be located according to the general rules established in LIVA art. 69 on location, while the exceptions outlined in LIVA art. 70.1.4. will not apply, for these exceptions, as we shall see, are aimed at e-commerce transactions for services over the internet (online supplies).The special regime for services supplied online (LIVA chapter XI of title IX, arts. 163 septiesdecies to 163 quatervicies) does not apply either, for the same reasons.

In the case of **licence agreements**, when the copyright for use of the product is transferred, this is classified as a provision of services (LIVA art. 11.2.4, where the general location rules established in LIVA art. 69) apply.

4.3. The location of services supplied online

LIVA art. 69 establishes the general rules for the location of service provisions, while LIVA art. 70 determines a series of special regulations for the location of certain service provisions. Specifically, under the new regulations brought in with Law 28/2014 as of 1 January 2015, the regulation of all telecommunications, broadcasting, and electronic services is grouped together in LIVA art. 70, regardless of the place where the service provider is established, given that the services will always be located at the **address of the recipient**.

Before exploring the details of the many possible scenarios of locating services supplied online, it is worth pausing to consider the concept so as to gain a better understanding of the range of application for these regulations concerning location.

LIVA art. 69.3.4 establishes that the category of **services supplied online** includes services that are sent and received by processing equipment, including digital compression and data storage, and those that are entirely transmitted, conveyed and received by electronic means, including cables, radio waves and fibre optics, such as:

a) website supply and web-hosting,
b) remote maintenance of programs and equipment,
c) supplying and updating programs,
d) supplying images, text and data and providing databases,
e) supplying music, films, games, including gambling and games for money, and political, cultural, artistic, sporting, and scientific entertainment programmes and broadcasts,
f) providing distance learning.

The law also clarifies that it is not the same thing to contract a service online as to supply a service over the internet. To this effect, the fact that the service provider and the recipient communicate via email does not mean that the service provided will be categorised as a service supplied online (LIVA art. 69.3.4).

Providing distance learning

In accordance with the General Tax Directorate query of 10 October 2014 (V2718-14), it is clear that between a teaching service provided over an electronic network and a provision of services online there is a difference which is particularly important when it comes to determining the application of exemptions and the scope of the provider's right to a deduction. The service is exempt from VAT when it can be qualified as an educative service (Directive 2006/112/EC art. 132.1.i and LIVA art. 20.Uno.9). However, if the service provided is qualified as a service supplied online, the aforementioned exemption will not be applicable, as neither the Directive nor the LIVA provide for any exemptions for services supplied online, from which it can be understood they would be taxed at the general rate of 21% (LIVA arts. 90 and 91). Furthermore, where a case qualifies as an educative service, in order for the exemption to apply, all the corresponding requirements must be met (LIVA art. 20.Uno.9) in accordance with interpretations made thereof by the jurisprudence of the Court of Justice of the European Union (in this context see the content of such requirements in the binding enquiry of 1 February 2013, number V0297-13).

Therefore, examples that are considered services provided online include the supplying and downloading of files, automated or recorded courses, programs and training content in general over the internet, or accessing information and programs over a training platform, even if the recipient or user has the opportunity to receive tutorials or support sessions online from teaching staff via the same channels, provided this human intervention part is accessory to the supply of, or access to, the content and programs.

In contrast, an educative service constitutes the provision of teaching services by teaching staff over the internet or a similar electronic network used as a means of communication between the teaching staff and the users, even when the teaching staff uses digital content to support the provision of educative services, provided that the content is accessory to the online communication between the teaching staff and the students.

As for the specific location criteria, first we shall look at what happens **when the recipient of the services is a businessperson or professional**. As already mentioned, the general regulations governing the place of provisions of services are established in LIVA art. 69. LIVA art. 69.1.1 establishes that provisions of services shall be understood to have been carried out in the TAI when the recipient is a businessperson or professional acting as such and has their place of business in said territory, or has a permanent establishment in that

territory, or their domicile or habitual residence, provided that the services are received at this place of business, permanent establishment, domicile or habitual residence, regardless of where the service provider is registered and where the services are supplied from.

This means that if the recipient is a VAT taxpayer established in the TAI, whether the supplier is a resident in said territory or not, the transaction itself will be located in the TAI. If the supplier resides in the TAI, they will apply the Spanish tax rate. If the supplier does not reside in the TAI, they should not apply the tax, rather it is the recipient who must do so (LIVA art. 84.1.2).

Example

For example, this would be the case of an American company that sold a database from its website to a Spanish company. It involves a provision of services that, according to LIVA art. 69.1.1, is located in Spain. The American company does not apply VAT. The taxpayer is the Spanish company (LIVA art. 84.1.2). This means that the Spanish tax rate will be applied, and paid to the Spanish Treasury.

Meanwhile, if the recipient is a taxpayer established in another Member State of the EU and the supplier resides in the TAI, the transaction is located at the residence of the recipient. The supplier will not apply the tax under these circumstances either, rather it is the recipient will do so.

Example

For example, a Spanish company sells an antivirus program via its website to a French company. This case involves a provision of services that, according to LIVA art. 69.1.1, is located in France. Consequently, the Spanish company should not apply the VAT, rather it is the taxpayer – the French company – who should do so, applying the French rate and paying the tax to the French public treasury.

Likewise, if the recipient is a taxpayer established outside of the EU and the supplier resides in the TAI, the transaction is also located at the residence of the recipient, so the supplier should not apply the VAT.

Example

If for example a Spanish company sells a computer program to a Canadian company, in terms of VAT, the operation is not located in the TAI but rather in at the address of the recipient, so the Spanish company should not apply VAT to the invoice.

Next we will look at what happens **when the recipient of a service is an individual**. As mentioned earlier, if the recipient of the services provided online is an end consumer, special rules apply for the location of certain service provisions contained in LIVA art. 70. Specifically, LIVA art. 70.1.4 lets it be known that services provided online are understood as supplied in the TAI when the recipient is not a businessperson or professional acting as such (individual or end consumer) provided that they are established in or have their domicile or habitual residence in the TAI.

Therefore, if the recipient is an individual residing in another Member State of the EU and the supplier resides in the TAI, the transaction is located at the residence of the recipient and the supplier must apply the VAT corresponding to the Member State of consumption. For this purpose, there is an optional special regime (EU scheme).

Example

An Italian individual downloads some video games from the website of a Spanish company. In this scenario, the provision of services is located in Italy and the Spanish company must apply the Italian tax, for which it may – if it so wishes – use the corresponding special regime (EU scheme).

Likewise, if the recipient is a private individual residing in the TAI and the supplier is established in another Member State of the EU, the transaction will be located in the residence of the recipient and supplier must apply the Spanish tax, using the corresponding special regime (EU scheme) if it so wishes.

Example

A Spanish individual downloads an update for a computer program from the website of a German company. According to LIVA art.70.1.4, the service provision is located in the TAI and the German company must apply the Spanish tax. For this purpose, there is an optional special regime (EU scheme).

Furthermore, if the recipient is a private individual residing in the TAI and the supplier is established outside the EU, the transaction is also located at the residence of the recipient and the supplier must apply Spanish VAT. In this case, if they so wish, the supplier may use the existing optional special regime (non-EU scheme).

Example

If a Spanish individual downloads a film from the website of a North American company, the service provision is located in the TAI. The North American company must apply the Spanish VAT, for which they may – if they so wish – use the appropriate special regime (non-EU scheme).

Finally, if the recipient is an individual residing outside the EU, the transaction is also located at the residence of the recipient, meaning that the supplier must not apply VAT.

Example

This would be the case for a Spanish company that sold a computer program online via its website to an individual residing in Argentina. The service provision is located at the recipient’s address and therefore the Spanish company must not apply VAT in the invoice.

In addition, it is worth bearing in mind the modifications to **Implementing Regulation (EU) No 282/2011, of 15 March**, which entered into force as of 1 January 2015 and were brought into effect by Implementing Regulation (EU) No 1042/2013, of 7 October, regarding the place of supply of service. This regulation is obligatory in all its aspects and applies directly to each Member State, therefore without any need for transposition by national legislators.

Implementing Regulation (EU) No 282/2011, of 15 March

The majority of these modifications relate to services supplied online. Specifically, various points have been removed from art. 7 of Regulation 282/2011 and others have been inserted, so as to modify the services covered by this concept. Thus, according to this precept, service provisions carried out online will include those supplied over the internet or an electronic network that by nature are basically automated and require only minimal human intervention, serving no purpose apart from information technology.

The inferences regarding the location of the client that are established in art. 24 bis of Regulation 282/2011 are also worthy of attention. When a supplier providing telecommunications, broadcasting or online services provides these services in places such as a phone booth, a wifi zone, an internet café, a restaurant or the lobby of a hotel, where the service provider needs a physical presence in the place where the service is supplied, it is presumed that the client is established in or has their domicile or habitual residence in that location, and that this place is where the effective use of the service takes place. If the location is on a vessel, a plane or a train that transports passengers within the EU, the location country will be the departure country.

Finally, it should be noted that **Law 6/2018, of 3 July on General State Budgets for 2018** introduces some new features in the LIVA, among which are those related to services provided electronically, as well as telecommunications, broadcasting and television services.

These legislative amendments are valid from 1 January 2019 and are the result of the adoption of Directive (EU) 2017/2455, of 5 December 5, 2017, amending Directive 2006/112/EC and Directive 2009/132/EC.

In this respect, the location rules laid down in LIVA art. 70.1.4 and 1.8 are amended with the aim of reducing the administrative and tax burdens for micro-enterprises in a single Member State that **provide these services occasionallyto end consumers in other Member States**. This entails that these micro-enterprises pay taxes in the Member State of consumption. Thus, a common threshold of EUR 10,000 is established at the community level (excluding VAT) which, if not exceeded, will imply that the provision of such services are **subject to VAT in the Member State where the micro-enterprise is established**, although they may opt for taxation in the Member State where the recipient of the service is established.

Occasional services to end consumers in other Member States

Therefore, telecommunications, broadcasting, television and electronic services provided by community entrepreneurs to individuals established in the Spanish territory in terms of VAT will be taxed in said territory in any of the following cases:

- The provider is established in more than one Member State.
- The provider is established in a single Member State and the total amount of such services provided to end consumers in other Member States has exceeded EUR 10,000 (VAT excluded).
- The provider is established in a single Member State and the total amount of this type of services provided to end consumers in other Member States has not exceeded EUR 10,000 (VAT excluded) but opts for taxation in the TAI.

In all these situations, the taxable person may choose to pay taxes through the optional special scheme (EU scheme) in the Member State where they are registered.

On the other hand, the telecommunications, broadcasting, television and electronic services provided by entrepreneurs established in the Spanish Peninsula or the Balearic Islands to individuals from other Member States will be taxed in the Spanish territory in terms of VAT when the following requirements concur:

- The provider is established only in the TAI.
- The total amount of this type of services provided to end consumers in other Member States has not exceeded EUR 10,000 (VAT excluded).
- The provider has not chosen to pay taxes in the Member State of consumption (the option will include at least two natural years).

Example

For example, a company established only in Spain provides electronic services nationwide and, in addition, to end consumers established in France for EUR 6,000. These services are located in the Spanish territory in terms of VAT since the services provided to EU customers other than domestic customers do not exceed EUR 10,000. However, the company may choose to pay taxes in France, registering and submitting its VAT declarations for these services in Spain through the optional special scheme (EU scheme).

5. Special VAT regimes for electronic services

In addition to the new regulations on location, and with the aim of simplifying and facilitating the fulfilment of taxpayers' formal obligations regarding this tax following the introduction of these new regulations on location, Law 28/2014 brought in changes to the special regime for services supplied online.

In this regard, the special regime for services supplied online to individuals by providers not established in the EU was modified, with the regime expanded to include telecommunications and broadcasting services, and being renamed as the special scheme applicable to telecommunications, broadcasting and online services supplied by businesspeople or professionals not established in the EU (**non-EU scheme**). This regime is optional and, as mentioned above, represents a simplification measure, allowing taxpayers to settle the VAT for the provision of these services through a web portal or one-stop shop in the Member State in which they are registered, avoiding the need to register in each member state in which they operate (Member States of consumption). In order to use this special regime, the businessperson or professional must not have any type of permanent establishment or obligation to register for VAT purposes in any EU Member State.

Furthermore, a new regime was brought in called the special scheme for telecommunications, broadcasting and online services supplied by businesspeople or professionals established in the EU but not in the Member State of consumption (**EU scheme**), which, when opted for, is applicable for businesspeople or professionals supplying the aforementioned services to individuals in Member States in which they do not have their place of business or a permanent establishment. In the Member States in which the businessperson or professional is established, provisions of electronic services supplied to individuals are subject to the general VAT regime.

Application of the special regimes

In this regard, it should be noted that for the EU scheme, it is compulsory that the Member State where the businessperson or professional registers be the Member State in which they have their place of business, or if their place of business is not in the EU, the Member State in which they have a permanent establishment. When they have a permanent establishment in more than one Member State, they may choose any of those Member States where they have a permanent establishment. As for the non-EU scheme, the businessperson or professional is free to register in any Member State they choose. What is more, in this regime the registration Member State may be the same as the Member State of consumption.

There are two optional regimes, which when used specify that the special regime must be applied to all services supplied in all Member States in which the regime can be applied. When a businessperson or professional chooses to use one of the special regimes, they will be under the obligation to present VAT self-assessments online on a quarterly basis through the one-stop shop of the registration Member State together with the corresponding payment, without the option to deduct amounts incurred in the acquisition

or import of goods and services used in the service provisions to which the special regime is applied.

The **two special regimes** are regulated in LIVA chapter XI of title IX, which is devoted to the special regimes applicable to telecommunications, broadcasting and online services (LIVA arts. 163 septiesdecies to 163 quatervicies), while the former LIVA chapter VIII of title IX, which was devoted to the special regime for services supplied online (LIVA arts. 163 bis to 163 quater), was annulled as of 1 January 2015.

Application of these new special regimes occurs through use of a so-called 'mini one-stop shop', or MOSS, which can be accessed from the website of the State Tax Administration Agency.

It should also be highlighted that the businesspeople or professionals who apply these special regimes must be aware not only of the LIVA regulations, but also of the Implementing Regulation (EU) No 282/2011, of 15 March, which also contains various rules that affect these regimes, and which must be applied directly and obligatorily, (with the modifications brought in by Council Implementing Regulation (EU) No 967/2012, of 9 October 2012). Additionally, it should be noted that chapter IX is added to title VIII of RD 1624/1992, of 29 December, approving the Value-Added Tax Regulation (RIVA) and providing regulatory development to these special regimes (RIVA arts. 61 duodecies to 61 quinquiesdecies).

Provisions common to both special regimes

LIVA art. 163 septiesdecies contains a series of provisions common to both special regimes, aimed at defining some basic concepts, such as telecommunications services, broadcasting services, and electronic or online services. It also covers the concept of Member State of consumption (the Member State in which the services are considered to have been supplied) and that of the periodical self-assessments (self-assessment containing the information required to determine the amount of tax corresponding to each Member State of consumption).

Furthermore, in addition to a referral to the regulations for the development and application of the chapter's provisions, causes for exclusion present in the former special regime for services supplied online are included, bearing in mind that decisions for exclusion are to be made exclusively by the registration Member State, and that the businessperson or professional may deregister voluntarily from these regimes. Meanwhile, RIVA art. 61 duodecies regulates the option of opting out of the special regime and its effects, and RIVA art 61. terdecies lays out the regulation for exclusion from the special regimes and its effects.

5.1. Non-EU scheme

In accordance with the provisions of LIVA art. 163 octiesdecies, businesspeople or professionals who are not established in the EU and supply electronic services to people who are not a businessperson or professional acting as such (individuals or end consumers) who are established in the EU or have their domicile or habitual residence there, may use this special regime (**non-EU scheme**).

For these purposes, the **registration Member State** is understood as the Member State in which the businessperson or professional not established in the EU has chosen to declare the start of their activity as said businessperson or professional in EU territory.

Regarding obligations, LIVA art. 163 noniesdecies states that in the event Spain is the registration Member State chosen by the businessperson or professional not established in the EU, said businessperson or professional will be subject to a series of formal obligations.

Formal obligations of the special regime

a) To declare the start, modification or end of the operations covered by the special regime. This declaration is to be submitted online. For the purposes of this regime, the tax administration will assign the businessperson or professional not established in the EU a unique identification number. The tax administration will give the businessperson or professional online notification of the identification number assigned to them.

b) To present a VAT self-assessment online each quarter, regardless of whether electronic services have been supplied or not. The declaration may not be negative and it is to be presented within twenty days following the end of the period to which the declaration corresponds.

c) To pay the corresponding tax amount for each declaration, including reference to the specific declaration to which it corresponds. The amount is to be paid in Euros into the bank account designated by the tax administration, within the declaration's presentation period.

d) To keep a record of the transactions covered by the special regime. This record must be kept with sufficient precision for the tax administration of the Member State of consumption to be able to check that it is correct. The record will be available both to the registration Member State and to the Member State of consumption, the businessperson or professional not established in the EU being obliged to make it available to the tax administrations of said Member States upon online request from these administrations. The businessperson or professional not established in the EU must keep this record for a period of ten years starting from the end of the year in which the transaction was made.

e) To issue and submit an invoice when the recipient of the transaction is established in or has their domicile or habitual residence in the territory of application of the tax.

Finally, as regards the **right to deductions for amounts incurred**, LIVA art. 163 vicies lets it be known that businesspeople or professionals not established in the EU who use this regime may not deduct anything from their self-assessment for amounts incurred in the acquisition or import of goods and services used in the provision of the electronic services to which the special regime is applied.

However, said businesspeople or professionals using this special regime will have the **right to a refund** of the VAT amounts incurred in the acquisition or import of goods and services used in the provision of the electronic services to which the special regime is applied, which must be seen to have been incurred in the Member State of consumption, in compliance with the procedure put forward in the regulations of the Member State of consumption.

In the event that Spain is the Member State of consumption, businesspeople or professionals not established in the EU using this special regime will have the right to a refund of the VAT amounts incurred in the acquisition or import of goods and services, which must be seen to have been incurred in the TAI, provided said goods and services are used towards the provision of the electronic services referred to within this special regime.

The procedure for the exercising of this right is set out in LIVA art. 119 bis. In this respect, recognised existence of reciprocal treatment for businesspeople or professionals established in the TAI is not required. Moreover, businesspeople or professionals following this refund procedure are not required to appoint a representative to the tax administration.

5.2. EU scheme

As described in LIVA art. 163 unvicies, the **special EU scheme** may be used by businesspeople or professionals established in the EU but not established in the Member State of consumption who provide electronic services to people who are not businesspeople or professionals acting as such (individuals or end consumers), and who are established in a Member State or have their domicile or habitual residence there.

In this EU scheme, the **registration Member State** must be understood as that in which the businessperson or professional has established their place of business. When the businessperson or professional does not have their place of business established in the EU, the registration Member State will be that in which they have a permanent establishment, or in the event they have permanent establishments in various Member States, it will be the Member State chosen by the businessperson or professional, in which they have a permanent establishment. In this last scenario, the choice of one Member State will be binding for the businessperson or professional as long as it is not revoked by that state. The decision will have a minimum validity of three calender years, including the calendar year to which the choice applies.

The above-mentioned LIVA art. 163 unvicies goes on to clarify that, in terms of the EU scheme, Spain will be considered a registration Member State in the following cases: a) all cases in which businesspeople or professionals have their place of business in the TAI and those in which they do not have their place

of business established in EU territory but do have one or more permanent establishments exclusively in the TAI; or b) in the case of businesspeople or professionals who do not have their place of business in EU territory and, having permanent establishments in the TAI and in another Member State, have chosen Spain as their registration Member State.

Formal obligations of the special regime

As regards the formal obligations for this EU scheme, LIVA art. 163 duovicies states that, in the event that Spain is the registration Member State, a businessperson or professional that provides electronic services under the special regime in another Member State will have formal obligations similar to those established in the non-EU scheme, that is they will be required to: a) declare the start, modification or end of the operations covered by the special regime; b) present a VAT self-assessment online each quarter, regardless of whether electronic services have been supplied or not; c) pay the corresponding tax amount for each declaration, including reference to the specific declaration to which it corresponds; and d) keep a record of the transactions covered by the special regime.

Therefore, a businessperson or professional making Spain their registration Member State will have to present – exclusively in Spain – the self-assessments for payment, where applicable, of the tax amount corresponding to all the transactions covered by this special regime made in all Member States of consumption.

Finally, LIVA art. 163 tervicies establishes that regarding the **right to deductions for amounts incurred**, businesspeople or professionals using this special regime may not deduct anything from their self-assessment for amounts incurred in the acquisition or import of goods and services used in the provision of the electronic services to which the special regime is applied.

However, businesspeople or professionals that use this special regime, and make transactions covered by this special regime in the Member State of consumption together with other separate transactions that require them to register and present self-assessments in said Member State, may deduct amounts incurred in the acquisition or import of goods and services seen to be transacted in the Member State of consumption and used towards the provision of the electronic services to which the special regime is applied through the corresponding VAT self-assessments, which must be presented in the Member State.

Without prejudice to the preceding statement, businesspeople or professionals using this special regime will have the **right to a refund** of the VAT amounts incurred in the acquisition or import of goods and services used in the provision of the electronic services to which the regime is applied, which must be seen to have been incurred in the Member State of consumption, in compliance with the procedure put forward in the regulations of the Member State of consumption. Specifically, businesspeople or professionals established in the TAI are to apply for the refund of the amounts incurred – with the exception of those in the TAI – through the procedure put forward in LIVA art. 117 bis.

Application of the special regime

In the event that Spain is the registration Member State, the amounts incurred in the acquisition or import of goods and services seen to have been incurred in the TAI and used towards the provision of electronic services may be deducted through the corresponding self-assessments in compliance with the general VAT regime, regardless of whether the services referred to are applicable within the special EU scheme or not.

Meanwhile, if Spain is the Member State of consumption, businesspeople or professionals established in the EU who are using this special regime will have the right to a refund of VAT amounts incurred in the acquisition or import of goods and services, which must be seen to have been incurred in the TAI, provided said goods and services are used towards the provision of the electronic services referred to within this special regime. The procedure for the exercising of this right is set out in LIVA art. 119.

Lastly, LIVA art. 163 quatervicies gives a reminder that the special EU scheme is not applicable for electronic services supplied in the TAI by businesspeople or professionals who have their place of business or a permanent establishment in the TAI. These service provisions are subject to the general VAT regime.

5.3. Reporting obligations and other formal obligations

RIVA art. 61 quaterdecies contains regulations on the **reporting obligations** for taxpayers using these special regimes. It establishes that taxpayers have a duty to submit a modification declaration to the registration Member State in the event of any change to the information they have provided it with, and that this must be submitted at the latest by the tenth day of the month following that in which the change occurred.

In cases where Spain is the registration Member State, as mentioned earlier, this declaration is regulated in LIVA arts. 163 noniesdecies and 163 duovicies, depending on which of the two special regime applies.

In this regard, it must should be noted that Order HAP/1751/2014, of 29 September, approved the form named **modelo 034** for the declaration of the start, modification or end of the operations covered by the VAT special regimes applicable to telecommunications, broadcasting and online services, as well as providing regulations governing different aspects related to this same form.

In this context, Council Regulation (EU) No 967/2012 art. 2, of 9 October, which modified the Implementing Regulation (EU) No 282/2011, with the goal of facilitating the application of these special regimes and enabling coverage of the services provided as of 1 January 2015, established that businesspeople or professionals not established were to be allowed to submit their registrations to the Member State they specified as their registration Member State as of 1 October 2014, in accordance with the new arts. 360 and 369 quater of Directive 2006/112/EC. Therefore, this form (modelo 034) was approved, enabling **registration of businesspeople or professionals on the spe-**

cial regimes as per the provisions of Directive 2006/112/EC, chapter 6, sections 2 and 3 of title XII, when Spain was specified as their registration Member State.

Form 'modelo 034'

This form is to be submitted online via the website of the State Tax Administration Agency by businesspeople or professionals who wish to use either of the special regimes. Specifically, modelo 034 – for the declaration of the start of, any modification to, or the end of, operations covered by the special regimes – must be submitted by: a) businesspeople or professionals not established in the EU who use or wish to use the special regime applicable to services supplied online and specify Spain as their registration Member State, or b) businesspeople or professionals established in the EU but not in the Member State of consumption who use or wish to use the special regime applicable to services supplied online, and who must specify or choose to specify Spain as their registration Member State.

Finally, RIVA art. 61 quinquiesdecies refers to other formal obligations in these special regimes. It establishes the duty to keep a **record of transactions covered by the special regimes** with sufficient detail for the tax administration of the Member State of consumption to be able to check the information submitted in the VAT declarations. The regulations give details on the information that must be included in this record.

Record of the transactions covered by the special regimes

Specifically, this record must contain the following information: a) the Member State of consumption where the service is supplied; b) the type of service supplied; c) the date of the service provision; d) the taxable base with specification of the currency used; e) any subsequent increase or reduction in the taxable base; f) the tax rate applied; g) the tax amount owed with specification of the currency used; h) the dates and the amounts of payments received; i) any advance payment received before provision of the service; j) the information contained in the invoice when invoices have been issued; k) the name of the client, whenever it is known; l) the information used to determine the client's place of establishment, domicile or habitual residence.

These regulations also establish the duty to preserve the aforementioned information in such a way that it can be made available online to both the Member State of consumption and the registration Member State, without delay, and for each of the services supplied. And finally, it establishes that the issuing of invoices, in cases where this is applicable, will conform to the regulations of the Member State of consumption.

6. VAT rates on services supplied online

6.1. Applying the super-reduced VAT rate

As mentioned previously, Council Directive 2002/38/EC, of 7 May 2002, opted to categorize e-commerce transactions made online – i.e. commercial transactions that do not involve any physical items – as the **provision of services** and not as the supply of material goods. However, deliveries of these products continue being qualified as a supply of goods when they include a physical format.

This measure, as discussed below, can be criticized, in our view, as it is not accompanied by any regulatory provision regarding **tax rates** to prevent the infringement of the principle of neutrality.

Different treatment for VAT

It is clear that the product acquired (whether a good or a service) is the same regardless of the format, so this is irrelevant to the consumer. Therefore, the solution adopted by the directive is to categorize e-commerce transactions carried out online as supplies of services, which only respects the principle of neutrality if, at the same time, the necessary regulation is adopted so that supplying a particular product will always be subject to the same VAT, regardless of whether it is carried out through delivery of the product in a digital or a physical format.

However, the European Commission, when faced with this argument, has responded since 2003 that the information provided online cannot be compared with material goods, as the former offers a number of additional benefits.

The problem of tax rates on e-commerce focuses on **books, magazines and newspapers**, and does not have an effect on other types of products that may be subject to online transmission, such as music, software, films, and so on. According to LIVA art. 91.2.1.2, a **super-reduced rate** (4%) applies to deliveries, EU intrastate purchases and imports of books, magazines and newspapers, provided they do not exclusively or primarily contain advertising. So, if we consider that the online delivery of a book, magazine or newspaper should be subject to VAT as a provision of services, it is questionable whether it can qualify for a super-reduced tax rate. If the answer is yes, this would respect the principle of neutrality, whereas if the answer is no, it would violate the principle of neutrality to the detriment of e-commerce.

Assuming that the applicable VAT rate is dependant on the nature of the good or service involved in the transaction, regardless of the means used to accomplish it, the supply of goods in digital format **should bear the same tax** that is applied on the sale of material goods that equate to the same object, which would leave traditional trade and e-commerce on an equal footing in terms of taxation.

However, as already noted, **this is not the position adopted by Directive 2002/38/EC**, which establishes that, although Member States can adopt one or two reduced rates for a finite list of goods and services, this would not be possible for services supplied online, which as a consequence would always have to be taxed at the standard tax rate.

The interpretation of the European Commission and the General Tax Directorate

The European Commission understands that, as already indicated, there is no evidence that digital information services of this nature are equivalent to traditional print products, and that even though the content may be similar, the additional functionalities frequently associated with electronic content (e.g. search engines, access to files or hypertext links) make such digital information services essentially a different product.

In Spain, the General Tax Directorate has come to the same conclusion as the European Commission. After various inquiries made by taxpayers, the Directorate stated that books, newspapers and magazines that are in a digital format and transmitted online should be taxed at the standard rate of VAT, regardless of whether similar or identical content is available in a paper format.

However, in more recent times a curious situation has occurred with regard to this interpretation by the General Tax Directorate. In December 2009, the Ministry of Culture announced that VAT on e-books would be reduced from 16% to 4%, based on the position of the General Tax Directorate in a reply to a query made on 4 December 2009. However, soon afterwards, through an answer to a query of 26 March 2010, the General Tax Directorate was forced to rectify this, adopting the traditional interpretation of the directive.

6.2. Taxation on e-books

As established in art. 2 of Law 10/2007, of 22 June, on Reading, Books and Libraries, the term ***book*** is defined as a "a work of a scientific, artistic, literary or any other nature, that constitutes a publication in one or more volumes and may appear in print or any other format through which it can be read. The definition of a book, for the purposes of this Law, includes **electronic books** and books that are published or distributed via the internet or any other media that may emerge in the future, as well as supplementary printed, visual, audiovisual or audio materials that are edited together with the book and form a part of it, as well as any other published work."

Moreover, one of the **definitions of the word *book***, according to the Dictionary of the Royal Academy of the Spanish Language, is as follows: "A work of a scientific, artistic, literary or any other nature, long enough to constitute a volume, which may be printed or be published in another format. *I'm going to write a book. The publisher will publish the atlas as an e-book.*"

Accordingly, both the Spanish Law on books and the Dictionary of the Royal Academy of the Spanish Language bear witness to the social reality, technological advances and the nature of books, establishing definitions that can be universally accepted. However, as discussed below, the regulations of the European Union have failed to reflect this reality in its legislation.

EU directives

Council Directive 2009/47/EC, of 5 May 2009, amending Directive 2006/112/EC, with regard to reduced VAT rates, establishes a provision that, in our view, clashes with the nature of the book and its commonly accepted definition in today's society. Indeed, the wording of Annex III of Directive 2006/112/EC approved the possibility of applying a reduced rate to the "supply, including on loan by libraries, of books (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising". Therefore, this definition of a book clearly includes any book in printed form or in any other format on which it can be read. However, the amendment introduced by Directive 2009/47/EC to Annex III of Directive 2006/112/EC is worded as follows: "supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising".

According to the response to the query of 7 December 2009, on VAT rates and other taxes on business profits, from the Directorate General for Taxation and Customs Union of the European Commission, referring to the VAT applicable to books, arising from Directive 2009/47/EC, "Member States are normally obliged to apply the standard VAT rate, which is at least 15%, to goods and services. However, they may opt to apply one or two reduced rates to some or all of the goods and services listed in Annex III of the VAT Directive.

Annex III constitutes an exception to the general system established by the VAT Directive, under which all supplies of goods and services should be taxed at the standard rate of VAT applicable in each Member States. According to the Court of Justice, any provisions that are exceptions to a regulation should be subject to a strict interpretation.

Under the new wording introduced for Directive 2009/47/EC, amending the VAT Directive, adopted on 5 May 2009, Member States may henceforth apply a reduced rate to supplies of books in any physical format. Furthermore, read in combination, art. 98, section 2, 2nd paragraph, and art. 56, section 1, letter k, of the VAT Directive, exclude electronic services from the items entitled to reduced VAT rates. More specifically, supplying text and information (see point 3 of annex II of the VAT Directive) via online means are electronic services for VAT purposes. This means that said services are not subject to a reduced VAT rate. Given that the European Council has not modified the text of the provisions relating to electronic services, their exclusion from the VAT rate still applies. This means the normal VAT rate should apply."

The position of the General Tax Directorate

As already noted, the General Tax Directorate, in its answer to the query made on 4 December 2009, said that "as a result of Directive 2009/47/EC and the tax regime indicated, books that are supplied in a physical format will be taxed at 4%, including those books that are supplied for reading on electronic and portable devices that allow electronic books to be stored and read as digital files. To this effect, said books may be supplied via CD-ROM, USB pen drives, or via direct downloads from hardware." This interpretation means that a reduced rate can be applied to all kinds of e-books, including those downloaded via the internet, as the last point refers to supply "directly downloaded from hardware".

However, the General Tax Directorate was forced to rectify this interpretation a few months later in response to the consultation of 26 March 2010, which states that "as a result of Directive 2009/47/EC and the tax regime indicated, books that are supplied in a physical format will be taxed at 4%, including those books that are supplied for reading on electronic and portable devices that allow electronic books to be stored and read as digital files. To this effect, said books may be supplied via CD-ROM, USB pen drives, or via

> any other physical device and then downloaded to hardware." The change in approach is reflected clearly in the last point, as it no longer refers to direct downloads from hardware, but rather from "any other physical device and then downloaded to hardware". In addition, the following clarification is added: "In this regard, it must be emphasized that e-books need to be incorporated into a physical medium for taxation to be applicable at 4%, since it is not possible, according to art. 98.2 of Directive 2006/112/EC, for electronic services to be taxed at reduced rates".
>
> Therefore, the e-book, or at least what is popularly known as such, i.e. texts downloaded directly from the internet to a computer (PC, mobile, e-reader, etc.) will be taxed at the general VAT rate and not at the super-reduced rate. In this regard, it should be noted that the General Tax Directorate has changed its position between the responses to inquiries from 4 December 2009 and 26 March 2010, which could have resulted in erroneous tax declarations, since the super-reduced VAT rate could be applied from the time when the first response was published. Given that this would be a reasonable interpretation of the guidelines, in the scope of information provided by the tax authorities to the taxpayer (the publication of the replies to queries over the internet), any verification to regularize the tax situation for these taxpayers could not lead to any tax penalties being imposed, in accordance with the provisions of art. 179.2.d of the General Tax Act 58/2003, of 17 December.

In our opinion, a broader interpretation of the guidelines could be adopted in the Spanish territory (which would have been imposed if the General Tax Directorate had not adjusted the approach it took to respond to the query of 4 December 2009), which should not cause any distortion in the European Union market, as from a legal point of view it is perfectly compatible with Spanish legislation on books, and would not violate European Union regulation on VAT, but rather would respect the **principle of neutrality** applicable on this matter.

In any case, regardless of the defensible interpretations of Spanish and European Union legislation pointed out above, the best thing would be for EU directives to be based on the social reality and technological progress in this field, and to use a **broader and more up-to-date definition of the book**, for the purposes of applying the reduced rate of VAT. This broad definition of the book should be established in similar terms as specified in Spanish Law, despite the accepted understanding of some transactions as the supply of goods and others as service provision.

In this respect, on 14 November 2018, Council Directive (EU) 2018/1713 of 6 November 2018 is published in the Official Journal of the EU, whereby the VAT Directive 2006/112/EC is amended to allow the Member States to apply reduced rates of VAT to publications on any physical means of support. In its judgment of 7 March 2017, the Court of Justice of the EU considered that the supply of digital publications on physical means of support and the supply of digital publications electronically amount to comparable situations.

The second subparagraph of Article 98.2 of the VAT Directive established that the reduced rates were not applicable to electronically supplied publications (books, newspapers and periodicals). The amendment of this article allows the Member States to apply reduced rates for electronically supplied publications, except for those consisting entirely or predominantly of music or video content. In addition, a new subsection is added to Article 99 of the VAT Directive whereby, as of 1 January 2017, the Member States that apply a reduced rate

of less than 5% (minimum established in section 1) to the supply of publications on physical means of support may apply the same rate to electronically supplied publications.

7. Taxation on electronic payments

7.1. Stamp duty on electronic documents

The problems regarding stamp duty levied on digital formats take a totally different form to those seen in taxation on e-procurement. If in the latter case there is a need to maintain and apply current concepts and categories to e-commerce, as far as possible, then the pressing matter in the taxation of electronic payments is the need to **remove an old and anachronistic tax**, namely, stamp duty. Stamp duty does not tax a real manifestation of economic capacity, and the only thing it succeeds in doing is to disrupt legal and commercial traffic, although it does generate high revenues.

Recommended reading

A. M. Delgado García; R. Oliver Cuello (2010). "Fiscalidad en Internet". *Principios de Derecho de la Sociedad de la Información*. Pamplona: Aranzadi.

Stamp duty is the third of the tax types relating to transfer taxes and document taxes. The current stamp duty (a tax that is basically derived from the old stamp duty, which was merged in 1964 with the tax on property rights) includes three types of tax: on notarial documents, on commercial documents and on administrative documents.

Criticisms of stamp duty

Criticisms of this tax are unrelated to the physical device used by the document (electronic or paper) and, therefore, have little to do with the internet's growing commercial significance. However, the emergence of the internet as a new form of communication has acted as a catalyst for the many criticisms levelled at this antiquated form of tax.

Art. 33.1 of the Law on Stamp Duty and Transfer Taxes deals with the **taxation of commercial documents**, which proclaims that "bills of exchange, documents that serve as negotiable instruments, or similar, are subject to this tax [...]". Therefore, it is essential to understand the concept of a negotiable instrument, which is when a document acts as a credit, through a payment order that can be enforced in another place and on a different date to the date of issue, and in favour of the rightful holder of the document.

Thus, it can be argued that the **taxable event** of this type of stamp duty consists of issuing commercial documents incorporating abstract rights afforded to the bearer of the document.

In this regard, we must also consider the concept of the ***document***. Art. 76.3, at the end of the Tax Regulation, approved by Royal Decree 828/1995, of 29 May, recognises the legal validity of electronic documents for tax purposes by stating that "for the purposes of the preceding provisions, a document shall be understood as any written text, including computerized formats, on which something is proved, confirmed or stated".

This means there is no difficulty in including all different types of **documents**, including computerized documents.

Supreme Court jurisprudence

In this area, we should bear in mind the ruling made by the Supreme Court on 3 November 1997, which, among other things, establishes the legality of the regulatory provisions on the inclusion of electronic documents among commercial documents (art. 76.3 of the Tax Regulation).

In short, an **electronic document** can be considered an instrument through which concepts, ideas or wishes are expressed, using information technology and telecommunications as a medium.

7.2. Taxation of various electronic payments

The use of information technology in the payment process for commercial transactions (especially in habitual relations, where solvency is guaranteed) has shortcomings in the use of **bills of exchange**, as the bills are only valid if they are made by the Royal Mint of Spain according to the current official model. These circumstances have prompted companies to seek solutions as alternatives to bills of exchange, especially when no acceptance is required, with no intent towards execution.

Alternative solutions

In short, this means using documents that are more easily accessed via computer systems and, where possible, replacing them in electronic formats. Naturally, a replacement of the exchange effect will be seen when dealing with transactions with regular customers for routine supplies in terms of amount and conditions, for which it is not considered necessary, or correct, to make the customer a debtor, as execution of the exchange effect is not expected.

The solution may lie in replacing the bill of exchange with a **standardized invoice** that allows access to a bank discount, issued by the drawer, made by the drawer, and in a computerized format, in which there is no need to take into account the differences in amount for each transaction. This is supported by tax legislation, in cases involving credit entities, with a convenient cash payment system for stamp duty, as applied to commercial documents. It is clear that the invoice has significant differences from the bill of exchange, as it does not include exchange guarantees; but, in certain cases, the advantages of the invoice outweigh the shortcomings, in terms of defaulting on payment. The drawee would not become the debtor, as they cannot become the acceptor, and nor would anyone signing the invoice become a debtor.

Invoices

Invoices for direct debit payments are simply part of the process, showing the service offered at checkout, a statement of banking activity and commercial commission. The bank's intervention is limited to facilitating customer payment for supplies or services. Such electronic invoices are not subject to stamp duty.

Invoices to accredit the partial payment of bills of exchange and even full payment, when the bank does not have possession of the original bill of exchange and payment

was made in an office or agency other than that of the document bearer, are subject to stamp duty. The system offers the possibility of cancelling the bill of exchange and the payment through invoices made by the bank itself in accordance with the template approved by the Banking Control Council.

Finally, any invoices that serve as negotiable instruments in place of bills of exchange are also subject to stamp duty. The Banking Control Council recognizes their popularity and has approved a standard template, recommending that financial institutions should manage how these documents are assigned and how they are replaced by digital formats. As in the case of an invoice to prove payment of the bill of exchange, this system eliminates the need for the original customer invoice, on paper, to accredit payment of the debt.

Another alternative to the bill of exchange, is to replace it with a **promissory note**, also drawn up by the issuer.

Promissory notes

The promissory note is a promise to pay that constitutes a declaration of exchange from the issuer and, as with the bill of exchange, it has full executive effect, if its financial requirements are met. However, it should be remembered that, in the cases of both bills of exchange and promissory notes, is not possible (under current law) to replace the document with a computerized version, in accordance with the need for a principal, with signatures on the exchange statements, which constitute obligations, even for the drawer, who has the possibility of having a printed signature rather than a handwritten one, provided for under the Law on Bills of Exchange. Concern about deleting physical documentation conflicts with the traditional concept of incorporating the principal (on paper), which is a prevailing principle and an essential component of the Law on Negotiable Instruments and Cheques.

Apart from the issues surrounding the taxation of invoices and promissory notes, an important question to ask is whether **electronic fund transfers** are transactions that should be subject to stamp duty.

Electronic transfers of funds

Law 9/1999, of 12 April, on the legal regime for transfers between EU Member States, states in art. 1.2 that, for the purposes of this Law, a transfer between Member States of the EU will be understood as "a transaction carried out at the initiative of a natural person or an organization through an entity or branch [...] aimed at sending an amount of money to an account accessible by the beneficiary". Therefore, in relation to the legal nature of the transfer, we can say that it is a neutral transaction that falls under the scope of banking activity, under which incoming/outgoing payments are made (art. 175.8. of the Commercial Code), but for which there is no substantive legal regime.

In terms their taxation, it should be recalled that, according to art. 44.2 of the Regulation on Stamp Duty of 1981, there was the consideration that "documents that serve as negotiable instruments include, among others, the following: [...] f) transfers between current accounts not in the name of banks or credit entities".

It must be concluded that section f of art. 44.2 of the 1981 Regulation referred to non-banking transactions, but also conversely affected entities of this nature. According to this section, a tax is to be levied on transfers when they occur between current accounts owned by companies other than banks or credit entities. Currently however, it is notable that these documents are not included in the existing Regulation on Stamp Duty, which means the situation included in the previous Regulation has been moved to the generic section c in art. 76.3 of the current Regulation. It does not include any exceptions regarding taxation on transfers carried out electronically.

Finally, in terms of **credit cards**, it should be recalled that, according to art. 44.2 of the Regulation on Stamp Duty of 1981, there was the consideration that "documents that serve as negotiable instruments include, among others, the following: [...] g) Release orders or credit orders for amounts to be paid from one account to another within a deadline, when presentation of cash is involved at the start or execution, except nominative cheques from credit

institutions against their branches or offices. Simple or documentary payment orders, including those resulting from the use of credit cards, are not subject to this tax when they are completed through accounts, without a cash transfer."

Credit cards

With regard to the issue of whether credit card transactions are subject to tax or not, if they transferring funds or paying a money order, the resolution of the Regional Financial Administrative Court of Catalonia of 25 January 1995 should be kept in mind. The resolution states that these transactions are not subject to tax, with no need for inspection activities to be carried out, on the grounds that "the card is not intended to replace money, or to serve as a negotiable instrument; its function is merely to identify the user and allow them to access the services that correspond to the card, which allow the cardholder to obtain money from a current account or credit account up to the limit granted, from any cash dispenser that allows it".

In summary, with regards to the taxation of commercial documents, it is important to stress that, today, given the widespread use of computing and telecommunications, the old system of collecting tax through stamp duty is **anachronistic**. With a legal solution is already provided, it is somewhat strange that there is resistance to removing stamp duty from bills of exchange, without the theoretical advantages of collecting tax revenue having any other effect than diminishing the use of the document. Accordingly, stamp duty does not only represent the addition of another tax to the production process, but also involves discrimination in relation to other usable forms of payment such as bank transfers, cheques and credit cards.

The most appropriate measure would thus be to **remove this tax** from the tax system, although given its status generating tax revenue for autonomous communities in Spain, the potential effects on regional financing should be considered.

8. Tax on certain digital services

As previously mentioned, **current international tax regulations** are primarily intended to tax taxable events based on physical presence. These tax rules have not been developed to tax trade operations and businesses in the digital economy, based primarily on intangible assets, data and knowledge. Therefore, it is difficult to apply this current regulation to companies that rather than providing digital services in a given country without being physically established in it, the service is provided online. Likewise, important problems are generated to prevent the relocation of intangible assets to territories with little or no taxation. And, on the other hand, current international tax regulations have difficulties in recognizing the role that users play in generating value for companies whose business model is based on data provision or content generation.

As long as the current international tax regulations are not amended, all this means that we have to do to a tremendous amount of **interpretative work**, as we have previously seen: we must apply rules to present situations that were not originally designed to contemplate electronic trade operations or some specific digital services.

As has also been said, this situation causes a **decrease in tax collection**, which concerns not only the individual States, but also international and supranational organizations, especially the European Union.

Therefore, for some years international tax regulations have been subject to a **review process**. Developed in the context of the OECD and the G20, the BEPS project (Base Erosion and Profit Shifting) stands out, and especially its Action 1 report on the fiscal challenges of the digital economy, of 5 October 2015, as well as the Interim Report on the tax challenges arising from digitization, of 16 March 2018. Along the same lines, in the EU the Communication from the European Commission entitled *A Fair and Effective Tax System in the European Union for the Digital Single Market*, adopted on 21 September 2017, and the package of proposals for Directives and Recommendation relating to the fair and effective taxation standard for the digital economy, presented on March 21, 2018 (the Digitax package") also stand out.

Among these latest EU measures there is a need to highlight the **Proposal for a Directive** on the common system of a digital services tax on revenues resulting from the provision of certain digital services[5]. One of such objectives is to address the inadequacy of the current corporate tax rules for taxing the profits of the digital economy since these fail to recognize the input obtained by a business from users, which in fact constitutes the creation of value for com-

(5) COM(2018) 147 final

panies in the countries where they carry out a digital activity. The proposal of the European Commission involves the indirect taxation of the revenues stemming from the provision of certain digital services.

Along these lines, at the beginning of 2019 the **Draft Law on the tax on certain digital services** has been approved by the Spanish Government, which is currently in the parliamentary procedure[6]. The regulation of this new tax is adapted to the proposal for an EU Directive. Therefore, this tax is designed as a transitional measure until the aforementioned Directive is definitively approved.

(6)BOCG 40-1, of 25 January 2019

The **purpose** of this tax is the provision of certain digital services, specifically, those digital services in respect of which there is a user participation that creates value for the company that provides the services and through which the company monetises those user inputs.

Regarding the **nature** of the tax, given that it focuses on the services provided without taking into account the circumstances of the service provider, including its economic capacity, the tax is not characterized as an income tax or property tax and, therefore, it does not fall in the scope of agreements to avoid international double taxation. It is therefore set up as an indirect tax, which is compatible with VAT.

In relation to the **taxable event**, it consists in taxing the revenues derived from the provision of any of the following services:

- services consisting in the placing on a digital interface of advertising targeted at users of that interface ("online advertising services");
- services consisting in the making available of multi-sided digital interfaces to users, which allow them to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users ("intermediation services"); and
- the transmission, including the sale or transfer, of the data collected about the users that have been generated by activities developed by the latter in the digital interfaces ("data transmission services").

The main **cases excluded from the scope of the tax** are the following:

- the provision of underlying supplies of goods or services that result from the interaction between users in the online intermediation service framework; and
- the sale of goods or services which are contracted online via the website of the supplier of such goods or services (retail e-commerce activities) where the supplier does not act as an intermediary because the value creation

for the retailer lies with the goods or services provided and the digital interface is only used as a means of communication.

On the other hand, **taxpayers** of this tax are the legal persons and entities referred to in LGT art. 35.4, whether established in Spain, in another EU Member State or in any other non-EU country that, at the start of the period of settlement, are above the two following revenue-related thresholds:

- that the total amount of their revenues reported by the entity for the latest complete financial year exceeds EUR 750,000,000; and
- that the total amount of their income derived from the provision of digital services liable to the tax, once the rules laid down for the determination of the tax base have been applied (in order to determine the part of said revenue that corresponds to users located in Spanish territory) corresponding to the previous natural year exceeds EUR 3,000,000.

Regarding **the scope of the tax**, the provision of digital services that may be linked in some way with the place of taxation will fall within its scope, which will be assumed to occur when there are users of such services located in that territory, which actually constitutes the annex that justifies the existence of the tax. For the purpose of deeming the users to be located in the place of taxation, a series of specific rules are established for each of the digital services, which are based on the place where the devices of those users have been used. In turn, these users are located, in general, in the territory where the Internet protocol (IP) address indicates, unless the user relies on any other means of geolocation to determine the place of taxation.

With respect to the **tax base** of the tax, it will include the total amount of revenues –excluding, where appropriate, VAT or other equivalent taxes – obtained by the taxpayer for each one of the provisions of digital services liable to the tax in the place of taxation.

As regards the **tax rate**, the tax will be required at the rate of 3%. The accrual of the tax will be produced for each taxed provision of services and the settlement period will be quarterly.

Also, a series of **formal obligations** are foreseen for taxpayers:

- submit declarations regarding the commencement, modification and cessation of activities that determine their tax liability;
- request the tax identification number from the Administration and notify and accredit it in the cases provided;

- request from the Administration its registration in the entity registry created for the purposes of this tax;
- keep the records as laid down by regulation;
- submit information periodically, or at the request of the Administration, regarding its digital services;
- appoint a representative for the purposes of complying with the obligations imposed in case of taxpayers not established in the EU;
- keep, throughout the period of limitation, the attesting documents and documents evidencing operations liable to the tax, particularly those means of geolocalisation that identify the place of provision of the taxed digital service;
- translate into Spanish or any other official language, when required by the Tax Administration, the invoices, contracts or attesting documents corresponding to the provision of digital services that are deemed to have been made in the place of taxation; and
- establish the systems, mechanisms or agreements that allow determining the location of users’ devices in the place of taxation.

Finally, in relation to this last formal obligation, failure to establish the systems, mechanisms or agreements that determine the location of the users' devices in the place of taxation is classified as a serious **tax offence**. The penalty will be a fine corresponding to 0.5% of the total amount of the turnover of the last complete financial year, with a minimum penalty of EUR 15,000 and a maximum penalty of EUR 400,000 for each financial year in which the aforementioned breach occurred.

Activities

Case studies

1. Company X, Ltd., with registered offices in Barcelona, is in business selling computer products. In the current financial year, the aforementioned company has carried out a number of commercial transactions over the internet, and there are some doubts as to how they are to be taxed.

More specifically, the company has carried out the following transactions with its supplier, a computer company based in France, through the French company's website: the purchase of computer equipment (laptops, printers, etc.) that were transported by conventional methods; the purchase of a database program, called Infodata 2.0, in a digital format and transferred over the internet, for use by the Spanish company; the purchase of a program for business management, tailor-made for the Spanish company and also transferred online; and finally, the purchase of the latest version of the database, Infodata 3.0, to be marketed in Spain, and also downloaded from the internet.

In addition, Company X, Ltd. purchased a standard program over the internet from a company called Software Plus, which has a website with the following domain name: www.softwareplus.es. The website is written in Spanish, uses an internet service provider based in Spain, where it is hosted, and the website states that Software Plus is a Spanish company. However, there are no known premises for this company in Spain, and furthermore, the products sold through the website come from an American company called Software Plus Inc.

In relation to direct taxation, the following questions arise:

a) Should the income earned from transactions involving computer equipment (laptops, printers, etc.) be considered as 'income obtained in Spain' and therefore subject to taxation in Spain and subject to a withholding?

b) And with regards to the 'Infodata 2.0' programs that were downloaded directly over the internet?

c) Does the fact that the business management program was tailor-made for the Spanish company have an impact on direct taxation? How would this transaction be taxed?

d) What is the tax regime for the transaction involving the 'Infodata 3.0' program, to be marketed in Spain?

e) In terms of the commercial transaction carried out with the company 'Software Plus', can it be said that the income received by said company is from a permanent establishment? How is this income taxed?

f) If the company 'Software Plus' owned a server in Spain that was used to carry out sales, would this make a difference? How would the income be taxed in this circumstance?

2. In the same situation as the one outlined above, the following questions refer to indirect tax:

a) What is the VAT rate for the purchases of computer equipment by Company X, Ltd. from the French company? Does the involvement of e-procurement have any effect on the aforementioned tax?

b) What VAT should be paid on the purchase of the program Infodata 2.0? What if it was bought by a private individual and the amount of the transaction was higher than 10,000 euros?

c) What VAT should be applied on the purchase of the business management program? And what about the purchase of the program Infodata 3.0?

d) Is the purchase of the program from Software Plus subject to VAT? And if the program was on a DVD and shipped via conventional means?

e)) How would the purchase of a computer program over the internet from Software Plus be taxed if it were bought by a Spanish private individual?

Self-evaluation

1. In terms of direct taxation, the sale of material goods over the internet...

a) implies that there is no need to apply regulations for corporation tax, personal income tax and non-resident income tax, which tax profits from sales or services provided.
b) does not pose any serious problems concerning the objective categorization of e-procurement.
c) poses many problems concerning the objective categorization of e-procurement, requiring great efforts to classify the income.

2. The tax consequences of different categories of income, depending on the whether they involve licensing or a purchase or sale...

a) are significant when e-commerce is carried out between taxpayers resident in different countries through a permanent establishment.
b) are significant when e-commerce is carried out between taxpayers resident in the same country.
c) are significant when e-commerce is carried out between taxpayers resident in different countries without going through a permanent establishment.

3. The consensus reached by international organizations, in particular the OECD, states what as a general principal?

a) The primacy of the source country over the country of residence.
b) The primacy of the country where the taxpayer has nationality.
c) The primacy of the country of residence over the source country.

4. According to the interpretation given in the commentary to the OECD model DTA...

a) a website hosted on a server does not constitute a permanent establishment, while computer equipment could constitute a permanent establishment in the buyer's country, if owned by the selling company.
b) a website hosted on a server does constitute a permanent establishment, while computer equipment may never constitute a permanent establishment in the buyer's country, even if it were owned by the selling company.
c) a website hosted on a server does not constitute a permanent establishment, and neither does computer equipment located in the buyer's country, even if it is owned by the selling company.

5. Directive 2002/38/EC states that, in relation to VAT, services from countries outside the EU supplied online to persons established in EU territory, or from within EU territory to recipients established in third countries...

a) should pay tax at the place of residence of the service provider.
b) should pay tax at the place of residence of the recipient of the service.
c) should be exempt from taxation.

6. For the purposes of VAT on services supplied electronically for amounts higher than 10,000 euros, if the recipient is a taxpayer established in another Member State of the EU and the supplier resides in the TAI, then...

a) the transaction will be located at the residence of the recipient of the service.
b) the transaction will be located at the residence of the person providing the service.
c) the transaction will not be subject to tax.

7. For the purposes of VAT on services supplied electronically for amounts higher than 10,000 euros, if the recipient is a taxpayer established in another Member State of the EU and the service provider resides in the TAI, then...

a) the transaction will be located at the residence of the recipient of the service.
b) the transaction will be located at the residence of the person providing the service.
c) the transaction will not be subject to tax.

8. In the special regime for VAT on e-commerce, if the service provider consults the VIES database and the Tax ID No. provided by the client for VAT purposes is on the database, and if the service provider does not have any information that calls the taxpaying status of the client into question, then...

a) the service provider is not responsible for any debt that might occur.
b) the recipient of the service is not responsible for any debt that might occur.
c) Neither the service provider nor the recipient of the service are free of responsibility for any debt that might occur.

9. In accordance with the position of the European Commission and the General Tax Directorate (before Council Directive Directive 2018/1713 of 6 November 2018), supplying texts and information online...

a) constitutes the supply of goods, for VAT purposes, and can be subject to a reduced VAT rate.
b) constitutes an online service, for VAT purposes, and can be subject to a reduced VAT rate.
c) constitutes an online service, for VAT purposes, and cannot be subject to a reduced VAT rate.

10. Invoices that serve as a negotiable instrument in place of bills of exchange...

a) are subject to stamp duty.
b) are not subject to stamp duty.
c) are subject to and exempt from stamp duty.

Answer key

Case studies

1. a) This situation does not involve income obtained in Spain. In a situation involving an international purchase, article 7 of the DTA between Spain and France applies, which means that business profits will be declared in the country of residence of the taxpayer, unless there is a permanent establishment in the source country, which is not the case here. There is no obligation for the Spanish company to withhold tax, since that obligation exists only in relation to income taxable in Spain (LIRNR art. 31.1).

1. b) This situation does not involve income obtained in Spain either. The fact that the product has a digital format makes no difference: there are no royalties, and it is simply a purchase. Given that this is a situation involving an international purchase, art. 7 of the DTA between Spain and France applies, which means that business profits will be declared in the country of residence of the taxpayer, unless there is a permanent establishment in the source country, which is not the case here. There is no obligation for the Spanish company to withhold tax, since that obligation exists only in relation to income taxable in Spain (LIRNR art. 31.1).

1. c) Whether or not the program is tailor-made or standardized has no impact: there is no transfer of copyright and we are not dealing with royalties, but rather a purchase. Therefore, this situation does not involve income obtained in Spain either. In a situation involving an international purchase, article 7 of the DTA between Spain and France applies, which means that business profits will be declared in the country of residence of the taxpayer, unless there is a permanent establishment in the source country, which is not the case here. There is no obligation for the Spanish company to withhold tax, since that obligation exists only in relation to income taxable in Spain (LIRNR art. 31.1).

1. d) In this case we are dealing with income subject to non-resident income tax, earned by a non-resident without a permanent establishment. Given that this scenario involves the transfer of intellectual property rights for commercial use, art. 12 of the DTA between Spain and France (on royalties) applies, meaning that this type of income is subject to shared taxation; it is taxed in the country of residence (France), but also partly in the source country (Spain). According to the DTA between Spain and France, the tax rate is 5%. Therefore, the Spanish company (paying the royalties) is required to withhold tax, since we are dealing with income taxable in Spain (LIRNR art. 31.1). In this case, the amount withheld coincides with the amount of non-resident income tax (LIRNR art. 31.2). However, the French company has the right to declare and pay non-resident income tax. In such a case, if this is established, there is no obligation to withhold tax (LIRNR art. 31.4.c).

1. e) The DTA between Spain and the USA (art. 5) does not include any specific mentions of a permanent establishment in terms of e-commerce. It refers instead to the concept of a 'fixed place of business'. In this case, the company does not have any premises on Spanish territory. This means that the criteria of location shown by the website and the domain name can be ruled out. Finally, the commentary to art. 5 of the OECD model DTA should be studied as interpretative criteria. According to the OECD's criteria, the hosting contract does not indicate a permanent establishment. This means that if there is no permanent establishment, the income was not earned in Spain. This is an international purchase, and art. 7 of the DTA between Spain and the USA applies, which means the business profits will be declared in the country of residence of the taxpayer, unless there is a permanent establishment in the source country, which is not the case here. There is no obligation for the Spanish company to withhold tax, since that obligation exists only in relation to income taxable in Spain (LIRNR art. 31.1).

1. f) This deals with an issue in terms of the legal impact of the commentary on the OECD model DTA. Spanish courts may depart from the interpretative criteria of the OECD, expressed in the comments on the model convention. What really binds the Spanish courts is the applicable legislation, which in this case is the DTA between Spain and the USA. However, if the Spanish Courts follow the criteria of the OECD expressed in the comments on art. 5 of the model DTA, taxation would be as follows: in the case of owning a server, it is understood that the selling company has a permanent establishment in the buyer's country. Under these circumstances, according to art. 7 of the DTA between Spain and the USA, the income is understood to have been obtained in the source country (Spain). The American permanent establishment has to pay non-resident income tax, which is practically the same as Spanish corporation tax, with a few exceptions, having to be declared in the same forms and by the same deadline as a local company. Finally, the Spanish company does not have to withhold tax, as there is no income subject to withholdings, according to Spanish Corporate Tax Regulation, specifically in accordance with its arts. 56 and ss.

2. a) The purchase of computer equipment (laptops, printers, etc.) qualifies as an EU intrastate purchase of goods (LIVA art. 13). The transaction is located in Spain (LIVA art. 71). This means the tax automatically applies. Therefore, the Spanish tax rate will be applied, and the tax will be paid to the Spanish Treasury. The fact that these products were purchased online has no impact on the tax regime applied. Since the product is not in a digital format, there is no doubt as to the classification of the transaction, which is a supply of goods or services.

2. b) The taxation of the online purchase of the program Infodata 2.0 is as follows: the recipient is a taxpayer resident in the TAI, the supplier is not a resident in the TAI, the location is the registered address of the recipient and in terms of taxation, the VAT rate will be that of the recipient country (LIVA art. 69.1.1). The purchasing party becomes the taxpayer (LIVA art. 84.1.2) and the tax is applied automatically. This means that the Spanish tax rate will be applied, and paid to the Spanish Treasury.

If the buyer is a private individual and the amount of the transaction is higher than 10,000 euros, taxation will be as follows: the recipient is a private individual resident in the TAI, the supplier is a resident in another EU Member State, the location is the registered address of the recipient and in terms of taxation, the VAT of the recipient is applied (LIVA art. 70.1.4). This means that the Spanish tax rate will be applied, and the transaction may be covered by the EU special regime.

2. c) The taxation of the purchase of the business management program is as follows: the recipient is a taxpayer resident in the TAI, the supplier is not a resident in the TAI, the location is the registered address of the recipient and in terms of taxation, the recipient will pay VAT (LIVA art. 69.1.1). The purchasing party becomes the taxpayer (LIVA art. 84.1.2) and the tax is applied automatically. This means that the Spanish tax rate will be applied, and paid to the Spanish Treasury.

Following on, the taxation of the purchase of the program Infodata 3.0 is as follows: it is a provision of services, since it involves the transfer of copyright (LIVA art. 11.2.4), and the location is the registered address of the recipient (LIVA art. 69.1.1). The purchasing party becomes the taxpayer (LIVA art. 84.1.2) and the tax is applied automatically. This means that the Spanish tax rate will be applied, and paid to the Spanish Treasury.

2. d) The taxation for the purchase of the program online is as follows: the recipient is a taxpayer resident in the TAI, the supplier is not a resident in the TAI, the location is the registered address of the recipient and in terms of taxation, the recipient will pay VAT (LIVA art. 69.1.1). The purchasing party becomes the taxpayer (LIVA art. 84.1.2) and the tax is applied automatically. This means that the Spanish tax rate will be applied, and paid to the Spanish Treasury.

As for the taxation for the purchase of the program on CD-ROM, it should be as follows: if supplied on a physical format, it will go through customs and Spanish import VAT will be paid (LIVA art. 18). The purchasing party does not become the taxpayer here, as in LIVA art. 84.1.2, because this is not intended for imports, in which the importer is the taxpayer, whether they are a natural person or an organization (LIVA art. 86

2. e) If the purchase was made by a Spanish individual, taxation would be as follows: the recipient is a private individual resident in the TAI, the provider is not a resident in the EU, the location is the registered address of the recipient and in terms of taxation, the recipient will pay VAT (LIVA art. 70.1.4). The non-EU special regime applies. The American company has to apply the Spanish tax rate, and it should be paid to the Treasury of its member state of identification.

Self-evaluation

1. b

2. c

3. c

4. a

5. b

6. a

7. a

8. a

9. c

10. a