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& Your pocket guide to VAT on digital e-commerce

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Foreword

This is your pocket guide to VAT on digital e-commerce

VAT is a constant issue to be considered for all internet-based businesses, e-commerce transactions and shareholders of IT companies. E-commerce markets offer significant rewards not only for entrepreneurs, but also for tax authorities. The dynamics of economic and technological development incur permanent changes in taxation on VAT. Taxation of digital business and e-commerce is currently in the focus of international organisations.

With Bird & Bird's unique heritage and depth of expertise in the media, technology and communications industries, we are ideally placed to help our clients to navigate the presently fast changing tax landscape.

Bird & Bird's team of tax lawyers and tax advisors acts on behalf of high-profile internet and software companies as well as companies which use e-commerce or social media internally or externally for communication, marketing or other commercial objectives.

This VAT booklet on digital e-commerce was mainly prepared by Bird & Bird's VAT specialists, in particular Alexander Bellheim, Caroline Brown, Fredrik Erneholm and Marcel Jundt under the supervision of Bird & Bird tax partners including Brian Mulier and Mathew Oliver. Many thanks for their substantial support.

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1. General VAT background

1.1 VAT and digital e-commerce in the European Union (EU)

Digital e-commerce is a rapidly growing business market within the EU, emerging as a key economic driver. However, as acknowledged by the EU Commission High Level Expert Group on the Taxation of the Digital Economy in its report presented to the EU Commission and EU President on 28 May 2014, ensuring that VAT is fully effective for transactions in the digital economy presents challenges.

The general consensus in Europe and of the OECD is that the "destination principle" – i.e. taxation at the place of consumption, is the way forward for VAT in Europe and other consumption taxes elsewhere, particularly in relation to digital e-commerce and the establishment of a digital single market. The result is that the location of a supplier's business activities should not affect the VAT treatment. Business choice as to location should therefore not be affected by VAT considerations, while competing businesses should face the same VAT rates on digital sales, avoiding distortion of competition and neutrality issues.

In Europe, the EU Commission has been pursuing the application of the destination principle in relation to sales of digital e-commerce products to final consumers in the EU so that they are subject to VAT in the consumer's country. This brings the VAT treatment of these services in line with one of the main principles of VAT that, as a consumption tax, tax revenues should accrue to the Member State in which goods/services are actually consumed. The EU Commission feels that the application of the destination principle provides a basis for a sustainable solution to the challenges raised by the digital

economy, on the basis that it should ensure a level playing field for operators providing goods and services from a remote location.[1]

In this respect, the meaning of the term"digital e-commerce" as the subject matter of this guide needs further clarification – this is because a distinction needs to be made for VAT purposes between the following types of supply:

(1) a supply of digital products delivered over the internet without needing a distinct physical presence in the markets in which the service provider operates – this also covers digital products kept at a central data centre and distributed as a service (e.g. cloud services);

(2) supplies of other services over the internet (e.g. consultancy, teaching); and

(3) supplies of tangible products e.g. goods, ordered and sold online.

A digital e-commerce business model at (1) would include, for example, downloading an e-book in return for a fee or online streaming services in return for a fee. Such digital products are delivered via the internet or an electronic network and their supply is essentially automated and involves no or minimal human intervention. They can be distributed and supported by suppliers from locations that are very distant from the locations where the product is actually consumed by a consumer, and/or consumers can access the products from any location they choose provided there is internet access.

[1] As recently stated in a feasibility report from the EU Commission to the EU Council dated 26 June 2014 on significant changes to EU VAT rules for digital e-commerce which are being introduced as from 1 January 2015 (as explained later in this guide).

Conversely, supplies within (2) and (3) are not treated in the same way as digital e-commerce supplies from a VAT perspective as the nature of these supplies is different – they essentially cover the physical delivery of items or the supply of tangible services ordered online using any device, but carried out in a conventional way. Mailing a printed book, receiving professional services such as consultancy via email, purchasing theatre tickets or access to similar events as well as accommodation, car-hire, restaurant services, passenger transport and similar services via the internet are examples. In such cases, the internet or similar electronic network is being used as a tool for communication and distribution between the supplier and consumer, but it should not alter the nature of the underlying supply being provided – i.e. a purchase of goods or admission to an event. Accordingly, the principles of the EU's VAT Directive particular to such supplies should apply to determine their VAT treatment. In such cases, the place of taxation may depend on whether the supply is to another business (a"**B2B**" transaction) or to a final/private consumer (a"**B2C**" transaction), or, where the event is actually performed, irrespective of the identity/status of the customer (for example, theatre tickets).

Taxation in the Member State of destination is already in place for the B2C online sale of goods (called "distance sales") where the supplier takes care of the transport of the goods to consumers (for example, mail order companies), when the turnover of the supplier in that Member State is above a certain threshold (EUR 100,000 or EUR 35,000 or the equivalent in national currency, depending on the Member State of destination concerned). In that event, the seller must register and account for VAT in the Member State of destination, with the result that the final VAT-inclusive retail price would include different VAT rates depending on the Member State of destination. Standard VAT rates in EU Member States range from 15% to 27% - see 2.3 below.

For the purposes of this guide, we are primarily concerned with supplies at (1) above, i.e. commercial transactions that are conducted exclusively online. The presentation of products, order, delivery, and as the case may be, performance and payment are all carried out via the internet or other similar network in an automated manner, i.e. they are electronically-supplied services. In particular, the following electronically-supplied services would be treated as digital e-commerce services:

- provision of digitised products (e.g. downloads) including e-books, software and changes to or upgrades of software and downloads of applications;

- services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;

- provision of data bases (i.e. search engine, text, information) and automated distance learning services;

- services automatically generated and supplied by a computer via the internet or an electronic network, in response to specific data input by the recipient;

- downloads of music, movies and games, including gambling games via the internet;

- other services for which the internet is required (e.g. services of online market providers which are billed on a commission fee basis or in a similar fashion, involving the transfer of the right to put goods or services up for sale on a website operating as an online market on which potential buyers make theirs bids using an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated by a computer); and

- internet service packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part.

Therefore, businesses affected include those selling apps such as smartphone games, e-books, online gaming businesses selling gambling games, streaming services (of sports/film/TV/music), providers of online dating services and digital access to journals, newspapers and magazines that are subscribed to electronically.

As a consumption or sales tax, VAT can apply to all forms of transaction in digital e-commerce but the main challenges presented in relation to electronically-supplied services cover issues such as considering whether these services are provided to an entrepreneur (B2B) or to a final consumer (B2C) as this will be relevant to determining who is responsible for accounting for VAT on such supplies, as well as issues such as correctly identifying the location of the customer and therefore the place of taxation of the supply for VAT purposes.

Broadly, to address these challenges and in line with the "destination" principle, any B2B transactions involving the supply of digital e-commerce services will be subject to VAT at the location where the business customer is "established" – specific rules then apply to determine where a business is "established". This rule is combined with a reverse charge mechanism in the case of cross-border supplies of services (see further below at 1.2).

B2C transactions in the context of digital e-commerce will also, as from 1 January 2015, be taxable at the place where the final consumer belongs (see further at 1.3 below), rather than at the place where the supplier belongs as provided for under current EU VAT rules. This introduces significant VAT implications for businesses world-wide and the EU Commission has produced extensive guidance to assist businesses in understanding the new 2015 rules and to clarify their practical application. The Commission has also set up an EU web

portal dedicated to providing business information on the forthcoming changes (see Section 5 of this guide for references). We briefly highlight the new rules here but we have also produced a more detailed client note on the changes which is available on request.

VAT is based on EU legislation, such that the VAT issues discussed in this note should, broadly speaking, be generally applicable across the EU. However, local implementation of VAT rules differs according to the relevant Member State. To avoid additional complexity, this guide is intended as a general overview only. If you have any questions about the detailed VAT treatment of any transaction in the UK/Europe, or any other jurisdiction, please contact your usual Bird & Bird tax contact. The main contact details for our International VAT Group are set at the back of this guide.

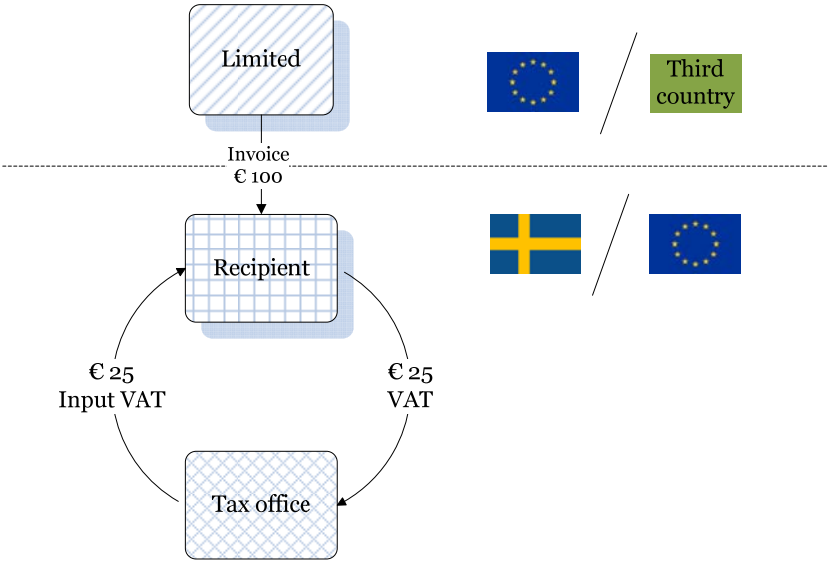
1.2 B2B digital e-commerce transactions

Normally, if digital e-commerce services are rendered by non-EU / EU suppliers to an entrepreneur resident in another Member State on a cross-border basis, they are subject to VAT at the place where the recipient entrepreneur is established. Very broadly, this is either the country where it is registered and has its head office or, where more appropriate, the country where it has fixed premises and staff receiving the service. To verify the status of the recipient and where they belong, suppliers can rely on a valid VAT identification number communicated by the recipient in respect of the supply. The recipient of such supply would then usually be required to account for VAT on the supply under the reverse charge mechanism which transfers the liability of VAT from the supplier to the recipient. Consequently, the supplier should issue an invoice without VAT.

According to the reverse charge mechanism the recipient of the digital e-commerce service has to declare the VAT due to the tax authorities via their VAT return as if they were the supplier. However, the recipient can usually make a corresponding input VAT deduction at the same time and in the same amount as the VAT due (provided that

he does not carry out certain VAT-exempt supplies - such as financial services - in which case the recipient cannot deduct the VAT) such that the transaction is normally cash flow-neutral for the recipient.

As noted, VAT is an end consumer tax and each business in a supply chain can to the extent it makes VATable supplies deduct the input VAT it is charged on business costs of goods and services. Those costs are built into the price of the end product as sold to final consumers, and therefore VAT should, assuming the final consumer is in the same Member State as the last business in the supply chain, accrue to the Member State of consumption pursuant to this reverse charge mechanism.



1.3 B2C digital e-commerce transactions

Until 31 December 2014, the EU VAT Directive distinguishes between electronically-supplied services/e-services made by EU suppliers and those made by non-EU suppliers:

- e-services provided by an EU supplier to final consumers[2] in the EU is subject to VAT at the EU supplier's place of establishment (and not at destination), while the same services provided by a non-EU supplier to final consumers in the EU is subject to VAT where the final consumer belongs (i.e. they are established (in the case of a legal person), or have their permanent address or where they usually live (in the case of a natural person)). E-services provided to non-EU consumers are outside the scope of EU VAT so usually no EU VAT is charged on such supplies (subject to the use and enjoyment rule – see 1.4 below).

- so, for non-EU suppliers of B2C e-services, there is a liability to register in each Member State where their final consumer belongs if the value of their supplies has exceeded the Member State's VAT registration threshold for non-established suppliers (which varies among Member States – see 2.4), and account for VAT at different VAT rates. However, to reduce burdens in such cases, the non-EU-entrepreneur one-stop-shop mechanism was introduced (the non-EU-OSS), and in addition, there was an option for non-EU suppliers to create an establishment in one Member State in order to declare VAT on all their B2C supplies in that one Member State.

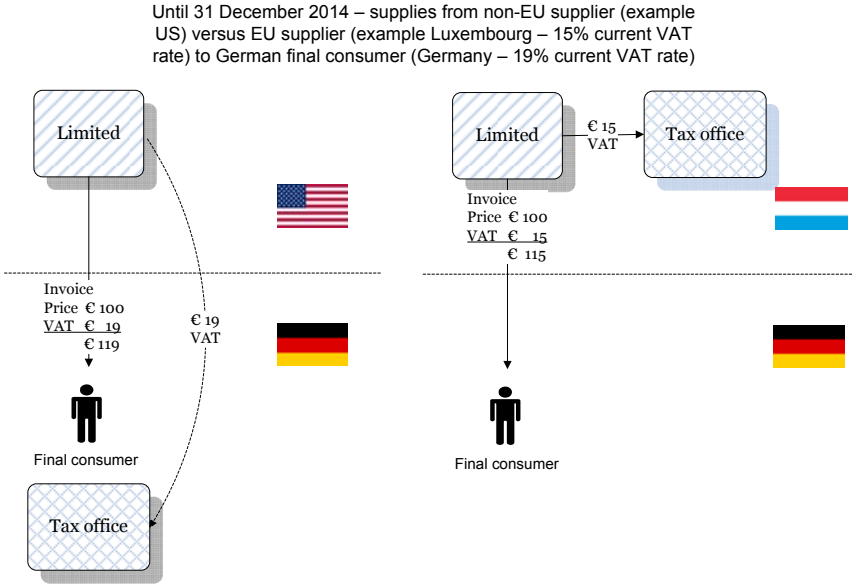
As noted by the Commission Expert Group, these rules led to a cluster of businesses establishing themselves in Member States with the lowest rate of VAT, from which they could supply electronic services across the EU at a more advantageous VAT rate than a business established in the Member State of the consumer.

Accordingly, the Commission and Member States have taken measures to address this distortion so that, with effect from 1 January

[2] A person who does not independently carry on an economic activity for VAT purposes and is not an entrepreneur (or otherwise) registered with a VAT ID number.

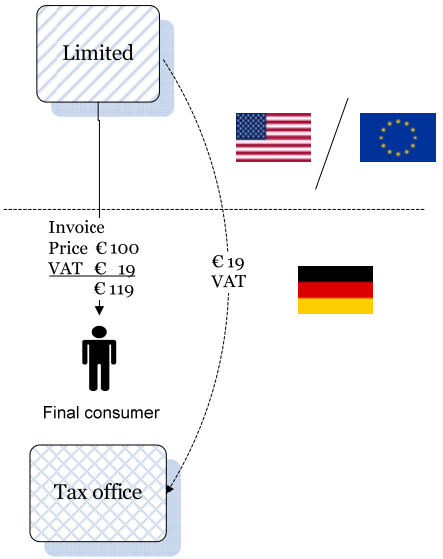
2015 onwards, EU VAT legislation will no longer distinguish between EU suppliers and non-EU suppliers making electronically-supplied services and also telecommunications and broadcasting services to final consumers - please see Section 4 of this guide for further examples of these types of "**digital services**".

As a result, VAT will be due on the supply in the Member State where the final consumer belongs irrespective of where the supplier is established, at the VAT rate applicable in that Member State.[3] This approach should, from 2015, provide a level playing field and ensure that VAT receipts accrue to the Member State of consumption.



[3] Pursuant to EU Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as amended by EU Council Implementing Regulation (EU) 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services.

As of 1 January 2015 – any supplier (non-EU/EU) to German final consumer



The first issue for suppliers to consider is whether their supply falls within the definition of a digital service, particularly if they are sold as part of a package with other goods or services not covered by these 2015 changes. It is necessary in those cases to determine whether the bundle is a single supply and if so, how to characterise the nature of the supply.

A supply can consist of one or more elements. If there are more elements, a transaction comprising a single supply from an economic point of view should not be artificially split. The essential features of the supply must be ascertained in order to determine whether the consumer receives several distinct principal supplies or a single supply, and whether the digital service is the principal supply, part of a mixed supply or ancillary or additional to a non-digital principal supply. For example, if the supplier provides both printed material and digital access to the content, the supplier would need to determine if the digital element is caught by the new rules. This will very much depend on facts taking into consideration relevant case law of the European Court of Justice.

When the new rules do however apply, the 2015 changes will have a significant effect on businesses. Take for example, those that provide on-line gaming services.

Currently, an EU supplier providing e-gaming services to EU players only has to consider the VAT regulations in the country in which the supplier is established to determine if the services are exempt from VAT. As a result of the 2015 changes, given that the place of taxation of such services will be the location where the customer belongs, the supplier will now need to determine whether the services are exempt from VAT under national VAT regulations in the customer's country. There is scope within the EU's VAT Directive (Council Directive 2006/112/EC) for Member States to determine what is exempt from VAT and what limitations should apply to such exemptions, meaning that the application of VAT exemptions in Member States will not be consistent, particularly for gambling services. For example, the VAT exemption may apply to lotteries and betting but not to poker or bingo.

As a further consequence, these measures impose potentially significant administrative burdens and costs on businesses because they would potentially require suppliers making B2C supplies to potentially register for VAT purposes in each EU Member State in which its final consumers are located, in order to be able to declare and account for VAT to those Member States at the various rates applicable.

In order to mitigate such VAT compliance burdens on business and to relieve operators of the obligation to register for VAT purposes in every Member State where they make B2C digital supplies, a Mini One Stop Shop electronic registration portal/procedure (the “MOSS”) has been introduced as an optional, simplification measure, also with effect from 1 January 2015, for both EU and non-EU suppliers – please see further at 2.1 below. The MOSS is an electronic system whereby a supplier can register in one Member State which will then

distribute the VAT due at different rates from the supplier to other Member State authorities.

However, it is also important to note that other aspects of national legislation in each Member State will continue to apply to suppliers irrespective of a MOSS registration, such as with regard to invoicing, the "use and enjoyment" rule (see 1.4 below), and the use of certain VAT exemptions as noted above. For example, the new rules have not introduced a standardised B2C VAT invoice and therefore suppliers will need to ensure their IT systems are able to issue VAT invoices which comply with published requirements in each relevant Member State on local language and currency, such as showing the relevant currency of the Member State of consumption on the invoice.

Another key effect will be on supplier pricing strategy as a result of having to account for VAT at the different rates applicable in Member States, as this will have an impact on margins and could lead to an increase in gross prices. Suppliers will need to ensure their IT systems can correctly calculate applicable VAT rates on their supplies at the point-of-sale, and they may need to consider alternative pricing structures such as global universal pricing using a blended rate, or local differential pricing.

Evidence of consumer location – the key challenge for suppliers of B2C digital services will be in determining where the final consumer belongs, and therefore where VAT will be due. As noted by the Commission Expert Group, in the traditional economy, this is not usually an issue as the place of consumption of a meal is the restaurant, the delivery address for a good etc. Complications however arise in respect of digital supplies as it can be difficult to identify the place of consumption especially with the growth of mobile devices such as tablets and smart phones and the ability of customers using such devices to buy digital services in a Member State in which they are not established.

To address this, further new rules have been introduced with effect from January 2015 dealing with evidence of consumer location, to help determine where a consumer is established, has its permanent address, or usually resides. The determining factor for supplies to final consumers which are non-taxable legal persons (e.g. public authorities) will be to identify the place where they are established (defined as where the functions of its central administration are performed/executed, or any other (permanent) place from which it operates activities). A consumer's permanent address is defined as an address in a population or similar register, and usual residence as the place where a person has personal and occupational ties and where these are different, their personal ties.

In cases of customers having multiple locations, priority should be given (in the absence of evidence to the contrary), in the case of a non-taxable legal person, to the place where the functions of its central administration are carried out, and in the case of an individual, to the usual residence of that person.

The new rules introduce a set of presumptions that suppliers can rely on to identify a customer's location where it is considered difficult, if not practically impossible, for the supplier to identify with certainty where the customer belongs (but where the supplier knows or should have known how the service has been delivered). The starting point will therefore be to look at the extent of information available to suppliers as to how their digital service has been delivered to the final customer. The presumptions typically require the physical presence of the final consumer for receiving the service and can be summarised as follows:

1. when B2C or B2B digital services are provided through a telephone box, a telephone kiosk, a specific wi-fi hot spot, an internet café, a restaurant or a hotel lobby (i.e. supplied to a customer at the physical location of the supplier, without knowing the exact location of the customer i.e. where that

customer is established, has a permanent address or usually resides), suppliers can presume that the location of the customer is at that specific location, e.g. the Member State where the phone box/kiosk, wi-fi hot spot etc. is located. This presumption also applies where the service is supplied through a telephone box, a telephone kiosk, a specific wi-fi hot spot, an internet café, a restaurant or a hotel lobby which is on board transport travelling between different countries in the EU (for example, by boat or train), in which case the consumer location will be the place of departure for the consumer's journey.

Generally this presumption would be relevant to the provision of telecoms services e.g. telephone calls (when at a telephone box or kiosk) or access to the internet (at a wi-fi hot spot or in an internet café), and could also apply to certain broadcasting and electronic services, for example where gaming machines are being operated (in arcades, in bars) or entertainment is on offer (gaming relying on localised servers for example in cafés or kiosks). However, this presumption will not cover services (called "over the top" services by the EU Commission in its guidance on the 2015 rules) which can only be delivered thanks to a connection that is established via a communication network and therefore does not require the physical presence of the recipient at the location where the service is supplied (- in other words, this presumption will only cover services rendered by the supplier at the specific location but not services supplied by other service providers, so for example, it will cover the case where a fee is paid by the customer to surf the internet in an internet café, but not downloads made by that customer while using the internet/wi-fi connection).

2. when B2C digital services are supplied as follows (these presumptions do not cover B2B supplies but could cover "over the top" services):

- through an individual consumer's fixed land line (covering any type of cable used to transmit data to or from premises (for example copper wire, fibre optic cable, broadband cable) and also a satellite when this requires the installation of a satellite dish), the consumer location will be the place where the land line, satellite dish etc. is installed/located;

- through a mobile phone, the consumer location will be the country code of the SIM card (covering e.g. prepaid credits) – the Commission considers that a SIM card will mostly be used in the country indicated by the mobile country code attributed to the card;

- through a decoder or viewing card, the consumer location will be the postal address where the decoder or card is sent or installed.

Where any one of the above presumptions applies, the supplier is only required to retain evidence showing the relevant place (e.g. the place where the decoder is installed).

Where the above presumptions do not apply, such as in cases where a service can be supplied via at least two different channels (e.g. a fixed land line or mobile networks) or which do not required the physical presence of the recipient at the location where the service is supplied (and the supplier cannot know or should have known about which channel was used by the consumer to purchase the digitised product), then the supplier will need to identify the customer's location by obtaining two pieces of non-conflicting evidence to support their decision.

The example provided by the Commission is as follows: an "app" may be purchased by a final consumer in an app store through his mobile

phone account (the mobile phone bill is charged or credits are deducted) and the app store accounts for VAT on this service (see further at 2.3 of this guide). The app store should apply a particular presumption if it has or should have had (in normal commercial circumstances) the information about the SIM card (in practice that could mean that the telecom operator would need to share this information) and knows or should have known that an app is delivered via mobile networks. Otherwise the app store will be obliged to find two items of non-contradictory commercial evidence.

Finally, if suppliers choose to, they can rebut any of the presumptions using alternative evidence. To support this decision, they will need to collect and to keep three pieces of non-conflicting commercial evidence.

Examples of commercial evidence required to support taxing decisions include:

- the billing address of the customer (electronic addresses for e-invoices excluded;
- 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 customer's bank account used for payment or the customer's billing address held by the bank;
- the mobile country code of the SIM card used by the customer;
- the location of the customer’s fixed land line through which the service is supplied to him;
- other commercially relevant information which point to a Member State (e.g. unique payment systems used in a

Member State, customer trading history, gift card point of sale - where a gift card is sold to a customer physically present at a retail establishment or country-locked gift cards, product coding information which electronically links the sale to a particular jurisdiction, customer self-declaration within the online ordering process or on registering an account with the supplier's website regarding e.g. bank account details and credit card information. However, where, for example, a customer gives bank details which also refer to a unique payment system that constitutes one single item of evidence, not two.

The above information (e.g. billing address) may need to be obtained from third parties such as payment service providers, subject to data protection and security considerations.

Tax authorities will in certain circumstances be able to rebut the presumptions in cases of misuse or abuse by a supplier.

The key point to take away from the above summary is that suppliers will not be able to operate a blanket approach to the collection of consumer data. Further considerations will include: adding additional fields and validation procedures at the point-of-sale and how this may impact a customer's shopping experience with the supplier's website; whether the supplier's IT/point-of-sale systems can gather enough data to track and validate the status and location of customers to satisfy these rules; and whether their systems will be capable of making decisions where data is conflicting or points to several jurisdictions. There are also data storage implications, including whether the storage of data is in compliance with data protection rules which vary across different Member States – as the EU's data protection legislation is loosely harmonised, and how long data would need to be stored, for example, for tax audit purposes.

Customer status – a further new rule for 2015 has also been introduced to help suppliers identify the "status" of their customer i.e.

as to whether their customer is a business or final consumer, and therefore whether the transaction should be treated as B2B or B2C. The rule provides an option for suppliers to treat customers as B2C where customers do not provide a VAT registration number at the relevant time of supply. This could create concerns for customers who are in business but may not be VAT registered, such as charities, educational institutions or small businesses. Suppliers may still choose to accept alternative commercial evidence of their business status although this may not be acceptable for all Member States.

1.4 Summary of the new EU VAT rules from 2015 affecting digital e-commerce

To recap, the 2015 EU VAT position for suppliers is helpfully summarised by the EU Commission (via its web portal – see 5.) as follows:

"New rules from 2015…"

From 1 January 2015, telecommunications, broadcasting and electronic services will

always be taxed in the country where the customer belongs*

– whether customer is a business or consumer

– whether supplier based in the EU or outside

** For a business (taxable person) = either the country where it is registered or the country where it has fixed premises receiving the service.*

** For a consumer (non-taxable person) = the country where they are registered, have their permanent address or usually live.*

The effects of this are as follows:

EU BUSINESSES supplying

1. Business in another EU country	No VAT charged. Customer must account for the tax (reverse-charge mechanism).
2. Consumer in another EU country	Must charge VAT in the EU country where the customer belongs (not where the supplier's business is based).
3. Business or consumer outside the EU	No EU VAT charged. But if the service is effectively used and enjoyed in an EU country, that country can decide to levy VAT

NON-EU BUSINESSES supplying

1. Business in the EU	No VAT charged. Customer must account for the tax (reverse-charge mechanism).
2. Consumer in the EU (telecoms, broadcasting or electronic services)	Must charge VAT in the EU country where the customer belongs. (Subject potentially to the use and enjoyment rule if the service is effectively used and enjoyed outside the EU)

As a result of the new 2015 rules, digital e-commerce suppliers need to consider the following:

- whether their services fall within the definition of digital services (see 4. for further examples);
- the status of the recipient, i.e. whether they are in business or not;
- how to determine where final consumers belong for VAT purposes, whether the supplier's IT systems can determine where the customer belongs and the value of services provided to customers in each country and deal with charging VAT at different rates depending on where the customer is located;
- how to manage consumer data collection/evidence requirements, local invoicing requirements and storage;
- if the recipient is a final consumer and the service is provided through a platform via parties in a supply chain, which supplier in a supply chain is providing the B2C service to the consumer (see 2.3);
- whether the supplier would be better off using the MOSS system rather than registering for VAT in each individual EU country where they have final consumers;
- whether the "use and enjoyment" rules apply to the services provided (see 2.1);
- whether new pricing strategies need to be adopted once different VAT rates are applied; and
- wider considerations such as data protection compliance.

1.5 The use and enjoyment rule

To prevent double taxation, non-taxation or distortion of competition, Member States may decide to shift the place of supply of digital e-commerce (and certain other) services as determined under the normal rules, using a special override rule based on the "effective use and enjoyment" of the service. This additional provision seeks to correct instances of distortion which could remain as a result of considering, for example, only where the service provider and/or the customer belong. In effect, the rule allows Member States to disregard the "place of supply" position provided for under the normal rules and instead consider that:

- even though the place of supply of digital services would be situated within their territory (because the customer belongs there), the place of supply may be considered as being situated outside the EU, if the "effective use and enjoyment" of the service takes place outside the EU;

- even though the place of supply of digital services would be situated outside the EU (because the customer belongs there), the place of supply may be considered as being situated within the EU country, if the "effective use and enjoyment" of the service takes place within their territory.

Broadly this means that, for EU VAT purposes, Member States can only apply the "effective use and enjoyment" rule to tax services actually consumed within their territory if those services have been supplied to customers that belong in a third/non-EU country (rather than to a customer belonging in another Member State). For example, the rule will not apply where the place of supply would be, for example, the UK (because the customer belongs in the UK) but the service was effectively used and enjoyed in another Member State.

Conversely where the service is supplied to a customer who belongs in a Member State but who actually consumes the service outside the EU,

the Member State where the customer belongs may refrain from taxing the transaction. The rule could be relevant to the supply of digital services which do not require the physical presence of a customer at a location in order to be received.

Examples of the effect of the use and enjoyment rule in a B2B context are provided below, in relation to a UK-based supplier:

- a UK business purchases digitised software from an Irish supplier for use only in its branch in the Channel Islands. Although the supply would normally be taxed in the UK because the business belongs and is established in the UK, the service is actually used outside the EU and is therefore outside the scope of UK (and EU) VAT.

- a UK VAT registered branch of an international company which is using electronically supplied services (e.g. web-hosting services) that were previously supplied to its US headquarters by a US provider may be required to account for UK VAT, to the extent that the services are used and enjoyed in the UK, by applying the reverse charge at the time the US provider is paid. This is because, although the place of supply would normally be the US where the international company is established, to the extent that the service is used in UK, it may be subject to UK VAT.

- a UK business purchases downloaded information from another UK business for use both in its UK headquarters and its Canadian branch. Although the place of supply would be the UK, to the extent the service is used in Canada, it may be outside the scope of UK/EU VAT. UK VAT would be due only to the extent of use by the UK headquarters.

The term “effective use and enjoyment” is not expressly defined in EU VAT legislation. However, generally it is understood to be the place where a service is consumed (irrespective of contract, payment or

beneficial interest). This should normally be at the final stage of supply. However, the question of measuring or quantifying use and enjoyment can be difficult particularly where only part of a supply is consumed in a Member State and even more so in relation to branches/offices of an international entity. There are no prescribed methods of apportionment when supplies are used and enjoyed outside the EU as well as in the EU - the level of use and enjoyment will depend upon the exact circumstances surrounding the particular supplies. It is therefore important to identify where the customer is physically using the service and where the benefit is felt.

Suppliers should adopt a pragmatic and systematic approach in order to reach a mutually agreeable solution with a Member State tax administration and avoid disputes. Invariably, the approach adopted will probably have as its basis factual data available, such as measured usage, internal company management records showing inter-company recharges, percentage business transactions at the specific location, proportion of relevant equipment and number of sites (assuming equal use at such sites, which may be reasonable in the absence of information to the contrary).

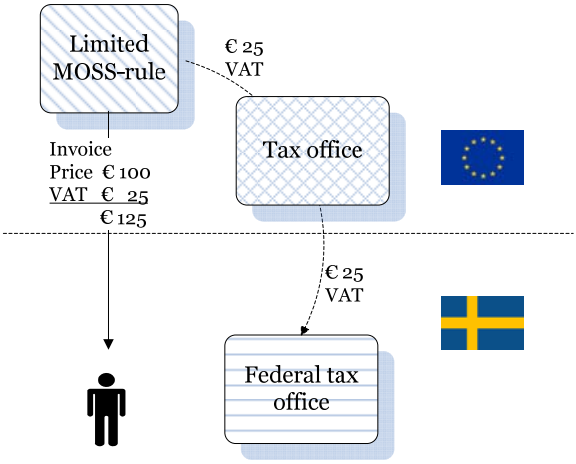
However, it should be noted that each Member State is responsible for the implementation of the effective use and enjoyment rule so the rules will vary across Member States and it should be verified with the Member State concerned.

2. Digital e-commerce issues

2.1 Mini One Stop Shop ("MOSS")

From 1 January 2015 onwards, the new MOSS comes into effect in the EU. This will extend the non-EU OSS scheme currently in place until 31 December 2014 for B2C electronically-supplied services provided by non-EU suppliers (mentioned earlier at 1.3).

The MOSS will allow suppliers to register, submit VAT returns and pay VAT due on their B2C supplies of digital services in other EU Member States in which they do not have an establishment through a single registration and contact point with their Member State of identification/MSI (via a web-portal in the MSI), thereby avoiding the requirement to register for VAT in each Member State in which there are final consumers (the Member State of consumption/MSC).



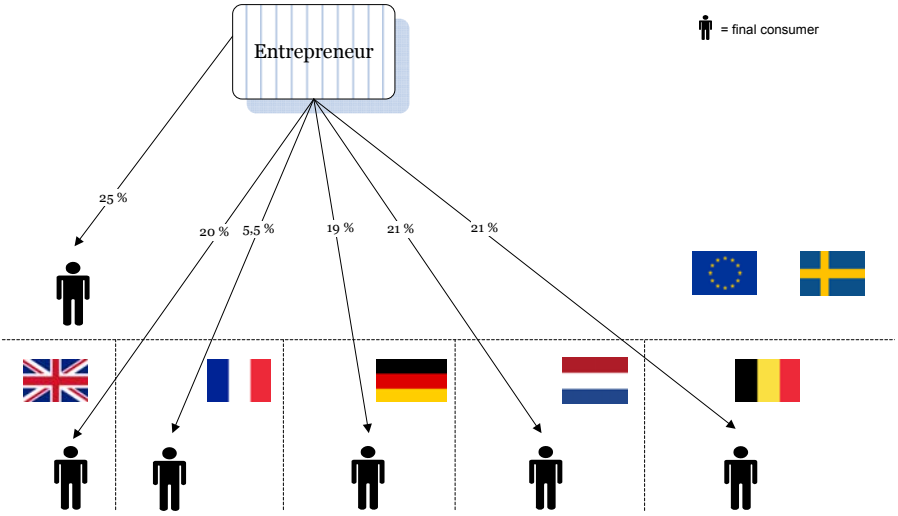
Only B2C cross-border supplies of digital services are within the scope of the MOSS. MOSS will not cover the following:

- the supply of goods (including distance selling) where use is made of electronic systems only to place or accept an order;

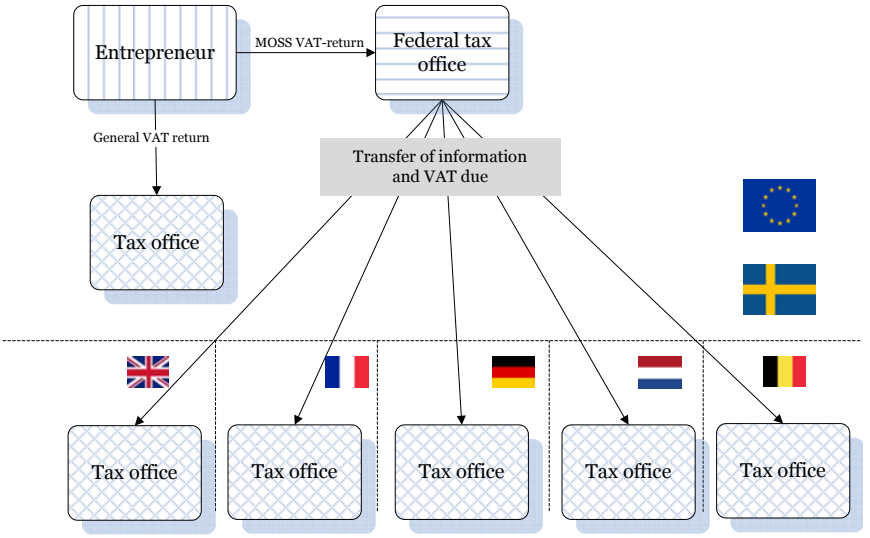
- the supply of services other than telecommunications, broadcasting and electronic services; and

- digital e-commerce supplies (or other services) provided to a business recipient (B2B).

Under MOSS procedures, suppliers will be required to electronically submit calendar quarterly MOSS VAT returns with the tax authority of the MSI, detailing supplies of digital services to final consumers in MSCs, along with the VAT due at the relevant national VAT rates.



The MSI will then transmit the relevant information in the supplier's MOSS VAT returns, together with the corresponding VAT paid, to each Member State of consumption via a secure communications network.



The MOSS will only become effective in each individual case upon application – it is a voluntary registration process.

If the supplier opts for MOSS, the supplier must apply the scheme in respect of all cross-border B2C supplies in all relevant Member States of consumption. It is important to note that there are no de-minimis rules in the MOSS, so even low value sales must be declared and VAT paid.

The main goal of the MOSS is to minimise administrative and compliance burdens on suppliers of B2C digital services who, without MOSS, would otherwise be required under the January 2015 changes to register for VAT purposes in each EU Member State where a final consumer belongs.

However, although MOSS will relieve administrative obligations particularly in helping suppliers to avoid dealing with multiple VAT return procedures, there remain certain issues and limitations with MOSS, and therefore, all suppliers should assess whether it could be more beneficial to use existing EU registrations or create new registrations under local VAT registration rules in other Member States (an overview of which is given at section 3 of this guide for various Member States) compared with using MOSS.

For example:

- MOSS does not cover input VAT – the MOSS only allows suppliers to pay output VAT on their cross-border B2C supplies. Any input tax related to those supplies would need to be recovered through a domestic VAT return where the supplier has an existing VAT registration in the relevant Member State, or otherwise under the EU's cross-border VAT refund procedures which could be a lengthy process, compared with a faster repayment process through a local VAT registration in a Member State;

- VAT payments and returns will need to be submitted electronically within 20 days of the end of the return period. A return period is one calendar quarter.[4] These payment and filing deadline obligations may be shorter than those under local VAT registrations which may have cash-flow implications; and

- businesses will need to maintain records for MOSS purposes for 10 years from the end of the year in which supplies were made and Member States will have the legal right to audit MOSS records. These will include general information such as

[4] So the first period is 1st January to 31st March, the second 1st April to 30th June, the third 1st July to 30th September, and the fourth 1st October to 31st December and the submission dates for each of these periods would be 20th April, 20th July, 20th October, and 20th January.

the MSC of the supply, the type of supply, the date of the supply and the VAT payable, but also more specific information, such as details of any payments on account and information used to determine the place where the customer belongs. A business which persistently fails to make these records available could be excluded from MOSS and instead will have to register in every Member State in which it makes B2C digital supplies. These are onerous record-keeping requirements and shorter data retention periods may apply under local rules in Member States.

- the requirement to submit MOSS VAT returns will be additional to the VAT returns a supplier will be required to submit in its home MSI under its domestic VAT obligations.

There are also conditions on eligibility for suppliers in relation to MOSS because there are two schemes available – a Union MOSS scheme and a non-Union MOSS scheme.

Under Union MOSS, EU-based suppliers (i.e. with a business establishment or fixed establishment in the EU) can use the Union MOSS to declare and pay VAT due on B2C digital supplies in other Member States where they do not have an establishment. The MSI must be the country in which the supplier has established its business (i.e. the head office). If the supplier has not established its business in the EU, the MSI will be the Member State in which the supplier has a fixed establishment. The rules recognise that a supplier may have established its business in the home MSI, but at the same time have fixed establishments in other Member States. Cross-border supplies from these fixed establishments to other Member States of consumption can also be included in the supplier's MOSS VAT return, whereas suppliers would need to declare VAT on B2C supplies made in the Member State where the fixed establishment belongs via the domestic VAT return of the fixed establishment. The business cannot

use MOSS for B2C supplies made in a Member State in which it has an establishment (business establishment or fixed establishment).

Under Non-Union MOSS, non-EU suppliers (with no business or fixed establishment in the EU and with no VAT registration in the EU or requirement to be identified for VAT in the EU) can use the non-Union VAT MOSS scheme to declare and pay VAT due on all B2C digital supplies made to all Member States, including in its MSI. However, in the event the non-EU supplier has an establishment in the EU, then that supplier would need to register for MOSS in that Member State in which the establishment is located under the Union MOSS scheme.

It is important to be aware that any non-EU suppliers registered for VAT purposes (e.g. as a result of imports of goods) but with no fixed establishment in the EU cannot use the Union scheme or the non-EU Union scheme and would therefore be required to register and account for VAT in each Member State where there are final consumers to whom their services are supplied. Such suppliers may therefore need to consider setting up an establishment in the EU.

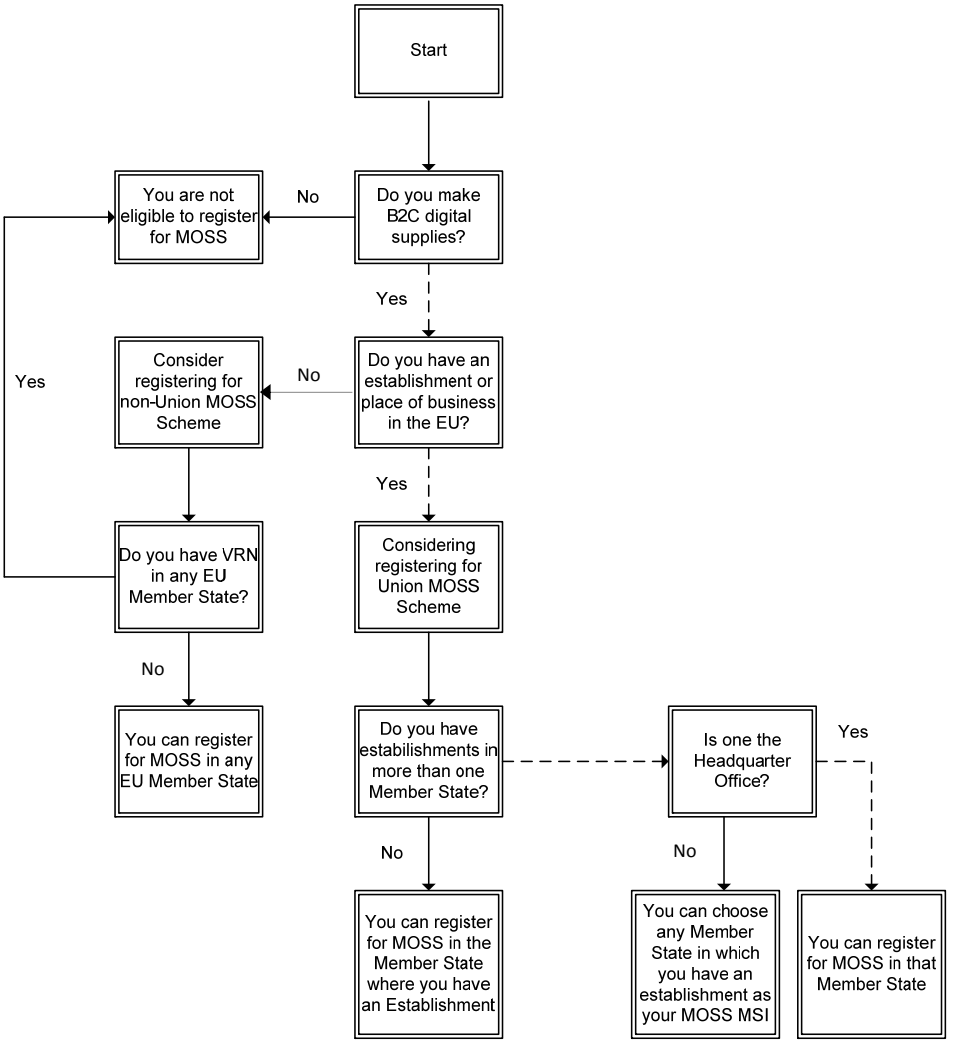
Special rules also apply under MOSS for VAT groups. Members of a VAT group will be able to use the MOSS to account for VAT on their B2C digital supplies in other Member States, by arranging for their supplies to be recorded on the MOSS return. However, any ties with VAT Group members in other Member States will be broken, just for the purpose of operating the MOSS. This means that if a member of the VAT group has, or will have, a fixed establishment in another Member State, the ties with that fixed establishment are broken for MOSS registration purposes, and the supplies from that fixed establishment cannot be declared on the group's MOSS Return. Similarly, supplies from the VAT Group to the Member State of that fixed establishment must be declared via the MOSS return, and not via the domestic VAT return of that fixed establishment.

The EU Commission has produced a detailed practical guidance note on the application of MOSS which businesses should review (please see the list of legislative references at Section 5 of this guide). The Commission's guide covers four key areas – registration process, including deregistration and exclusion from MOSS (which can occur as a result of persistent failures to comply with MOSS); the MOSS VAT return process; payment processes including overpayments, and record keeping. The note also reiterates that the rules applicable in the Member State of consumption to domestic supplies also apply to supplies under the MOSS and these would include the rules relating to invoicing, cash accounting and bad debt relief, etc.

The MOSS schemes will be available from 1 January 2015, but suppliers will be able to register to use the relevant scheme from October 2014. Member States are in the process of implementing MOSS. Meanwhile, suppliers should consider how they will tackle their obligations under the new 2015 rules (e.g. either internally or via outsourcing, using MOSS or local VAT registrations).

Furthermore it should be noted that the EU's legal framework for MOSS has not introduced centralised compliance rules on VAT invoices, penalties for late returns/payments and audit requirements which remain within the competence and responsibility of Member States and therefore suppliers will be obliged to consider and comply with applicable VAT laws concerning those matters in the Member States where their final consumers are located. In order to minimise the risks of suppliers receiving multiple information requests in multiple languages and being audited in quick succession by several Member State authorities, the Commission has sought to encourage Member States to co-ordinate audits of MOSS data by asking Member States to agree to audit guidelines concerning the best way to contact suppliers as part of an audit (i.e. initial contact should be routed through the MSI) and also the method suppliers should use to submit information required by an audit. However, not all Member States have agreed to implement the recommendations.

Please see the following flow chart of the MOSS registration process (this is an extract from recent guidance published by the UK's HM Revenue & Customs).



2.2 Cloud computing / outsourcing of IT services

Cloud computing and outsourcing of IT services are generally considered to be the provision of digital IT services in a B2B context to entrepreneurs. These entrepreneurs purchase such services in order to reduce their costs for IT infrastructure (e.g. costs for maintaining a server) while using and having access to IT resources at any time.

One of the various cloud computing / outsourcing supply chains could involve IT services being supplied by a provider to a recipient through the "cloud" and the recipient then installing the required software in the "cloud". In respect of the software, the recipient would generally enter into a licence agreement with the software provider.

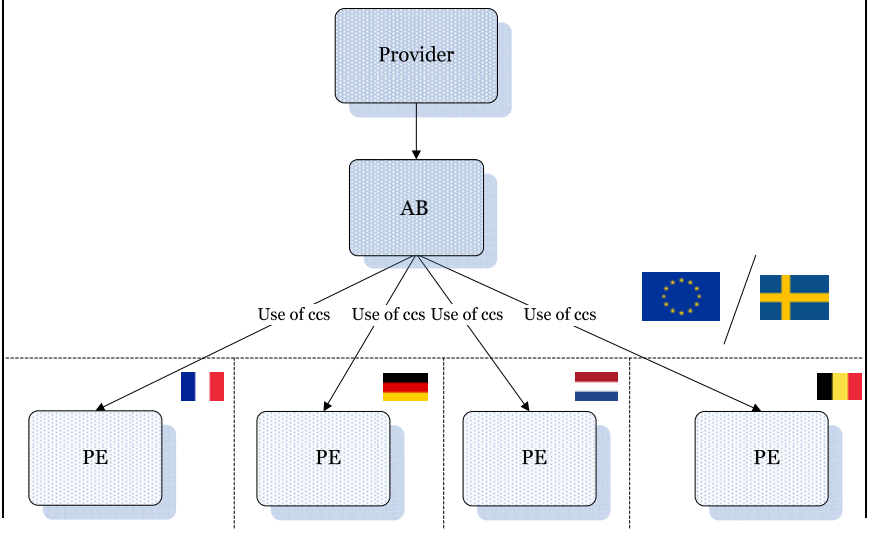
In principle, cloud computing services between entrepreneurs supplied within the EU should be subject to EU VAT. In a straightforward cross-border scenario which does not involve multiple establishments, the reverse charge mechanism should usually apply so that the business customer/recipient is responsible for accounting for VAT to the tax authorities in respect of such cloud computing services. The business recipient should (if fully taxable) however be able to reclaim the VAT as input VAT so that the VAT payable should usually be nil and therefore cash-flow neutral for the recipient, unless the recipient carries out VAT-exempt supplies.

However, cloud computing structures can present significant VAT challenges in terms of determining the place of supply and compliance where they involve supplies to multiple establishments in various Member States, and this would require specialist review. This is because while the place of supply of cloud computing could be the location where the business recipient has established its business, if the cloud computing services are provided to a fixed establishment (e.g. branch), the cloud computing services may be treated as taxable at the place of that establishment provided this does not lead to an inappropriate or irrational result for VAT purposes nor create conflict with another Member State. The cloud computing provider would therefore need to identify the recipient's establishments to which the

services are actually supplied, and each supply received should be looked at separately, examining the nature and use and enjoyment of the service provided, the contractual and payment arrangements, and the VAT ID numbers used by the recipient in respect of establishments being treated as customers of the service. Other relevant factors that can be taken into account include looking at the economic substance and reality of the supply if this conflicts with the contracts, whether the service provides a clear direct (rather than indirect) benefit to the recipient's business as a whole, which establishments appear on the relevant contracts, correspondence and invoices, and at which establishments decisions are taken and controls exercised over contract performance.

Example:

*A corporation ("**AB**") incorporated in Sweden has four permanent fixed establishments for VAT purposes ("**PE**") located in France, Italy, the Netherlands and Germany. The AB entered into an agreement with a cloud service provider ("**Provider**") located in Sweden in order to use cloud services at the AB's head office in Sweden and at its PEs in France, Italy, the Netherlands and Germany.*

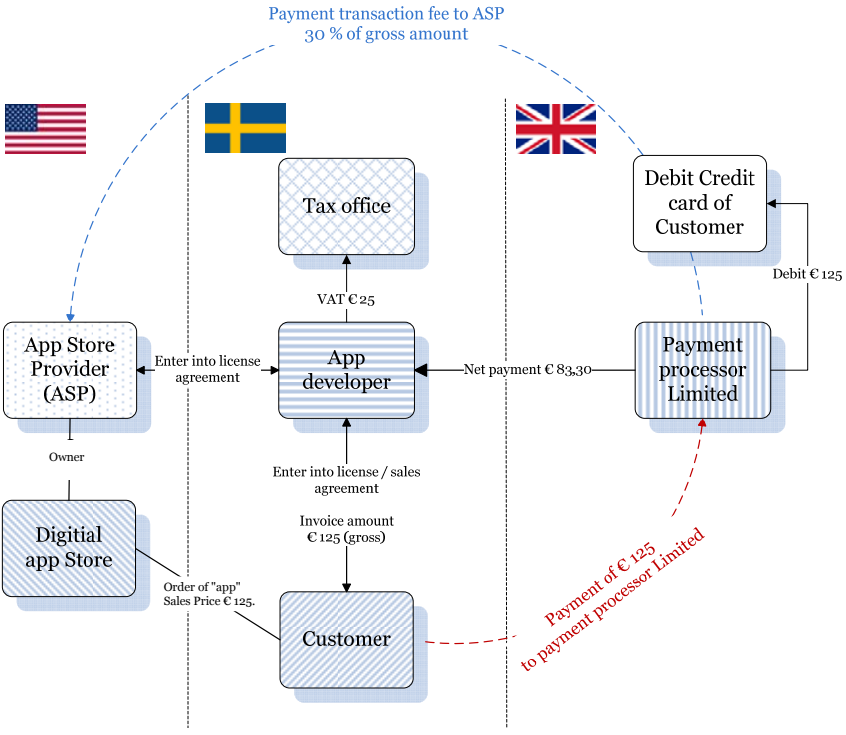


In order to determine the correct VAT treatment, the Provider should determine together with the AB in which location each cloud computing service will be consumed and to what extent.

2.3 Supply of "apps"

The EU VAT treatment of the supply of apps can be very complex due to the whole range of supply possibilities and supply chain scenarios, e.g. through a telecommunications network, via an interface, a portal or an online app store, whereby apps can be supplied to a final consumer indirectly by the developer via an intermediary or several intermediaries taking part in the supply.

In general, a typical app store business model could be as follows:



As indicated in the diagram above, the contractual relationships could be as follows: The final consumer purchases the app via the app store and enters into a contract with the app developer and/or app store; the app developer concludes a contract with the app store provider, and enters into a separate contract with a payment processor (e.g. mobile operator/credit card company) which debits the final consumer the gross price for the app. It withholds a certain percentage of the gross amount and forwards this percentage to the app store provider and/or to the bank/telecom provider (if the final consumer pays through its mobile provider). The remaining amount is then forwarded to the app developer.

The supply chain is often long and can stretch across borders. In such cases, it can be challenging to determine the point in time when the services are actually supplied to a final consumer and the identity of the actual supplier in the supply chain who should be responsible for the VAT payment on that supply.

In general, the EU VAT treatment should follow the contractual agreements between the parties involved so long as they reflect the economic reality of the arrangements.

However, as a result of the 2015 changes affecting B2C supplies of digital services (see earlier at 1.3), a new rule has been introduced to define who in the supply chain should be seen as the supplier of the service to the final consumer, which can be rebutted in certain circumstances. This rule affects supplies of electronically supplied services and telephone services provided through the internet, including voice over Internet Protocol (VoIP), which are supplied through a telecommunications network, an online portal, interface, gateway or marketplace.

Broadly under this new rule, the default position is that each business in the chain will be presumed to be buying in and selling on the digital service in its own name as if it were a principal/the service provider,

even if contractually it is only an agent. This default position will apply in particular where an intermediary (e.g. the app store provider/platform operator) takes part in the supply or sets the general terms and conditions of the supply, authorises payment (not merely collecting/processing payment) or authorises delivery of the content/supply, or, where, throughout the supply chain, the original service provider e.g. the app content owner/developer, is not clearly stated as the supplier of the digital service on the bill, receipt or invoice issued or made available to a customer (which could be another intermediary) including to the final consumer.

The purpose of the rule is to tax as close as possible to the final consumer unless there is a sufficient level of information to identify another business as supplying to the final consumer at an earlier point in the chain.

The Commission's detailed guidance lists certain indicators which would suggest an intermediary takes part in a supply, including as follows: being responsible for the actual delivery; owning or managing the technical platform over which the services are delivered; controlling or exerting influence over the pricing of the service; providing customer care or support in relation to queries about or problems with the e-service itself; owning the customer data related to the supply; and 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.

Conversely, indicators of an intermediary not taking part in a supply could include internet providers/mobile operators/payment service providers who are only processing payment and/or making a network available for the carrying of content, the argument being that such participation should not be sufficiently relevant and merely facilitates the flow of cash and/or content. However, mobile operators can be seen as taking part in a supply if the network is essential for the supply

or if their payment collection does not only cover a simple charge but includes other elements (e.g. use of premium SMS).

Suppliers should assess the effect of this new rule on their B2B contracts with intermediaries and on platforms on which they supply their B2C digital services, and ensure there is a clear, common agreement within the supply chain as to which party is legally responsible for accounting for the VAT due on the ultimate B2C transactions.

2.4 Small entrepreneur regime and the MOSS-rule

The EU VAT Directive has special provisions governing small entrepreneurs (Articles 284-287 of the EU VAT Directive). These provisions are not mandatory. Each EU Member State has the right to either implement them into national VAT law or to refrain from such implementation.

In general, the small entrepreneur regime exempts small entrepreneurs from registering and therefore accounting for VAT if their turnover does not exceed a certain threshold defined by national VAT law. As a consequence however, the small entrepreneur does not have the right to claim related input VAT deductions. In certain countries, the regime has been implemented to require small entrepreneurs to register for VAT but to then exempt such registered suppliers from having to account for output VAT up to a certain amount.

This small entrepreneur regime is only applicable in the EU Member State where the small entrepreneur has established its business. Further, it only applies to turnover generated in that Member State.[5]

In connection with the MOSS, given that (1) the MOSS does not cover input VAT recovery and (2) there is a zero VAT registration

[5] ECJ C-97/09 - Ingrid Schmelz.

threshold/exemption for supplies of digital services, this has a particular impact on small entrepreneurs that provide digital services direct to consumers in other Member States and may lead to additional costs.

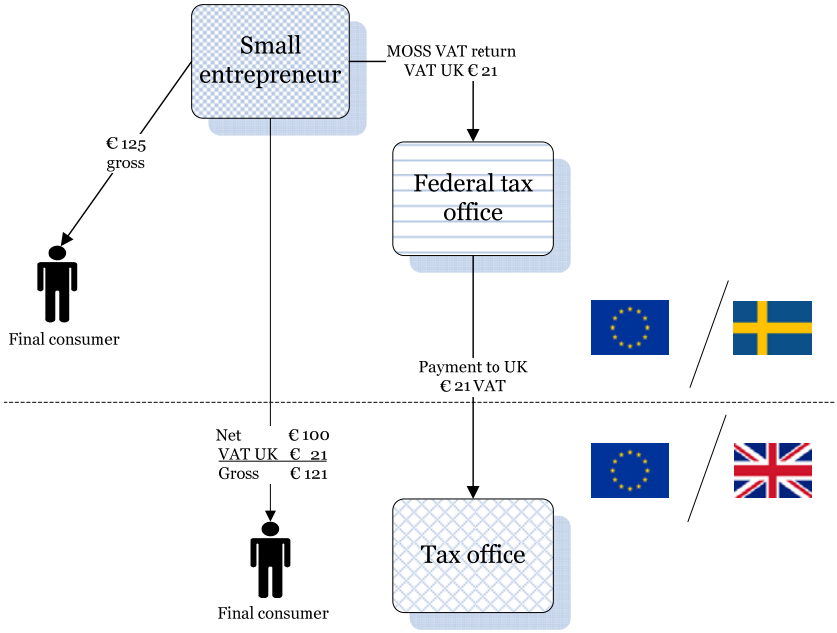
This is illustrated by the following example:

- a small entrepreneur is located in an EU Member State that has implemented the small entrepreneur regime (i.e. Germany). He does not exceed the threshold (i.e. EUR 17,500 in Germany with regard to turnover generated in Germany).

- this entrepreneur supplies B2C digital services through an app store to consumers located in Germany and in other EU Member States (i.e. Italy, UK, and France). With regard to the consumers situated in Germany, the entrepreneur could presently invoice his service without any German VAT due to the small entrepreneur regime. For supplies to customers situated in other EU Member States, the small entrepreneur would have to charge and account for VAT on those supplies with the applicable VAT rate of the relevant Member State, from 1. January 2015 onwards.

- if the small entrepreneur chooses to register for MOSS in Germany, he will also need to register for VAT in Germany, particularly to ensure he can recover related input VAT in Germany. The position will be similar in other Member States – for example, HM Revenue & Customs in the UK have confirmed that businesses currently unregistered in the UK who choose to register for MOSS in the UK will also have to obtain a UK VAT registration and their UK supplies will therefore also become liable to VAT.

The challenge therefore for small entrepreneurs is that they will need to consider and distinguish between future, expected national turnover and EU turnover and decide strategically whether their supplies should be limited to domestic consumers (to maintain the benefit of being within the small entrepreneur regime) or whether their EU/overseas market justifies the need to register both under MOSS and under a domestic VAT registration.



Overview of VAT rates and thresholds pursuant to the small entrepreneur regime in certain EU Member States

	Standard VAT rates	*VAT thresholds*
Belgium	21 %	€15,000
France	20%*	€90,300 or €34,900
Germany	19 %	€17,500
Hungary	27 %	6,000,000 HUF/approx. €19,526
Italy	22 %	€30,000
The Netherlands	21 %	None**
Sweden	25 %	None
United Kingdom	20 %	£81,000

** 5.5% for digitised e-books delivered over the internet although this is subject to EU infringement proceedings.*

*** but there is a separate small entrepreneur regime which means that suppliers, although they will have to register for VAT, will not have to pay VAT where the output VAT liability is below a certain threshold.*

3. Country overview of VAT registration etc.

The following country overviews give brief details in respect of EU VAT registration requirements (outside of MOSS) for non-EU suppliers. In certain cases, the rules may also apply to suppliers who are not established in the country but established in another Member State (such as in Hungary and the UK) although the position should be checked locally with the country concerned.

Country of registration	*B2B**	*B2C*	*Time frame of registration*
Belgium	X	√	4 to 6 weeks
France	X	√	
Germany	X	√	Up to 5 working days
Hungary	X	√	Registration required before the date of the (first) supply
Italy	X	√	A few hours
The Netherlands	X	√	Up to 5 working days
Sweden	X	√	2 to 6 weeks
United Kingdom	X	√	Up to 2-3 weeks

** cross-border supplies.*

3.1 Belgium

3.1.1 When do we need to be registered for VAT purposes?

VAT registration in Belgium is mandatory when the following three conditions are met:

1. the non-EU entity conducts VAT transactions in Belgium;
2. these transactions allow the non-EU entity to deduct input VAT;

3. the non-EU entity is liable to VAT vis-à-vis the Belgian State because of the VAT transactions it conducts take place in Belgium

The rules for VAT registration applied to Belgian entities, would also be applicable to all foreign entities (i.e. non-EU suppliers) when making taxable supplies in Belgium with the following exceptions:

- when it is not possible for the non-EU entity to register in Belgium or to appoint a VAT representative (i.e., when the transactions conducted in Belgium are occasional and that these transactions imply an amount of VAT due and deductible below a threshold of 5,000 EUR; above this threshold, the VAT administration will analyse into details the occasional character of the transactions in Belgium);

- when the reverse charge rule makes the other party to the contract liable for the payment of VAT.

3.1.2 How can we register for VAT purposes?

In order to register for VAT the E-commerce business could use the form 604A. The form could be filled out in either French or Dutch. The form 604A should be completed with information about;

- applicant;

- description of the business operations in Belgium;

- information for VAT registration in Belgium

3.1.3 Where can we receive the registration form?

The registration form (604A) can be found in Dutch and in French on the "Finform" website of the Belgian tax authorities:

https://eservices.minfin.fgov.be/portal/fr/public/citizen/datasanddocs/forms

3.1.4 Do we need a VAT representative / fiscal representative?

All companies, with the exception of companies domiciled within the EU must appoint a VAT representative. Furthermore, companies not required to appoint a fiscal representative are however entitled to do so.

3.2 France

3.2.1 When do we need to be registered for VAT purposes?

VAT identification is mandatory for a non-French entity realising operations subject to VAT in France (i.e. supply of goods, supply of services with the exception if the reverse charge rule makes the customer liable for the payment of VAT).

E-commerce businesses established outside EU which renders services to France need to be registered when they render services to a non-taxable customer (B to C). With a taxable French customer (B to B), a reversal of liability for the payment of VAT leads to a VAT payment by the French customer.

3.2.2 How can we register for VAT purposes?

Non-EU entity established in a country which has signed with France an assistance agreement for the recovery of taxes has to register at the non-French resident tax service.

A registration form is provided by the tax administration and contains the following information:

- address;
- description of the activity carried out in France;
- address of the entity's accountant in France or abroad; and
- details of the tax service of the entity in its country.

It is necessary to join the form with the following documents:

- copy of the certificate of registration to the Trade and Companies Register or similar in the country of origin;

- original certificate of liability to VAT in the country where the company has its registered office or principal place of business; and

- copy of the bylaws or articles of association of the company.

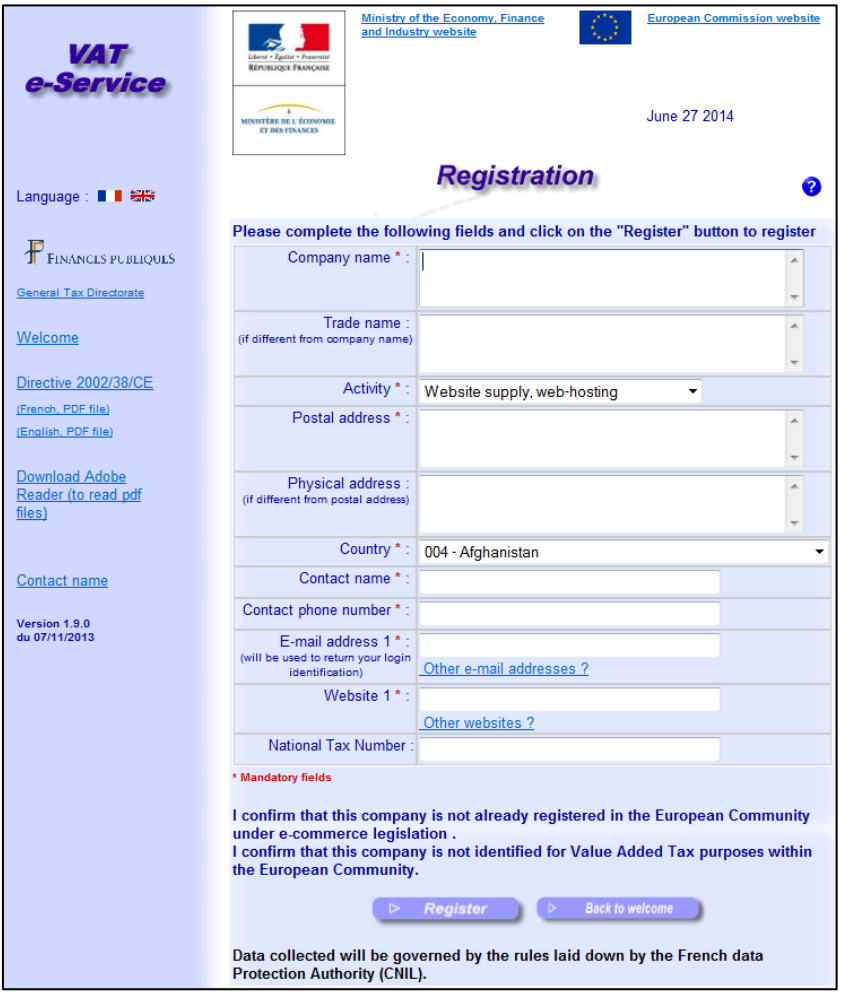
For non-EU entity established in a country which has not signed an agreement with France, a VAT/fiscal representative has to be appointed.

The VAT representative is in charge to accomplish all the formalities linked to the payment of VAT in France by the entity.
In case of electronic services to a final consumer, an electronic registration is available on the website of the French Ministry of Economy, Finance and Industry.

3.2.3 Where can we receive the registration form?

A direct registration via the website of the Ministry of Economy, Finance and Industry website (in French or in English) is applicable:

http://www.pce.dgi.minefi.gouv.fr/index.php?lang=en&



3.2.4 Do we need a VAT representative / fiscal representative?

A VAT / fiscal representative is not required for a taxable non-EU supplier established in a country which has signed with France an assistance agreement for the recovery of taxes.

However, in case the non EU supplier is established in a country which has not signed such treaty, a VAT / fiscal representative has to be appointed.

3.3 Germany

3.3.1 When do we need to be registered for VAT purposes?

In case of the supply of goods the non-EU supplier has to be registered from the first day of the supply (i.e. import VAT, input VAT, VAT return, customs purposes). However, VAT will only be trigger if the non-EU-supplier is faced with import VAT (i.e. not be paid by customer under supply conditions).

In case of the supply of digital services to final consumer the non-EU-supplier has to be registered for VAT purposes. In case of digital services to an entrepreneur the reverse charge mechanism should apply.

3.3.2 How can we register for VAT purposes?

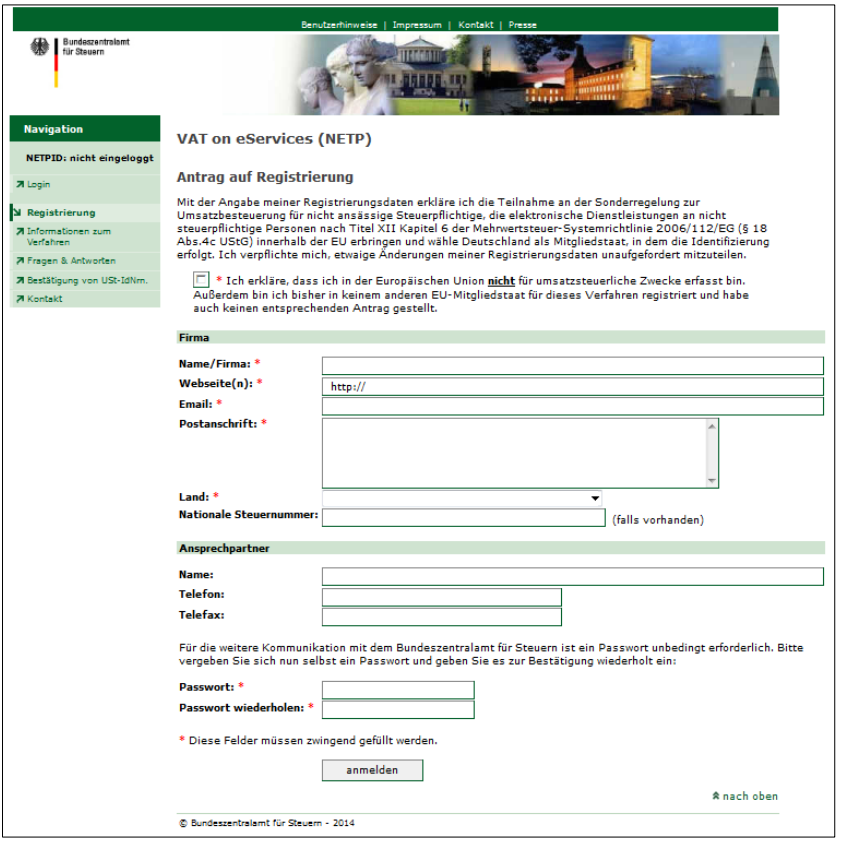
In case of supply of goods a local registration at the responsible tax office via registration form (in German) is necessary for VAT purposes (i.e. import VAT, input VAT and VAT declarations).

In case of electronic services to a final consumer an electronically registration (in German) to the Federal Tax Office is applicable. (The non-EU-supplier can only be registered under this procedure in one member state in the EU).

3.3.3 Where can we receive the registration form?

A direct registration via the website of the Federal Tax Office (in German) is applicable:

https://evat.bff-online.de/001/addNetpForm.



3.3.4 Do we need a VAT representative / fiscal representative?

A VAT / fiscal representative is not required under German VAT law. However, a German tax advisor would be well recommended.

3.4 Hungary

3.4.1 When do we need to be registered for VAT purposes?

If a non-EU supplier (without a fixed establishment) is not yet registered in any other EU member state.

3.4.2 How can we register for VAT purposes?

Registration at the Tax Authorities Major Taxpayers' Directorate. Registration is also possible online in English. VAT returns can only be submitted online (in Hungarian).

3.4.3 Where can we receive the registration form?

The registration form provided by the Tax Authorities is available online on the following link:

http://www.nav.gov.hu/nav/letoltesek/nyomtatvanykitolto_programok/nyomtatvanykitolto_programok_nav/adatbejelentok_adatmodositok/14t201.html

The submission requires the software of the authorities as well as access to the national administrative online platform. The application for registration must be filed personally at the Tax Authority's Major Taxpayers' Directorate, while all further changes may be sent in electronically.

3.4.4 Do we need a VAT representative / fiscal representative?

Except for services provided electronically, it is a requirement for a non-EU supplier to appoint a fiscal representative during the application for registration for VAT purposes.

The fiscal representative can be a business entity having an equity capital of at least HUF 50 million (approx. EUR 167.000) or bank guarantees for the same amount and must not have any outstanding tax debts to the tax authority. The law provides that during its appointment, only the fiscal representative can act on behalf of the company during the procedures with the tax authorities.

Appointing a fiscal representative is optional for EU entities.

3.5 Italy

3.5.1 When do we need to be registered for VAT purposes?

Generally speaking, the non-EU-supplier has to be registered before supplying goods for VAT purposes. The VAT treatment of such transactions is subject to ordinary rules depending on the goods flow and the client (customer o business).

It is not mandatory to register for VAT purposes. The customer, VAT person, accomplishes VAT obligations through the reverse charge mechanism.

In the case of B2C transactions the non-EU-supplier has to be registered with the first day of the supply of goods and electronic services for VAT and customs purposes.

3.5.2 How can we register for VAT purposes?

The subject wishing to adopt this system has to appoint a fiscal representative or register themselves directly.

In order to appoint a fiscal representative the subject should proceed through:

- Public deed;
- Authenticated private deed; and
- Filing a form with the competent Tax Revenue Authority.

After the appointing of the fiscal representative he has to produce the AA7/10 form (hereby attached) at the competent office.

In order to proceed through direct identification, the subject should proceed by producing the ANR/3 form at the competent office before carrying out any transaction territorially relevant in Italy.

Only electronically registration (in Italy) is allowed.

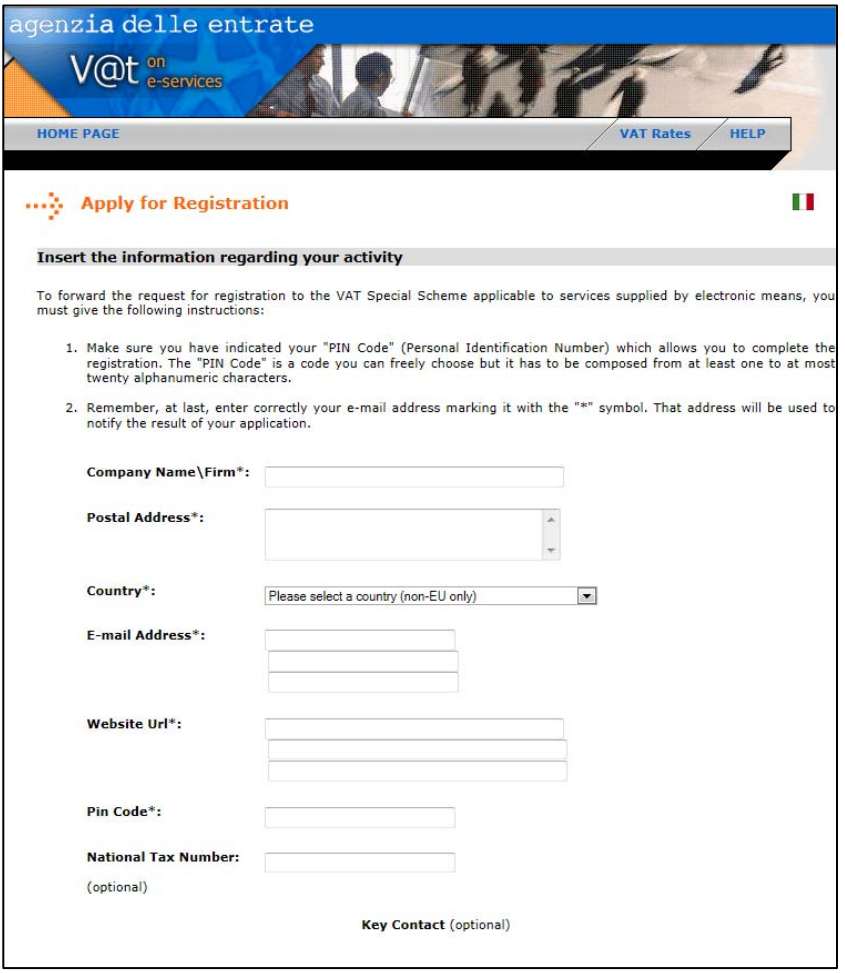
3.5.3 Where can we receive the registration form?

Fiscal representative

http://www.agenziaentrate.gov.it/wps/content/Nsilib/Nsi/Strumenti/Modelli/ModulisticaP/Modelli+di+istanza+richiesta+domanda/Modelli+di+istanza+richiesta+domanda+2009/IVA+AA9_9+AA7_9+ANR_2/IVA+-+Modello+AA7_9/

Direct identification

http://www1.agenziaentrate.gov.it/inglese/international_taxation/vat_identification.htm


agenzia delle entrate
V@t on e-services
HOME PAGE
VAT Rates
HELP
Apply for Registration
Insert the information regarding your activity
To forward the request for registration to the VAT Special Scheme applicable to services supplied by electronic means, you must give the following instructions:
1. Make sure you have indicated your "PIN Code" (Personal Identification Number) which allows you to complete the registration. The "PIN Code" is a code you can freely choose but it has to be composed from at least one to at most twenty alphanumeric characters.
2. Remember, at last, enter correctly your e-mail address marking it with the "*" symbol. That address will be used to notify the result of your application.
Company Name\Firm*:
Postal Address*:
Country*:
Please select a country (non-EU only)
E-mail Address*:
Website Url*:
Pin Code*:
National Tax Number:
(optional)
Key Contact (optional)

3.5.4 Do we need a VAT representative / fiscal representative?

Companies based in EU and in third countries with legal instruments in place governing mutual assistance for the purpose of indirect taxation can choose between the direct identification and the appointment of a VAT representative. Only for extra-EU companies (based in a State not provided with a mutual assistance regulation for indirect taxation) it is mandatory to have a VAT representative. Furthermore, companies not required to appoint a fiscal representative or to register directly are however entitled to do so.

3.6 The Netherlands

3.6.1 When do we need to be registered for VAT purposes?

A taxable person must register when it starts its activities in the Netherlands that are subject to VAT. Dutch law does not require the taxable person to register when it carries out its first investment activities already. However, registration is preferably done before the first day of the supply or delivery of goods.

Foreign (non-resident) entrepreneurs have to register for VAT purposes if they perform VAT-taxable transactions in the Netherlands that require them to submit a VAT return or if they wish to claim refund of VAT paid e.g. upon importation or as input VAT. EU entrepreneurs who are not required to submit a VAT return, but solely wish to claim a refund of VAT, do not need to be registered.

The Dutch Tax Authorities consider a non-EU-supplier as a foreign entrepreneur if the entrepreneur is not established in the Netherlands or if the entrepreneur does not have a fixed establishment in the Netherlands.

A fixed establishment is a place of business in the Netherlands with sufficient facilities for running an independent enterprise. The fixed establishment is part of the enterprise.

3.6.2 How can we register for VAT purposes?

Foreign (non-resident) entrepreneurs can register at the Tax and Customs Administration/Limburg/Department of International Issues via a registration form (i.e. import VAT, input VAT and VAT declarations).

Foreign (non-resident) entrepreneurs can make use of a fiscal representative to deal with the Dutch Tax and Customs Administration.

In the Netherlands the registration of non-EU suppliers of e-services is electronically at the Federal Tax Office. (The non-EU-supplier can only be registered under this procedure in one member state in the EU.)

If the entrepreneur is established in the Netherlands or has a fixed establishment in the Netherlands it has to file a local registration at the competent tax office via a registration form.

3.6.3 Where can we receive the registration form?

The registration form for non-EU suppliers of electronic services can be found at:

https://mijn.belastingdienst.nl/eVatNETP/

Foreign entrepreneurs that wish to apply for a VAT registration number have to complete a form that can be ordered either by phone at the Department of International Issues, +31 55 538 53 85 or by mail at the Tax and Customs Administration/Limburg/Department of International Issues, Turnover Tax Department, PO Box 2865, 6401 DJ Heerlen, The Netherlands.

Alternatively, the form can be downloaded, via the following link:

http://download.belastingdienst.nl/belastingdienst/docs/application_reg_nr_foreign_enterprises_ob0751z4foleng.pdf

3.6.4 Do we need a VAT representative / fiscal representative?

Foreign entrepreneurs that are not established in the Netherlands or do not have a permanent establishment in the Netherlands can appoint a fiscal representative for deliveries and supplies subject to VAT and for intra-Community acquisitions and import. In order to appoint a fiscal representative a license is required.

In case of distance sales (except for the sale of new vehicles and sales for which special procedures apply) foreign entrepreneurs have to appoint a fiscal representative with a general license if the head office or the establishment of the foreign entrepreneur is located in a third-country with which no legal instrument exists relating to mutual assistance as provided in Article 204 of the VAT Directive.

Foreign entrepreneurs are required to appoint a fiscal representative for deliveries as mentioned in Table II, sub a, special regulation and Table II, sub b, special regulation of the Dutch VAT Act 1968. This involves specific deliveries for the transport of mineral oils that are neither transported to another EU Members State nor exported or stored in a warehouse as well as goods that are stored in non-located non-customs warehouses.

3.7 Sweden

3.7.1 When do we need to be registered for VAT purposes?

There is no threshold for VAT registration in Sweden. A taxable person must always register for VAT if it makes supplies that are subject to VAT (or zero-rated supplies), irrespective of the amount of the sales. It is recommended that the application for VAT registration is submitted before the trading starts.

Non-resident businesses that make supplies of goods or services through a fixed establishment in Sweden are required to register for VAT in Sweden.

The registration rules described herein also apply to a business that is not established, and does not have a fixed establishment in Sweden (i.e. a non-established business) and that makes supplies subject to VAT in Sweden, except when providing to VAT registered businesses goods and services that are subject to the reverse charge rules.

A non-established business must be VAT registered in Sweden when performing the following supplies:

- Distance sales with revenues in excess of a SEK 320,000 threshold during the current or preceding taxable year;

- Other supplies of goods or services that are not subject to the reverse charge, such as passenger transportation, cultural services or supplies to private persons, (with no minimum threshold); or

- Intra-Community acquisitions in Sweden.

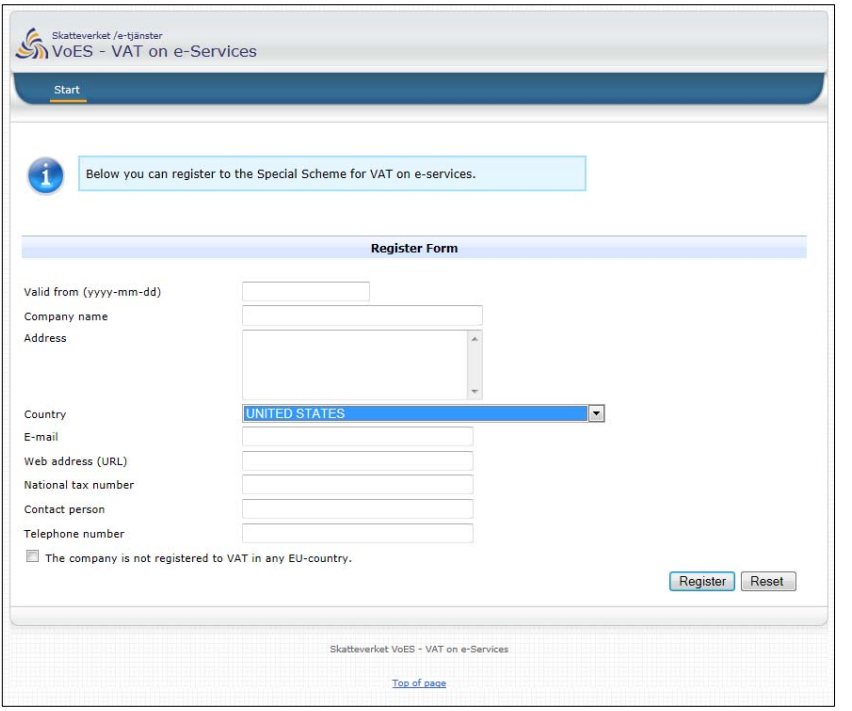
3.7.2 How can we register for VAT purposes?

The VAT registration can be done either electronically or by submitting a printed form called “Skatte- och avgiftsanmälan”.

3.7.3 Where can we receive the registration form?

The registration form for non-EU suppliers of electronic services can be found at:

http://www.skatteverket.se/4.18e1b10334ebe8bc80002474.html



The registration form can also be downloaded from the Swedish Tax Agency website.

- Tax application (registration) form 4620, ("Skatte- och avgiftsanmälan") in Swedish:

http://www.skatteverket.se/download/18.7afdf8a313d3421e9a926/1362383994535/462032.pdf.

- Tax application for foreign entrepreneurs, form 4632, in English:

http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/employersbusinessescorporations/howtoapplyforaswedishtaxregistrationwiththe4632formtaxapplicationforforeignentrepreneurs.4.71004e4c133e23bf6db800017516.html.

3.7.4 Do we need a VAT representative / fiscal representative?

A non-established business that makes taxable supplies in Sweden, and is registered for VAT in Sweden, has the option of appointing a VAT representative ("Ombud"). The VAT representative must be:

1. a person that permanently resides in Sweden;

2. a legal entity with a board of directors with a fixed place of business in Sweden; or

3. a company with a permanent establishment or permanent operations in Sweden.

Appointment of a VAT representative is not an alternative to registering for VAT, but rather, an alternative way of administering VAT liability. A VAT representative must retain VAT records and

accounts and account for Swedish VAT on behalf of the business it represents.

The Swedish Tax Agency requires a business established outside of the European Economic Area (EEA) or Nordic region (Norway, the Åland Islands, Iceland, the Faroe Islands and Greenland) to appoint a VAT representative.

3.8 United Kingdom

3.8.1 When do we need to be registered for VAT purposes?

Any person who makes taxable supplies in the UK may have a liability to be registered in the UK even if they have no physical presence here. HMRC refer to such persons as non-established taxable persons (NETPs).

An NETP is any person who is not normally resident in the UK, does not have a UK establishment and, in the case of a company, is not incorporated here (so this could affect a non-EU supplier or a supplier established in another EU Member State).

A UK establishment exists if:

- the place where essential management decisions are made and the business's central administration is carried out is in the UK; and

- the business has a permanent physical presence with the human and technical resources to make or receive taxable supplies in the UK.

HMRC would normally consider a company which is incorporated in the UK to have an establishment there as long as it is able to receive business supplies at its registered office.

As of 1 December 2012, there is no UK VAT registration threshold specifically available to NETPs and therefore, any non-established business which makes or intends to make taxable supplies in the UK of goods or services there (regardless of the value) in the next 30 days has 30 days from the date it formed that intention to notify HMRC that it is required to register for VAT.

This follows the decision (Schmelz C-97/09) in the CJEU (the European Court of Justice) which confirmed that only businesses

established in a Member State can benefit from its domestic VAT registration threshold. However, non-UK established businesses only involved in "distance sales" or "acquisitions" of goods into the UK (these terms have specific meanings for VAT purposes - see:

http://www.hmrc.gov.uk/vat/forms-rates/rates/rates-thresholds.htm#3;
http://www.hmrc.gov.uk/vat/managing/international/distance-selling.htm;

and

http://www.hmrc.gov.uk/vat/managing/international/imports/importing.htm)

are not affected by the removal of the VAT registration threshold and very broadly therefore, they will be required to register if the annual value of their intra-EU distance sales into the UK exceed £70,000 or the value of their intra-EU acquisitions into the UK exceeds £81,000 in the current year from 1 January or in the next 30 days alone.

Overseas businesses making only B2B reverse charge supplies of services to the UK should also not be affected by the removal of the threshold.

Where a non-UK business makes supplies of electronically supplied services to UK business customers, the place of supply is where the UK business customer is established. As the business customer is located in the UK/EU, the business customer will have to account for VAT using the reverse charge mechanism. There will be no requirement on the overseas supplier to register for VAT in the UK for those B2B transactions alone.

The UK's VAT on e-Services (VoES) scheme has been available to non-EU suppliers wishing to use the scheme to register and account for

VAT in respect of e-services to end consumers located in the EU (i.e. private individuals and non-business organisations) (B2C transactions) – this is a special VAT scheme in the UK implementing the non-EU OSS (see 1.3), and provides an optional, simplified means of registering and accounting electronically for EU VAT.

VoES does not apply to B2B supplies to business customers in the EU as they will account for any tax due using the 'reverse charge' mechanism.

On 1 January 2015, as a result of the changes being made to the EU VAT place of supply of services rules for business to consumer (B2C) supplies of digital services, i.e. broadcasting, telecommunications and e-services as described in this guide, a non-EU business making B2C/business to consumer supplies to EU consumers will be able to register and use the new Non-Union VAT Mini One Stop Shop (VAT MOSS) online service in any Member State. The Non-Union VAT MOSS will be a slightly modified version of the current VoES scheme, covering supplies of broadcasting and telecommunications, as well as e-services. The Union MOSS scheme will be available to UK businesses.

VOES will be available to use for VAT declarations until 31 December 2014. From 1 January 2015, it will continue to be available for a limited period only for late declarations, or for making corrections to declarations, for periods ending on or before 31 December 2014.

3.8.2 How can we register for VAT purposes?

Outside of MOSS, any NETP business which is required or entitled to register for UK VAT can directly apply for VAT registration with HM Revenue and Customs ("HMRC") either online or by completing form VAT 1 ("VAT Application for Registration Notification"): http://www.hmrc.gov.uk/forms/vat1.pdf, or online via the following links:

http://www.hmrc.gov.uk/vat/start/register/how-to-register.htm

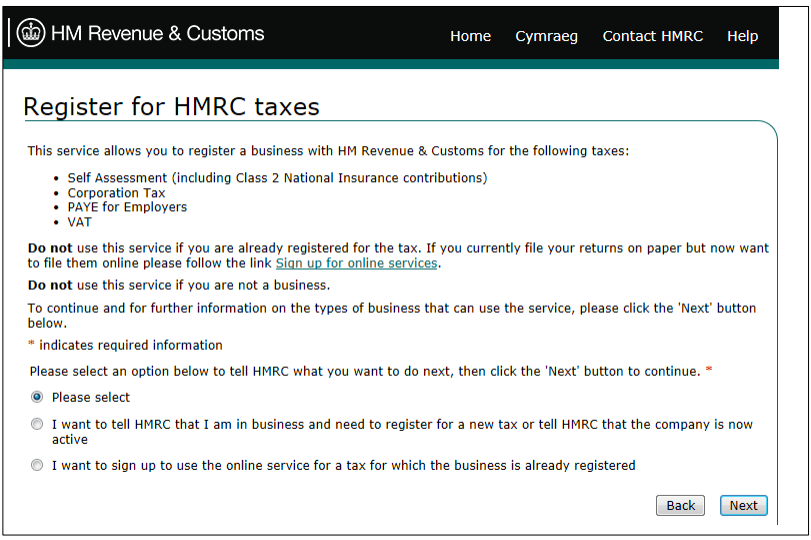
https://online.hmrc.gov.uk/login?GAREASONCODE=-1&GARESOURCEID=Common&GAURI=https://online.hmrc.gov.uk/home&Reason=1&APPID=Common&URI=https://online.hmrc.gov.uk/home

NETPs can also register for VAT via a UK tax representative or via a UK agent (although an agent is not allowed to register for VAT under VoES on behalf of a non-EU business but can be authorised to submit VAT declarations and make payments on behalf of the non-EU supplier).

NETPs may register for VAT in any of the following ways

- directly with HMRC;
- via a UK tax/VAT representative or,
- via a UK agent.

See further at: http://www.hmrc.gov.uk/vat/start/register/agents.htm



3.8.3 Where can we receive the registration form?

A NETP is to send their completed application online or by post to HMRC's NETP Unit in Aberdeen. HMRC provide guidance notes to assist with completion of the paper form:

http://www.hmrc.gov.uk/forms/vat1-notes.pdf

There is no obligation on NETPs to appoint a UK VAT representative to act on its behalf in respect of VAT matters, although NETPs can voluntarily appoint a UK VAT representative. Under UK legislation, VAT representatives (rather than agents) are jointly and severally liable for the VAT debts incurred by the NETP in the UK, so HMRC can pursue the VAT representative for any outstanding tax which has become due on or after the date from which they are appointed. In practice, very few companies or individuals are willing to provide the services of a VAT representative because they are unwilling to become liable for the VAT debts of the principal.

HMRC has the power to direct an NETP to appoint a VAT representative. It is understood however that this provision is rarely used and exists as a measure for cases where the HMRC suspects difficulties in collecting tax due.

4. Examples of Digital Services

Types of electronically supplied services

Supply of digitised products generally, including software and changes to or upgrades of software
Services providing or supporting a business or personal presence on an electronic network such as a website or a webpage
Services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient
The transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer
Internet Service Packages (ISP) (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.)
Website hosting and webpage hosting
Automated, online and distance maintenance of programs
Remote systems administration
Online data warehousing where specific data is stored and retrieved electronically
Online supply of on-demand disc space
Accessing or downloading software (including procurement/accountancy programs and anti-virus software) plus updates
Download drivers such as software that interfaces computers with peripheral equipment
Online automated installation of filters on websites or firewalls
Accessing or downloading desktop themes; photographic or pictorial images or screensaver

Digitised content of books and other electronic publications and subscription to online newspapers and journals
Weblogs and website statistics
Online news traffic information and weather reports
Online information generated automatically by software from specific data input by the customer, such as legal and financial data, (in particular such data as continually updated stock market data, in real time)
The provision of advertising space including banner ads on a website / webpage
Use of search engines and Internet directories
Accessing or downloading of music on to computer and mobile phones, jingles, excerpts, ringtones, or other sounds, films or games
Accessing automated online games which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another
Accessing to on-demand video / radio streaming / IP streaming
Automatic distance teaching dependent on the Internet or similar electronic network
Workbooks completed by pupils online and marked in an automated fashion without human intervention.

Types of telecommunications services

Fixed and mobile telephone services for the transmission and switching of voice, data and video, including telephone services with an imaging component (videophone services)
Telephone services provided through the Internet, including voice over Internet Protocol (VoIP)
Voice mail, call waiting, call forwarding, caller identification, three-way calling and other call management services
Paging services
Audiotext services
Facsimile, telegraph and telex
Access to the Internet, including the World Wide Web
Private network connections providing telecommunications links for the exclusive use of the client

Types of broadcasting services

Radio or television programs transmitted or retransmitted over a radio or television network
Radio or television programs distributed via the Internet or similar electronic network (IP streaming) if they are broadcast simultaneously to their being transmitted or retransmitted over a radio or television network (e.g. live broadcasts over the internet)

5. List of Legislative References

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services

Commission explanatory notes published 3 April 2014on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force as of 1 January 2015 (Council Implementing Regulation (EU) No 1042/2013)

Commission guide to the MOSS published 23 October 2013 complemented by additional guidelines on the audit of the MOSS (published June 2014)

See further at:
http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/telecom/index_en.htm#report

6. Getting to know us

Bird & Bird is a truly international firm, organised around our clients. We connect our passion and practical insight with our clients' vision, to achieve real commercial advantage.

With more than 1,100 lawyers and legal practitioners in 26 offices worldwide, we specialise in combining leading expertise across a full range of legal services, including advice on commercial, corporate, EU and competition, intellectual property, dispute resolution, employment, finance and real estate matters.

Our clients build their businesses on technology and intangible assets, and operate in regulated markets. The key to our success is our sector focus. We have developed deep industry understanding of these sectors, including aviation & aerospace, communications, electronics, energy & utilities, financial services, healthcare, information technology, life sciences, media and sports. Our deep industry knowledge gives us:

- Expertise in the law and regulatory framework relating to each sector

- A practical, commercial approach to navigating the sector, supported by advisors who have worked for decades in these specific industries

Most of our work is cross-border and multi-jurisdictional. We excel at managing complex projects across multiple regions with a seamless one-firm approach.

We have offices in key business centers across Europe, the Middle East and Asia, including in Abu Dhabi, Beijing, Bratislava, Brussels,

Budapest, Copenhagen, Dubai, Düsseldorf, Frankfurt, The Hague, Hamburg, Helsinki, Hong Kong, London, Lyon, Madrid, Milan, Munich, Paris, Prague, Rome, Shanghai, Singapore, Skanderborg, Stockholm and Warsaw.

We are now the only truly international firm with a presence in Denmark, Finland and Sweden, ideally positioning us to support companies looking to invest in the Nordic region. We also have dedicated groups focusing on Africa, India, Japan and Russia and close ties with firms in other key jurisdictions in Europe, the Middle East, Asia, Australia and the United States. We offer local expertise within an international context.

As we have expanded into new jurisdictions we have established our offices as real, local, full service offerings rather than representative or franchised offices to ensure our ability to provide a consistent approach and client service experience across the firm. Operating as one, truly international partnership, with shared goals and accounting and a single profit pool, we are committed to providing our clients

advice from the right lawyers, in the right offices, working together properly in the interests of our client.

Today, we maintain an open and flexible business culture, aiming to respond as rapidly as possible to the commercial pressures that our clients face and to ensure that our own business remains configured in the best way possible to provide excellent service to our clients, however they themselves define excellence.

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This book, prepared by Bird & Bird's international VAT group, is a guide to VAT on digital e-commerce providing a sufficiently detailed summary to give an e-commerce business an understanding of the VAT implications on typical cross-border transactions, VAT on different e-commerce business models, as well as how to manage VAT registration and VAT representative procedures in various member states in the EU.

Bird & Bird is one of few law firms that offer a team of specialists in VAT and indirect taxes across Europe, Middle East and Asia.

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