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GROUP ON THE FUTURE OF VAT

GFV N° 071

Council Directive EU 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods

Electronic interfaces – considerations for the implementing provisions

1 PURPOSE OF THE DOCUMENT

On 5 December 2017, the Council adopted Council Directive EU 2017/2455 amending Directive 2006/112/EC (the VAT Directive) and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods. Directive EU 2017/2455 will be referred to as VAT e-commerce Directive. Unless provided otherwise, Articles referred to are Articles of the VAT Directive as amended by the VAT e-commerce Directive.

The VAT e-commerce Directive introduces Articles 14a and 242a in the VAT Directive, creating new liabilities and obligations for taxable persons considered electronic interfaces.

Article 14a introduces new deeming provisions for electronic interfaces that facilitate distance sales on import or intra-EU supplies. In addition, Article 242a introduces record keeping obligations for the electronic interfaces that facilitate supplies of goods and services for which the place of supply is in the EU.

Article 14a

- 1. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself.*
- 2. Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself.*

Article 242a: record keeping obligations for taxable persons facilitating supplies of goods or services through electronic interfaces:

- 1. Where a taxable person facilitates, through the use of an electronic interface such as a market place, platform, portal or similar means, the supply of goods or services to a non-taxable person within the Community in accordance with the provisions of Title V, the taxable person who facilitates the supply shall be obliged to keep records of those supplies. Those records shall be sufficiently detailed to enable the tax authorities of the Member States where those supplies are taxable to verify that VAT has been accounted for correctly.*
- 2. The records referred to in paragraph 1 must be made available electronically on request to the Member States concerned.*

Those records must be kept for a period of ten years from the end of the year during which the transaction was carried out.

These new concepts require implementing rules and the Council minutes statement provided guidance into where such implementing rules are needed as a minimum. The

present working paper aims to establish the basic principles for the rules to be laid down in the implementing provisions.

2 DEEMING PROVISIONS FOR ELECTRONIC INTERFACES

2.1 Defining the term “facilitates”

1. Article 14a introduces the concept of the deemed supplier for an electronic interface when such electronic interface facilitates the following e-commerce transactions:
 - the distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150 (the low value imports); and
 - the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person (the intra EU distance sales).
2. It follows from this that the said e-commerce transactions take place effectively by using the electronic interface and the electronic interface becomes the de-facto supplier (seller) of the goods to the consumer (buyer).
3. In order for an electronic interface to facilitate the e-commerce transactions, first it should dispose or be able to dispose of the necessary information for determining the correct amount of VAT due on the e-commerce transaction and be able to collect this amount of VAT. Therefore, the electronic interface should be in control, have access to or be able to obtain the following information concerning the e-commerce transaction:
 - the original seller’s identification data, at a minimum the name and address;
 - goods subject of the e-commerce transaction with at minimum their description, the quantity, their value/price;
 - the time when the supply is made
 - where the goods are located at the time of the supply;
 - the place where the goods will be dispatched or transported to.
4. The implementing rules for the VAT Ecommerce Directive could indicate in a broad sense that the term "facilitates" means that the electronic interface brings the customer and seller together resulting in a sale via the electronic interface.
5. The implementing rules for the VAT Ecommerce Directive could further provide that when at least one of the following actions occurs, the electronic interface facilitates an e-commerce transaction:
 - Authorizes (directly or indirectly) the charge to the customer; or
 - Authorizes (directly or indirectly) the delivery of goods; or
 - Sets the general terms and conditions of the e-commerce transactions facilitated by its electronic interface
6. In practice, this means that the electronic interface carries out or is involved in actions/operations resulting in a supply of goods such as:

- bringing the buyer and the seller together (buyer's identification, seller's identification, product details and pricing),
 - the buying initiation (placing in the shopping cart),
 - the ordering of goods and/or payment of goods (checkout process),
 - the delivery information (confirmation of purchase and/or supply).
7. The explanatory notes published for the application of the 2015 changes to the place of supply rules for telecommunication, broadcasting and electronic services provided some useful indicators suggesting when a taxable person takes part in the supply. These indicators could be further adapted (taking into account the different nature of goods and services) in the Implementing rules for the current VAT Ecommerce provisions to develop in more detail the concept of "facilitates" for the electronic interface (in [] text that is adapted for the supply of goods). Having such types of indicators on when they would be covered by the deeming provisions would provide legal certainty to the taxable persons in engaging in e-commerce transactions:
- Owning or managing the technical platform over which the [goods] are supplied/delivered
 - Being responsible for the actual delivery;
 - Being responsible for collecting payment unless the only involvement of the taxable person is the processing of payment;
 - Controlling or exerting influence over the pricing;
 - Being the one legally required to issue a VAT invoice, receipt or bill to the end user in respect of the supply;
 - Providing customer care or support in relation to queries about or problems with the [goods] itself;
 - Exerting control or influence over the presentation and format of the virtual marketplace (such as app stores or websites) such that the brand and identity of the taxable person [electronic interface] are significantly more prominent than those of other persons involved in the supply;
 - Having legal obligations or liabilities in relation to the service provided [goods supplied];
 - Owning the customer data related to the supply in question;
 - Being in a position to credit a sale without the supplier's permission or prior approval in cases where the supply was not properly received.
8. These indicators can be further expanded with certain operations that are specific when dealing with supplies of goods:
- The electronic interface provides product listings for the seller, including goods description and pricing, and the technical solution for order taking;
 - the electronic interface provides to the seller storage and/or fulfillment services;
 - the electronic interface provides customer relating services or assistance with returns, refunds or exchanges
 - the electronic interface manages or intervenes directly or indirectly in the correspondence regarding the e-commerce transaction.

- 1) Do Member States agree with the statements provided in paragraph 3 of this Section for electronic interfaces to be able to act as deemed supplier?
- 2) Do Member States agree to indicate in the implementing rules for the VAT Ecommerce Directive provisions as provided in paragraphs 4 and 5 in this Section to define the term “facilitate”?
- 3) Do Member States agree to also include further indicators such the ones described in paragraphs 7 and 8 for the term “facilitate” to increase the legal certainty for taxable persons caught by this provision? Should such indicators be in the implementing rules or in future explanatory notes for the application of the VAT Ecommerce Directive?
- 4) Do Member States also want to provide a negative list to indicate when an electronic interface does not “facilitate” the supply of goods? Should such negative list be in the implementing rules or in future explanatory notes for the application of the VAT Ecommerce Directive?

2.2 The scope of the deeming provisions

Article 14a provides which types of supplies fall under the deeming provisions. In what concerns supplies of goods within the Community, there seems to be a slight contradiction between recital 7 of the VAT Ecommerce Directive and Article 14a(2).

Recital 7 of the VAT Ecommerce directive provides that “[...] it is, therefore, necessary to involve taxable persons who facilitate distance sales of goods through the use of such an electronic interface in the collection of VAT on those sales by providing that they are the persons who are deemed to make those sales. For distance sales of goods imported from third territories or third countries to the Community, this should be restricted to sales of goods which are dispatched or transported in consignments of an intrinsic value not exceeding EUR 150, as of which a full customs declaration upon importation is required for customs purposes.”

Article 14a(2) does no longer refer to distance sales of goods, but to supplies of goods within the Community. Since, the VAT Ecommerce Directive introduces now definitions for distance sales of goods, it should be considered that under Article 14a(2) the term supply of goods within the Community covers both national supplies of goods as well as intra-Community distance sales of goods as long as they are facilitated through an electronic interface.

In detail, the scope of Article 14a covers the following transactions:

- For the low value imports not exceeding 150 EUR (in practice, all such imports covered by Article 14.4 (2) so not just the B2C ones):
 - o the supplies made by EU and non-EU suppliers
 - o such supply of goods is facilitated by an electronic interface.
 - o It is irrelevant for this purpose, whether the electronic interface is established or not established in the EU or whether they are registered or not in MOSS
- For supplies of goods in the EU to non-taxable persons (B2C):

- Supplies of such goods made by suppliers not established in the EU; a non-EU supplier with an EU VAT number will also be covered by this provision.
- supply of goods is facilitated by an electronic interface.
- It covers both national and intra-EU B2C supplies.
- It is irrelevant for this purpose, whether the electronic interface is established or not established in the EU or whether they are registered or not in MOSS.

- 1) Do Member States agree that Article 14a(2) covers also the national supplies of goods when the supply of such goods is facilitated through an electronic interface?
- 2) Should an implementing provision be included to clarify this aspect?

2.3 The deeming transactions

Article 14a by introducing the deeming provisions splits the e-commerce transaction with goods in two supplies for VAT purposes, as follows:

1. a B2B supply between the seller and the electronic interface (B2B supply); and
2. a B2C supply from the electronic interface to the final consumer in the EU (B2C supply)

Where several transactions take place and only one transport operation arises, such transport can only be allocated to one of the transactions in the chain. On this issue, the Council minute statement for the approval of the VAT Ecommerce Directive provided the following:

“[...] Specific provisions on deeming the dispatch or transport of the goods to be linked to the supply by the electronic interface to the customer where an electronic interface is used to facilitate sales of goods [...]”

Therefore, the B2B supply is the supply without transport and the B2C supply is the supply with transport. Going forward we are looking on the VAT implications for the two deemed supplies in several situations that can arise under Article 14a.

The deemed B2B transaction

1. In case of importation of goods as foreseen under Article 14a(1), the goods are located outside the EU.

The B2B supply is a transaction without transport. In accordance with Article 31 of the VAT Directive, the place of supply of the B2B supply is outside the EU. No VAT obligations arise in the EU from this transaction for either the seller or the electronic interface.

2. If the goods are located in the EU under Article 14a(2) the B2B supply without transport will always be deemed to have the place of supply in the EU, i.e. in the Member State where the goods are located. Two separate issues need to be considered in this context:

- a) The VAT deduction/refund for the electronic interface arising from this supply – to ensure neutrality for VAT purpose, the VAT deduction/refund right must be ensured for the electronic interfaces;
- b) The payment of VAT to the seller by electronic interface. By introducing this deemed supply, the risk of effective VAT collection will still exist if the electronic interface will have to pay the related VAT to the seller.

It would be desirable that these two points above would be neutral (i.e. no flow of money in respect of VAT). Under the current VAT rules, Member States may use Article 194 of the VAT Directive to make the electronic interface liable for the payment of this VAT.

If such electronic interface is VAT registered in the Member State where the goods are located, the reverse charge provided by Article 194 of the VAT Directive becomes an efficient measure in dealing with this deemed B2B supply under Article 14a.

However, situations may exist where the non-EU established seller holds a stock of goods in one Member State (MS1) and sells them to EU consumers via an electronic interface established in another Member State (MS2) or in a third country. In these two particular situations, whilst Member States can still use Article 194 of the VAT Directive, it would be more problematic to apply from a VAT compliance perspective (i.e. how will the electronic interface pay such VAT for which he is then entitled to claim the reimbursement).

Considering the limitations described above and the main objective to avoid flow of VAT between the electronic interface and the initial seller, it would be reasonable that Member States disregard the B2B supply for VAT purposes.

A further solution available for Member States is to extend the joint and several liability to the warehouse keeper where the goods are kept in the respective Member State in accordance with Article 205 of the VAT Directive.

In respect of any input VAT incurred by the non-EU established seller upon either importation, national or EU acquisition of the goods subject to the e-commerce supply, no specific provisions are necessary, as the current rules will apply (i.e. refund via the VAT return in the Member State where they have the VAT number and where the goods are located).

- 1) Do Member States agree to provide in the Council Implementing Regulation 282/2001 for the application of Article 14a that the dispatch or transport of the goods takes place in the second supply, the one by the electronic interface to the customer, in situations where an electronic interface facilitates the sale of the good? Or should this provision be included in the VAT Directive (ongoing work on quick-fixes)?
- 2) In the situations covered by Article 14a(2), do Member States agree that an effective flow of VAT should be avoided between the electronic interface and the non-EU established seller?
- 3) If the answer to the previous question is yes, do Member States agree to make use of the provisions provided for under Article 194 of the VAT Directive,

when the electronic interface is established on its territory?

- 4) If the electronic interface is not established/registered for VAT purposes in the Member State where the goods are located, which of the following do Member States consider suitable:
 - a. disregard the B2B supply for VAT purposes;
 - b. provide for a procedure to offset the VAT payment with the VAT refund rendering the B2B transaction neutral (same effect as reverse charge).
 - c. Should this treatment be included in the implementing rules or is there a change to the VAT Directive needed?
- 5) In cases where the electronic interface is not VAT established or VAT registered in the Member States where the goods are located and where the B2B supply takes place, do the Member States also want to hold the warehouse keeper jointly and severally liable for the B2B supply?

2.4 Acceptance of payment

The VAT Ecommerce directive introduced in the new Articles 66a and 369n providing that for supplies of goods for which VAT is payable for the person facilitating the supply pursuant to Article 14a or for supplies under the Import scheme, the chargeable event shall occur and VAT shall become chargeable at the time when the payment has been accepted.

The Council Minutes statement indicated that the implementing rules should provide specific provisions on the conditions for determining when the payment is accepted.

At the previous meeting of the GFV, some Member States indicated that it should be made clear in the implementing rules that the payment should be accepted by or on behalf of the supplier.

Typically, in an online transaction, a buyer will submit the payment related information via the website where the sale is performed. In practice, a payment service provider will intervene in processing the payment related information and such payment service providers are linked directly or indirectly to the electronic interface or the seller. Based on the payment related information provided by the buyer (typically the information regarding the method of payment, identification data related to the person making the payment, the amount of money to be paid), the payment service providers will provide a confirmation message to the electronic interface or to the seller. Upon receiving the confirmation message from the payment service provider, the electronic interface or directly the seller then agrees or confirms the sale of goods.

Typically, in e-commerce transactions such confirmation messages are instantaneously sent upon clicking a relevant button (“pay now”) on the website where the sale takes place. The confirmation message does not imply necessarily an immediate exchange of money.

For the purpose of Articles 66a, 369n Article 14a, the acceptance of payment should be assimilated with the receiving of the payment confirmation message for any given e-

commerce transaction. Such a provision could be included in the implementing rules for the VAT Ecommerce Directive.

- 1) Do Member States find sufficient what this Section provides regarding when the payment is accepted?
- 2) Should the Commission carry out further discussions with interested parties (electronic interfaces, payment service providers, direct sellers) on this issue?

3 RECORD KEEPING OBLIGATIONS

Article 242a introduces record keeping liabilities for electronic interfaces that facilitate supplies of goods or services to EU consumers that have their place of supply in the EU.

The Council Minute Statement provided certain insight into what the Commission should look for the implementing rules regarding this new provision:

[...] The type of information to be kept in the records of taxable persons facilitating supplies of goods and services to non-taxable persons in the Community through the use of an electronic interface, taking account of what information is available to such taxable persons, is relevant to tax administrations and is proportionate to the purpose of the provision, as well as taking into account the need to comply with the General Data Protection Regulation (EU) 2016/679.

Under Article 28 of the VAT Directive and Article 9a of Council Implementing Regulation 282/2011, already presently certain electronic interfaces are deemed the suppliers when taking part in a supply of service. The newly introduced Article 14a of the VAT Ecommerce Directive provides a similar provision for the electronic interfaces facilitating supplies of goods. Such electronic interfaces, both for the supplies of goods and for the supplies of services are or will be allowed to register in one of the special schemes foreseen in Chapter 6 of Title XII of the VAT Directive.

Under the three existing special schemes [(i) the non-Union scheme for the supplies of services, (ii) the Union scheme for distance sales of goods and for supplies of services; (iii) Import Scheme for distance sales of goods from third countries or third territories], there is a dedicated article that deals with record keeping obligations for taxable persons making use of those schemes. In going forward, Article 63c of Council Implementing Regulation 282/2011 provides details to the information kept by taxable persons, including the electronic interfaces that are deemed suppliers. Article 63c of Council Implementing Regulation 282/2011 will be updated to include the information relevant for distance sales of goods.

When the electronic interface will register in one of the three special schemes as a result of the obligation arising under Article 28 of the VAT Directive or Article 14a, the record keeping obligations under Articles 369, 369k and 369x will be applicable. The provisions under Article 242a will not be applicable in these situations.

When the electronic interface does not register under any of the special schemes, but it is deemed a supplier under the Article 28 of the VAT Directive and/or Article 14a, the general provisions in Article 242 of the VAT Directive are applicable, as any other supplier of goods and services.

When an electronic interface facilitates a supply of goods or services for which such electronic interface is not the deemed supplier under Article 14a and/or Article 28, such electronic interface should also keep records regarding the supplies it facilitates, in accordance with Article 242a. Consideration given to the proportionality, the implementing rules should provide the following principles for this record keeping obligation for electronic interfaces:

1. the modality to provide the information

In principle, the information should be provided at the request of the tax authority responsible for VAT. However, tax authorities may also be allowed to conclude agreements with such electronic interfaces and set up the framework for information sharing (periodicity, modality of exchange, etc.).

2. Similar to the requirements under Article 14a, also for the application of Article 242a the information to be kept in the records should be at the disposal of or easily accessible to the electronic interface. Such information should serve the purpose of ensuring and controlling VAT collection on B2C supplies taxable in the EU, but cannot subrogate to the normal record keeping obligations of the seller that is the primary source of information for establishing the VAT liability. The type of information to be provided should be the following:

- details of the seller (name, address or any contact details for the seller and bank or virtual accounts)
- the nature of the supply (goods or services)
- the value of the supply
- minimum indication on the destination of the supply depending on the nature of the supply.

3. Could other electronic interfaces be covered by this additional record keeping obligation. This could be the case for payment service providers who would then have to provide for the following information:

- total amount of payments per destination Member State and per seller and/or electronic interface.

4. Would there be other types of electronic interfaces that Member States want to target?

- 1) Do Member States agree that Articles 369, 369k and 369x of the VAT Directive are applicable when the electronic interface is the deemed supplier as per Article 14a or 28 of the VAT Directive? Do Member States want to include in the implementing rules clarifications in this respect?
- 2) Do Member States agree that when the electronic interface is the deemed supplier as per Article 14a or 28 of the VAT Directive and none of the special schemes is used, the record keeping information in Article 242 of the VAT Directive are applicable?
- 3) When the electronic interfaces are not the deemed suppliers, the implementing rules should provide that:
 - a. the information is to be provided upon request of tax authorities
 - b. the information required is at the disposal of or is easily accessible by the electronic interface
 - c. the information required is high level information serving as an additional source of information to ensure the correct VAT collection
 - d. the scope of the provision in terms of the electronic interface to be covered and in case other electronic interfaces are covered establish what type of information has to be kept by the different electronic interfaces depending on their nature? These different types of record keeping can be detailed in explanatory notes depending on the nature of the electronic interface.