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FROM ARTICLE 12B OF THE UN-MC TO ARTICLE 7 OF THE REGULATION 282/2011: BETWEEN AUTOMATON AND MINIMAL HUMAN INVOLVEMENT/INTERVENTION

Abstract. The current article draws a comparison between one of the necessary criteria both for the electronically-supplied services (ESS) under Article 7 of the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down the implementing measures for the Directive 2006/112/EC on the common system of value added tax (Regulation 282/2011) as well as the automated digital services (ADS) under Article 12B of the United Nations Model Taxation Convention between Developed and Developing Countries (UN-MC). This is “minimal human involvement/intervention.” The aim is to outline the similarities and the differences between the approaches for their design, as well as the possible challenges therewith.

Keywords: electronically-supplied services, automated digital services, minimal human involvement, minimal human intervention

OD ART. 12B UN-MC DO ART. 7 ROZPORZĄDZENIA 282/2011 – MIĘDZY AUTOMATEM A MINIMALNYM ZAANGAŻOWANIEM/INTERWENCJĄ CZŁOWIEKA

Streszczenie. Niniejszy artykuł przedstawia porównanie jednego z niezbędnych kryteriów zarówno dla usług świadczonych drogą elektroniczną (ESS) zgodnie z art. 7 rozporządzenia wykonawczego Rady (UE) nr 282/2011 z dnia 15 marca 2011 r. ustanawiającego środki wykonawcze do dyrektywy 2006/112/WE w sprawie wspólnego systemu podatku od wartości dodanej (rozporządzenie 282/2011), jak i dla zautomatyzowanych usług cyfrowych (ADS) zgodnie z art. 12B Modelowej Konwencji Narodów Zjednoczonych w sprawie opodatkowania krajów rozwiniętych i rozwijających się (UN-MC). Jest to „minimalne zaangażowanie/interwencja człowieka”. Celem artykułu jest nakreślenie podobieństw i różnic w podejściach do jego projektowania, a także możliwych wyzwań z tym związanych.

Słowa kluczowe: usługi świadczone drogą elektroniczną, zautomatyzowane usługi cyfrowe, minimalne zaangażowanie człowieka, minimalna interwencja człowieka

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1. ARTICLE 7 OF THE REGULATION 282/2011

The aim of this part of the paper is to briefly examine the history of the ESS in the VAT system. Special focus on the requirement for “minimal human intervention” will be made, as well as on its interpretation via soft law, case law, and the professional statements of the competent bodies. Also, more in-depth analysis of some of the examples because of its disputable nature that are (not) ESS will be carried out. The idea is to estimate whether Article 7 of the Regulation 282/2011 is unambiguously designed (both the general definition and the relevant examples) and gives a complete picture of this type of services.¹

Annex L of the Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily the Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically-supplied services² may be estimated as an initial introduction for the ESS into the EU VAT system. It is in relation to Article 9(2)(e) of the Directive 77/388/EEC³ by addition of this hypothesis. There is no explicit definition

¹ See the comparison between the relevant to the study analysis of Article 7 of the Regulation 282/2011, Article 12B of the UN-MC, and Article 3(5) of the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence as an appendix at the end of this paper.

² ANNEX L

ILLUSTRATIVE LIST OF ELECTRONICALLY-SUPPLIED SERVICES REFERRED TO IN ARTICLE 9(2)(e)

1. Website supply, web-hosting, distance maintenance of programmes and equipment.
2. Supply of software and updating thereof.
3. Supply of images, text, and information, and making databases available.
4. Supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific, and entertainment broadcasts and events.
5. Supply of distance teaching.

³ The place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier shall be the place where the customer has established his/her business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he/she has his/her permanent address or usually resides:

- transfers and assignments of copyrights, patents, licences, trade marks, and similar rights,
- advertising services,
- services of consultants, engineers, consultancy bureaux, lawyers, accountants, and other similar services, as well as data processing and the supplying of information,
- obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right referred to in this point (e),
- banking, financial, and insurance transactions including reinsurance, with the exception of the hire of safes,
- the supply of staff,
- the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e).

and a non-exhaustive list of typical examples. Article 11(1) of the Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down the implementing measures for the Directive 77/388/EEC on the common system of value added tax (Regulation 1777/2005)⁴ introduces the term ‘ESS’. It is noteworthy that even then one of its main characteristics was “minimal human intervention.” Article 11(2)⁵ of this regulation contains a list of examples for ESS.

The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) includes these services in Article 56, l. “k” as a separate type with examples in Annex II⁶ thereto. Compared with the previous directive, there is no definition, too.

Article 7(1) of the Regulation 282/2011, similarly to Article 11 of the Regulation 1777/2005, outlines the legal features of the ESS for the purposes of the VAT Directive. The two provisions are identical. Article 7(2) of the Regulation 282/2011 corresponds to Article 11(2) of the Regulation 1777/2005. The novelty in Article 7 of the Regulation 282/2011 is paragraph 3, which introduces examples that are out of the ESS’ scope. It can be summarised that no

⁴ ‘Electronically-supplied services’ as referred to in the 12th indent of Article 9(2)(e) of the Directive 77/388/EEC and in Annex L to the Directive 77/388/EEC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and in the absence of information technology is impossible to ensure.

⁵ The following services, in particular, shall, where delivered over the Internet or an electronic network, be covered by paragraph 1:

- (a) the supply of digitised products generally, including software and changes to or upgrades of software;
- (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;
- (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;
- (d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;
- (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather, or travel reports; playgrounds; website hosting; access to online debates, etc.);
- (f) the services listed in Annex I.

⁶ INDICATIVE LIST OF THE ELECTRONICALLY-SUPPLIED SERVICES REFERRED TO IN POINT (K) OF ARTICLE 56(1)

- 1. Website supply, web-hosting, distance maintenance of programmes and equipment.
- 2. Supply of software and updating thereof.
- 3. Supply of images, text, and information, and making available of databases.
- 4. Supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific, and entertainment broadcasts and events.
- 5. Supply of distance teaching.

significant textual change of the conceptual apparatus regarding these services has been noticed over the years. It is debatable whether this is an argument for the constant perception of their scope.

For the purposes of the current article, one of the ESS' criteria which is invariably present in the definition – namely “minimal human intervention” – will be analysed in details.⁷ On the one hand, electronic services are usually associated with digitalisation and the lack of physical manifestations. On the other hand, the presence of people, according to the definition, is required without any additional guidelines.

The term in question contains the expression “minimal”, which can give rise to different interpretations. For example, are some quantitative thresholds required for the people (e.g. at least 2 and more)? Are certain time criteria to be met (e.g. the completion of the work within a certain minimum time frame)? Can universal criteria be derived or is it dependent on the nature of the activity (e.g. given the differences in the industries)? Are there possible exceptions to the “minimum” (again based on the nature of the activity) and are there certain maximum limits (i.e. is the minimum the only limit)?

These are some of the inquiries that may arise during an initial careful reading of Article 7(1) of the Regulation 282/2011. The lack of detailed guidance on this mandatory for the ESS prerequisite leads the possibility of different views. This may also reflect to divergent practice.

Regarding the other two elements – i.e. “human” and “intervention” – no serious challenges are evident. “Human” should be construed according to its traditional understanding, indicating the need for human intervention. The same common interpretation's approach applies to “intervention.”⁸ It can be concluded that the idea is interaction between people and the automated provision of the service.

In its Working papers, the VAT Committee pays more detailed attention to the “minimal human intervention.” The position on the direct connection between the term in question and the second criterion according to Article 7(1) of the Regulation 282/2011 has been expressed.⁹

Firstly, the VAT Committee outlines that “minimal human intervention” is relevant to the supplier.¹⁰ Such view is logically supported, given that this person performs the supplies. At the same time, such clarification is not superfluous,

⁷ For more details, see Merx (2017).

⁸ <https://dictionary.cambridge.org/dictionary/english/intervention>: “the act or fact of becoming involved intentionally in a difficult situation.”

⁹ The VAT Committee, WP No 843, taxud.c.1(2015)694775, p. 5: “the 2nd and 3rd elements of the definition are two sides of the same coin.”

¹⁰ The VAT Committee, WP No 882, taxud.c.1(2015)4459580, p. 5: “It is the activity of the supplier of the service that has to be assessed with a view to determine whether or not it involves human activity that exceeds the limit of minimal”; the VAT Committee, WP No 896, taxud.c.1(2016)922288, p. 3: “the involvement on the side of the supplier and not on the side of the customer”; the VAT Committee, WP No 1013, taxud.c.1(2021)2147591, p. 7: WP No 919, taxud.c.1(2017)1270284, p. 8: “When the services are provided with more than minimal human

since the recipient may also be qualified as a required party for the transaction. For example, without the VAT Committee's position, the understanding that at least two people should be available to fulfil the "minimal human intervention's" requirement for the supply may be shared.

Another essential aspect is the relationship between the supplier and the recipient.¹¹ This is directly related to the very nature of the service.¹² It is necessary to analyse to what extent a general approach to all recipients or a separate one to each individual is applied. In general, there will be "minimal human intervention" in the first case, while in the second one – no "minimal human intervention". The last hypothesis exceeds the notions of "minimal", since the rendering of the service takes into account the specific needs of the individual.

This approach provides guidance for its field of application. At the same time, it can hardly be universal for all such activities given their diversity. The same understanding is shared by the *Confédération Fiscale Européenne* (CFE).¹³ However, no further proposals for the differentiation of the activities according to certain criteria have been made.

The introduction of different thresholds seems fairer at first sight, but also more difficult for implementation. Challenges may arise in their delineation. It is also not entirely clear whether this will provide greater legal certainty taking into account the constant dynamics of this type of activities.¹⁴

intervention on the side of the supplier they should be seen as intermediation services excluded from the scope of the electronically-supplied services."

¹¹ The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, p. 6: "The decisive element for these games to be qualified or not as an electronically-supplied service is (...) the level of interaction between that dealer and the players influencing individual supplies of services."

¹² The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, pp. 6–7: "The requirement of minimal human intervention is referring to the activity deployed by the supplier to provide each individual service when such a service is required by the customer (...) Only in cases where the action of the player leads to a reaction by the supplier in relation to an individual supply, the level of that human intervention should be analysed in order to determine whether or not the service can qualify as an electronically-supplied service"; the VAT Committee, *WP No 896*, taxud.c.1(2016)922288, pp. 5–6: "We should look at what the supplier is doing when providing a particular service and whether there is a requirement of human involvement for that service to be supplied to his customer. If yes, then there is more than minimal human intervention involved in the supply of such a service. (...) The requirement of minimal human intervention should be seen as referring to the activity deployed by the supplier to provide each individual service when such a service is requested by the customer."

¹³ CFE, *Opinion Statement FC 9/2018 on the notion of "minimal human intervention" in the definition of "electronically-supplied services" for the purposes of Article 58 of the VAT Directive*, p. 3: "However, it cannot be ignored that this test may not necessarily be of universal application, and that it would not be reasonable to apply a one-size-fits-all approach."

¹⁴ See Beretta (2022), where an analysis of the tax treatment of virtual activities was made.

The VAT Committee specifies that the actions of third parties are irrelevant to the determination of “minimal human intervention.”¹⁵ This is consistent with the understanding that this criterion applies to the supplier. The CFE generally follows such view, but also pays attention to some specifics in certain types of activities.¹⁶ Outsourcing is indicated as such. The author of this article also shares this position. It is rational to apply the economic rather than the purely formal approach. An overly restrictive interpretation may reflect to abuse of law. In some scenarios, the use of subcontractors and other persons, different from the supplier, is a typical manifestation. Therefore, it is recommendable to rethink how much third parties should influence “minimal human intervention.”

Working Paper No. 919 follows the previous views of the VAT Committee, further developing them through examples. In the majority thereof, it is again evident that it is important to the “minimal human intervention” whether there is an individual approach from the supplier to the recipient’s requirements.¹⁷

Some of them can be defined as particularly relevant to the term in question. The author shares the position that the provision of non-standardised PDF-files via

¹⁵ The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, p. 4: “In the case of betting activities, they usually refer to a sport event that can be performed by humans or animals (football games, tennis, horse races, greyhound races...). However, the fact that these events imply the activity of humans cannot lead to the conclusion that the betting activity is not an electronically-supplied service.” The VAT Committee, *WP No 896*, taxud.c.1(2016)922288, p. 3: “Therefore the activity of a third party, to which services may in one way or the other relate (...) cannot be relevant for the assessment of the ‘minimal human intervention’ element of the supply of those services.”

¹⁶ CFE, *Opinion Statement FC 9/2018 on the notion of “minimal human intervention” in the definition of “electronically-supplied services” for the purposes of Article 58 of the VAT Directive*, p. 3: “To the extent that the outsourced component is labour-intensive and central to the supply of the service, then the fact that those activities are carried out by a ‘third party’ should not be relevant to the assessment of whether the service delivered to the customer is an electronically-supplied service or otherwise.”

¹⁷ The VAT Committee, *WP No 919*, pp. 4–7: “For these two packages the engagement on the side of the supplier should be seen as more than ‘minimal human intervention’ (i.e. services supplied via premium and professional packages should not be seen as electronically-supplied services). There is an additional human intervention on the side of the supplier in relation to each individual supply.”; “Where digital products are personalised (adapted to the identified needs of an individual client as a result of his/her request), more than minimal human intervention is involved in their supply. Further where the supplier sends each product individually via e-mail the supply involves more than just ‘minimal human intervention’.”; “The assessment of the supply depends on the existence or not for a customer of the possibility to interact with persons making the presentations during the seminar. Where the customer can ask questions and receives feedback online during the seminar, the intervention on the side of the supplier is more than just minimal. However, where the customer can only watch the seminar without the possibility to interact in any other way the scope of ‘minimal human intervention’ is not exceeded. In this second case the seminar takes place at a given time regardless of the online presence of any customer.”; “Every time where there is any individual human feedback provided by the supplier as a part of the concrete/particular supply, the scope of minimal human intervention is exceeded.”

e-mails cannot be defined as minimal. Here, a query could arise regarding this type of files. For example, do they fall into this hypothesis with another extension? By literal interpretation of the example, the answer should be negative, because no others are included, or the expression “and others” is not added.

It is also reasonable that the understanding regarding the support itself in the case of functional problems meets the requirements of “minimal human intervention.” However, could it not be entirely aimed at solving problems, but, for example, at updating and improving the system? Example 8 seems to answer this question affirmatively. According to the author, it is advisable to apply the same understanding. The reason is not as crucial as the intervention itself. If the opposite view is applied, i.e. that this goes beyond the notion of “minimal”, then a series of practical difficulties may arise. Sometimes, it will be difficult to determine by mixed activities when one is talking about solving a problem and when about simple improvement.

The scenario when the maintenance is aimed at completing this system is also not covered. However, this cannot be defined as an omission, because the provision of the services in question is terminated in this case. It can also be construed as solving a problem.

A common hypothesis is regarding distance teaching and educational supplies. Here, attention has been paid to the cases where questions can be asked during an online event. Then one cannot talk about minimal human intervention. Rewatching a seminar leads to the opposite hypothesis. Of interest are the cases where questions are posed after the expiration of these supplies.

Example 7 goes some way to answering this question. As evident thereof, this goes beyond the original idea of these services and requires more significant human intervention. The author also shares the understanding that this should not count towards the original supply. On the one hand, this is not explicitly covered by the programme, since there may be no questions asked at all. At the same time, it is possible that they are also a significant number and, therefore, only a part of them can be answered. A more limited field of application is assigned to the hypothesis that it is answered only by software with preset algorithms (e.g. only with “yes” or “no”). However, even in the latter case, if this is not expressly specified in advance and included in the supplies, it rather exceeds them.

As already mentioned, it is difficult to find a universal solution due to the specifics of the activities. This is evident, for example, in online gambling activities.¹⁸ Due to their nature, it is sometimes disputable whether they meet the requirements under Article 7(1) of the Regulation 282/2011. In this regard,

¹⁸ “This leads to an interesting question what would be the classification of these games for VAT purposes? If the online game fulfils the elements of gambling but exceeds the minimal human intervention, does it mean that game is exempted from VAT since it is not considered as electronically-supplied service?” (Ahonen 2023, 21).

special attention is paid to them by the VAT Committee.¹⁹ By similar factual circumstances, it is evident that there may be a significant difference in their tax treatment. Again, this depends on the “minimal human intervention”, respectively, whether they are ESS.

According to the author, the evaluation of the human factor will become increasingly difficult in the future. With the advent of artificial intelligence (AI), there will be a number of trials in relation to “minimal human intervention.” Sometimes, it will be challenging to estimate whether the responses will be standardised for everyone or whether they will vary according to the specific needs of the recipient and more precisely who/what decides about this – AI or the human being.

Regarding “minimal human intervention”, the CFE also pays attention to the role of the preparatory/support functions.²⁰ Given the different manifestations of digitalisation, they can play a decisive role in some cases. Therefore, it is inappropriate that they not always satisfy the requirements under Article 7(1) of the Regulation 282/2011.

In its practice, the Court of Justice of the European Union (CJEU) has already had the opportunity to consider cases regarding ESS. The followed approach is a *verbatim* reference to the requirements of Article 7(1) of the Regulation 282/2011.²¹ However, the CJEU does not provide additional guidance, including through the “minimal human intervention’s” perspective. The absence of more detailed instructions does not contribute to the legal certainty.

The derivation of the ESS’s prerequisites under Article 7 of the Regulation 282/2011 is rather construed by the soft law through the VAT Committee’s Working Papers. The CJEU follows the provision without adding detailed arguments. Possible challenges are related to the differences in the activities, which in some cases are characterised by particular complexity. This is also due to the dynamics of this matter.

¹⁹ See the VAT Committee, *WP 844 REV*, taxud.c.1(2015)1619349 and *WP No 882*, taxud.c.1(2015)4459580.

²⁰ CFE, *Opinion Statement FC 9/2018 on the notion of “minimal human intervention” in the definition of “electronically-supplied services” for the purposes of Article 58 of the VAT Directive*, p. 4: “In our view, preparatory/support functions refer to those functions which enable the technical infrastructure and the creation of the environment in which the electronic service is supplied.”

²¹ See CJEU’s judgements in cases C-479/13, para. 36 and 39; C-502/13, para. 43 and 46.

2. ARTICLE 3(5) OF THE PROPOSAL FOR A COUNCIL DIRECTIVE LAYING DOWN RULES RELATING TO THE CORPORATE TAXATION OF A SIGNIFICANT DIGITAL PRESENCE

The aim of this part of the paper is to make comparison between ESS and digital services in the proposal in question as well as, more specifically, what the positive and the negative aspects of their identical wording are.

The proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence does not find realisation nowadays. It can be defined as one of the examples of finding a proper solution regarding the taxation of the digital economy.²²

Article 3(5) thereof contains a definition for “digital services.” By comparison with the text of Article 7(1) and (2) of the Regulation 282/2011, they are identical. Moreover, despite the fact that the term is “digital services” instead of ESS, even the hypotheses are structurally and chronologically the same. It also contains the term “minimal human intervention.”

Some may express concerns that this is a risky approach given the different legal nature of direct and indirect taxes. Therefore, the same text is no guarantee of their conceptual identity. It is also possible that they may have different practical manifestations.

According to the author, the identity of digital services in these two provisions is rather a positive approach, given their role and perception in society. Despite the specificity of direct and indirect taxes, deriving a universal concept of these services does not contradict the traditional postulates. On the contrary, the introduction of completely different definitions for them can create ambiguity regarding their legal nature.

Equality can take many forms. For example, it may be textual in nature, but with practical differences. It is possible to have different definitions, but the same tax treatment. Therefore, it is not possible to derive an unequivocal answer as to which approach is the most rational one.

According to the author, it is more essential to determine to what extent their theoretical perception brings clarity to the practical cases related to them. Taking into account the great dynamics of this type of activities, which undergo daily modifications, general views thereof seem to be the more recommended option.

Although the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence has no effect at the moment, it shows willingness for the unification of these services at the EU level. How feasible this is internationally remains an open question.

²² See more on taxation of digital economy in, e.g., Mikhaylova-Goleminova, Tarkhova (2022, 71–78).

3. ARTICLE 12B OF THE UN-MC

The aim of this part of the paper is to analyse the relevant texts to ADS in the UN-MC and the significance of the soft law (2021 UN Commentary) for their interpretation. There is also comparison with other relevant provisions from direct and indirect taxes' perspective on this issue. First, differences and similarities with Article 7 of the Regulation 282/2011 are examined. Second, a parallel regarding the structure of the provision in question (Article 12B of the UN-MC) with Article 5 of the UN-MC is carried out. Third, there is a comparison with another type of services under Pillar 1 that are similar to this matter. Such multi-layered examination of the relationship between different relevant provisions may derive the best practices regarding the proper application of this type of services.

Article 12B of the UN-MC²³ can be defined as the relevant provision regarding such services from direct taxes' perspective at the international level. It was discussed at the 21st meeting of the UN Tax Committee²⁴ and subsequently analysed at the 22nd meeting of the UN Tax Committee.²⁵ Therefore, the provision in question is relatively new and has yet to have any effect on this matter.

Article 12B of the UN-MC consists of eleven paragraphs. For the purposes of this article, attention will be paid to three of them – Article 12B(5–7) of the UN-MC. By comparison with another provision – namely Article 5 of the UN-MC (the concept of “permanent establishment”) – a similar approach in the structure of the concept is noticeable. Both Article 5(1) of the UN-MC and Article 12B(5) of the UN-MC start with a general rule outlining the necessary criteria. As is the case with Article 12B(6) of the UN-MC, Article 5(2) of the UN-MC provides a non-exhaustive list of typical examples of the concept. Respectively, Article 12B(7) of the UN-MC and Article 5(4) of the UN-MC examine the opposite hypothesis – the cases that fall outside the scope of the concepts. Therefore, the understanding that such approach is not new in the UN-MC can be shared.

Article 12B(5) of the UN-MC introduces the definition for ADS – “The term ‘automated digital services’ as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider.” By comparison with Article 7(1) of the Regulation 282/2011, several things should be considered.

In the secondary EU law, the expression used regarding the services is “electronically”, whereas in the UN-MC, it is “automated.” The author does not consider that there is a serious conceptual difference between them.

²³ For more details, see Knotzer (2024).

²⁴ UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the 21st session*, 2021, pp. 18–21.

²⁵ UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the 22nd session*, 2021, pp. 21–24.

There is also a noticeable difference in the name in one of the necessary prerequisites. In Article 7(1) of the Regulation 282/2011, it is “minimal human intervention”, while in Article 12B(5) of the UN-MC, it is “minimal human involvement.” The author is of the opinion that this difference is more of a lexical nature and does not have a significant effect on the perception of the concepts.

Here, following the same approach from the indirect taxes, challenges about the proper interpretation of “minimal” may arise. In this regard, it is intriguing to assess whether the same views under Article 7(1) of the Regulation 282/2011 for this criterion are applicable.

As already mentioned, the use of the expression “human” is associated with a physical intervention of the digital service. Regarding the expression “involvement”, traditional perceptions should be applied, i.e. the idea of interaction between people and the performance of the service.²⁶

Whereas, four necessary criteria are outlined in Article 7(1) of the Regulation 282/2011, there are two in Article 12B(5) of the UN-MC. The first prerequisite is textually and semantically identical in both provisions – the use of the Internet or an electronic network.

It is noteworthy that Article 12B(5) of the UN-MC contains clarification about the second term – “minimal human involvement.” According to the text, it is in relation to the service provider. It corresponds to the logic outlined by the VAT Committee that this criterion is applicable for the supplier.

Differences between Article 7(2) of the Regulation 282/2011 and Article 12B(6) of the UN-MC regarding the list of examples that can be defined as such services are noticeable. By careful comparison, it can be stated that they are relatively similar.²⁷ This is another argument for the importance of the actual meaning rather than the textual structure.

Article 12B(7) of the UN-MC outlines which hypotheses cannot be defined as ADS.²⁸ These are the royalties according to Article 12 of the UN-MC and the fees for technical services according to Article 12A of the UN-MC. While in Article 7(3) of the Regulation 282/2011, the same approach with a list of examples as in paragraph 2 of the same provision is used, Article 12B(7) of the UN-MC is designed as delineation with other provisions of the UN-MC.

This can be defined as a more substantial structural difference. The outlined exceptions for ADS presuppose a correct interpretation of other provisions of the UN-MC. Only one paragraph is available on this hypothesis in the 2021 UN Commentary, which does not provide further details.²⁹ However,

²⁶ <https://dictionary.cambridge.org/dictionary/english/involvement>: “the act or process of taking part in something.”

²⁷ For more details, see para. 58 to Art. 12B of the 2021 UN Commentary.

²⁸ For the purposes of the current study, not all of the exclusions will be analysed.

²⁹ Para. 66 to Art. 12B of the UN Commentary from 2021 that refers again to the provisions mentioned in the article in question.

the 2021 UN Commentary contains a list of examples that do not fall within the scope of ADS.³⁰ That is why a mixed approach is followed here. To sum up, the “positive catalogue” is placed in the provision, and the “negative” one – in the 2021 UN Commentary.

Regarding the scope of the activities, differences can be seen when compared to ADS outlined in OECD Pillar 1.³¹ The latter include Consumer-Facing Business (CFB)³² in their scope. Moreover, some of the exceptions laid down in Article 12B of the UN-MC can be construed as CFB (Chand 2021). Thus, according to Article 12B of the UN-MC, activities that have physical presence in the source state can fall outside the scope of ADS (Singhania et al. 2021, 11).

The proposal for Article 12B of the UN-MC is considered as a positive approach by some authors (Teijeiro 2020). However, there are also a number of challenges. There is no definition of “services” in the UN-MC, including the provision in question (Bendlinger, Mitlehner 2020, 516). The Regulation 282/2011 also does not contain it. Reference is made to the VAT Directive in significant part of the texts for the various types of services.

Article 23(1) of the VAT Directive derives a definition for “service.” According thereto, everything that is not a good is a service. This view is also applicable to ESS under Article 7 of the Regulation 282/2011, taking into account their legal nature.

The author does not consider that having a definition in the UN-MC would lead to greater legal certainty. From the VAT point of view, it is broadly defined and can also create ambiguity in some cases. What is more important for the UN-MC is to make a proper distinction between the types of services so as not to create any conflict between them. This determines their separation into clearly outlined hypotheses.

According to Article 12B(5) of the UN-MC, there is no specific threshold that should be met for the presence of ADS. In general, there are two criteria – regarding the type of provided services and regarding the human factor (Aiftpho n.d., 2).

As with the indirect taxes, it is not entirely clear in which cases the human factor requirement is met (Báez 2021, 16, 18). An interesting hypothesis – the so-called “complex contracts” – is explored by Báez. These contracts include both ADS and other supplies outside their scope (Báez 2021, 20). Therefore, risks regarding their proper tax treatment may arise.

Báez also mentions challenges regarding the activities that may fall within the scope of Article 12, Article 12A, and Article 12B of the UN-MC. Teaching activities may serve as an example by making the comparison between

³⁰ Para. 59–60 to Art. 12B of the 2021 UN Commentary.

³¹ For more details on the relationship between Art. 12B of the UN-MC and OECD Pillar 1, see Goede (2023, 19–22).

³² See more detailed explanation in OECD (2020, 21–23; 2023).

Article 12A(3), l. “b” of the UN-MC³³ and Article 12B of the UN-MC (Báez 2021, 26). Thus, risks may arise under Article 12B of the UN-MC not only due to the diversity of activities, but also due to the possible conflict with other provisions of the UN-MC.

As under Article 12B(5) of the UN-MC, as well as in paragraph 53 to Article 12B of the 2021 UN Commentary, it is outlined that “minimal human intervention” applies only to the supplier. Another distinctive feature thereof is that it “focuses on the provision of services and therefore does not include human involvement in creating or supporting or maintaining the system needed for the provision of services.” This is again identical to the perception with the VAT perspective. With such understanding, one can have the impression that the main activity is decisive.

The UN’s understanding that “the provision of services to new users involves very limited human response to individual user requests/input” is intriguing. According to the author, it is not entirely clear what is meant by “new user.” This leads to the possibility of using different criteria. It is possible that the user has multiple accounts that satisfy the conditions for new user. Also, the date of registration can be determined as a decisive factor. In this regard, the question whether it matters when the user is registered and when the service is used may arise. A valid response cannot be given by its use in the “individual user requests” expression.

It is also noteworthy that by the clarification of “minimal human intervention” in the 2021 UN Commentary, the expression “very limited” is used. This may give rise to discussions about its implementation. However, it is not specified that it is synonymous with “minimal.” Its logical interpretation leads to a similar understanding. The lack of proper arguments and their explicit presence cannot provide a definite answer. If the understanding that there is difference between them is followed, the inquiry of what it consists of will also arise.

³³ Article 12A.

3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made for teaching in an educational institution or for teaching by an educational institution.

4. CONCLUSION

Both the legal nature and the clarifications regarding the list of examples of ESS and ADS in direct and indirect taxes are derived from soft law. In one case, these are the VAT Committee's Working Papers, and in the other – the 2021 UN Commentary. Due to the lack of another detailed guidance on this issue, these means of interpretation are of great importance. It should be noted that the VAT Committee's Working Papers and the 2021 UN Commentary are not legally-binding, so their application is not mandatory.

By comparison with the hypotheses outlined in Article 7 of the Regulation 282/2011 and Article 12B of the UN-MC, the following aspects are common.

Both provisions in question begin with a general rule that introduces their necessary prerequisites. Another paragraph contains a list of typical examples without further guidance.

The human factor appears as a necessary prerequisite of the common definition in Article 7 of the Regulation 282/2011 and Article 12B of the UN-MC. Its textual variation – namely “minimal human intervention/involvement” – does not reflect the theoretical perception. This view would be followed in practice.

“Minimal human intervention/involvement” is characterised by a number of challenges, some of which are addressed in the present article. They can be divided into several groups. The first one concerns its interaction with other necessary prerequisites for these services. The possibility of ambiguity in some cases also reflects the uncertainty towards the perceptions of the human factor. The second one is related to the activities themselves. It is difficult to cover all examples of ESS/ADS. It is even more challenging to outline general views about all possible hypotheses. This is directly related to the third aspect – the requirement for “minimal.” Despite an illustration through relevant examples, it is still rather impossible to derive a definitive answer.

The author is of the opinion that, at this stage, the more appropriate option for ADS'/ESS' interpretation is soft law. From the VAT perspective, the CJEU does not provide detailed explanations and generally follows the provisions in question. As evident, it is also impossible to cover all cases, which may change their characteristics over the years. Therefore, the VAT Committee's regular Working Papers are a rational approach.

Through the international tax law's perspective, the 2021 UN Commentary is also the appropriate means of interpretation. Article 12B of the UN-MC is a relatively new provision that has no equivalent in the OECD-MC. Its actual effect is still debatable given the possibility of competition and even conflict with other provisions of the UN-MC. It is also not entirely clear what the practice of the states that follow this text will be. Therefore, adding new hypotheses to the 2021 UN Commentary seems to be the most recommendable opportunity for ADS' delineation. This approach is also applicable to other UN-MC's provisions.

It will be intriguing to see to what extent the good practices from Article 7 of the Regulation 282/2011 are applicable for Article 12B of the UN-MC. On the one hand, the first provision has more history and practice. Also, the services in question, including the examples, are of a similar legal nature. On the other hand, there are some differences regarding the scope of direct and indirect taxes. Divergent views of identical scenarios are more likely to negatively influence the ADS' perceptions. In this regard, the author finds the first position for the application of the good practices to be more appropriate.

Future trends can significantly modify this criterion, including its complete rethinking. According to the author, "minimal human intervention/involvement" will continue to play a significant role for ADS/ESS. Therefore, it is recommended to periodically examine the possible evolution thereof.

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Similarities and differences between Art. 7 of the Regulation 282/2011, Art. 12B of the UN-MC, and Article 3 of the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence

<p>Article 7(1) of the Regulation 282/2011:</p> <p>‘Electronically-supplied services’ as referred to in the Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.</p>	<p>Article 12B(5) of the UN-MC:</p> <p>The term “automated digital services” as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider.</p>	<p>Article 3(5) of the Proposal:</p> <p>‘Digital services’ means services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology</p>
<p>Article 7(2) of the Regulation 282/2011:</p> <p>Paragraph 1 shall cover, in particular, the following:</p> <ul style="list-style-type: none"> (a) the supply of digitised products generally, including software and changes to or upgrades of software; (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient; 	<p>Article 12B(6) of the UN-MC:</p> <p>The term “automated digital services” includes especially:</p> <ul style="list-style-type: none"> (a) online advertising services; (b) supply of user data; (c) online search engines; (d) online intermediation platform services; (e) social media platforms; (f) digital content services; (g) online gaming; (h) cloud computing services; and (i) standardised online teaching services. 	<p>Article 3(5) of the Proposal:</p> <p>including in particular</p> <ul style="list-style-type: none"> (a) the supply of digitised products generally, including software and changes to or upgrades of software; (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;

APPENDIX 1

<p>(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;</p> <p>(e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.);</p> <p>(f) the services listed in Annex I.</p>		<p>(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;</p> <p>(e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part, in other words packages going beyond mere internet access and including other elements such as content pages giving access to news, weather or travel reports, playgrounds, website hosting, access to online debates or any other similar elements;</p> <p>(f) the services listed in Annex II.</p>
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