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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 958

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Germany**
REFERENCE:	**Article 2(1)(c)**
SUBJECT:	**Conditions for there being a taxable transaction when Internet services are provided in exchange for user data**

1. INTRODUCTION

The German authorities have asked the opinion of the VAT Committee on whether the supply of IT services without a monetary consideration by an IT provider in exchange for the right to use the data of its clients, and the users' granting to the IT provider of the permission to use that data, constitute taxable transactions subject to VAT.

In case the VAT Committee considers that any of these transactions is taxable as a supply of services for consideration, the German authorities would like to know how the taxable amount for the services supplied should be calculated.

A translation of the text of the question is annexed to this document.

2. SUBJECT MATTER

Article 2(1)(c) of the VAT Directive[1] establishes that the supply of services for consideration within the territory of a Member State by a taxable person acting as such shall be subject to VAT.

Therefore, to determine if the transactions at stake constitute a taxable supply of services, two conditions have to be analysed:

– Whether the services are supplied for consideration.

– Whether the services are supplied by a taxable person acting as such.

To determine this, it will need to be examined whether the permission granted by the user of IT services to use his personal data and the provision of IT services without requesting a monetary consideration fulfil the abovementioned conditions and therefore should be subject to VAT.

In case it is concluded that the transactions should be subject to VAT, the next step would be to determine the taxable amount, which according to Article 73 of the VAT Directive shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party. As the transactions do not involve a monetary consideration, it would be necessary to value the consideration obtained in exchange for the services supplied.

3. THE COMMISSION SERVICES' OPINION

IT providers may offer to their customers different services without requesting a monetary consideration. When customers want to use any of these IT services, they have to agree to the terms and conditions of the provider. As one of these conditions, they usually have to grant to the provider the permission to use their personal data.

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

IT providers use the data obtained for commercial purposes. For instance, the provider can use them directly for his own economic activity, to obtain a better knowledge of the preferences of the customer, so that the company can target that customer with products better suited to him.

However, in most cases the IT provider sells the data (directly or after processing) to third parties who use such data for user-specific advertising purposes. The sale of the data constitutes a very important part of the turnover of these IT providers.

Therefore, there is an exchange of an asset with economic value (the personal data) for an IT service. We will analyse first whether the provision of data by the customer is a taxable transaction and later if the provision of the IT service by the IT provider should be taxed.

3.1. Is the provision of data by the customer a taxable transaction?

As explained under section 2, to determine if this transaction is a taxable supply of services it has to be determined whether the supplier is a taxable person acting as such and whether the services are supplied for consideration.

Article 9(1) of the VAT Directive establishes that "*taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity*". Further, it is added that "*the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity*".

Personal data constitutes intangible property. When the owners of the data grant permission to the IT service provider to use it in exchange for the provision of IT services they are exploiting their own data, similarly to the case of an administrative concession. In exchange, they obtain an advantage, an income: the right to use different IT services without needing to pay a monetary consideration.

Therefore, it could be thought that the user, by granting to a third party the right to use his personal data in exchange for an IT service, carries out an economic activity.

However, it should be taken into account that personal data is part of the private sphere, that is property of the individual. The VAT Committee discussed in 2012 the conditions an activity should fulfil in order to be regarded as an economic activity within the meaning of the VAT Directive[2]. In that analysis, the reasoning of the Court of Justice of the European Union (CJEU) in *Slaby*[3] was seen as particularly relevant:

"*50. A natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for VAT for the purposes of Articles 9(1) and 12(1) of the VAT Directive when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.*

[2] See Working paper No 731.
[3] Judgment of 15 September 2011, *Slaby*, Joined Cases C-180/10 and C-181/10, EU:C:2011:589.

51. If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, that person must be regarded as carrying out an 'economic activity' within the meaning of that article and must, therefore, be regarded as a taxable person for VAT.".

Therefore, it was concluded that for the CJEU, the defining element regarding an economic activity is whether the person, in order to carry out his activity, uses human or material resources in the same way as they would be used by a producer, trader or a person supplying services. There will be an economic activity in the sense of the VAT Directive when there is an intention to use and organise resources in order to participate in the production or distribution of goods or the supply of services.

In that regard, it is useful to recall the ruling of the CJEU in the case of an individual, Mr Fuchs, who owned a photovoltaic installation fitted on the roof of his house[4]. The electricity produced by this installation was fed into the network and, under the contract granting access to that network, remuneration was provided as consideration for that supply. Therefore, the CJEU concluded that in this case there was an economic activity as there was a mobilisation of resources (the photovoltaic installation) and that was done for the purpose of obtaining income on a continuing basis (the remuneration). The CJEU found it irrelevant that the amount of electricity produced by that installation was always lower than the amount of electricity consumed by the operator in meeting his household needs. The activity of supplying electricity was considered as taking place independently of the activity whereby the owner of the photovoltaic installation was taking electricity from the network for his household needs.

In the case we are examining here the activity does not meet those criteria. The individual does not intend to participate in the production or distribution of goods or the supply of services nor does he mobilise any kind of resources as was the case in the above-mentioned judgment. He simply wants to access certain services and is willing to pay their price, which consists in granting the permission to use his personal data. In fact, if individuals were given the possibility of paying a monetary price instead of granting that permission they might agree to pay that monetary price.

Besides, individuals do not obtain income on a continuing basis neither do they try to maximize the income derived from the exploitation of that intangible property. They do not try to get as many IT services as possible in exchange for that data, which would be the normal goal if it were an economic activity. The CJEU in *SPÖ*[5] considered that external advertising activities carried out by the section of a Member State's political party are not to be regarded as an economic activity, as they do not allow the generation of revenue on a continuing basis. The goal of the political party was the development of informed political opinion with a view to participation in the exercise of political power, but in carrying out that activity, the party did not participate in any market. In the same way, the individuals in question simply want to have access to the services they would like to use, they do not intend to participate in any market and they do not obtain income on a continuing basis. Indeed, their behaviour shows that the permission for using the data is

4 Judgment of 20 June 2013, *Finanzamt Freistadt Rohrbach Urfahr*, C-219/12, EU:C:2013:413.
5 Judgment of 6 October 2009, *SPÖ Landesorganisation Kärnten*, C-267/08, EU:C:2009:619.

considered by the individual rather as a price to be paid and not as a source of income. This is consistent with the behaviour of some users who provide the supplier with fake data, block cookies, use "disposable" email addresses for registration purposes, etc. These users are trying to avoid paying the price or reduce it as much as possible, which would not be the case if they were trying to supply services within the framework of an economic activity.

Thus, we can conclude that the granting of permission to use personal data by the customer falls within the scope of the management of his private property and merely constitutes the price to be paid for the use of IT services. The user does not intend to carry out an economic activity and does not deploy the means that would characterize such an activity. Therefore, the provision of data does not constitute an economic activity and is not a taxable supply of services.

It should be stressed that if the provision of data were to be considered a taxable supply of services, it would have to be accompanied by the right to deduct[6] the VAT paid on goods or services used for the purposes of that activity, including hardware (computers, tablets, telephones …) and software (antivirus…). In that case, it would be necessary to apportion the use, taking into account the use made for private purposes and that for the economic activity.

3.2. Is the supply of services without a monetary consideration by an IT provider a transaction subject to VAT?

3.2.1. Analysis of the transaction

In this case the supply of services is provided by a taxable person acting as such. Therefore, the decisive element is whether the service is supplied for consideration.

IT services are provided in exchange for the user's data. This data, as already explained, is the raw material that, directly or after processing, is used by the IT company to carry out its economic activity. Thus, this data has an economic value.

However, the fact that the data received in exchange for the service has economic value is not enough to conclude that the services are supplied for consideration. According to the CJEU in *Tolsma*[7] "*a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received … It follows that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient*".

In *Commission vs Finland*[8], the CJEU analysed the existence of this direct link when public legal aid offices provided legal advice in exchange of a part contribution by the

6 Unless the turnover of the activity stays below the threshold established by the Member State according to the special scheme for SMEs in the VAT Directive and the individual has not opted out of the scheme.

7 Judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, see in particular paragraphs 12, 13 and 14.

8 Judgment of 29 October 2009, *Commission vs Finland*, C-246/08, EU:C:2009:671.

recipient. The CJEU concluded that "*it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct for that payment to be regarded as consideration for those services*". The CJEU reached that conclusion taking into account that the payments did not cover all the costs of the activity and were not related to the activity deployed by the supplier (number of hours worked by the public offices, complexity of the case concerned) but to the personal circumstances of the recipient.

The same conclusion was reached by the CJEU in the case of public broadcasting activities funded by a compulsory statutory charge paid by owners or possessors of a radio receiver and carried out by a radio broadcasting company created by law[9]. The CJEU did not find a direct link between supply and consideration either in *Baštová*[10]. In the view of the CJEU "*the service provided by the horse race organiser, consisting in enabling the owner of a horse to have his horse participate in the horse race, cannot be regarded as effective consideration for the supply of a horse by the owner to the race organiser. That service is remunerated by the payment, by the horse owner, of entrance and declaration fees reflecting the value actually given in return for the horse's participation in the race*". The CJEU considered that even though the horse owner could possibly obtain a benefit due to the increase in the value of the horse or the publicity gained by the horse from its participation in the event, that benefit is difficult to quantify and uncertain, since it essentially depends on the result of the race. That benefit could therefore not be taken into consideration for the purposes of determining the value actually given in return for the supply of the horse[11].

IT companies provide their services in the same way irrespective of the amount of data provided by the users or the quality of such data. As mentioned above, users can provide the supplier with fake data, block cookies, use "disposable" email addresses for registration purposes, etc. There are also users who use the services of IT companies continuously, providing a lot of data to the IT company whilst others barely use their services, so the data provided by them is insignificant. However, all of them receive the same services from the IT company. The IT provider does not offer different levels of service depending on the amount or quality of data provided by the users. Nor is there an obligation to provide a certain amount of data periodically to remain connected to the service.

Therefore, in the view of the Commission services, there would not be a direct link between the provision of IT services without a monetary consideration and the consideration received.

Against this conclusion, it could be argued that there are cases where services can be provided in a different way subject to the user paying a monetary consideration. For example, the user can decide to pay periodically a fee in order not to be exposed to advertising while using the service. In that case, there would be a link between the service supplied and the consideration received as compared to the case where the service is provided without a monetary consideration, and the monetary consideration could be quantified. However, this payment does not change the situation from the perspective of

9 Judgment of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470.
10 Judgment of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855.
11 *Baštová*, paragraph 35.

the collection of data. In both situations, with monetary consideration or without it, the IT company continues collecting the data of the user exactly in the same way, and it can keep selling it to other companies. The only difference is that advertisements are then no longer sent to the customer while he is using the service. So, the payment is not consideration for the service provided but rather consideration for not receiving advertisements while using the service.

From an economic point of view, it also makes sense not considering the provision of IT services without a monetary consideration to be a taxable transaction. The activity of the IT company is not to provide IT services for free but to sell data in exchange for a consideration. The offering of IT services for free is the means that allows the company to obtain the data that it can later sell, but it is not in itself the purpose of the company. It is from the selling of the data, an activity that is subject to VAT, that the company obtains the funds necessary to cover its general expenses, including the ones related to the provision of IT services without any monetary consideration, and to make a profit. Therefore, the activity of the IT service provider is taxed at the time when he sells the data of the users. The taxable amount to be determined when selling this data will need to take account of the costs of the provision of the IT services.

Hence, the IT service provider supplies the services without asking a monetary consideration in exchange for the users' consent to use their data. The data received varies in quantity and quality from one user to the other, it being even possible that the data received in exchange for the service is false. The provider has no control over the amount or quality of data that users provide to him. Therefore, no direct link can be found between the provision of IT services without a monetary consideration and the consideration received from the users.

3.2.2. Taxable amount

In case it were nevertheless to be found that the provision of IT services without a monetary consideration constitutes a taxable transaction, the taxable amount of that transaction would have to be established. This process is particularly difficult in cases such as the one at stake where there is no monetary consideration.

Article 73 of the VAT Directive states that the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party.

According to the CJEU that consideration is "*the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. In addition, that consideration must be capable of being expressed in monetary terms*[12]". Further, the CJEU has clarified that "*Where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose. Where, as here, the supply of goods is involved, that value can only be the*

[12] Judgment of 19 December 2012, *Orfey Balgaria*, C-549/11, EU:C:2012:832, paragraph 44.

price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question[13]".

According to that, the taxable amount would be the value attributed by the IT service provider to the data received, which must then correspond to the amount that the provider is prepared to spend for that purpose. In the present case, it would be the cost of providing the service without a monetary consideration to the customer. Therefore, the IT service provider would need to determine the cost of providing the service to each user and that would constitute the taxable amount.

3.3. Conclusions

When an individual wants to use an IT service offered without a monetary consideration, he has to agree to the terms and conditions of the provider, which include granting the permission to use the individual's personal data. This permission given by the individual falls within the scope of the management of what is his private property. The individual does not intend to carry out an economic activity and does not deploy the means that characterize that activity. Therefore, the provision of data by the user of an IT service offered without a monetary consideration does not constitute an economic activity and it is not a taxable supply of services.

The provision of an IT service without a monetary consideration, which allows the supplier to use the personal data of his customer, does not constitute a taxable transaction for VAT purposes as there is no direct link between the service provided and the consideration received. The data for which use is granted varies in quantity and quality from one user to the other, it being even possible that the user only provides false data to the supplier. For that reason, it is not possible to establish such a direct link, which is a condition for the transaction to be regarded as taxable.

If, however, it were to be found that a sufficient direct link exists between the IT services provided and the customer's data received without a monetary consideration being requested, there would then be a taxable transaction. In such case, the taxable amount would be the cost for the supplier of providing the service to the customer.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on this matter raised by the German authorities and the observations made by the Commission services.

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[13] Judgment of 2 June 1994, *Empire Stores*, C-33/93, EU:C:1994:225, paragraph 19.

ANNEX

Question from Germany

Due to doubts about the application of EU law in this matter, I would like to submit the following question for examination by the VAT Committee.

1. Situation

IT providers offer their users a wide variety of services and apps which can be accessed without payment of a monetary consideration. In most such cases, users need only register their personal data to obtain access. In addition, they must agree to the conditions of use in the form of the general terms and conditions of business. The services described are consequently classified as free IT services.

With the users' permission, the IT provider acquires rights of use of the user data.

The IT providers record and store the users' personal and use-related data and sell them – sometimes pre-processed – to third parties, who in turn use them for user-specific advertising purposes. This selling-on of data is subject to VAT. Most providers of free IT services finance their activities in part from such turnover, either directly or indirectly.

2. Issue

In VAT terms, this situation gives rise to many unresolved issues of law.

(a) The first grey area concerns whether users' consent to an IT provider recording and using their personal user data in return for free IT services constitutes an economic supply to the IT provider.

(b) If so, the next question is whether users' consent to the recording and use of their personal data also constitutes a material consideration for the provision of the IT services.

Only if this necessary direct connection between service and consideration is confirmed does the supply of IT services free of charge constitute a supply of services for a consideration and, therefore, a taxable supply of services.

(c) If it is accepted that the transaction is taxable, clarification would also be needed as to how the taxable amount for the services supplied by the IT provider is to be calculated.

3. Legal basis

Article 2 of Directive 2006/112/EC ('the Directive') specifies the categories of transaction that are subject to VAT. Under Article 2(1)(c) of the Directive, one of the transactions subject to VAT is the supply of services for consideration within the territory of a Member State.

(a) Under Article 24(1) of the Directive, 'supply of services' means any transaction that does not constitute a supply of goods. The Directive does not contain a positive

definition of the supply of services. However, it may be deduced from Article 25(b) of the Directive that a supply of services may also consist in refraining from or tolerating an act or situation. As Germany understands it, one can only speak of a supply of services within the meaning of Directive 2006/112/EC in respect of intentional conduct (action, toleration or refraining from action) on the part of a person - the supplier - vis-à-vis another person - the recipient - that is suitable to be made the object of trade in such a way that the conduct of the supplier provides an economic advantage to the recipient and leads to consumption.

(b) According to the consolidated case law of the European Court of Justice, barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations[1]. Not only money, but also benefits which are worth money, can constitute a 'consideration' within the meaning of Article 2(1)(c) of Directive 2006/112/EC, meaning that even an exchange of two supplies of services can be the basis of a taxable transaction[2]. According to the constant case law of the Court of Justice, for there to be taxable barter transaction there must be a direct link between each of the supplies of services[3]. If, on the other hand, the activity of the supplier is confined exclusively to effecting supplies without receiving any direct consideration, there is no taxable amount and these supplies are not subject to VAT. The direct link which is a precondition of a transaction being taxable exists if there is a legal relationship between the service provider and the recipient, pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the value actually given in return for the service supplied to the recipient[4].

Thus the Court makes it a further precondition that the value of the service received can be expressed in monetary terms[5]. It says that this is the case if a supply is 'remunerated' by a consideration from a company in the form of supplies of goods/services[6]. In a more recent judgment, the Court has also found that there is no taxable barter transaction if the supplying company receives only a benefit that is difficult to quantify and 'uncertain'[7].

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1 E.g. judgments of 3 July 1997, *Goldsmiths*, Case C-330/95, ECLI:EU:C:1997:339, paragraphs 23 und 25; of 19 December 2012, *Orfey Balgaria*, Case C-549/11, ECLI:EU:C:2012:832, paragraph 35; of 26 September 2013, *Serebryannay vek*, Case C-283/12, ECLI:EU:C:2013:599, paragraph 39.

2 Judgment of 26 September 2013, *Serebryannay vek*, Case C-283/12, ECLI:EU:C:2013:599, paragraph 38.

3 E.g. judgments of 19 December 2012, *Orfey Balgaria*, Case C-549/11, ECLI:EU:C:2012:832, paragraph 36; of 26 September 2013, *Serebryannay vek*, Case C-283/12, ECLI:EU:C:2013:599, paragraph 38, each with further references.

4 Judgments of 3 March 1994, *Tolsma*, Case C-16/93, ECLI:EU:C:1994:80, paragraphs13 and 14; of 21 March 2002, *Kennemer Golf*, Case C-174/00, ECLI:EU:C:2002:200, paragraph 39; of 3 September 2009, *RCI Europe*, Case C-37/08, ECLI:EU:C:2009:507, paragraph 24; of 3 May 2012, *Lebara*, Case C-520/10, ECLI:EU:C:2012:264, paragraph 27.

5 E.g. judgments of 3 July 1997, *Goldsmiths*, Case C-330/95, ECLI:EU:C:1997:339, paragraph 23; of 19 December 2012, *Orfey Balgaria*, Case C-549/11, ECLI:EU:C:2012:832, paragraph 36; of 26 September 2013, *Serebryannay vek*, Case C-283/12, ECLI:EU:C:2013:599, paragraph 38.

6 E.g. judgments of 2 June 1994, *Empire Stores Ltd*, Case C-33/93, ECLI:EU:C:1994:225, paragraph 17; of 3 July 2001, *Bertelsmann*, Case C-380/99, ECLI:EU:C:2001:372, paragraph 18.

7 Judgment of 10 November 2016, *Bastova*, Case C-432/15, ECLI:EU:C:2016:855, paragraph 35.

(c) Under Article 73 of the VAT Directive, the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party.

According to the case law of the Court of Justice, the taxable amount for the supply of goods or services effected for consideration is represented by the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. In addition, that consideration must be capable of being expressed in monetary terms. Since, in the case of barter contracts, the value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose[8].

4. Preliminary assessment

The preliminary assessment of the German authorities is that users of IT services supplied free of charge do not provide an economic benefit to the IT provider when, in return for those services, they consent to their personal and use-related data being recorded and used (a).

Moreover, there would not be the required direct link between supply and consideration, meaning that the IT provider would not, for this reason, derive any taxable turnover from the provision of IT services free of charge in return for personal user data (b).

If it were nevertheless concluded that the IT services were taxable, it would be difficult to calculate the taxable amount, which would perhaps have to be estimated (c).

(a) Following preliminary assessment, the German authorities already have doubts as to whether users of IT services provided free of charge provide an economic benefit to the IT provider at all if they consent to the recording and use of personal user data in return for use of the IT services.

These doubts are based on the following considerations: Although users consent to the use and data protection conditions of the IT provider concerned, they do so only as a means to an end, in order to have access to the IT service (e.g. the possibility of sharing their photos and videos with friends) free of charge. It may be assumed that users do not intend to give the IT provider a benefit with monetary value by allowing/tolerating the data use rights. In most cases the personal data is generated unbeknown to the users and is derived only from user behaviour. Users regularly act without intending to provide, or even being aware that they are providing, an economic benefit, and supply their data to the IT provider without aiming to do so. They merely put up with the fact that they are then exposed to sometimes highly personalised advertising. As they see it, putting up with the use of their data is not associated with surrender of a legal position with an asset value.

[8] Judgment of 19 December 2012, *Orfey Balgaria*, Case C-549/11, ECLI:EU:C:2012:832, paragraphs 44 and 45, with further references.

(b) If, contrary to the German authorities' provisional assessment, the consent to data use does constitute an economic benefit, the German authorities are unsure whether, in that case, the provision of internet services free of charge in return for users' consent to the recording, storing, processing and use of their personal and use-related data constitutes a supply of services for a consideration and is therefore taxable.

According to its provisional assessment, Germany considers it doubtful that the direct link necessary for this to be the case exists. The fact that users can use the services of the IT provider on terms that they can themselves determine seems to argue against such a link. At the time when the IT provider makes the services available, it cannot be certain about the volume or quality of the data that it will obtain for processing and use. Consequently the provider does not demand any specific remuneration/consideration from users for offering the services free of charge. The absence of charges for the services is not made conditional upon the quality or quantity of the data collected. On the other hand, users can also take active steps to prevent the use of their data by explicitly excluding personalised advertising, regularly deleting their user data, registering for services under a false name, using 'disposable' e-mail addresses for registration purposes (in order not to receive advertising e-mails), using the possibility of anonymising their surfing behaviour, deactivating JavaScript, blocking cookies, which enable surfing behaviour to be monitored, or using advertising blockers and preventing such advertising overlays and pop-ups altogether. Hence, giving consent to the general terms and conditions, or tolerating/allowing use rights would merely be a 'means to an end' in order to benefit from the IT provider's offer 'free of charge'.

(c) Lastly, if it were confirmed that this arrangement constitutes a taxable barter transaction, the German authorities are uncertain what the taxable amount would be on which to base the taxation of free-of-charge IT services. It is not clear how the value of the user data of an individual user could be determined, particularly since the quantity and quality of such data vary greatly.

5. QUESTIONS

Germany has not yet finished analysing the issue or formed a final opinion on, and is continuing work on it. Another factor to be borne in mind is that many other cash-free transactions involve the release of personal user data that are regularly used by the supplier, for instance for advertising purposes in the form of newsletters. In this connection there should perhaps be discussion of whether the customer pays an additional consideration in the form of release of use rights over his or her user data.

Germany in any case considers that there should be uniform treatment of comparable cases in the Member States. For this reason, it would be very interested to learn, when the matter is examined by the VAT Committee, the position of the other Member States and the Commission on the following questions:

(a) Does a user of IT services supplied free of charge provide an economic benefit to the IT provider when, in return for that service, he or she consents to his or her personal and use-related data being recorded and used?

(b) Is there a direct link between the provision of IT services for use on the one hand and consent to the recording and use of personal and use-related data on the other, and does the provision of use rights constitute the value actually given in return for use of the internet services?

(c) If so, what criteria should be used to determine the taxable amount for the services supplied by the IT provider?

I would be very grateful if you could put this issue on the agenda of the VAT committee as soon as possible.