



## Response to the European Commission's Request for input from business on the VAT treatment of services connected with immovable property

*23 May 2014*

### Introduction

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The European Property Federation represents all aspects of property ownership and investment: residential landlords, housing companies, commercial property investment and development companies, shopping centres and the property interests of the institutional investors (banks, insurance companies, pension funds). Its members own property assets valued at € 1.5 trillion, providing and managing buildings for the residential or service and industry tenants that occupy them. [www.epf-feji.com](http://www.epf-feji.com)

The changes to the place of supply rules from 1 January 2010 and 1 January 2011 highlighted differences in the treatment of certain supplies in various Member States and led to some businesses suffering double taxation. We therefore commend the efforts of the Commission and Member States in addressing these through Implementing Regulation No 1042/2013 and welcome the opportunity to respond to the Commission's request for input on supplementary Explanatory Notes.

### Key points

The main problem in determining the VAT treatment of supplies connected with immovable property is assessing whether particular services are sufficiently closely connected with immovable property for the location of the land to determine the place of supply. We set out below the main areas that we feel would benefit from the additional certainty that inclusion in the Explanatory Notes would deliver.

### Operation of Article 31a

There is a certain amount of ambiguity as to the order of priority of the different paragraphs in Article 31a. In particular, it is unclear whether:

- Paragraph 2 extends the scope of paragraph 1, such that as long as a service falls within one of sub-paragraphs (a) to (q) it should be considered connected to immovable property; or
- Paragraph 2 is limited by paragraph 1, so that where a service appears to be covered by sub-paragraphs (a) to (q) it is necessary to validate this against the conditions in paragraph 1.



It is critical that the Explanatory Notes set out how these two paragraphs interact and the thought process that taxpayers should follow in order to determine whether a particular supply is connected with immovable property.

### **Estate agency services – boundary uncertainties**

Paragraph 2(p) of Article 31a makes clear that *“intermediation in the sale or leasing or letting of immovable property”* is to be treated as connected with immovable property. Likewise, paragraph 3(d) makes clear that the *“intermediation in the provision of hotel accommodation or accommodation in sectors with a similar function...if the intermediary is acting in the name and on behalf of another person”* is not so connected.

In many cases it will be fairly straightforward to determine whether a supply falls into the former category or the latter. For instance, arranging a letting of a holiday cottage for a week would in our view fall comfortably within paragraph 3(d) as the service being provided is one of travel agency rather than estate agency. Conversely, arranging a lease of that same cottage for 99 years is estate agency, and should fall within paragraph 2(p).

But situations may not always be so clear cut, and it is not easy to discern a clear boundary between estate and travel agency. Sticking to the holiday cottage example above, at what point does arranging letting switch from one category of services to the other? At 3 months? At 6 months? Longer? Or do other factors need to be taken into account? Given the potential uncertainty, we would very much welcome greater clarification on the distinction between supplies falling within paragraphs 2(p) and 3(d).

### **Waste removal services**

Paragraph 2(k) indicates that the *“maintenance, renovation and repair of a building...including...cleaning”* should be considered connected to immovable property. It is not entirely clear to what extent this treatment extends to the provision of waste removal services.

Arguably, such services should in general not be considered connected with immovable property on the basis that waste collection is a service of a more general nature that does not derive from immovable property. For instance, if waste is packaged up (in bags or in a skip) prior to collection we would not view its removal as connected with immovable property.

However, there may be occasions where the removal involves altering land or immovable property in some way. For example, where a contractor is required to remove tiles from a roof, or soil from the land before removing it/them from the site. Such supplies should in our mind be treated as connected to immovable property.



As the Regulation is somewhat silent on the matter we believe that additional guidance would be helpful on the types of waste removal services that fall to be treated as connected with immovable property.

### Valuation services

As clearly provided in paragraph 2(g), “*the valuation of immovable property*” should generally be viewed as being connected with immovable property. However, it is not entirely clear whether this should be the case where – for instance – valuation services are provided quarterly on a portfolio-wide basis, some of those valuations consisting of ‘desk-top’ valuations carried out without a proper inspection of the property assets. It is arguable that such desktop or portfolio valuations do not always entail a ‘sufficiently direct connection’, but adopting an approach that differentiates between types of valuation can be problematic for taxpayers and their suppliers. That said, a valuation does not cease to be a valuation just because it is not based on the inspection of a property.

Accordingly, we would very much value additional guidance on whether the method by which a property valuation is carried out has a bearing on whether the provision of that service is treated as connected with immovable property.

### Single property-portfolios

Paragraph 3(g) makes clear that “portfolio management of investments in real estate” should not be considered directly connected with immovable property. It would be helpful for the Explanatory Notes to confirm that for these purposes a portfolio can comprise a single asset.

### Legal, tax and advisory services

On the face of it, the Regulation is fairly categorical about the types of legal, tax and advisory services that are connected with immovable property. Paragraph 2(q) states that “*legal services relating to the conveyance or the transfer of a title to immovable property and to the establishment or transfer of certain interests in immovable property or rights in rem over immovable property (whether or not treated as tangible property)...*” are so connected.

Paragraph 3(h) provides that “*legal services other than those covered by point (q) of paragraph 2, connected to contracts, including advice given ...where such services are not specific to a transfer of a title on an immovable property*” are not so connected.

In reality it may not always be easy to discern a boundary between the two, particularly as they may well be provided by the same party as part of a single transaction. Accordingly, we would welcome additional guidance on the following points:

### Definitions



The term 'certain interests' in paragraph 2(q) is vague; probably deliberately so in order to accommodate different concepts of interests in property arising in different Member States. However, this vagueness could result in double taxation where Member States disagree on what the term means and what it includes in practice. It would be useful for the Explanatory Notes to give additional guidance on this issue – perhaps by including a list of the types of property and land interests that exist in different Member States.

There may also be uncertainty regarding the meaning of 'specific to a transfer of a title' in paragraph 3(h) and in particular whether services connected with the transfer of a title that happened at some point in the past (i.e. the service does not relate to a current or prospective transaction) can be treated as connected with immovable property. In our view, services relating to a prior transaction should not be considered connected with immovable property but there is clearly room for debate and further guidance would be valuable. In addition, it is unclear whether 'transfer of title' should include the reference in paragraph 2(q) to 'certain interests'.

### ***Litigation***

We would generally expect the provision of litigation services to fall within paragraph 3(h) and therefore not be connected with immovable property. However, on certain occasions – such as when the dispute relates to the legal validity of transfer of title or to the breach of a contract of sale – they could arguably be so connected. As such litigation will generally relate to transactions which have already taken place, it is important that clarification is provided regarding the meaning of 'specific to a transfer of a title' as highlighted in the previous paragraph.

### ***'Bundling' of services***

As noted above, it is very common for advisory services falling within paragraph 3(h) to be provided alongside those falling within paragraph 2(q) and for them to be charged to the recipient under a single invoice. Our general view is that on such occasions services should be considered separately for VAT purposes, unless they are specifically linked to an intended conveyance (independently from who has carried out the work and whether or not the conveyance actually takes place).

However, that view is of course subject to consideration of whether the single/multiple supply rules and the principles set out in *CPP* are in point. It would be helpful for the Explanatory Notes to provide some commentary on the interaction between those concepts and the place of supply rules.

### ***Corporate property transactions***

Paragraph 2(c) of Article 15 allows Member States to treat as tangible (and so immovable) property "*shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof*". However, only some Member States actually apply this treatment to shares in property holding entities and equivalent interests.



Given the potential for inconsistency across Member States as to whether advisory services relating to transactions involving the transfers of shares or units in property-holding entities can be regarded as connected with immovable property, we are surprised that the Regulation is silent on the matter. Our view is that such services should not generally be considered connected with immovable property for the purposes of determining their place of supply, even if a Member State has implemented paragraph 2(c) of Article 15.

That said, there might be some exceptions to the general position outlined above, such as due diligence services carried out in respect of property assets held by companies involved in the corporate transaction. Guidance in relation to this matter would therefore be welcome.

### ***Specialist tax services***

We would generally expect that most tax advisory services, such as transaction structuring and consideration of the tax implications of property financing should fall within paragraph 3(h) and therefore not be considered services connected with immovable property.

However there may be certain situations in which the services arguably have a 'sufficiently direct connection' with a property, such as where a property is assessed for the purposes of calculating its tax depreciation entitlement. Such assessments are often carried out by surveyors or valuers and they generally involve a site visit. We would therefore welcome additional guidance as to what factors might create a 'sufficiently direct connection'.

As noted above, paragraph 2(q) provides that services connected with immovable property include those "*relating to the conveyance or the transfer of a title to immovable property and to the establishment or transfer of certain interests in immovable property ...*". It is arguable that the provision of legal advice on a real estate transfer tax or VAT structure that allows a property transaction to proceed could well fall within paragraph 2(q). Again, guidance on this point would be helpful.

### ***Preparatory costs***

Paragraph 2 (a) provides that "*the drawing up of plans for a building or parts of a building designated for a particular plot of land regardless of whether or not the building is erected*" should be connected with immovable property. Further clarification would be welcome to ascertain whether the costs of advisory services incurred in connection with obtaining planning permission (such as planning consultancy costs and public relations expenditure to secure local support) should also be included in this category.

### ***Insolvency situations***

We would generally expect advisory services provided by insolvency practitioners to fall within paragraph 3(h) and therefore not be connected with immovable property. Such services are



generally limited to making recommendations about what is in the interest of creditors and lawyers will usually be appointed for the actual disposal of assets.

The services of insolvency practitioners should not therefore be considered connected to immovable property as they are provided to an entity in administration; not with regard to a specific property but as part of the general supply of advice to the entity itself in order to serve the interests of creditors. Whereas there may not appear to be much uncertainty on this point it would be useful for the Explanatory Notes include some guidance on it.

We would be delighted to discuss any of the above in more detail if that would be helpful. Please contact Ion Fletcher at the British Property Federation ([ionfletcher@bpf.org.uk](mailto:ionfletcher@bpf.org.uk), +44 (0)20 7802 0105) in the first instance.