

## EGDF Memos 2013

### Commission proposal for a Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services

#### QUESTION FOR OUR MEMBERS:

#### Is this proposed regulation actually a progress or does it not solve the issues of double taxation?

#### 1. TIMELINE

**2006 VAT directive** (2006/112/EC) on the common system of value added tax

**2008 VAT package**, amending the VAT directive by a directive (2008/8/EC) focusing on the place of supply of services

**2011 VAT Implementing Regulation** Council Implementing Regulation (EU) No 282/2011 on how to apply certain provisions of the VAT Directive, including the list of electronic services

**2012 Commission Consultation** about the clarification of changes related to electronic services supplied to non-taxable persons

=> **by the end of 2013: Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services clarifying how the VAT directive will be applied in practice.**

**2014:** National implementation of the directive

**2015:** Electronic services become taxable in the Member State in which the customer is established

#### 2. NEW VAT RULES FOR DIGITAL SERVICES

Electronic services (=games), are in general, taxed at the place where the customer is established or resides. Where the supplier is established within the EU and the customer is a non-taxable person (= the gamers), the supply is, however, currently taxed at the place where the supplier (=game developers/distribution platform holders) is established.

**From 1 January 2015**, all telecommunications, broadcasting and electronic services will be taxable at the place where the customer belongs (unless the rule on effective use and enjoyment applies), even if the customer is a non-taxable person. Thus for non-taxable

persons, EU and non-EU suppliers will need to identify:

- where the customer is established,
- has his permanent address
- or usually resides.

Without a VAT identification number (which is usually reserved for taxable persons) for guidance, the supplier will have to rely to some extent on information from the customer. To ensure legal certainty, and avoid double taxation or non-taxation, suppliers need clear and binding rules on how to do this.

#### 3. WHO ACTUALLY PAYS THE VAT? A GAME DEVELOPER OR THE DIGITAL DISTRIBUTION PLATFORM HOLDER?

**Article 9a** clarifies the treatment of broadcasting and electronic services when supplied through the telecommunications network or via an interface or a portal such as a marketplace for applications belonging to an intermediary (or a third party intervening in the supply). The presumption is that in supplying those services the intermediary (=Appstore, Google play, Steam etc.) acts on behalf of the supplier but in its own name. Unless stated otherwise, the intermediary will be deemed to have received and supplied those services. Where supply is made to a non-taxable person, the intermediary then has to account for VAT in the Member State of its customer.

#### 4. HOW TO IDENTIFY THE LOCATION OF THE CONSUMER?

According to the **articles 24a and 24b**, the following shall be considered irrebuttable presumptions for consumer location:

- (24a) If the physical presence of the recipient of the service is needed for the service to be rendered to him (e.g. a telephone box, a telephone kiosk, a wi-fi hot spot, an internet café, a restaurant or a hotel lobby), the presumption shall be that the customer is established at the place of that location and the service is effectively used and enjoyed

there. This presumption may not be rebutted by any means in fact or law.

- (24b) Where pre-paid credits stored on a SIM card are used by a customer for electronic services, the presumption shall be that the customer is established in the country identified by the mobile country code of that SIM card and the service is effectively used and enjoyed there. This presumption may not be rebutted by any means in fact or law.

According to the **articles 24c, 24d, 24e and 24f** the following shall be considered rebuttable presumptions for consumer location:

- (24c) the customer is established at the place of installation of the fixed land line.
- (24d) the customer is established in the country identified by the mobile country code of the SIM card used when receiving those services.
- (24e) the customer is established at the place of installation of the device or if that place is not known the place to which the viewing card is sent with a view to being used there

According to the **articles 24f and 24g**, if the aforementioned irrebuttable or rebuttable evidence is not available, in identifying the place where the customer is established, has his permanent address or usually resides, two separate pieces of evidence shall be required provided that the evidence is not contradictory. The following shall, in particular, serve as evidence:

- a) customer details such as the billing address of the customer;
- b) the Internet Protocol (IP) address of the device used by the customer or any method of geolocation;

- c) bank details such as the place where the bank account used for payment is and the billing address of the customer held by that bank;
- d) the Mobile Country Code (MCC) of the International Mobile Subscriber Identity (IMSI) stored on the Subscriber Identity Module (SIM) card used by the customer;
- e) the location of the residential fixed land line through which the service is supplied to the customer;
- f) in relation to a customer who is selling goods via the Internet or similar electronic network, the place where the transport or dispatch of the goods sold by that customer initially begins;
- g) in relation to a customer who is buying goods via the Internet or similar electronic network, the place where the transport or dispatch of the goods bought by that customer finally ends;
- h) registration details of the means of transport hired by the customer, if registration of that means of transport is required at the place where it is used, and other similar information;
- i) other commercially relevant information obtained by the supplier.

## 5. CONSUMERS WITH A VAT NUMBER

According to proposed Article 18, you should offer a customer a possibility to communicate his VAT identification number in order to allow them to prove that they are taxable-persons (=companies).

## 6. HOW THE COMMISSION TRIES TO AVOID DOUBLE TAXATION?

The Commission targets the double taxation by:

- creating the aforementioned "clear and binding" rules securing "the smooth and coordinated transition" and "ensuring the uniform application of the rules" and by stressing the importance of applying the rules in "a uniform manner" in member states
- securing that where a non-taxable person is established in more than one country or has his permanent address in one country but usually resides in another, priority is to be given to the place that best ensures taxation at the place of actual consumption.
- securing that for electronic services supplied around 1 January 2015, i.e. the time when the new rules on the place of supply become applicable, conditions linked to the supply or differences in application between Member States do not result in double taxation or non-taxation. To prevent this from happening, Article 2 of the proposal makes it clear that, no matter when the VAT becomes chargeable, the decisive moment for determining the place of supply is when the services are supplied or, for ongoing supplies giving rise to successive statements of account or successive payments, when each supply is completed. That is when the chargeable event occurs in any of the Member States. Those measures are necessary to ensure a smooth transition to the rules put in place as of 1 January 2015.
- advising that for the purposes of this Regulation, it may be appropriate for Member States to adopt legislative measures limiting certain rights and obligations (Directive 95/46/EC) on the protection of individuals with regard to the processing of personal data and on the free movement of such data in order to safeguard the interests referred to in Article 13(1)(e) of that Directive where such measures are necessary and proportionate in view of the risk of tax fraud and tax evasion in Member States and the need to ensure the correct collection of VAT covered by this Regulation. .