Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of VAT

Towards an equal treatment of physical and online performances for low VAT rates

A sectoral perspective

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Introduction

The live performance sector is characterised by thousands of SMEs, often holding a non-profit legal status. The sector gives work to about 1,2 million workers, which is an underestimated figure, as many people also work partially as second job in the sector, which is not included in Eurostat figures. The turnover of the sector is estimated at 45 billion Euros, not including the part of the sector that provides services such as light, sound, stage setting and other technical support. 85% in the sector are micro to small enterprises, with only a few employing over 1000 people.

The core business of the live performance sector is to hold live events with a physical audience present in a venue, theatre, concert hall, outdoors, and others. For that reason, an important source of income is the sale of tickets.

The sector is highly labour intense: the 'product' can only be made on the spot and with the people (artists, crew, other offstage staff) present at the moment of the performance.

The profit margins are relatively low or non-existent. Unlike industrial production or in the case of electronic services, multiplication does not lower the cost of the product, as the main part of costs are labour costs which do not reduce by having more performances.

Live Performance and VAT

According to the VAT directive 2006/112/EC Member States have an option to bring specific goods and services, such as culture, under a low VAT rate or exempt.

There are two situations in which this is possible for culture, according to Annex III, referring to article 98:

> *(7) admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities*
> and
> *(9) supply of services by writers, composers and performing artists, or the royalties due to them*

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In the case of tax exemption for certain activities in the public interest, title IX, referring to article 132(1)(n) of the Directive, provides:

1. *Member States shall exempt the following transactions:*
   (n) the supply of certain cultural services, and the supply of goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned

It is reminded that low VAT rates or exemption directly affect the consumers, which are the audiences, who therefore pay less to see a live performance or event. It is a tax incentive taken by governments to encourage people to go to cultural activities and hence to advance culture in society and contribute to the well-being of its citizens.

In this regard, and **as a general approach, it is crucial to maintain the option for member states to provide low VAT rates or exemption for culture**.

Live performance and online viewing: a situation triggered from the Corona-crisis

When the pandemic reached Europe early 2020, the live performance sector took responsibility to protect public health and was among the first to close cultural activities. Apart from an interval during the summer, or depending on the national situation, where performances with limited number of audiences were allowed, most venues have been out of business for the largest part of the year or even did not had any activity at all. This is still the case in many countries in 2021.

At the beginning of the pandemic, during the first lockdown, the sector held many solidarity actions for citizens, by making available for free archived material of performances that were recorded in the past.

As soon as it was allowed to resume work in the form of rehearsing, practising, and making final stage products, music and performing arts organisations decided to share the performances by (live) streaming online.

The situations in which those happened, include for instance: presentation of a performance online as if it were planned and scheduled to take place in the form of a performance with a physical audience; a performance newly created taking into consideration the protocols on distancing and other measures. Both rely only on access to audiences that watch online. Another situation concerns a combination of a performance attended by a limited audience and simultaneously streamed by an audience for whom the reserved seat for a physical performance was turned into seeing an online activity or who watch in the frame of a restricted number of days.

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If those performances were not accessible for free, the following happened: live performance organisations turned tickets reserved and sold for physical performances into tickets for online performances and gave the audiences the option to still see the show online. In the case of newly created performances, tickets were sold as if for a live event, but then in this context (in absence of the possibility to have a live event with physical audience) only for an online audience.

Equal treatment of a live and online performance?

Because of the measures by governments not allowing the physical presence of audiences in a venue, the only option left for organisations to somehow have some activity still is an online performance.

Unfortunately, as online performances may be considered -strictu sensu- to be an electronic service, when interpreted in such way, the VAT rate applicable to electronic services applies.

The question to be addressed is whether there is a change in the activity? Does the performance change because the audience watches the stage from behind a computer screen or from a seat in a venue? The artists still undertake the same action, and the stage is still the centre of the activity. The live act still must happen and can as such not be automated. Every performance is unique.

According to the definition of "electronically supplied services" given in Article 7(1) of the VAT Implementing Regulation[1]: '*Electronically supplied services' 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'.* But the regulation also describes what does not fall under such service. For instance, a live streaming of a radio- or tv-production does not fall under the scope which in essence is the same for a live performance production. As the implementing regulation is ten years old, it is normal that the circumstances today are different and that in the same line streamed live productions could be added.

Although, in the case of live performance the medium is electronically, the content is not as explained above. This is no different to e-publications that benefit from an equal treatment of VAT between printed and electronically available books or other publications. In a recent case of the ECJ Geelen (2019/1883) the court ruled that interactive webcam sessions did not qualify as electronic service, which also indicates that there is a general approach to the scope of services which may continue to benefit of low VAT rates.

[1] Council Implementing regulation No 282/2011 of 11 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

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This also leads to the consideration whether a live performance organisation should be considered as a business whose main activity is to provide electronic services. According to the economic sector defined in NACE 90 'arts and entertainment' there can be no confusion on the scope of their activity. Across the sector there is a clear affirmation that the core business of their activity is to make and present live performances with a physical audience. Any online activity is considered as ancillary and subordinate to live performances.

Online performances: a potential threat to disturb the market?

The electronic service market is a highly competitive market, with large and international companies whose sole business is to provide online content to consumers worldwide (examples are Netflix, Amazon tv, Spotify, Deezer, etcetera).

Drawing from the description above a live performance organisation cannot be compared with an online platform, for the following reasons: the size of the companies (85% are small and often non-profit organisations) is not comparable, the number of companies is so high in the live performance sector that there is little chance that it would come to a market concentration which could result into a distortion of the market.

The factor of the consumers and the specific role of culture in VAT rules

Following a year of limited access to cultural activities, as described in a report entitled 'Culture Shock: Covid 19 and the cultural and creative sectors' of the OECD[2] published in September 2020 culture has a crucial role to play in the well-being of citizens. It contributes to the mental health of people and provides opportunities to escape from the daily sorrows. In essence, it does not differ from the general approach expressed in Council Directive 2006/112/EC that low VAT rates (or exemption) allow people to enjoy culture, without it being considered as a luxury good, but making it accessible to all.

In this regard, giving people the opportunity to watch online performances according to the same (low) tax rates is a logic continuation of this approach.

It is also difficult to explain to audiences why a ticket for a performance attended physically is cheaper (due to low VAT) than the one attended online. Another aspect that has come out of the Corona-crisis, is that online performances allowed again to reach audiences who for health, high age, or other reasons are not able to attend performance physically but can now enjoy again events online. The social aspect of such offer demonstrates that culture has an important role to reach people at all levels of society.

[2] http://www.oecd.org/coronavirus/policy-responses/culture-shock-covid-19-and-the-cultural-and-creative-sectors-08da9e0e/

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From this point of view, it is hardly possible to explain to the consumer the difference in ticket price due a higher VAT rate.

Administrative burdens and compliance costs

From an administrative viewpoint, SMEs prefer that their trade actions are as easy as possible to be handled. However, if different VAT rates are to be applied it means that websites and ticketing systems must be adapted.

It also means that in case of electronic services the VAT rate of the country of the consumer is to be applied (Council directive 2008/8/EC).

This is a great disincentive for small organisations who do not have the capacity and knowledge to deal with such administrative conditions and where the compliance costs may well be higher than the actual income earned, even with the option for micro-enterprises that certain administrative conditions can be exempt (Council directive (EU) 2017/2455).

An equal treatment between tickets for physical and online performances would take away those administrative burdens and compliance costs.

The live performance sector in the frame of recovery from the crisis

The sector belongs to the worst hit sectors in economy in 2020. A study of EY[3] published in January demonstrates that performing arts and music have an estimated 90% less revenues in 2020 for performing arts and 75% less for music.

On 15 July 2020, the European Commission adopted a new Tax Package, which is also intended to support the EU's recovery and make taxes better adapted to the digital world. The Commission has set out in its priorities a "Europe fit for the digital age" for businesses to make more use of the digital environment, such as in the recently proposed initiatives such as the Digital Services Act.

Although direct support to the sector, through different schemes, ranging from wage subsidies or temporary unemployment, over grants to companies and others, have helped the sector during the period of highly strict measures, specific tax initiatives are necessary for the sector to be able to restart and make it possible to cover the losses of more than a year (possibly up to two years) of inactivity.

It is necessary to remind that the sector is highly labour-intense, and where its products cannot be outsourced outside Europe like other industries but are all undertaken on the spot and in real-time. There is a general approach by the legislator vis-à-vis labour intense sectors to make it possible to benefit of low VAT rates.

[3] study 'Rebuilding Europe - The cultural and creative sector before and after the crisis

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The efforts and investments that must be made to adjust venues to meet conditions for safe concerts and performances, the potential measure that no full capacity will be possible still for a substantial time, also requires initiatives in the field of taxation.

To help the urgent needs of the sector, being able to benefit to the same low VAT rates (or exemption) for online performance is an important element to contribute to recovery of the sector.

Taking into consideration that there is a regular review of the EU VAT acquis, an evaluation can be made after a few years (3-5 years) to consider the uptake of online offer by live performance organisation.

Conclusion

As a general principle, Pearle* underlines the need to maintain the option for Member States to apply low VAT rates (or exemption) for culture.

As regards online performances, given the type of the organisations and companies, which are SMEs, often with a non-profit legal status, given the similarity between an online and physical performance, the role of culture and access to all people in society, the minimal risk of distortion of the market, the potential administrative burdens, the high labour-intensity of the sector, the strong need for support towards the recovery of the sector, there are clear arguments for an equal treatment of physical and online performances in the frame of Council Directive 2006/112/EC as regards rates of VAT.

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