# VAT EUROPEAN CASE·LAW

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# FACTS (I)

In its judgment of today, 15-4-2021, C-593/19, SK Telecom, the ECJ analyses the incidence of the controversial rule of effective use contained in Dir 2006/112 art.59a in **roaming services**.

SK Telecom was a company established in South Korea that provided mobile telephony services to its customers, also residents of that country, throughout roaming services that enabled the use of the Austrian mobile communication network.

To this effect, an Austrian operator made its network available to SK Telecom, the later reinvoicing its customers roaming charges for the use of the Austrian mobile communication network during their temporary stays in Austrian territory.

# FACTS (II)

SK Telecom submitted a request for a **refund of the VAT** invoiced by the Austrian operator.

The Austrian Tax Authorities denied it, considering that the roaming expenses invoiced to SK Telecom customers were subject to tax in Austria, in accordance with the Austrian regulation transposition of art.59a of the VAT Directive, since the supplied telecommunication services were not subject, in the third country, to a **tax comparable** to the Austrian VAT.

To the extent that SK Telecom had carried out taxable operations in Austria, the VAT it had paid could not be refunded under the refund procedure for non-established.

## REASONING (I)

The question on which the ECJ has ruled is whether, for the purposes of art.59a of the VAT Directive, the **roaming services** provided by a mobile telephone operator, established in a third country, to its customers, also resident in said third country, allowing them to use the national mobile communication network of the Member State in which they are temporarily, must be considered **effectively used** in a Member State, so that the latter may consider that the place of provision of these roaming services is located in its territory when such services are not subject to a tax treatment comparable to a VAT tax in the third country.

## REASONING (II)

The CJUE has started from the **underlying logic** of the provisions relating to the place of provision of services, the requirement that their VAT taxation must be carried out as far as possible where said services are consumed, according to settled jurisprudence.

At the outset, **telecommunications services** such as those described, provided to non-taxable persons residing outside the EU, are not taxed there.

However, as an **exception**, the aforementioned art.59a allows Member States to consider, in relation to certain services, that said place, in principle, outside the Union, is located on their territory, provided that the actual use or enjoyment of those services are carried out in its territory, resulting in such case being taxed therein.

## REASONING (III)

The mandatory application of this rule that was previously envisaged for telecommunications services provided to residents of the EU has not been understood by the ECJ as limiting its application to other cases. Nor has the length of the stay in the Austrian territory of the claimant clients been considered relevant for these purposes.

Focusing the issue on the roaming service, which through agreements between operators allow customers of one of them to use the other's network, the ECJ has concluded that it could be considered that their **effective use or enjoyment** is carried out necessarily in the territory of the Member State in question during the temporary stays of SK Telecom customers in that territory.

## REASONING (IV)

This **amplitude** that the ECJ has appreciated has been limited by this in a certain way, by stating that this taxation is only possible to the extent that the use of that power has the effect of avoiding cases of **double taxation, of non-imposition or distortions of competition**. This last may be the case when the aim is to avoid untaxed consumption in the EU, which, according to the information available, was the case for the roaming services at issue in the main proceedings.

Finally, the relevance for these purposes of the **tax treatment** given to the services in question in the concerned **third country** has been analysed.

In the absence of international agreement on the matter, it has **not** been accepted that this issue could be **relevant**.

This conclusion has been reinforced by the fact that any other conclusion would have the effect of making the application of EU regulations dependent on the internal tax law of third countries, not seeming that this was the intention of the Union legislator.

## REASONING (V)

Likewise, reference has been made to the **VAT Committee**, an advisory committee created by virtue of the art.398 of the VAT Directive, whose guidelines, although lack binding effect, are still an **aid for the interpretation of the VAT Directive** (order 8-10-2020, Weindel Logistik Service, C-621/19). Indeed, in the guidelines of said Committee adopted at its meeting of 30-9-2009, it was unanimously agreed that the use by the member states of the power provided for in said art.59a does not depend on the tax treatment applied to such services outside the Union. In particular, the fact that a service may be taxed in a third country according to its national rules shall not prevent a Member State from taxing it if such a service is actually used or enjoyed in the territory of that State.

## CONCLUSION

On these premises, it has been concluded that for the purposes of art.59a of the VAT Directive, roaming services provided by a mobile phone operator, established in a third country, to its customers, also resident in that third country, which allow them to use the national mobile communication network of the Member State in which they are temporarily located, must be considered to be the object of an effective use or enjoyment in the territory of that Member State, so that the said Member State may consider that the place of provision of these roaming services is located in its territory when, without prejudice to the tax treatment to which those services are subjected in accordance with the internal tax regulations of said third country, adding that the exercise of The aforementioned power has the effect of avoiding the non-taxation of these services within the Union.

## RELATED TOPICS (I)

1st. It is worth to point out the importance that the ECJ gives to the proper taxation of services consumed in the EU, admitting, in the event of non-taxed consumption occurring in Austrian territory, the application of the rule of effective use and, with it, its VAT taxation.

2nd. The fact that this tax is decoupled from its effective taxation in the corresponding third country, in this case, South Korea, reinforces the nature of this provision as a **consumption tax rule**, but not as an **anti-abuse rule** (that could happen redirecting services to tax jurisdictions with low or no VAT). This question, however, is irrelevant, as the ECJ expressly explains. Whether the services, in this case telecommunications, were taxed in South Korea or not is independent of whether they are also taxed in Austria.

The previous comment, in line with what the ECJ itself had already declared in its judgment of 19-2-2009, Athesia Druck, C-1/08 (curiously, absent today), is conclusive. Consequently, it is possible to apply the rule of effective use both when there is a non-taxation due to strategies aimed at completely avoiding the taxation of services where their consumption occurs as well as in other, simpler cases.

## RELATED TOPICS (II)

3rd. It is noteworthy that in this case the Austrian operator had applied VAT to its services. The discussion took place when his client, the Korean operator, requested the return. The ECJ having admitted the existence of an effective use in these terms, when the service is provided by an EU company to another from outside the EU, which in turn provides it to its clients, final consumers, confirms the application of the rule to **chain services**, provided that it is known that the actual use actually occurs in the territory of the corresponding State.

Once again, the ECJ is in line with the above-mentioned judgment of 19-2-2009, regarding advertising disseminated in Italy which, therefore, was understood to lead to consumption in Italy due to the increase in sales. sales in that country for the recipient company.

## RELATED TOPICS (III)

4th. The foregoing raises an additional question, which is relative to the **control possibilities** for the national tax authorities over the concerned services. It is not an easy matter, especially when it can affect operators from third countries. This, however, should not prevent its effective application in cases in which the objective elements available clearly point to an effective use of the service in the State in question (advertising, roaming services, legal assistance in national law, etc. ).

5th. To all the above, a relevant fact must be added, which is the **UK's departure from the EU**. In light of the outcome we are commenting on, it seems that the tax administrations of the EU States that have incorporated this device into their VAT regulations should pay special attention to its effective application.

## RELATED TOPICS (IV)

6th. One last comment has to do with the **coherence** of this VAT rule with the work undertaken in other areas on digital taxation, especially with regard to what is known as **Pillar One in the OECD**.

Indeed, if the trend at the international level is to ensure a certain tax on some activities that is linked not only to the existence of a business presence, but also to other generating value elements, it seems consistent that acts of consumption as they could be those analysed in this judgment are also subject to taxation, in this case, on consumption.

In other words, it does not seem **reasonable** that efforts aimed at taxing certain activities or operations in the field of direct taxation are not reflected in indirect taxation, in which they find a clear inspiration.