



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Indirect Taxation and Tax administration  
**Value added tax**

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**VALUE ADDED TAX COMMITTEE**  
**(ARTICLE 398 OF DIRECTIVE 2006/112/EC)**  
**WORKING PAPER NO 880**

**QUESTION**  
**CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

**ORIGIN:** The Netherlands

**REFERENCES:** Articles 132(1)(e), 140(a) and (b) and 143(1)(a)

**SUBJECT:** Interpretation of the terms ‘dental technician’, ‘services by dental technicians in their professional capacity’ and ‘dental prostheses’

## **1. INTRODUCTION**

The questions submitted by the Netherlands concern the scope of the tax exemption pursuant to Article 132(1)(e) of the VAT Directive<sup>1</sup> and the interpretation of the following terms:

- dental technician
- services by dental technicians in their professional capacity
- dental prosthesis

The memo from the Netherlands on these questions is annexed to this Working paper.

## **2. SUBJECT MATTER**

### **2.1. Relevant provisions of the VAT Directive**

Pursuant to **Article 132(1)(e)** of the VAT Directive Member States shall exempt the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians.

The peculiarity is that Article 132(1)(e) of the VAT Directive is one of the tax exemptions which might be concerned by **Article 370** of the VAT Directive, according to which Member States are authorised to retain certain provisions of their national legislation predating the VAT Directive which would, without that authorisation, be incompatible with that directive. On the basis of the transitional arrangement following from Article 370 of the VAT Directive in connection with Annex X, Part A, point (1) of the VAT Directive supplies covered by Article 132(1)(e) of the VAT Directive are still taxed in some Member States.

Furthermore, the tax exemption pursuant to Article 132(1)(e) of the VAT Directive plays an indirect role as regards the tax exemption for intra-Community acquisitions of goods pursuant to **Article 140(a)** and **(b)** and upon final importation of goods pursuant to **Article 143(1)(a)** of the VAT Directive. According to these provisions Member States shall exempt the intra-Community acquisition (Article 140(a)) and the final importation (Article 143(1)(a)) of goods of which the supply by a taxable person would in all circumstances be exempt within their respective territory. In addition, pursuant to Article 140(b) Member States shall exempt the intra-Community acquisition of goods the importation of which would in all circumstances be exempt – for instance – under point (a) of Article 143(1).

### **2.2. Proceedings before the Court of Justice of the European Union (CJEU)**

Previous judgments of the CJEU in the context of Article 132(1)(e) concerned, *inter alia*, the different legal situation among Member States caused by Article 370 of the VAT

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<sup>1</sup> 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).

Directive and its effects on the competition between suppliers of dental prostheses in different Member States.

The relationship between Articles 132(1)(e) and 370 of the VAT Directive is, for instance, relevant in the CJEU judgment of 26 February 2015 in *VDP Dental Laboratory and Others*<sup>2</sup>, which is the starting point of the current Dutch request. In this judgment the CJEU ruled that Article 140(a) and (b) and Article 143(1)(a) of the VAT Directive must be interpreted as meaning that the exemption from VAT provided for under those provisions applies to the intra-Community acquisition and the final importation of dental prostheses supplied by dentists and dental technicians where the Member State of the acquisition or importation has not implemented the transitional rules provided for in Article 370 of the VAT Directive (and where, accordingly, the supplies in question would in all circumstances be exempt within its respective territory pursuant to Article 132 (1)(e) of the VAT Directive). Furthermore, the CJEU has clarified that this also applies where the intra-Community acquisition of dental prostheses originates from a Member State which has implemented the derogating and transitional arrangements provided for in Article 370 of that directive. Before this judgment the Netherlands took the position that in such a situation the intra-Community acquisitions were to be taxed.

However, neither the judgment of 26 February 2015 nor previous ones include any definition of the terms dental prostheses or dental technician. A clarification on the qualification of the supplier who might benefit from the tax exemption pursuant to Article 132(1)(e) of the VAT Directive derives from the CJEU judgment of 14 December 2006 in *VDP Dental Laboratory*<sup>3</sup>. Herein, the CJEU decided that Article 132(1)(e) of the VAT Directive does not apply to supplies of dental prostheses effected by an intermediary who does not have the status of dentist or dental technician, but has acquired such prostheses from a dental technician.

### **2.3. Interpretation issues raised by the Netherlands**

The Netherlands have raised three interpretation issues:

- The first one concerns the **definition of the term ‘dental technician’**. According to the Dutch position a dental technician within the meaning of Article 132(1)(e) of the VAT Directive must have successfully completed an education as a dental technician and must be engaged in activities that are specific and essential for this vocation. Since there is no definition for dental technicians in Dutch or European law, the word ‘dental technician’ could only be interpreted by reference to common usage.

In this regard, the Netherlands refer to the problem that in practice it will be very burdensome for a business who buys dental prostheses from businesses in other Member States or outside the EU, to ascertain that the supplier is a dental technician (and, thus, whether the requirements of the tax exemptions pursuant to Article 140(a) and (b) and Article 143(1)(a) of the VAT Directive are fulfilled). A practical solution might be to generally assume that prostheses are supplied by a dental technician.

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<sup>2</sup> CJEU, judgment of 26 February 2015, joined cases C-144/13, C-154/13 and 160/13 *VDP Dental Laboratory and Others*.

<sup>3</sup> CJEU, judgment of 14 December 2006, C-401/05 *VDP Dental Laboratory*.

- Furthermore, the Netherlands ask what are **services carried out by dental technicians in their professional capacity**, in particular, whether these services include the production of a 3D-scan by a laboratory if the laboratory produces the scan under the responsibility of a dental technician.
- Finally, the request concerns the definition of **dental prostheses**. In particular, the Netherlands ask for the VAT treatment of the supply of stegs (titanium girders) that form part of prostheses or braces which do not replace teeth but are – according to the nomenclature – placed under prostheses.

For further details, please refer to the attached memo.

### **3. THE COMMISSION SERVICES' OPINION**

The VAT Directive, in particular Article 132(1)(e), does not include definitions of the terms 'dental technician', 'dental prosthesis' and 'services by dental technicians in their professional capacity'. Thus, the meaning of these terms must be determined by legal interpretation.

It follows from the settled case-law of the CJEU that the exemptions from VAT laid down in Article 132 of the VAT Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another<sup>4</sup>.

Furthermore, the exemptions provided for in Article 132 of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person<sup>5</sup>. However, the requirement of strict interpretation does not mean that the terms used to specify those exemptions should be construed in such a way as to deprive them of their intended effect. They must be interpreted in the light of the context in which they are used and the scheme of the VAT Directive, having particular regard to the underlying purpose of the exemption in question<sup>6</sup>.

Basically, any interpretation is limited by the wording of the relevant provision. An interpretation which goes beyond the wording, the literal meaning, would lead to a development of the law which would contradict the principle of strict interpretation deriving from the case-law of the CJEU. It is only if the wording is not clear with certainty, that it must be checked by a second step as to whether the purpose of the relevant provision or/and its legal context could allow an inclusion of certain supplies of goods or services within the scope of the tax exemption in question. The literal meaning of a specific term is also determined by common usage<sup>7</sup>.

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<sup>4</sup> See e.g. CJEU, judgment of 9 February 2006, C-415/04 *Kinderopvang Enschede*, paragraph 13 with further references.

<sup>5</sup> See e.g. CJEU, judgment of 19 September 2004, C-382/02 *Cimber Air*, paragraph 25.

<sup>6</sup> See e.g. CJEU, judgment of 16 October 2008, C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 17.

<sup>7</sup> As regards the importance of 'common usage' for the legal interpretation see CJEU, judgment of 14 May 1985, C-139/84 *Van Dijk's Boekhuis*, paragraph 20.

### **3.1. Dental technician**

#### *3.1.1. Qualification/job description*

The concept of strict interpretation explicitly also applies to the terms ‘dentist’ and ‘dental technician’ within the meaning of Article 132(1)(e) of the VAT Directive<sup>8</sup>.

Starting from its literal meaning the term ‘dental technician’ refers to a person who is capable of carrying out essential activities in the field of prosthetic dentistry. The VAT Directive does not require that the taxable person in question has a specific degree of qualification. Thus, it would be crucial that the taxable person actually carries out the essential activities which are connected to the typical job description of a dental technician and is allowed to do so by the Member State concerned. However, the comprehensive skills needed cannot be acquired without a specific education. Thus, as stated by the Netherlands, the person in question must have successfully completed an education as dental technician.

The Commission services assume that many countries provide for a professional law that governs the formation of a dental technician in detail and which also regulates what skills a dental technician must have. There might be differences among Member States/third countries as regards the education procedure or the job description of a dental technician. However, in general it can be assumed that the work of a dental technician encompasses – *inter alia* – the manufacturing of fixed prosthesis (including crowns, bridges and implants), removable prosthesis (including dentures and removable partial dentures), maxillofacial prosthesis, orthodontic appliances and auxiliaries (e. g. mouthguards)<sup>9</sup>. This work can be carried out using machines and tools but also by using modern computer techniques.

Specialisations are of course not excluded<sup>10</sup>. However, the Commission services share the Dutch view according to which a single training in the field of computer/software technique is insufficient for the qualification as a dental technician; a person who has only a very limited knowledge in the field of dental technology and thus does not have all essential skills linked to the typical job description of a dental technician or one of its specialisations cannot be seen to be a dental technician within the meaning of Article 132(1)(e) of the VAT Directive.

#### *3.1.2. Legal form*

The tax exemption is not dependent on a specific legal form of the taxable person carrying out the activities covered by Article 132(1)(e) of the VAT Directive. This derives from the principle of fiscal neutrality according to which taxable persons with a different legal form

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<sup>8</sup> VDP *Dental Laboratory*, paragraph 33.

<sup>9</sup> See e.g. <http://www.nhscareers.nhs.uk/details/Default.aspx?Id=142>; Huschens in Schwarz/Widmann/Radeisen, *Commentary to German VAT Code*, section 12(2) No. 6 paragraph 18; or more detailed the German ‘Regulation on vocational training as a dental technician’, Federal Law Gazette I 1997, 3182, section 3.

<sup>10</sup> In the UK, for instance, there are four specialised areas: Prosthodontic technicians, Conservation technicians, Orthodontic technicians, Maxillo-facial technicians (see: <http://www.nhscareers.nhs.uk/details/Default.aspx?Id=142>).

should be treated in the same way<sup>11</sup>. Thus, besides individual businesses, dental laboratories run as a partnership or a corporation might also be covered by the tax exemption in so far as they carry out services typically done by a dental technician or supplies of dental prostheses.

### 3.1.3. *Intra-Community acquisition/Final importation of goods – practical problems*

The Commission services agree that in practice it might be quite burdensome for businesses buying dental prostheses in other Member States or importing them from outside the EU, to ascertain if the supplier is a dental technician and, accordingly, whether the requirements for a tax exempt intra-Community acquisition or final importation of goods are fulfilled. Very vivid is the example presented by the Netherlands of a multinational company with several legal entities where the prostheses are sold by a company in charge of sales instead of the production company<sup>12</sup>.

Despite possible practical problems, it must be stressed that the exemptions granted upon intra-Community acquisition of dental prostheses pursuant to Article 140(a) or final importation of such goods pursuant to Article 143(1)(a) of the VAT Directive are linked to the requirements governing the tax exemption pursuant to Article 132(1)(e) of the VAT Directive. This tax exemption is not only defined according to the nature of the goods supplied, but also according to the status of the supplier. Supplies of dental prostheses are not tax exempt if the person who is the supplier according to the contractual relationship is not a dental technician (or a dentist).

Whether this is the case must be finally decided by general rules of evidence. In cases of doubt, the burden of proof lies with the person claiming the application of a tax exemption who must prove that the requirements are fulfilled. This does not exclude that a Member State may grant facilitations of the burden of proof as it can also be derived from Article 131 of the VAT Directive. Pursuant to this provision – *inter alia* – the tax exemptions at hand shall apply in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

To apply a general assumption according to which prostheses are supplied by a dental technician would however be too far-reaching. Such a facilitation would fully neglect the wording of Article 132(1)(e) of the VAT Directive and render the condition relating to the status of the supplier inoperative. Such a *de facto* amendment of the content of the tax exemption is not justified<sup>13</sup>.

## 3.2. Tax exempt supplies

The question is what kind of supplies are covered by the tax exemption pursuant to Article 132(1)(e) of the VAT Directive. Services are tax exempt if they are supplied by dental technicians in their professional capacity. The supply of goods is only tax exempt if it is done by a dentist or a dental technician and concerns the supply of dental prostheses.

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<sup>11</sup> See e. g. CJEU, judgment of 10 September 2002, C-141/00 *Kügler*, as regards Article 132(1)(c) of the VAT Directive.

<sup>12</sup> For details see page 2 of the annexed question submitted by the Netherlands.

<sup>13</sup> In this context see also *VDP Dental Laboratory*, paragraph 26.

### *3.2.1. Services by dental technicians*

The CJEU has clarified that services supplied by dental technicians in their professional capacity applies to all activities that constitute the specific subject-matter of that profession<sup>14</sup>. Accordingly a service, in order to qualify as tax exempt, must be related to activities covered by the typical job description of a dental technician as presented above under section 3.1.1.

The manufacturing of a 3D-scan as described in the memo seems to be typical preparatory work for the manufacturing of dental prostheses. It is part of the production process and seems to be typical for part of the work done by a dental technician.

The tax exemption pursuant to Article 132(1)(e) requires that this work qualifies as a service and does not qualify as a supply of goods because the tax exemption for the latter is restricted to the supply of dental prostheses. We assume that in principle – from the relevant perspective of an average consumer – the service element will prevail; subject matter of the supply is the service ‘manufacturing of a 3D-scan’ and not the supply of the completed scan<sup>15</sup>.

In addition, such a service (manufacturing of a 3D-scan) is only tax exempt if the supplier is a dental technician. Whether this is the case is dependent on the underlying contractual relationship.

### *3.2.2. Dental prosthesis*

A prosthesis is a replacement made of exogenous, inanimate material aiming at the best possible substitution of a body part in form and/or function<sup>16</sup>. A dental prosthesis is an intraoral prosthesis used to restore (reconstruct) intraoral defects such as missing teeth, missing parts of teeth, and missing soft or hard structures of the jaw. Dental technology distinguishes, for instance, between fixed prostheses (including crowns, bridges and implants), removable prostheses (including dentures and removable partial dentures) and maxillofacial prostheses<sup>17</sup>.

Questionable is the VAT treatment of the supply of braces, titanium girders and the material that is used to manufacture dental prostheses.

A **brace** is a device by which a malposition of the jaw or of teeth is corrected. It does not substitute a body part as required by the definition mentioned above. A brace is an **aliud** in relation to a prostheses and cannot be covered by the literal meaning of the term dental prostheses used in Article 132(1)(e) of the VAT Directive. According to the Commission services, including the supply of a brace within the scope of the tax exemption in question would not be justified in light of the principle of strict interpretation. This applies independently of the fact that prostheses and dental devices might be classified under the same category of the nomenclature.

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<sup>14</sup> *VDP Dental Laboratory*, paragraph 30

<sup>15</sup> However, this is finally depending on the specific contract. In this context see also CJEU, judgment of 11 February 2010, C-88/09 *Graphic Procédé*.

<sup>16</sup> ‘Roche Encyclopedia medicine’, 5<sup>th</sup> edition, page 1522 under ‘prostheses’.

<sup>17</sup> Maxillofacial prostheses = Protheses which concern the jaw and the face

**Titanium girders** are usually manufactured by dental technicians. They do not substitute a body part as such but they are a part of a dental prosthesis which substitutes a body part. It is crucial to note that the term ‘dental prosthesis’ is not so sufficiently clear as to necessarily exclude ‘parts of a dental prosthesis’. In contrast to a brace a part of a dental prosthesis is not an aliud to a dental prosthesis; it is rather a **Minus** to a dental prosthesis because it is included in it. According to general legal interpretation rules, the literal meaning of the term ‘dental prostheses’ as it is used in Article 132(1)(e) of the VAT Directive does not prevent it from being interpreted as including ‘a whole dental prosthesis and its components’. Whether or not this is justified must be checked by analysing the purpose of Article 132(1)(e) of the VAT Directive and the context of the provision.

The exemption of the supply of dental prostheses made by dentists and dental technicians is intended to ensure that the supply of health-related products does not become inaccessible by reason of the increased costs of those products if their supply were subject to VAT<sup>18</sup>. Since a tax exemption for the supply of titanium girders would contribute to restrict the costs for health-related products such a tax exemption would not contradict the purpose of the tax exemption pursuant to Article 132 (1)(e) of the VAT Directive.

This solution applies to titanium girders and other parts of a dental prostheses typically manufactured by a dental technician (or a dentist). However, it must be stressed that **the supply of the material which is used to manufacture dental prostheses** is not covered by the tax exemption. The limitation of the tax exemption of Article 132(1)(e) of the VAT Directive to supplies carried out by dentists or dental technicians clearly indicates that the subject of the supply must concern a product which is typically manufactured by a member of these professions. This also derives from the systematic context with the first part of the tax exemption according to which only those services are favoured which are carried out by dental technicians in their professional capacity; insofar, the tax exemption is related to the manufacturing process. Furthermore, the supply of raw material is not essential for the professions of a dentist or a dental technician and is also done by other taxable persons. It would not be justified to exempt the supplies of such material if done by a dentist/dental technician but to tax it if it is done by another entrepreneur<sup>19</sup>.

### **3.3. Conclusions**

The Commission services would draw the following conclusions:

- (1) Dental technicians within the meaning of Article 132(1)(e) of the VAT Directive are taxable persons who – independent of their legal form – possess the necessary professional qualification to carry out essential activities linked to the typical job description of a dental technician.
- (2) Member States are not entitled to implement facilitations of the burden of proof – of the sort as proposed by the Netherlands – which would render the condition relating to the status of the supplier as dental technician inoperative. In cases of doubt, the

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<sup>18</sup> *VDP Dental Laboratory and Others*

<sup>19</sup> In this context see also CJEU, judgment of 17 January 2013, C-360/11 *Commission vs Spain*, from which it follows that the reduced VAT rate is applicable to supplies of medicines but not to the supply of materials to produce them.



burden of proof lies with the person claiming the application of a tax exemption who must prove that the requirements are fulfilled.

- (3) Services which are done by dental technicians in their professional capacity are those which are covered by the typical job description of a dental technician and, thus, constitute the specific subject matter of this profession. This might include the manufacturing of a 3D-scan.
- (4) The term ‘dental prostheses’ within the meaning of Article 132(1)(e) of the VAT Directive is broad enough to also include the supply of parts of a dental prosthesis which are typically manufactured by dentists or dental technicians. However, it does not encompass the supply of dental devices and of material which is used to manufacture dental prostheses.

#### **4. DELEGATIONS' OPINION**

The delegations are requested to give their opinion on this matter.

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## **Question from the Netherlands**

### **Interpretation issues dental prostheses**

#### **Issues**

Following the ECJ ruling in the joint cases C-144/13, C-154/13 and C-160/13, the Netherlands encounters three interpretation issues as regards the exemption for the supply of dental prostheses by dentists and dental technicians.

#### **Purpose**

The Netherlands seeks the views of the Commission and the Member States about these issues.

#### **Legislation and jurisprudence**

According to art. 132, paragraph 1, part e, of the vat Directive, the supply of dental prostheses by dentists and dental technicians are exempt from vat. Recently, the Court of Justice of the EU ruled in the joint cases C-144/13, C-154/13 and C-160/13, that art. 140(a) and (b) and art. 143(a) of the vat directive must be interpreted as meaning that the exemption applies to the intra-Community acquisition and the final importation of dental prostheses supplied by dentists and dental technicians where the Member State of the supply or importation has not implemented the transitional rules provided for in art. 370 of the vat directive. And furthermore, that this also applies where the intra-Community acquisition of dental prostheses originates from a Member State which has implemented the derogating and transitional arrangements provided for in art. 370 of that directive. So far the Netherlands took the position that these intracommunity acquisitions and imports were taxable.

#### **The concepts of dental prostheses, dentist and dental technician**

As regards the application of art. 132, paragraph 1, part e, of the VAT Directive, three interpretation issues have arisen. These issues have already emerged or might emerge in other Member States as well. A common interpretation within the EU is essential for a level playing field in this area.

The first issue concerns the definition of a dental technician.

#### **Question**

- 1. What is to be understood as a dental technician and how do we ascertain that the goods are produced by a dental technician?**

According to Dutch policy rules, a dental technician has to provide services ‘as such’/in his capacity in order to fall under the exemption. This means that the supply of goods and services should be distinctive and essential for the profession of dental technician. He must have successfully completed an education as a dental technician and must be engaged in activities that are specific and essential for this vocation. This may include the

following activities: the manufacturing, processing or judging of dental work or a parts thereof. This work can be carried out using machines and tools but also using computer techniques. A single training in the field of the computer/software technique is insufficient to be regarded as a dental technician.

We think that this definition suits within the wording of art. 132, paragraph 1, part e, of the VAT Directive. Because there is no definition for dental technicians in Dutch or European law, we believe that the word 'dental technician' can only be interpreted by reference to common usage. (see case ECJ 14 may 1985, case 139/84 (Van Dijk's Boekhuis) under 20.).

Furthermore, it is clear that the term 'dental technician' constitutes an independent concept of Community law (see for instance ECJ, case C-233/05). It also is clear that exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see ECJ Case C-287/00 Commission v Germany [2002] ECR I-5811, paragraph 43, and Case C-8/01 Taksatorringen [2003] ECR I-13711, paragraph 36). However, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, ECJ, C-284/03 Temco Europe [2004] ECR-11237, paragraph 17, and also, in relation to university education, Commission v Germany, paragraph 47).

In practice this means that it will be very burdensome for businesses who buy dental prostheses from businesses in other Member States or outside the EU, to ascertain that the supplier is a dental technician. It might, for instance, happen that there is a multinational company in the EU which has several juridical entities, which does not form a VAT group, where the prostheses are sold by a selling company instead of the production company. The buyer who deals with the production company in ordering the prostheses will probably not know that the selling company is not a dental technician.

Furthermore, digital import documents do not have the possibility to fill in whether or not the supplier is a dental technician. A practical solution might be to assume that prostheses are supplied by a dental technician.

## **2. What are dental prostheses?**

In the Netherlands, dental prostheses are dental goods used as replacements of teeth and molar which are made for individual persons by means of 3D-scan, plaster casts, wax casts, etcetera. The material that is used to manufacture dental prostheses is not included in the definition of dental prostheses. A question is whether steps (titanium girders) that form part of prostheses are to be considered as dental prostheses. We think not since these steps do not independently form a prosthesis. These parts are placed under number 90 21 29 00 00 of the nomenclature. Also braces cannot be regarded as dental prostheses since they do not replace teeth. However according to the nomenclature they are placed under prostheses.

## **3. What are services of dental technicians in their professional capacity?**

This question has arisen in the context of the supply of 3D-scans.

Normally dentists use 3D-scan equipment to make an exact scan of teeth.

It also occurs that dentists use plaster casts of teeth and send those casts to a dental lab. These labs are transformed in a 3D-scan which is supplied to the dentist, who sends it to a dental technician who produces the dental prostheses. Currently we consider that the production of a 3D-scan by a lab may be seen as a service of a dental technician performed in its professional capacity if the lab produces the scan under the responsibility of a dental technician.

**Question**

The delegations are requested to give their opinion on the three interpretation issues.