

Changes to the VAT place of supply for telecomms, broadcasting and electronic services

Christophe Plainchamp and Thibaut Boulangé of Atoz – Taxand Luxembourg look at the incoming changes to the VAT place of supply rules in the EU.

From January 1 2015, new rules determining the place of supply of telecommunication, broadcasting and electronically supplied services (TBE services) will be applicable. After that date, all TBE services will be taxable for VAT purposes at the location of the customer, regardless of the service provider's location (EU or non-EU) or the type of customer (B2B or B2C transactions). For non-EU service providers, rules now in force already ensure such taxation in the country of the customer. The main change will affect EU businesses which, based on the current rules, tax their services in their country of establishment when invoicing final customers (B2C transactions).

Following the entry into force of the new regime, EU and non-EU businesses will be on an equal footing when determining the status of their customers (taxable or non-taxable person) and the place to which these customers belong (within or outside the EU) to ensure the correct VAT treatment.

Based on the principle of taxation at the place of consumption of the services, the new system aims at creating a level playing field between EU and non-EU operators involved in the supply of TBE services within the EU.

Step back: Regimes applicable before 2015

Before 2003, there were no EU harmonised rules applicable to online services. EU member states had not anticipated the development of the e-commerce sector and the VAT treatment of these services rendered to EU final customers fell within the scope of the general B2C VAT rules. In this nebulous context, services provided by non-EU suppliers to EU final customers were not subject to EU VAT while EU businesses supplying similar services had to charge VAT at the rate applicable in their country of establishment. As a result, EU businesses were at a significant disadvantage compared to their non-EU competitors. This situation raised awareness for the need to provide more specific regulation of online services, and dedicated legislation was introduced in 2003 enhancing a level playing field between EU and non-EU businesses.

The changes, which took effect on July 1 2003, required non-EU businesses to account for VAT in the country where the final customers were located. To allow non-EU businesses to file their VAT returns without the burden of filing one return in every country, they were allowed to use the mini one-stop shop (MOSS) where they could file one return in one EU country for the VAT charged in all EU countries. Alternatively, non-EU

businesses could set-up a platform in a low VAT rate EU jurisdiction and then charge their EU final customers with one single low VAT rate. Luxembourg's ability to attract big e-commerce players over the past 10 years has notably stemmed from these tax considerations.

The fact remains that EU businesses providing TBE services to EU final customers were obliged to charge VAT at the rate applicable in the country where the seller is established while non-EU businesses selling electronic services to EU customers had to charge VAT at the rate imposed by the country of the final customer. Modifications beginning on January 1 2015 are one of the consequences of the VAT package adopted in 2008 which aimed at eliminating such tax treatment asymmetry.

2015 regime: New rules

As from January 1 2015, the system now applicable to TBE services supplied by businesses established outside the EU will be extended to EU businesses. Such services supplied by businesses established within the EU to final customers (B2C relations) will also be taxable for VAT purposes where the recipient is established, has a permanent address or usually resides, in line with article 58 of Directive 2006/112/EC (VAT Directive, amended version). Such a regime confirms the principle of taxation at the place of consumption of the services and implements a true level playing field between all operators, regardless of where they are located.

In this future regime and for B2C transactions, service providers will remain liable for the payment of VAT. However, and contrary to the existing system, EU businesses will have to charge VAT to the rate applicable in the country where their EU final customers are located. They will no longer be entitled to charge the VAT rate applicable in their countries of establishment. Consequently, EU and non-EU service providers will be subject to the same VAT treatment, and any VAT competitive advantage for businesses of setting up establishments in EU jurisdictions with lower standard VAT rates will, *de facto*, be eliminated.

2015 regime: Services covered

Most of the B2C services supplied by EU businesses fall under the general localisation VAT rules and are consequently taxed in the country where the supplier is established (article 45 of the VAT Directive). Since the new rules derogate to this general localisation principle and only cover TBE services, the scope of the regime has been accurately determined:

- telecommunication services notably encompass fixed and mobile telephone services (...); telephone services provided through the internet; voice mail, call waiting, call forwarding; audio text services; facsimile, telegraph and telex; access to the internet; and so on;
- broadcasting services cover services consisting of audio and audiovisual content, such as radio or television programmes



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Christophe has 13 years of experience in cross-border transaction advisory (including the setting-up of VAT strategies, optimisation of VAT flows and VAT compliance) and in providing indirect tax planning solutions for international clients.

Relevant experience

Christophe's experience includes providing clients with advice on the optimisation of the VAT recovery of holding companies, saving several million euros of VAT for PERE funds. He also has expertise in reviewing the VAT situation of holding companies and regularising compliance work with the VAT authorities, significantly reducing fines and penalties for PERE funds, as well as giving advice on cross-border transactions for optimising VAT flows, saving millions of euros of VAT for multinational groups.

Qualifications

He holds a business degree from the University of Liège in Belgium and completed a post-graduate course in Luxembourg tax. He is a member of the Institute of Chartered Accountants of Luxembourg (*Ordre des Experts-Comptables de Luxembourg*) and of the indirect tax committee of the Luxembourg Fund Association, the Luxembourg Bankers' Association and the Luxembourg Private Equity Association.

which are provided to the general public via communication networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programmes schedule;

- electronically supplied services notably include website supply, web-hosting, distance maintenance of programmes (...); supply of software and updating thereof; supply of images, text and information and making available of databases; supply of music, films and games, including games of chance and gambling games, (...); supply of distance teaching.

2015 regime: Status and location of final customers

One of the key issues for businesses is to clearly identify the status and the location of their customers in order to determine who is liable for the payment of the VAT and under which rate. The VAT status of the recipient of the services

(taxable or non-taxable person) is not relevant in order to determine the place of supply but is of utmost importance for establishing the tax liability.

Pursuant to the Implementing Regulation, the supplier of TBE services may consider a customer established within the EU as a non-taxable person as long as that customer has not communicated his individual VAT identification number to him.

Service providers will therefore:

- not charge VAT on the services rendered if a valid VAT number is received. In such a case, the recipient will be liable to self-assess the VAT through its own VAT return; and
- charge VAT at the VAT rate applicable in the country of the customer when no valid VAT number has been received.

Determining the location of the non-taxable customers is crucial for businesses to apply the accurate VAT rate. The Implementing Regulation has established a set of presumptions to identify the customer's member state of residence, notably when services are prepaid and used by an anonymous customer.

Businesses will have to analyse whether any of the conditions foreseen by the rebuttable presumptions of the Implementing Regulation are met. The customer of TBE services is presumed to be located:

- in the country where the service is effectively used and enjoyed when the physical presence of the customer is needed for the service to be received (for example a telephone box, a telephone kiosk, a wifi hot spot, and so on);
- in the country of departure of the passenger transport operation when services are provided onboard a ship, an aircraft or a train during an EU passenger transport operation;
- at the place of installation of the fixed landline when services are provided through a fixed landline;
- in the country identified by the mobile country code of the SIM card when services are received through mobile networks; and
- at the place where a decoder or similar device is located, or if that place is not known, at the place to which the viewing card is sent with a view to being used there when a decoder or similar device or a viewing card is needed and a fixed landline is not used.

In the case where services supplied do not fall within the scope of the presumptions described above, businesses must determine the customer location on the basis of two items of non-contradictory evidence. The recourse to the following factual elements can be used as evidence: the billing address of the customer, the internet protocol (IP) address of the device used by the customer or any method of geolocation, bank details such as the location of the bank account used for payment or the billing address of the customer held by that



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Over the past few years, Thibaut has developed a strong knowledge of indirect tax issues in the fields of financial services, real estate, e-commerce, industrial and distribution sectors as well as aviation for national and international clients.

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bank, the Mobile Country Code (MCC) of the International Mobile Subscriber Identity (IMSI) stored on the SIM card used by the customer; the location of the customer's fixed landline through which the service is supplied to him; and other commercially relevant information.

Presumptions foreseen by article 24 of the Implementing Regulation can be rebutted by service providers on the basis of three items of non-contradictory evidence indicating that the customer is established, has his permanent address or usually resides elsewhere. In case of indications of misuse or abuse by service providers, tax authorities can also rebut these presumptions.

2015 regime: Services supplied by intermediaries and vouchers

Electronic and internet telephone services supplied by intermediaries as well as vouchers in relation to TBE services require an in-depth analysis to determine the VAT debtor and the scope of information to be received from intermediaries so as to account for VAT in the customer's country.

In line with the commissioner arrangement set out by the VAT Directive, the Implementing Regulation provides with the rebuttable presumption that a taxable person who takes part in the supply of electronic or internet telephone services is acting in his own name, but on behalf of the provider of these services. To illustrate with an example, online store providers selling apps from content owners should in principle be deemed to be the one selling those apps to final customers and therefore responsible for accounting for VAT. Depending on the way intermediaries intervene in chain transactions (disclosed or undisclosed agent – presumption rebutted or not), identifying exactly who qualifies as the supplier to final customers is of the

utmost importance for determining the VAT liability as well as the scope of information to be received from intermediaries regarding the customer's location.

Vouchers are frequently used for TBE services and involve additional technical difficulties (location of the final customer, VAT rate applicable, sales by intermediaries, and so on). While harmonised rules on vouchers are still subject to discussions at EU level, businesses will also have to carefully determine who has to account for VAT as well as the information necessary to do so.

2015 regime: Mini one-stop shop scheme

Due to these changes, EU businesses providing TBE services should in principle register for VAT purposes in all EU member states where they have customers. However, a specific scheme called mini one-stop shop (MOSS) will be put in place to prevent businesses from suffering important VAT administrative burdens (for example, VAT registration, filing of VAT returns, VAT payments) in each of the member states where they provide services. This MOSS was already available for non-EU businesses providing these services to EU customers.

The MOSS concerns only VAT on the provision of TBE services by businesses to non-taxable persons (B2C relation) established in the EU.

As from January 1 2015 the MOSS scheme will enable both EU and non-EU businesses to choose one member state for one single VAT registration, allowing the filing of one single VAT return per quarter and the payment of all VAT due (in all member states) in this member state of registration. Under the MOSS platform, quarterly VAT returns will need to be filed on the portal within 20 days of the end of the calendar quarter. Respective information and VAT amounts due are then distributed to each member state of consumption.

EU VAT taxable persons already registered within the EU will remain identified in the country where their business is established (that is, the head office). However, if a taxable person is not established within the EU, the member state of identification will be the one in which the taxable person has a fixed establishment (choice possible in case of various fixed establishments).

Registration options for the MOSS scheme can be completed from October 1 2014 (early registration period) on the MOSS platforms. These portals ease the management of VAT returns, the follow-up of VAT payments and transfers among member states.

With skilled and experienced manpower, appropriate infrastructures as well as at the cutting edge of IT support servic-

es, Luxembourg remains an advantageous place for businesses providing TBE services. Regardless of these VAT changes, major e-commerce players well established in Luxembourg should not relocate their activities to other EU or non-EU jurisdictions. Luxembourg should remain at the forefront of the e-commerce sector and should maintain its attractiveness to newcomers.

To help EU businesses, the European Commission in April published explanatory notes clarifying practical difficulties that might arise as well as guidelines on the audit of MOSS (contact and information request formalities). In Luxembourg, practical guidelines on the MOSS scheme have now been published by the VAT authorities with the aim of providing a better understanding of the registration and administration process of this scheme.

Preparatory steps

New VAT rules in relation to the supply of TBE services to final consumers will enter into force from January 1 2015. The place of supply of all TBE services to EU consumers will be the place where these customers are established. The MOSS regime already available for non-EU businesses will be extended. It will allow EU service providers to submit returns and pay the relevant VAT due to the member states through the web portal of one member state, thereby simplifying their VAT compliance obligations.

In this context, Luxembourg should remain the best place to be for e-commerce players due to its pool of qualified service providers, its appropriate infrastructure and tax friendly environment. In this favourable framework, it is unlikely that this new regime will involve the relocation of Luxembourg players to other jurisdictions.

In view of these changes, EU businesses providing TBE services should:

- adapt their pricing policies to reflect the different VAT rates applicable within the EU or compute the impact of the VAT changes on the margin if prices remain unchanged; and
- ensure the compliance of accounting and customer data collection. Due to the usually limited amounts per transaction, it is unlikely that tax authorities will analyse each transaction within the framework of VAT audits. We can therefore anticipate that VAT audits will focus on the methodology used to compute the amounts of VAT due per country. The status and the location of the customers have to be carefully monitored to determine the person liable for the payment of VAT and the VAT rate applicable.