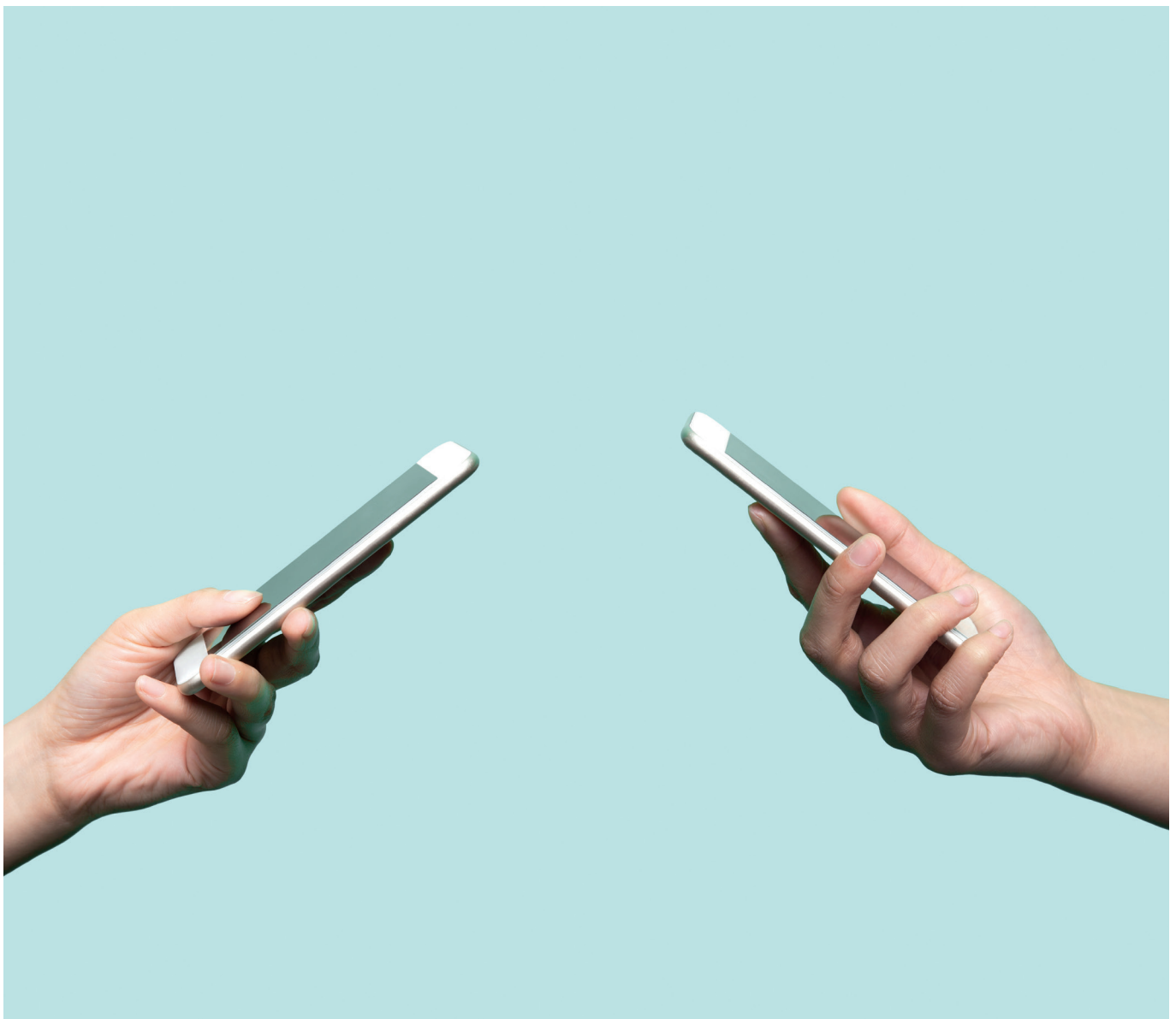


# WTS VAT Update for the Digital Economy

Data as Currency, Digital Service Tax, Obligations for payment  
service providers, Online marketplaces



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## Introduction

The final weeks of 2018 week proved to be important for online service providers, webshops and online marketplaces.

The VAT Committee published two so called working papers in which it shared their views on three highly important VAT issues that online service providers face, i.e. the "data as currency" discussion, the VAT treatment of online platforms, and the VAT status of customers that do not provide their VAT identification numbers (i.e. B2B or B2C).

Also the long awaited adjustment that allows EU Member States to charge a low VAT rate on e-Books was published and entered into effect. A new EU Regulation on Geo-Blocking came into force, which could have a substantial effect on the VAT position of webshops. And, new rules for payment service providers were published.

In the meantime EU Commission continued its work on the upcoming changes on the VAT treatment for online marketplaces (a deemed buy-sell, per 2021). Whilst at the same time, some EU Member States already took a unilateral approach by introducing a VAT liability for online marketplaces themselves.

Finally, during the Ecofin meeting of December 4th, 2018 it became clear that there was no sufficient supports amongst the EU Member States to introduce the much discussed EU Digital Service Tax (DST). It appears how-

ever that an alternative plan is in the works. In the meantime, various EU jurisdictions announced their intentions to introduce their own DST. These taxes can be applied by the various members states, at least until the DST will be harmonized on an EU level.

From an indirect tax perspective, one could say that 2018 went out with a bang and 2019 is off for an interesting start. Perhaps even more because the new EU VAT rules on "vouchers" apply as of January 1st, 2019, as do the new VAT rules relating to "Small and Medium Sized Enterprises" (SME's) rendering electronic services on a B2C basis.

In order to provide you with a full insight in all these different VAT developments, we have prepared a client alert of max. 2 pages per topic and bundled these alerts for your convenience in this easy-to-read binder. It allows you to select the topics that are of interest for you and ignore those which are not.

We hope you will find this overview useful and that it allows you to start 2019 fully aware of the VAT developments that may affect your business.

Kind regards,

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## 1 VAT treatment services of certain online platforms (Working Paper 947)

### Introduction

From a general perspective, one could perhaps take the position that the disruptive "sharing economy" is gradually claiming its place in the overall global economy. However this has been accompanied with an increase of political and public pressure these past years, generally related to employment, privacy, financial and other regulatory aspects. The result of this development is an increase of court rulings relating to the legal status of operators in the sharing economy, such as online platforms, and a variety of new legislation or legislative proposals.

### CJEU C-434/15 Asociación Profesional Elite Taxi / Uber Systems Spain

An interesting example is the [conclusion of the Advocate General \(further: "AG"\)](#) and the subsequent [judgement of the CJEU in the case C-434/15](#) in which the CJEU ruled on the qualification of the services rendered by a taxi-app from a regulatory perspective. More specific whether the taxi-app renders passenger transportation services which are regulated by the Member States themselves or as a different service e.g. information technology services, regulated by the EU treaties. Although this ruling did not address the qualification of these services from a VAT perspective, the CJEU ruled in cons. 37 and 44:

*"It is appropriate to observe, however, that a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. (...) (Instead) the intermediation service at issue in the main proceedings is to be classified as 'a service in the field of transport' (...)."*

In its Working Paper the VAT Committee adopts the position of the EU Commission that this ruling regards a qualification for regulatory purposes, which does not necessarily also extend to the levying of VAT. The services under consideration must therefore also be qualified for VAT purposes. In that regard and in particular in light of the appeal to the economic reality in the ruling, Estonia referred questions to the EU VAT Committee, regarding the VAT treatment of the services rendered by a taxi-app

in the C-434/15 case which resulted in Working Paper 947 discussed below.

### Working Paper 947

First of all we note that these Working Papers are not legally binding. However, in practice they are often perceived as giving a strong guidance on the VAT issues discussed in these Working Papers. We further point out that the EU VAT Committee underlined that they see this Working Paper as a starting point, which should trigger a discussion in the VAT Committee on the services in question. Although the VAT committee has published several Working Papers on the VAT treatment of the sharing economy, more specific online platforms, it appears that more developments on the EU VAT treatment of online platforms can be expected.

As to the VAT qualification of the services of the underlying taxi-app, the EU VAT Committee adopts the position of the EU Commission services which considers the approach of the AG particular interesting. In its conclusion the AG points out that:

*"(...) the platform's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by [the platform] or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use the platform's services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by the platform (...)."*

In the Working Paper the Commission services considers various possibilities, i.e. passenger transport, intermediation with passenger transport, ESS or a service taxable under the general rules. In this regard the Commission services notices that it could be perceived (assuming that the transport service is supplied directly by the driver to the user) as fulfilling the conditions of the definition of electronically supplied services.

However the Commission also stresses that the user's perception of who actually is the provider of the service is important. It seems that the users link the service with the platform itself and not with individual drivers. Aligned with the conclusion of the AG in C-434/15, the

Commission therefore does not rule out that the taxi-app could be seen as a genuine organizer and operator of urban transport in the cities where it has a presence.

The latter is also the reason for the Commission to be of the opinion that the service of the tax-app does not qualify as intermediation, as the underlying service goes well beyond intermediation both for the drivers and for the users. Furthermore, the Commission is of the opinion that the services cannot be considered transportation services and must therefore in principle be considered services covered by the general VAT rules.

### WTS Global

Although Court rulings on regulatory aspects does not automatically also apply to EU VAT, this ruling is one to keep in mind. Given the fact that the sharing economy is still developing from a legal and tax perspective, it cannot be fully ruled out that these kind of court rulings or new legislation or legislative proposals may very well impact the application of EU VAT legislation. Keep in mind that a number of EU VAT CJEU cases have been ruled on the basis of non-tax EU regulations e.g. on the definition of an insurance intermediary<sup>1</sup> or on the definition of a supply in case of financial and operational lease.<sup>2</sup>

The approach based on “*economic reality*” appears to be increasingly used by the CJEU in its rulings on EU VAT. As a result we recommend companies to at least take such an approach also into consideration when structuring supply chains, business lines or when determining the EU VAT consequences of products. And to the extent possible, implement precautions for possible adverse VAT consequences.

Judging on the underlying Working Paper (e.g. “*start of a discussion*”) and the overall global developments on taxing the digital economy, the latter specifically would be recommendable for online platforms.

<sup>1</sup> CJEU, C-472/03 (Arthur Andersen)

<sup>2</sup> CJEU, C-118/11 (EON Aset Menidjmnt)

## 2 The significance of the VAT identification number in the light of the correct application of the place of supply rules for services (Working Paper 947)

### Introduction

For online service providers the difference between a B2B and B2C supply is of substantial importance in case of cross-border supplies of online services. In case of a B2B supply the online services provider applies the so called reverse charge and does not charge VAT. In case of a B2C supply however, the online service provider charges local VAT of the Member State in which the B2C customer is located. This local VAT is reported and remitted through the EU MOSS VAT return.

To prove the B2B status, and thus the correct application of the Reverse Charge, online service providers can in principle rely on a valid VAT identification number of their customers. However, to qualify as a VAT taxable person under the EU VAT Directive, a VAT registration is not required. In other words, the fact that a VAT taxable person does not have a VAT identification number does not change its B2B VAT status.

In light of the above Estonia referred a question to the VAT Committee regarding the significance of the VAT identification number in relation to establishing the VAT status of customers. These questions were addressed in the Working Paper 947.

### Working Paper 947

In response to the questions raised, the VAT Committee adopts the position of the Commission services, which reiterates that customers can be regarded as a B2B customer by service providers on the basis of a valid VAT identification number. The VAT identification number is in fact the most important piece of evidence that a service provider could collect in order to identify correctly the status of his customer.

However, according to the Commission Services, service providers are free to establish the correct VAT status (i.e. the B2B status) of their customer based on other means of evidence. Therefore, it is not obligatory for service providers to obtain a valid VAT identification number of the customer in order not to charge VAT on the relevant

service. However, the service provider has to have a strong indication that the customer is a VAT taxable person. The indications need to be of a material nature. A mere clause in a contract existing between the supplier and the customer is not sufficient in that regard. Where there would be a contradiction between contractual arrangements and the economic reality, the latter would prevail.

It is up to each taxable person to ensure that he is in possession of appropriate elements of proof indicating correctly the status of his customer.

### WTS Global

Collecting the valid VAT identification numbers of all the customers often proves to be a difficult or complicated task. Specifically in the event where the online service at hand can be used by B2B customers, as well as B2C customers. In the event a company cannot sufficiently prove the correct VAT status of its customers (B2B or B2C) it will often be at risk of a VAT assessment, including penalties and interest.

A solid approach on the latter thus prevents unnecessary VAT risks. In addition, being able to prove that a customer qualifies as a VAT taxable person, under certain conditions, could even increase margins.

The approach set out in the above i.e. to be allowed to substantiate a customer's B2B VAT status other than on the basis of a valid VAT identification number, can in practice be very useful to apply the so called Reverse Charge mechanism (instead of charging local VAT in case of B2C online services). Alternative means of proof are for instance the nature of a service (e.g. providing software or an online portal which can only be used for business purposes such as an online platform where taxi drivers can log on to connect to users looking for a taxi). The VAT status of a customer could also be determined based on the internet site of the customer.

Notwithstanding the above, we recommend to always use the VAT identification number of your customer as the primary means of substantiating the B2B VAT status of your customer. From a compliance perspective this requires little additional attention and it is also easy to implement into your online customer journey.

Alternative means to prove your customers B2B VAT status however could prove to be useful in case you'd require further substantiate the VAT status of your customer in hindsight, without having received your customers VAT identification number e.g. in case of a voluntary VAT disclosure in one of the EU Member States.

Furthermore, this alternative means of proof could be used to obtain a ruling from local tax authorities based on which each customer is in principle regarded as a VAT taxable person, for instance due to the nature of the underlying online service. As a result, the compliance burden of an online service provider would substantially decrease.

## 3 Data as Currency (Working Paper 958)

### Introduction

*For the past two years now the so called "Data as Currency" discussion has been getting a lot of attention within the digital economy and the academic world. As a result of various publications, and a pending German VAT assessment on the basis of the "Data as Currency" approach, Germany turned to the VAT Committee to ask for their opinion on this matter. The VAT Committee has now published its views on this topic in [Working Paper 958](#).*

### Data as Currency

In short, the "Data as Currency" discussion is based upon phenomenon that a lot of online services and platforms, such as online social media platforms and search engines, do not charge a fee to its users for the use of the online service or platform. From a monetary perspective the use of the service or platform thus appears to be free. However, in the vast majority of cases, users do agree by accepting the T&C's, that the online service or platform can collect a specified or an unspecified quantity of user data from the user when he uses the service or platform or when they are online in general. This data is then used by the online service or platform for commercial purposes.

The "Data as Currency" approach states that the data collected from the users of the service or platform should in fact be regarded as the remuneration for the use of the service or platform. This would mean that from a VAT perspective a "barter" takes place, a so called "Data-barter". As a result the online service provider or platform

operator has to report the VAT due out of<sup>3</sup> the value of the underlying service and remit the VAT due out of pocket. This would obviously have a very negative effect on the financial results of such service providers or platform operators.

The “Data as Currency” approach however comes with a number of VAT challenges. In the underlying Working Paper the VAT Committee addresses the following two;

1. do the users by “bartering” their data, become taxable persons themselves; and
2. is the supply of services without a monetary consideration by an IT provider a transaction subject to VAT?

#### **The position of the VAT Committee – Working Paper 958** **VAT status users due to “bartering” their data**

It could be thought that the user, by granting the right to use their data to a service provider, in exchange for an online service, carry out an economic activity and thus obtain the VAT status of a taxable person. The VAT Committee however points out in this regard that it should be taken into account that personal data that is intangible property of the private individual.

In the Working Paper the position is taken that the individual does neither intend to participate in the production or distribution of goods or the supply of services, nor does he mobilize any kind of resources, as was the case in both the rulings of the CJEU in the *Slaby case*<sup>4</sup> and in the case regarding solar panels of *Thomas Fuchs*<sup>5</sup>. He simply wants to access certain services and is willing to pay their price, which consists in granting the permission to use his personal data. In fact, if individuals were given the possibility of paying a monetary price instead of granting that permission they might agree to pay that monetary price. Besides, according to the VAT Committee, users neither obtain income on a continuing basis, nor do they try to maximize the income derived from the exploitation of that intangible property. They do not try to get as many IT services as possible in exchange for that data, which would be the normal goal if it were an economic activity.

Thus, the VAT Committee concludes that the granting of permission to use personal data acquired from the users falls within the scope of the *management of private property* and merely constitutes the price to be paid for the use of IT services.

#### **Is the supply of services without a monetary consideration by an IT provider a transaction subject to VAT (“Data as Currency”)?**

The second issue addressed by the VAT Committee regards the question whether the data received by the (online) service provider is subject to VAT. In answer to that question the VAT Committee adopts the consideration of the EU Commission services that the data acquired from the users has an economic value. At the same time, it observes however that as such, this doesn’t mean that the “provision” of the data by the users should be regarded as a payment for a VAT taxable (online) service? In order to qualify as such, according to CJEU case law, there should be a legal relationship between the provider of the service and the user pursuant to which there is reciprocal performance (i.e. a direct link) between the both. Meaning that the personal data of the user, received by the provider of the service, constitutes the value actually given in return for the online service supplied to the user.<sup>6</sup>

In light of the above, the Commission services argues that IT companies provide their services in the same way irrespective of the amount of data provided by the users or the quality of such data. Users can in fact provide the online service provider with fake data, block cookies, use “disposable” email addresses for registration purposes, etc. There are also users who use the services of IT companies continuously, providing a lot of data to the IT company whilst others barely use their services, so the data provided by them is insignificant. However, all of them receive the same services from the IT company. According to the Commission Services the IT provider does not offer different levels of service depending on the amount or quality of data provided by the users. Nor is there an obligation to provide a certain amount of data periodically to remain connected to the service.

As a result, the Commission services concludes that the provision of an IT service without a monetary consideration, which allows the supplier to use the personal data of his customer, does not constitute a taxable transaction for VAT purposes as there is no sufficiently direct link

<sup>3</sup> Assuming a B2C transaction

<sup>4</sup> CJEU *Slaby* (C-180/10)

<sup>5</sup> CJEU *Thomas Fuchs* (C-219/12)

<sup>6</sup> CJEU *Tolsma* (C-16/93)

between the service provided and the consideration received. The data for which use is granted varies in quantity and quality from one user to the other, it being even possible that the user only provides false data to the supplier. For that reason, it is not possible to establish such a direct link, which is a condition for the transaction to be regarded as taxable.

If, however, it were to be found that a sufficient direct link exists between the IT services provided and the customer's data received without a monetary consideration being requested, there would then be a taxable transaction. In such case, the taxable amount would be the cost for the supplier of providing the service to the customer.

#### WTS Global

Due to the potential impact, the *"data as currency"* or *"data barter"* discussion is of the highest importance. Not only for online service providers, in principle for every company that collects user data in the course of their business e.g. through customer loyalty cards.

The Commission services concludes with regard to the underlying question that the provision of data by the users does not constitute a remuneration for the use of an online service. We have however some doubts regarding this outcome, not to mention the overall approach taken by the Commission Services. This is the case since, first of all, Working Papers by the VAT Committee are not binding which allows Member States to take their own approach on the subject at hand. Secondly, we have serious doubts regarding the underlying substantiation taken by the Commission services in relation to the quality and/or quantity of the data gathered. The approach could have been taken that the remuneration provided by the users consists in fact of having the users make their personal data available to the Online service providers, regardless of the quality and/or quantity of that data. This alternative approach would also address the situation that in our view Online service providers can collect different types of user data in various ways, which we doubt the Commission services has taken into consideration whilst taking its approach as set out above.

Most importantly we note that, based on the conclusion of the underlying Working Paper, the possibility that user data should in fact be regarded as the remuneration for

the use of an online service, and thus VAT should be remitted over or out of its value, is kept wide open in the approach of the VAT Committee, since explicitly the position is taken that, if the data should be regarded as such, the taxable amount would be the cost for the supplier of providing the service to the customer.

Given the above we would not be surprised if this Working Paper can be considered as the beginning of one of many discussions on the VAT treatment of *"Data Barter"*. Discussions that would not only affect online service providers, but may in principle affect all companies that collect data from their users, for instance through Customer Loyalty programs. We will of course keep you updated on any further developments on this topic closely, however we do recommend to review the way in which your company collects data from users, specifically if and if so, to what extent, this collection of data relates to any services that are provided to the users i.e. to what extent a direct relation exists between the both. This to get a better understanding in any VAT risks and the materiality and financial impact of such a possible risk.

## 4 The (non-)European Digital Service Tax

### Introduction

2018 definitely was the year of the European Digital Service Tax (*"DST"*). In order to face the tax challenges arising from the rapidly developing digital economy, the European Commission (*"EC"*) published in March 2018 a proposal to create a new kind of taxable nexus through implementation of the Digital Service Tax Directive (*"DST Directive"*) and the Significant Digital Presence Directive (*"Virtual PE Directive"*).

The DST Directive and Virtual PE Directive both more or less follow from the idea, or perhaps even the conclusion, that current tax rules no longer fit the digitalized landscape in which many companies operate these days, leading to a decrease in competitiveness and declining state budget revenues across the EU. According to Paul Tang, Member of the European Parliament, this has led to the situation that *"both the European Parliament and the European people want tech giants to pay their taxes"*. The combination of the two aforementioned directives aims to make this happen.



### DST vs. Virtual PE

According to the EC, the DST should be seen as an indirect tax, and therefore double tax treaties should not necessarily have impact on the question whether a country would be allowed to levy a DST. The Virtual PE Directive on the other hand does not regard indirect taxation and the potential to levy taxes on the basis of the Virtual PE is therefore subject to double tax treaties. The EU Commission recommends that the EU Member States include the provisions in the Virtual PE Directive in order prevent that the rules of the applicable double taxation treaty will prevent the Virtual PE Directive from having its intended effect.

The relationship between the DST Directive and the Virtual PE Directive is that the former is intended as a short-term solution (pending the negotiation of a Virtual PE in double tax treaties), whereas the Virtual PE Directive is intended to be the end-solution in situations not only in intra EU situations and situations where no double tax treaties apply, but also in situations where the concept of the Virtual PE, as envisaged in the Virtual PE Directive, has successfully been included into the double tax treaty concluded by the respective EU Member States with third countries.

### The DST Directive

Based on the March 2018 proposal, the DST Directive entails a 3% tax turnover tax on revenues generated with certain digital activities within the European market by certain companies, established in the EU or 'abroad'.

The digital companies in scope of the DST are part of a group with a global turnover of at least EUR 750 million of which at least EUR 50 million qualify as 'taxable relevant European digital turnover'. Based on the March 2018 proposal, revenues generated with the following kind of digital activities qualify as 'taxable relevant European digital turnover':

1. The placing on a digital interface of advertising targeted at users of that interface;
2. The making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users; and
3. The transmission of data collected about users and generated from users' activities on digital interfaces.

The above listed activities have in common that value is created through 'user interaction'. Activities that therefore do not qualify for the DST are for example streaming services, as offered by e.g. Spotify and Netflix. Examples of activities that are in scope of the DST are platform services such as Airbnb and Uber or companies through which advertising is rendered such as Google and Facebook.

Notwithstanding the foregoing has the European Parliament In December 2018 amended the DST Directive proposal in such way that online streaming services will now also be in scope of the DST, the EUR 50 million threshold is decreased to EUR 40 million and the 3% rate is amended to 5%.

Considering that the DST Directive must be adopted on the basis unanimity and considering that a number of EU Member States (e.g. Ireland and Sweden) has reservation with the proposal now tabled, it seems unlikely that the proposal for the DST Directive will be adopted any time soon.

### International developments

Absent the expectation that a near-future coordinated approach towards taxing the digital economy is realistic, a number of jurisdictions are taking matters into their own hand. Various countries have therefore launched unilateral initiatives for tax measures that aim to tax the tech giants. Of these countries Hungary, South Korea, India, Israel, Slovakia, Chile, Singapore and Australia can be named. Recently Italy, the UK and Spain have also launched initiatives, which are outlined below.

#### Italy

Likely taking effect per 30 June 2019, the Italian tax system will contain a so-called 'webtax'. According to the 2019 Budget Law, the Italian webtax will apply to companies with a total turnover of EUR 750 million or more, for which an amount of at least EUR 5.5 million qualifies or is considered to qualify as 'relevant digital turnover'. In order to qualify as 'relevant digital turnover' for the purpose of the Italian webtax, turnover has to be generated in Italy and has to qualify under the following kind of services:

1. the transmission, on a digital platform, of advertising targeted at users of the that platform;
2. the availability of a multilateral digital platform that enables users to enter into contract and interact with each other, also in order to facilitate the direct supply of goods and services; or
3. the transmission of data collected from users and generated by the use of a digital platform.

The webtax will be levied on a quarterly basis at a rate of 3% on the revenue generated with the above services. Online streaming services should not qualify under the above list of services and are therefore not in scope of the Italian webtax.

#### United Kingdom

To apply from April 2020, the UK tax legislation will contain a DST. The UK government has launched a [consultation paper on DST](#) with a deadline for responses of February 28, 2019. Based on the consultation document, the UK intends to apply a 2% tax on certain revenues for large digital businesses, designed to ensure that digital businesses pay UK tax that reflects the value they derive from UK users.

The DST is targeted specifically at large businesses, and is designed to be a temporary measure pending a more comprehensive global solution. The DST includes the following features to support this intention:

- two financial thresholds- global revenues from in-scope activities must be at least £500m a year and the first £25m of relevant UK revenues are also not taxable; and
- safe harbour – allowing businesses to elect to calculate their liability on an alternative basis, which will be of benefit to those with a very low profit margin.

It will only apply to revenues from intermediating sales, as opposed to the online sales themselves, and where value is derived from UK users. Search engines, social media platforms and online marketplaces will be caught, whereas financial and payment services, provision of online content, sales of software or hardware, and TV and broadcasting services are not within scope.

#### Spain

The Spanish government launched its DST proposal in October 2018. The Spanish DST proposal is to a large extent similar to the Italian webtax and European DST proposal.

According to the Spanish proposal, the Spanish DST will apply to companies with a total turnover of EUR 750 million or more, for which an amount of at least EUR 3 million qualifies as 'relevant digital turnover'. In order to qualify as 'relevant digital turnover' for the purpose of the Spanish DST, turnover has to be generated in Spain and has to qualify under the following kind of services:

1. The placing on a digital interface of advertising targeted at users of that interface (*online advertising services*);
2. Services consisting in the making available of multi-sided digital interfaces to users which allow users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users (*online intermediation services*); and
3. The transmission of data collected about users which has been generated from such users' activities on digital interfaces (*data transfer services*).

The DST will be levied on a quarterly basis at a rate of 3% on the revenue generated with the above services. Online streaming services should not qualify under the above list of services and are therefore not in scope of the Spanish DST.

The intended effective date of the Spanish DST was January 1, 2019. To date however, the Spanish DST legislation has not yet been adopted.

## 5 E-commerce: new obligations for payment service providers introduced

### Introduction

On 12 December 2018, the European Commission has launched a new proposal for a Council Directive introducing certain requirements that will be imposed to payment service providers involved in cross-border e-commerce transactions. The requirements laid down in the proposal are meant to facilitate the fight of the Member States against VAT fraud in the field of e-commerce. If approved, the Member States will have to adopt and apply these measures as from 1 January 2022.

### Which e-commerce transactions are considered in the proposal?

The new e-commerce proposal aims in particular at cross-border supplies of goods and services to final consumers in Member States of the European Union. In other words, this covers situations where the VAT is due in the Member State of the consumer while the supplier is established in another Member State, or in a third country. As final consumers do not have any VAT or accounting obligations, the risk exists that fraudulent businesses exploit this situation to avoid VAT liability in the Member State of consumption.

### What are the requirements that will be imposed to payment service providers?

Since payment service providers are often involved in the execution of payment transactions relating to e-commerce transactions, the proposal of the European Commission now requires that information concerning certain cross-border payment transactions should be made available - within the legal framework of administrative cooperation and exchange of information between the Member States - to the tax authorities of the Member States. This should be done by a **sufficiently detailed records containing specific information** (i.e. identification of the payer and recipient, amount, date of the transaction, Member State of origin of the payment, etc.). In this regard, it is expected that the payment service providers should be able to determine this information based on the 'IBAN' or 'BIC' of the payer and recipient in the Member State concerned.

Note that these requirements will only apply if the payment service provider (i) transfers funds from a payer located in one Member State to a recipient in another Member State or third country and (ii) executes more than 25 payment transactions to the same recipient per calendar quarter. In such case, the payment service provider will have to keep the required records electronically for a period of at least two years starting from the end of the year in which the payment transaction took place.

### Which payment service providers are being affected by the above requirements?

By 'payment service providers' are meant: all bodies envisaged in Article 1, paragraph 1, points (a) to (f) of the Payment Services Directive 2015/2366, not benefitting from the exemption laid down in Article 32 of the same Directive, and, established in the European Union. In practice, this includes credit institutions, electronic money institutions, payment institutions, post office giro institutions, but also the ECB and national central banks and other public authorities, when they are not acting in their capacity of monetary authority or public authority.

Once introduced, it will be important for payment service providers involved in e-commerce transactions to comply with the proposed recording obligations in order to avoid liabilities in the Member States concerned. This will require sufficient preparation by all payment service providers once this new directive should be approved by the Council.

## 6 Changes to VAT Rules on Online Services Effective January 2019

### Introduction

As of 1 January 2019 [Directive \(EU\) 2017/2455](#) will come into effect, amending [the EU VAT Directive](#). The first Directive forms together with two regulations the basis of the European Commission's so called "*e-Commerce package*". The revised legislation impacts businesses – especially small and medium enterprises (SMEs) – that sell electronic services on a B2C basis. The aim is to simplify their VAT compliance obligations and foster the growth of cross-border trade.

Currently, under the general rule, the place of supply is where the consumer is established or usually resides. The new rules are as follows:

- The new rules include an exception to this general rule providing for the introduction of an annual EUR 10,000 turnover threshold applicable to EU suppliers. Unless this threshold was exceeded in the previous year or until it is exceeded in the current year such services will be subject to VAT in the country where the supplier belongs;
- SMEs that generate annual revenues of less than EUR 100,000 from cross-border electronic services will only need to present one piece of evidence to verify the location of the consumer. At the moment, two pieces of evidence must be provided;
- Businesses using the Mini One Stop Shop (MOSS), will be required to follow the invoicing procedures of their Member State of identification, instead of the current burdensome practice of applying the local rules of all the Member States to which supplies are made; and
- The scope of the MOSS will be extended to allow non-EU established businesses with an EU VAT registration number to use the MOSS portal of their Member State of registration, to account for the VAT due on their sales of services to the EU.

## 7 VAT & e-Commerce: new details on rules for online marketplaces in 2021

### Introduction

As of January 2021, online marketplaces (i.e. so called electronic interfaces including online portals) will become responsible for ensuring that VAT is collected on the sales of goods by non-EU companies to EU consumers, taking place through their platforms. The online marketplace will be deemed to have acquired the goods from the suppliers (further: "Merchants") and subsequently supplied the goods to customers. The supply to the online marketplace most likely will qualify as a B2B supply, where the supply to the final customer qualifies as a B2C supply. As a result the online marketplace will have to report the VAT on the B2C-transactions under the "distance sales" regime. This applies when:

- the online marketplace facilitates distance sales of goods with a maximum intrinsic value of € 150 that are imported from a non-EU country into the EU;
- the online marketplace facilitates the supply of goods to consumers within the EU when the Merchant is not established in the EU. This latter rule applies regardless of the intrinsic value of the goods supplied.

The proposals for amending the VAT Directive and the VAT Implementing Regulation will now be forwarded to the Member States for their agreement and to the European Parliament for consultation.

The Commission aims for a quick ratification in 2019, as they are crucial in preparing the new VAT regime applicable as of 1 January 2021 for distance sales of goods.

### New detailed implementation rules – "facilitating"

The proposed rules clarify the meaning of the term *facilitating*, putting forward a broad "deemed reseller" concept. *Facilitating* means the use of an electronic interface to allow the customer and the Merchant to enter into a contact, resulting in a supply of goods through that online marketplace.

However, online marketplaces are excluded from this broad definition if they are not directly or indirectly:

- setting the general terms of sale;
- involved in charging payment; or
- involved in ordering or delivery.

The aforementioned approach more or less is in line with the *deemed buy-sell* that's already in place for online services which are sold through an online portal. Similar to those rules, online marketplaces will also **not** be considered to *facilitate* the supply if they:

- only provide payment processing services;
- simply list or advertise the goods; or
- link to other online marketplaces where goods can be purchased, without further intervention in the supply.

If the online marketplace facilitates a supply, VAT treatment will see it deemed as supplying the goods to the customer (as a so-called 'deemed reseller') if it concerns goods sent from outside the EU to a B2C customer, or

from inside the EU to a B2C customer where the supplier is established outside the EU.

The proposal also contains specific provisions that govern the supply chain in such case, stipulating that transport is allocated to the supply by the electronic interface rather than the supply to the electronic interface, and introducing a VAT exemption with the right to deduct input VAT (i.e. a 0% VAT supply) for the supply from the underlying seller to the online marketplace.

Furthermore, an electronic interface depends on the accurate information received from the suppliers selling goods through his interface. He cannot be held liable for excess VAT that it has not declared and paid when the information provided by the suppliers is erroneous and it can prove that he did not and could not reasonably know that this information was incorrect.

The new rules also contain new information retention obligations for electronic interfaces that go beyond their VAT liability as deemed reseller.

### International Developments

A number of jurisdictions passed legislation on the VAT treatment regarding the VAT and customs treatment of supplies made through an online marketplace in 2018 e.g. Australia, the UK, Ukraine, Sweden and Switzerland. Either the local regime for so called low consignment goods has been changed and/ or the liability for local VAT has been shifted to the online marketplace.

Currently a number of jurisdictions are also changing their local VAT rules and regulations with regard to the VAT treatment of these online supplies;

#### Germany

Germany announced in 2018 to introduce a so called online *marketplace liability* is enacted. Under these new rules the online marketplace may be held liable for VAT on deliveries beginning or ending in Germany that are effectuated through the online marketplace. Operators of an online marketplace are required to collect information on the supplier such as name, address, VAT ID, place of origin and destination, time of delivery, sales price.

#### New Zealand

New Zealand has proposed scrapping the GST and customs duty low-value consignment relief of NZD 1,000. As a result foreign e-Commerce traders selling goods to local consumers, have to register for GST purposes once their annual sales exceed a NZD 600,000 threshold. Supplies to businesses will remain zero-rated.

Online marketplaces may also be held liable to the GST if they authorize payments, delivery and manage general terms and conditions. Re-deliverers, who organize delivery into New Zealand of online consumer purchases, are also potentially liable to register and collect GST. GST returns are filed quarterly, and will likely be under the simplified sales-only registration.

#### Norway

Norway currently has a low value VAT and customs relief for consignments not exceeding a value of NOK 350 (appr. 35 EUR). The majority in the Norwegian Parliament however has recently decided to abolish this relief as off 1. January 2020. As a result of abolishing the low value relief, 25% import VAT will have to be calculated on all goods that are imported into Norway, regardless of their value. If the supplier does not act as importer of record, the import VAT will have to be calculated and paid by the Norwegian customer.

#### WTS Global

We expect that these new EU VAT rules will trigger substantial changes for the financial systems of online marketplaces. Where most online marketplaces are currently rendering an online service (i.e. right to use the platform) under the new rules they would be regarded to buy- and sell the underlying goods, which should follow from the financial systems as well. This most likely will call for a complete new set-up of the financial systems.

In addition we strongly recommend online marketplaces to consider their internal approach on managing their new VAT position as the key indicators which determine their overall VAT position will drastically change.

- the VAT taxable amount will be the sales price of these goods;
- any pricing policies used on the online marketplace, such as the application of dynamic pricing should be further reviewed;
- the online marketplace will be responsible for applying the correct FX rate;
- the online marketplace will have to be able to make a distinction between B2B and B2C supplies;
- in case of B2C supplies (so called "distance sales"), the online marketplace will have to apply the correct VAT rate for each EU jurisdiction to which goods are shipped;
- in case of B2C supplies (so called "distance sales"), the online marketplace will have to issue invoices; and
- in case of B2C supplies (so called "distance sales"), the pricing of the underlying goods has to be VAT included.

More important, due to the fact that the online marketplace is deemed to have bought the goods from the seller and subsequently sold the goods to the final customer, the online marketplace will be fully liable for the VAT over this sale.

In addition to the aforementioned changes to the financial systems, we strongly recommend to also review and, to the extent necessary, adjust the underlying agreements and Terms & Conditions with the Merchants as well as the customers that buy from your online marketplace.

## 8 Other relevant VAT changes

### VAT treatment e-Books

On 2 October 2018 the European finance ministers at the ECOFIN Council meeting adopted the proposal of the European Commission permitting Member States to apply the reduced, super-reduced or zero VAT rates to electronic books and other electronic publications, aligning them with the VAT treatment of physical publications. The new legislation ([Directive \(EU\) 2018/1713](#)) amending [the VAT Directive](#) has entered into force on 4 December 2018. It is up to the local EU jurisdictions to implement these new rules into their local VAT law. In the meantime, should you provide for any form of online content, than it may be worthwhile to review if this content would fall in the scope of the aforementioned reduced VAT rate. As the definition of an *online publication* is rather broad, it appears that the scope of the reduced rate may reach further than expected.

It is clear that an e-Book or subscription for an online newspaper will fall under the scope of this definition. On the other hand, publications with an advertising purpose or publications that fully or predominantly consist of audible music or video content from the reduced VAT rate scope are excluded. Other types of "online publications" e.g. a blog, subscription to a social media platform, subscription to use online databases, perhaps even the subscription to an online dating platform.

### Vouchers and Vouchers for online services

On 27 June 2016, the Council of the European Union adopted [Council Directive \(EU\) 2016/1065 \('the Voucher Directive'\)](#), amending the VAT Directive. This Voucher Directive applies as of 1 January 2019. Based on its new harmonized rules for VAT purposes a distinction has to be made between so called "*Single Purpose Vouchers*" and "*Multi Purpose Vouchers*". With regard to such vouchers we note that instruments merely entitling the holder to a discount do not qualify as a *Voucher* in the sense of these new rules. The VAT treatment of the latter instruments should therefore be determined on a country-by-country basis.

With regard to *Vouchers* in the sense of the Voucher Directive, we specifically recommend to review any incentives or instruments relating to online services e.g. the provision of an activation code for a month free

subscription on an online music provider, in order to obtain insight in the VAT treatment of such instruments and to exclude any adverse VAT consequences in hindsight. Since the determination of the type of voucher can impact the applicable VAT rate and/or the taxable base.

### Webshops: VAT consequences of EU Regulation on GEO-Blocking

The EU adopted a new regulation on Geo-Blocking ([Regulation \(EU\) 2018/302](#)) which applies since 18 December 2018. Based on this new regulation, web shops are no longer allowed to refuse to sell goods to customers in other EU jurisdictions. Although web shops will be allowed to decide not to ship into certain EU jurisdictions, they would have to offer (potential) customers from such EU jurisdictions an alternative in such cases (e.g. to pick up the goods and/or have the customer arrange for the transport themselves).

The above may have a substantial impact on the VAT treatment of cross border B2C supplies to EU based customers, so called "distance supplies". However, as a result of the Geo-Blocking Regulation, the VAT treatment of the supplies by web shops may change:

- Cross border B2C supplies could no longer fall in the scope of the Distance Sales regime, but could be regarded as local (pick-up) supplies, thus VAT from a different EU jurisdiction would apply;
- Cross-border B2B supplies may be taxable in different EU jurisdictions depending on the changes made to the supply chain. Or different invoice requirements may be applicable.

It goes without saying that the above VAT consequences following from the (possible) changes made to the supply chain, may trigger a VAT risk in various EU jurisdictions, should these changes not be implemented in the financial systems.

### Commission launches debate on a gradual transition to more efficient and democratic decision-making in EU tax policy

The European Commission earlier this month [started a debate](#) on reforming the decision-making mechanism for areas of EU taxation policy. Currently this requires unanimity amongst the Member States. This unanimity has proven to be difficult to achieve on EU tax initiatives.

Under the new envisaged mechanism the unanimity requirement would change into the so called qualified majority voting (QMV). Meaning that Decisions in the Council of Ministers require the support of 55% of member states (currently 16 out of 28 EU countries) representing a minimum of 65% of the EU's population. This makes it impossible for a very small number of the Member States to prevent a decision from being adopted, a blocking minority must comprise at least four member states. Otherwise, the QM will be deemed to have been reached even if the population criterion is not met.

Although the intention to change the voting mechanism on tax issues from an unanimity to a QMV has been suggested before, it appears that the failure to get consensus on the **European Digital Service Tax** amongst the Member States has triggered the European Commission to officially start the discussion. As it is not uncommon for some of the EU Member States to vote on these matters in line with their economic interests, such a change, if and when implemented, could very well be bad news for digital companies now that for instance the Irish, Dutch and Nordic vote could turn out not be sufficient to block any adverse EU tax initiatives aimed to tax the Digital Economy.

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