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E-Commerce in the European Union: Is the EU VAT Area Fit for Its Purpose in the 21st Century?

by Ronan McGivern, Jennifer Mace, and Dan Cassidy

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In this article, the authors provide a primer on the operation of the VAT in the European Union, devoting particular attention to the distinction between supplies of goods and supplies of services as well as the role of the place of supply rules in determining if VAT is due, where VAT is due, and which party owes VAT.

"Beyond the everyday world . . . lies the world of VAT, a kind of fiscal theme park in which factual and legal realities are suspended or inverted . . . . a complex universe [in which] relatively uncomplicated solutions are a snare and a delusion."

- Lord Justice Sedley, *Royal & Sun Alliance v. C&E Commissioners*, (Court of Appeal) 2001

VAT can be a daunting and bewildering area of tax. Even for those within EU member states, VAT is a construct that has a never-ending capacity to confound and confuse. The opening quotation is from a U.K. Court of Appeal decision on a VAT case. While the specific technical VAT issue in the case is not relevant to this article, the quotation will resonate with many who have tried in vain to understand the precise mechanics underpinning VAT in the EU, hoping to find "logic" in the rules.

For those who have struggled to make sense of the world of VAT, including many Europeans, Lord Sedley's quotation provides some level of reassurance — you are not alone. VAT legislation is complex. It can baffle lawyers and members of the judiciary, people who have spent their entire careers interpreting detailed legislation, let alone a foreign businessperson considering doing business in the EU. At the outset, it is important to recognize that the EU's VAT is unique. The starting point is the EU's VAT directive (2006/112/EC) — each member state's domestic VAT legislation is derived from this directive and must also comply with fundamental EU law. Thus, there are common core principles underpinning the VAT legislation of all of EU member states. Understanding these core principles is important for non-EU businesses that are seeking to do business within the EU.

This article seeks to peel away some of the layers of complexity. While aimed primarily at U.S. accountants and businesspeople operating in the EU, this discussion will also be helpful for other non-EU practitioners. The latter group of professionals may confront VAT issues regularly, but may still be unsure about the complicated and unique functioning of the tax in the EU.

This article provides an overview of some key VAT concepts, such as the distinction between supplies of goods and supplies of services for VAT purposes, as well as the concept of the place of supply, both for business-to-business (B2B) and business-to-consumer (B2C) transactions. These concepts are critically important for determining when VAT registration is required, who must account for the VAT, and in which jurisdiction VAT must be paid.

In a followup article, we will focus on the challenges e-commerce poses for VAT.

E-commerce encompasses both businesses that sell goods in Europe over the internet (for example, internet resellers) and businesses that make supplies of electronic services (for example, providing software for download). We will look at the effect that the existing EU VAT legislation can have on businesses operating in this sector, including the need for multiple VAT registrations and the challenge of managing VAT compliance across numerous jurisdictions. The article will also consider and address some of the inherent deficiencies with existing EU VAT legislation. Simply put, VAT legislation has not kept pace with globalization or with developments in international trade.

Finally, we will focus on the steps that the EU has taken to address the deficiencies in EU legislation, particularly the changes introduced to the place of supply rules for electronically supplied services and the special system developed to help businesses comply with VAT law. We will also consider the 2016 EU action plan on VAT "towards a single EU VAT area,"[1] which establishes a pathway to develop a "VAT area that is fit for purpose in the 21st century," and evaluate the effect these provisions are likely to have on e-commerce businesses in the future.

I. The European Context of VAT

While VAT and sales taxes exist in many parts of the world, the EU's VAT system is unique (and uniquely complicated) as the EU is one single market comprised of 28 individual member states — each with its own national revenue authority and domestic VAT legislation. The EU, as it is known today, recently celebrated its 60th birthday. Therefore, to understand VAT in a European context, it is useful to briefly recap the history of the EU and how it has developed.

The EU has developed from what was originally referred to as a common market into the European Economic Community (EEC)[2] and then into the European Union. At each stage of development, the number of member states expanded and there was a push toward greater integration of the member states. The U.K.'s Brexit vote marks the first step in a reversal of the integration that has been increasing over the last 60 years.

Four core principles underpinning the European project have remained constant throughout the various stages of development of the EU. Known as the four freedoms, they include:

- the free movement of people;
- the free movement of goods;
- the free movement of services; and
- the free movement of capital.

All jurisdictions that join the EU agree to abide by these freedoms.

The free movement of goods and services is integral to the EU. It is the foundation of the concept of the single market — goods and services pass easily across borders, moving between businesses and consumers in different EU member states without tariffs or other trade barriers. If each EU member state had its own unique VAT or sales tax system, the differences could restrict the ability of goods and services to flow freely across borders and would impede the free movement of goods and services.

Without appropriate safeguards or common legislation, EU member states could compete against each other on VAT and undercut each other's VAT rates, distorting competition within the market. For example, if the VAT rate for supplies of goods and services was based solely on the rate applicable in the jurisdiction where the supplier was established, there would be an incentive for suppliers to register in the EU member state with the lowest VAT rate and seek to supply customers across the EU from that jurisdiction, thereby obtaining a competitive advantage and leading to unfair competition.

To preserve the function of the common market, each EU member state's VAT legislation is derived from EU legislation. While each member state has some flexibility regarding its domestic VAT legislation (for example, the setting of rates), common core principles based on the VAT directive, originally adopted in the 1970s, underpin the VAT systems of all EU member states. This includes the place of supply rules and

[1] European Commission, Communication From the Commission to the European Parliament, the Council and the European Economic and Social Committee, "Towards a Single EU VAT Area — Time to Decide" (Apr. 7, 2016), COM(2016) 148 final.

[2] Treaty establishing the European Economic Community (Mar. 25, 1957) (known as the Treaty of Rome).

the reverse charge provisions, considered in more detail below.

Significantly, when the domestic VAT legislation of a member state conflicts with EU legislation, the EU legislation takes precedence. When disputes arise, the ultimate arbitrator is the Court of Justice of the European Union, a body that has provided a rich vein of VAT case law. CJEU rulings can and do lead to changes in member states' domestic VAT legislation, bringing the domestic legislation in line with EU principles.

Another notable point: Like every other EU member state, the U.K.'s domestic VAT system is rooted in the EU system. Post-Brexit, the U.K. will no longer be bound by the EU principles or decisions of the CJEU. One of the many complex issues raised by Brexit is that, as the U.K. exits the EU, its VAT regime will likely begin to diverge from that of the remaining EU member states.

II. What Is VAT?

A. General Principles

As most readers of this publication know, the VAT is a consumption tax. Article 2 of the VAT directive sets out the three elements needed for a VAT charge to arise: (1) a supply of goods or services (2) for consideration (3) by a businessperson acting as such.

Thus, for example, VAT is not charged on wages because, while the first two elements exist, an employee is not providing his services in the course of a business. There must also be a link between the supply and the payment. A famous and oft-quoted case on this point is *Tolsma v. Inspecteur der Omzetbelasting Leeuwarden*, C-16/93 (CJEU 1994).[3] The Dutch revenue authorities asserted that a street busker was liable for VAT on payments he received from passersby. The CJEU ruled in favor of the busker, finding that he owed no VAT. A critical element was the lack of a direct link between the performances and the payments made to the busker. A mere donation to a charity or to a street performer is not a payment for goods or services and hence VAT is not payable.

One of the main differences between VAT and the U.S. concept of sales and use tax is that VAT is charged at every stage in the supply chain, not just to the end-user/consumer of the goods and services. However, businesses in the supply chain are generally (with some exceptions) entitled to claim a credit for the "input VAT" charged to them on their purchases. They can use this to offset the VAT that they are required to pay in respect of their sales ("output VAT"). For each VAT period, the business files a VAT return that summarizes the output VAT and the input VAT for the period. They then either make a net payment to the revenue authorities (if the output VAT is greater than the input VAT in that period) or seek a refund from the revenue authorities (if the output VAT is less than the input VAT in the period). The net effect is that the VAT cost should only be borne by the end consumer, who can't recover the VAT.

B. Distinction Between Goods and Services

A critical distinction for the application of VAT across the EU is whether the supply at issue is of goods or services. Goods are defined in article 14 of the VAT directive as any tangible product. Services are, less helpfully, defined in article 24 as anything that is not a good. The VAT directive's concept of a service is very broad. It includes obvious services — such as legal services or consulting services — and also less obvious services — such as the payment of consideration for giving up a right or an entitlement under law. Notably, the transfer of intellectual property (such as copyright, goodwill, or trademark) is not regarded as a supply of goods from a VAT perspective but rather as a supply of a service.

The EU VAT legislation and the core VAT principles were originally developed in the 1970s. At that time, goods and services were two distinct categories that were relatively easy to separate. Today, that distinction is murkier. This is particularly true with e-commerce. For example, sales of downloads, apps, and streaming videos are all supplies of services. This leads to the inevitable conundrum — selling a CD or a DVD is a supply of goods from a VAT perspective, but supplying the same content via download (no physical product) is a service.

[3] *See* John G. Goldsworth, "European Court of Justice Rules Donations to Dutch Organ Grinder Not Subject to VAT," *Tax Notes Int'l*, June 27, 1994, p. 1700.

Distinguishing between goods and services being supplied is not just an academic exercise. For buyers, the function of what they have acquired remains the same, but goods and services are fundamentally different in the world of VAT. As will be explained in this article, there are different rules for determining the place of supply of goods versus services. There are also different rules for determining who is required to account for VAT to the revenue authorities. In some instances, the purchaser is required to self-account[4] for VAT. This concept frequently confuses those less familiar with the intricacies of VAT. Reverse charge, another term that basically means the same as self-account, is also fundamental to the functioning of VAT within the EU.

C. What Is a Taxable Person for VAT Purposes?

A taxable person is defined as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity"[5] — essentially, a businessperson. Individuals who acquire goods or services in a personal capacity for consumption are considered consumers, not taxable persons. Suppliers must know whether they are making a supply to a taxable person or a consumer because the VAT treatment can be different.

III. The Place of Supply

Understanding the place of supply rules is important because they generally determine where VAT is chargeable and where the VAT should be returned and filings made. To the uninitiated, this can look misleadingly simple — how can the place of supply be anywhere other than where the supplier is located? But as the following examples illustrate, this is not the case.

A. Supply of Goods

Supplies of goods can be broken down into five distinct categories:

- domestic supplies;
- distance sales;
- intra-Community supplies;
- exports; and
- imports.

1. Domestic Supplies

Domestic supplies are goods or products that do not cross a border. For domestic supplies, the place of supply of goods is the jurisdiction where the goods are located at the time of supply.[6] The simplest example of a domestic supply is a purchase of goods from a store on the street; the VAT applicable is that of the EU member state in which the goods are located at the time of the supply. For example, an Irish customer who acquires goods from a store in Ireland is charged the appropriate Irish VAT rate applicable to the product.

While the above may sound obvious, other domestic supply scenarios may be less obvious. For example, suppose a U.S. business customer (U.S. Inc1) acquires goods from a U.K. supplier and the goods are in an Irish warehouse at the time of the supply. U.S. Inc1 then sells the goods to another U.S. customer (U.S. Inc2), which in turn sells the goods to an Irish customer (ROICO). Throughout these dealings, the goods are always held in the Irish warehouse until they are physically delivered from the Irish warehouse to ROICO's Irish premises. The net effect is that each supply is regarded as a domestic Irish supply with an obligation for U.S. Inc1 and U.S. Inc2 to register for Irish VAT and account for Irish VAT on the sales. This holds even if the U.S. businesses do not have establishments in Ireland. The focus is on the location of the goods at the time of the supply.

2. Distance Sales

A distance sale occurs when goods are (1) supplied by a business established in one EU member state to non-VAT-registered individuals in other EU member states, and (2) the goods are dispatched or transported across a border from one EU member state to another EU member state. Historically, distance sales would have been associated with mail-order businesses. However, over the past several years, an increasing amount of commerce has been conducted over the internet via platforms like Amazon and eBay.

[4] Articles 196 and 197 of the VAT directive.

[5] Value Added Tax Consolidation Act 2010 (Ireland) (derived from article 9 of the VAT directive).

[6] Article 31 of the VAT directive.

For distance sales, the place of supply is the jurisdiction where the dispatch or transportation ends.[7] This means that, when distance selling occurs, the supplier is technically required to register for VAT in every EU member state it ships goods to, regardless of the value of sales. Since this would impose a significant burden on small businesses selling relatively small volumes of goods to consumers across the EU, the EU legislation allows each member state to set a threshold for distance sales that must be met before local VAT registration is required. The table at the end of this article shows the distance selling thresholds.

If the supplier's total expected sales into the other EU jurisdiction for a 12-month period are less than the applicable distance selling threshold for that jurisdiction, then the supplier can continue to charge VAT at the rate applicable in its home jurisdiction. Once the threshold is reached, the supplier must register for VAT in the other EU member state, charge the appropriate VAT in that jurisdiction, and account for VAT in the foreign jurisdiction.

This is best illustrated by an example:

> An Irish internet reseller supplies goods to consumers across the EU. In the first year, the company's sales to U.K., German, and French consumers were £50k, €15k, and €60k, respectively. Because the applicable thresholds for distance selling have not been exceeded, the supplier is not required to register for VAT in any of the other jurisdictions. Irish VAT is chargeable on all sales.
>
> In the second year, the company makes sales to U.K., German, and French consumers of £150k, €20k, and €110k, respectively. Because the distance selling thresholds have been exceeded in the U.K. and Germany, the company must register for VAT in both of these jurisdictions. It must charge U.K. and German VAT on sales to consumers in those countries and include the VAT in its U.K. and German VAT returns. Because the French distance selling threshold has not been exceeded, the company need not register for French VAT. The supplier can continue charging Irish VAT on those sales, and it can include the VAT on the French sales in its Irish VAT return.

In the current global environment, an increasing amount of retail business takes place online. This trend is expected to continue. As noted in Section I, the free movement of goods is a fundamental principle of the EU. If consumers in Ireland want to buy goods from a supplier in Austria, they have that right. However, the distance selling provisions mean these purchases can give rise to significant administrative costs for businesses. These costs include the cost of registering for VAT in multiple jurisdictions, the compliance cost associated with filing VAT returns in different jurisdictions, challenges to financial reporting systems for determining what VAT is due, and challenges capturing information to ensure the appropriate VAT is returned to the appropriate authority.

The price of getting any of this wrong can be significant. A supplier might account for VAT on all sales in the jurisdiction in which they are established. Unfortunately, if, for example, U.K. VAT is due and the supplier has innocently but incorrectly charged Irish VAT and paid it to the Irish revenue authorities, there is no legal mechanism to simply reallocate the VAT from Irish revenue to the U.K. authorities. Instead, the taxpayer must pay the VAT to the U.K. revenue authorities and seek a refund of the wrongly paid VAT from the Irish authorities. At a minimum, this will create a cash flow cost. There may also be an exposure to interest on the late payment of tax to the U.K. tax authorities. In the worst-case scenario, if the statute of limitations for seeking a refund of tax has passed, it may be impossible to recover the VAT paid to the Irish authorities, leading to significantly increased costs and effectively doubling taxation.

The distance selling rules can understandably be frustrating for U.S. entities conducting business in the EU. It is, however, important for businesses involved in distance selling to understand their obligations from the outset and put in place procedures to ensure that they are compliant in all jurisdictions.

[7] Article 33 of the VAT directive.

In our follow-up article, we will discuss long-overdue plans to simplify the distance selling rules.

3. Intra-Community Supplies

An intra-Community supply of goods is a supply of goods by a businessperson in one member state to a taxable person in another member state in which, as a consequence of the supply, the goods are transported across a border from one EU member state to another. There are two fundamental requirements for an intra-Community supply: (1) a supply to a taxable person (B2B) in which (2) goods are physically dispatched by or on behalf of the supplier from one EU member state to another.

Under article 30 of the EU VAT directive, the place of supply for intra-Community supplies of goods is the place where transport begins. When the customer can provide proof that the goods have been transported across a border into another member state, the supplier can effectively "zero rate." This means that suppliers do not actually charge or collect VAT from the customer. However, they are still required to include the zero-rated sale in their VAT returns.

A further complexity arises on the purchaser's side of the intra-Community acquisition.[8] Under EU law, when a person acquires goods by way of an intra-Community acquisition, a VAT charge arises in the jurisdiction in which the acquisition is made. The person making the acquisition must self-account for VAT in the EU jurisdiction to which the goods are shipped on a reverse charge basis — that is, self-account for the VAT as if they had supplied the goods to themselves. Purchasers entitled to recover VAT can claim a corresponding refund on their return; the amounts owing and the amounts due as a refund can cancel each other out, leading to a nil total — that is, no cash flow cost.

While the foregoing may seem complicated and convoluted, the reverse charge mechanism and the zero rating of invoices is actually a means to facilitate cross-border trade. Because of the reverse charge provision, the supplier is not required to register for VAT in multiple jurisdictions and submit multiple VAT filings across the EU (as is the case for distance sales). Also, from the purchaser's perspective, the reverse charge treatment can provide them with a cash flow advantage since they do not have to physically pay the VAT to the supplier and then seek a refund from the revenue authorities.

4. Exports

For VAT purposes, export refers to the dispatch of goods from an EU member state directly to a place outside the EU, such as sale of goods by a German supplier to a U.S. customer with goods being shipped from Germany to the United States. The place of supply is the location where the transportation begins. Generally, VAT legislation deems this to be a zero-rated supply as long as the goods are sold subject to the condition that they are to be dispatched outside the EU, either by a supplier (or a party acting on its behalf) or a purchaser who is not established in the state (or a party acting on its behalf).

As with intra-Community supplies, the supplier must retain evidence of the goods leaving the member state (for example, transport documentation). The supplier is not required to refer to VAT on those invoices.

5. Imports

From a VAT perspective, an import occurs when goods are brought into the EU from a territory outside the EU. Under article 2 of the EU VAT directive, subject to specific exceptions, the person importing the goods is required to account for VAT at the point of entry; it is a deemed self-supply. The obligation to account for VAT on import applies both to taxable individuals and to nontaxable individuals (consumers). There is a de minimis threshold for low value items below which the purchaser is not required to account for VAT. The threshold in Ireland, for example, is €22.

Businesses outside the EU must use care when they decide to store goods in an EU member state without setting up a separate subsidiary. An example would be if a U.S. company wanted to maintain a stock of goods in the EU to service the European market. Even if orders are placed with the U.S. supplier, if the goods are dispatched from the EU warehouse to customers elsewhere in the EU, then that transaction is technically either an intra-Community supply or a distance sale.

[8] Article 40 of the VAT directive.

B. Supply of Services

As Section III.A demonstrates, the VAT treatment of goods is very much dependent on the location of the goods and the location to which they are being dispatched. In the context of supplies of services, the key factors are (1) whether the service is being provided to a taxable person (B2B) or a consumer (B2C) and (2) the location where the supplier and customer are established.

We can break supplies of services into eight different categories:

- domestic supply;
- intra-Community B2B supply;
- intra-Community B2C supply (general rule);
- intra-Community B2C (supply of telecommunication and electronic services);
- supply of services to customers outside the EU;
- supply of services by suppliers established outside the EU to business customers (B2B) within the EU;
- supply of services by suppliers established outside the EU to consumers (B2C) within the EU (general rule); and
- supply of services by suppliers established outside the EU to consumers (B2C) within the EU (supply of telecommunications, broadcasting, and electronic (TBE) services).

1. Domestic Supplies

Suppliers must charge local VAT on the services regardless of whether the supply is B2C or B2B.

2. Intra-Community B2B Supplies

The place of supply of services by an entity established in one EU member state to a business customer established in another member state is generally deemed to be the location where the business customer is established.[9] In these cases, the supplier does not have to register for VAT in the other EU member state. Instead, the customer must self-account for the VAT on a reverse charge basis. The supplier in these transactions must obtain the VAT ID number of every business customer and include the number on their VAT invoice along with a comment along the lines of: "Recipient to account for VAT on reverse charge basis."

If the purchaser is entitled to recover VAT, it can claim a refund of the VAT, leading to a net nil refund/payable — that is, cash flow neutral.

3. Intra-Community B2C Supplies

a. General Rule. The general rule in article 45 of the VAT directive states that, when supplies are provided to a nontaxable person in another EU member state, the place of supply of services is the jurisdiction where the EU supplier is established. Suppliers are required to charge VAT no differently than if they had made a domestic supply. This treatment has the advantage of simplicity, as it avoids the supplier having to register for VAT in multiple EU member states. However, it stands in stark contrast to the treatment of goods (compare with Section III.A.2 on distance sales): For goods, once the supplier has exceeded the applicable distance selling threshold, it must register for VAT in the foreign EU member state.

The inherent flaw in this treatment becomes particularly apparent in the context of electronically supplied services. In effect, when these services were being provided to consumers across the EU, suppliers had an incentive to establish a presence in the jurisdiction with the lowest VAT rate and provide services to consumers across the EU from that jurisdiction. This tax arbitrage drove the changes discussed in the next subsection that now apply to the supply of TBE services across the EU.

b. TBE Services. Before January 1, 2015, the general rule in the previous subsection also applied to TBE services.[10] As of January 1, 2015, for TBE services, the place of supply is deemed to be

[9] Article 44 of the VAT directive.

[10] Council Implementing Regulation (EU) No. 1042/2013 of Oct. 7, 2013, amending Implementing Regulation (EU) 282/2011, defines TBE services. Telecommunications services include fixed and mobile phone services for the transmission of data and switching of voice, data, and video; telephone services provided through the internet; call management services; audiotext services; and access to the internet. Broadcasting services include radio or television programs that are transmitted or retransmitted over a radio or television network or distributed via the internet. Electronically supplied services include services delivered over the internet, the nature of which renders their supply essentially automated and involves minimal human intervention, including the supply of digitized products such as software.

the jurisdiction where the customer is located.[11] Unlike for distance sales of goods, no de minimis threshold exists before registration is required. Thus, technically, an EU supplier of TBE services must register and account for VAT in every EU member state in which a customer is located, applying the appropriate VAT rate for each member state, even for the smallest of transactions.

While it makes clear commercial sense to ensure that VAT is collected and paid in the jurisdiction of ultimate consumption, it is challenging to account for VAT with 28 (including the U.K.) different member states. The reverse charge mechanism is useful for shifting the obligation to account for the VAT onto the purchaser for B2B supplies because a business customer is likely to be VAT-registered. In the context of B2C supplies, however, the consumer will not be VAT-registered, so the onus to account for VAT must fall on the supplier. This creates challenges.

Considering the above and recognizing the difficulties created by the 2015 change to the place of supply rules for TBE services, a special mini one-stop shop (MOSS) scheme was introduced across the EU effective January 1, 2015.[12] This scheme allows a TBE service supplier to account for VAT on supplies of TBE services to consumers across the EU in the EU member state where the supplier is established, applying each member state's VAT as appropriate. The revenue authority that receives the VAT receipts is required to reallocate the funds to the revenue authorities of the EU member states where the supplies were made (that is, where the customer is located).

The MOSS scheme represents a real change to how VAT operates in the EU. It is the first time that an EU business can effectively register for VAT in one jurisdiction and then file and submit VAT returns for all of their supplies across the EU. We will look at the MOSS scheme in more detail in the follow-up to this article.

4. Supplies to Customers Outside the EU

Subject to specific exceptions, the general rule is that the place of supply for services to customers outside the EU is the location of the customer, regardless of whether the customer is a business or a consumer. Thus, these supplies are outside the scope of the EU VAT.

5. Outside Suppliers to EU Business Customers

The place of supply for services by suppliers outside the EU to business customers in the EU — whether or not they are TBE services — is the location where the business customer is located.[13] The business customer must self-account for VAT on a reverse charge basis. Again, if the customer has full VAT recovery, this should not have any cash flow cost.

This provision is often overlooked by corporate groups performing intragroup recharges. When a U.S. parent company makes a recharge of costs or provides management services to an EU-based subsidiary, this is a supply of services from a VAT perspective. The EU subsidiary must self-account for the VAT in its VAT return and claim an input credit. Because there is often no cash flow impact, this step can be overlooked. However, penalties can be assessed for failure to file correct VAT returns.

6. Suppliers Outside the EU to EU Consumers

a. General. The general rule is that services from suppliers outside the EU to EU consumers are deemed to be supplied outside the EU and therefore are outside the scope of VAT.[14] This would include services such as a U.S. accountant preparing a U.S. tax return for a U.S. taxpayer based in an EU member state.

b. TBE. A fundamental flaw with the general rule in the previous subsection is that EU businesses were effectively at a disadvantage when compared with non-EU businesses when TBE services were being supplied to EU consumers. For example, a Spanish consumer downloading software from a Spanish supplier would be subject to Spanish VAT. However, under the general place of supply rules, if the customer downloaded the software from a U.S. supplier,

[11] Article 58 of the VAT directive (as amended by article 5 of Council Directive 2008/8/EC, which had an effective date of Jan. 1, 2015).

[12] Articles 369a-369k of the VAT directive.

[13] Article 44 of the VAT directive.

[14] Article 45 of the VAT directive.

the supplier would be outside the scope of VAT and therefore effectively able to undercut the EU business. With the increasing volume of trade in downloads, this issue had the potential to create significant tax leakage in the EU and to provide non-EU suppliers with a competitive advantage over EU businesses.

To level the playing field, the EU amended the law so that the place of supply for TBE services supplied by non-EU businesses to consumers in the EU is the EU member state where the consumer is located.[15] This is consistent with Section III.B.3.b. Thus, any non-EU business supplying TBE services to private consumers in the EU is technically required to register for VAT in every EU member state in which it has customers. This creates significant challenges both for non-EU businesses that want to be compliant and for EU revenue authorities, potentially leading to a loss of VAT revenue for EU member states.

There is, however, a remedy to these problems — the MOSS regime also applies to non-EU businesses supplying TBE services to consumers within the EU.[16] This is of real benefit for these businesses. In effect, a non-EU business can elect to register for VAT in one EU member state and remit VAT for all supplies of TBE to consumers across the EU via MOSS.

IV. Conclusion

In this article, we have considered in detail the vital ingredients necessary for a VAT charge to arise in the EU. We have also looked at the important distinction between supplies of goods and supplies of services for VAT purposes and the subtle differences in rules for determining where the supply is deemed to take place. As a general rule, cross-border B2B trade is simplified by virtue of the reverse charge mechanism, which reduces the need for suppliers to have multiple VAT registrations. The greater challenges arise in the context of cross-border supplies of goods and services to consumers. The existing VAT rules have had unanticipated consequences and may actually hinder cross-border trade, giving rise to significant compliance costs associated with multiple VAT registrations and returns. This burden is exacerbated for small businesses.

In our next article, we will address the specific challenges that e-commerce raises from a VAT perspective and the steps that the EU is taking to deal with these challenges. We will also look at potential changes to the VAT directive and, more generally, discuss how the EU's VAT regime may evolve over the next five years.

Appendix. Distance Selling Thresholds (Updated April 2017)

Country	Currency	Distance Selling Threshold
Austria	EUR	35,000
Belgium	EUR	35,000
Bulgaria	BGN	70,000
Croatia	HRK	270,000
Cyprus	EUR	35,000
Czech Republic	CZK	1,140,000
Denmark	DKK	280,000
Estonia	EUR	35,000
Finland	EUR	35,000
France	EUR	35,000
Germany	EUR	100,000
Greece	EUR	35,000
Hungary	EUR	35,000
Ireland	EUR	35,000
Italy	EUR	35,000
Latvia	EUR	35,000
Lithuania	EUR	35,000
Luxembourg	EUR	100,000
Malta	EUR	35,000
Netherlands	EUR	100,000
Poland	PLN	160,000
Portugal	EUR	35,000
Romania	RON	118,000
Slovakia	EUR	35,000
Slovenia	EUR	35,000
Spain	EUR	35,000
Sweden	SEK	320,000
United Kingdom	GBP	70,000

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[15] Article 58 of the VAT directive (as amended by article 5 of Council Directive 2008/8/EC, which had an effective date of Jan. 1, 2015).

[16] Articles 358a-369 of the VAT directive.