EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value Added Tax

Published 3 April 2014

Explanatory notes

on

the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015

(Council Implementing Regulation (EU) No 1042/2013)

Disclaimer: These explanatory notes are not legally binding and only contain practical and informal guidance about how EU law should be applied on the basis of the views of the Commission's Directorate General for Taxation and Customs Union.

The Explanatory Notes aim at providing a better understanding of the EU VAT legislation. They were prepared by the Commission services and as indicated in the disclaimer on the first page they are not legally binding.

These Explanatory Notes are not exhaustive. It means that although they provide a lot of detailed information there are elements which are not included in this document.

It is advisable and can be recommended for any user of the Explanatory Notes interested in a particular topic to read the whole chapter which is dealing with that specific subject.

- **Why explanatory notes?**

The objective of these explanatory notes is to provide a **better understanding of legislation adopted at EU level** and in this case principally 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. Published almost nine months before the date on which the new rules for the place of supply of telecommunications, broadcasting and electronic services will start to apply which is 1 January 2015, the explanatory notes are expected to allow Member States and businesses to better prepare for and adapt to the upcoming changes in time and this in a more uniform way.

- **What will you find in the explanatory notes?**

The 'Explanatory Notes' are intended to be seen as a **guidance tool** that can be used to clarify the practical application of the new place-of-supply rules for telecommunications, broadcasting and electronic services. They provide help in understanding the meaning of certain issues contained in the articles of Implementing Regulation 1042/2013.

- **Characteristics of the explanatory notes**

The explanatory notes are a collaborative work: although the notes are issued by Directorate General for Taxation and Customs Union (DG TAXUD) for presentation on its website they are the result of discussions with both Member States and business. Member States and business have contributed first by sending their suggestions to the Commission and then through a Fiscalis workshop held in the Netherlands. Finally, Member States were consulted on them in the VAT Committee and business during an ad-hoc meeting. However it should be clear that the Commission services were not bound by opinions expressed by either Member States or business.

These explanatory notes are not legally binding. The notes are practical and informal guidance about how EU law is to be applied on the basis of views of DG TAXUD. They do not represent the views of the Commission nor is the Commission bound by any of the views expressed therein.

The explanatory notes do not replace VAT Committee guidelines which have their own role in the legislative process. Furthermore the VAT Committee may in future issue guidelines in this field.

Over time, it is expected that case law, VAT Committee guidelines and practice will complement the views given in the notes.

Member States may also prepare their own national guidance for the application of the new VAT rules on the place of supply of telecommunications, broadcasting and electronic services.

The notes are not comprehensive: only certain issues have been included for which it was seen as desirable to provide explanations.

They are a work in progress: these notes are not a final product but reflect the state of play at a specific point in time in accordance with the knowledge and experience available.

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1. KEY ELEMENTS OF THE EU VAT CHANGES ENTERING INTO FORCE IN 2015

1.1. General background

From 1 January 2015 all supplies of telecommunications, broadcasting and electronic services will be taxable at the place where the customer belongs. In order to ensure the correct taxation of these services, EU and non-EU businesses will need to determine the status of their customer (a taxable or a non-taxable person) and the place (in which country of the EU or outside the EU) where that customer belongs.

This modification arises from the changes to the rules on the place of supply of services in the EU VAT system adopted in 2008 as part of the 'VAT Package'[1].

The underlying reason for these changes was to bring the VAT treatment of these services in line with one of the main principles of VAT that, as a consumption tax, revenues should accrue to the Member State in which goods or services are consumed.

For non-EU businesses supplying telecommunications, broadcasting or electronic services to customers in the European Union, current rules already ensure taxation in the country where the customer belongs.

Until the end of 2014, business to final consumer (B2C) supplies by EU businesses are taxed in the country of the supplier. This means that for supplies made to final consumers, businesses established in Member States applying lower VAT rates have a competitive advantage over businesses established in other Member States. The new rules of taxation based on the country where the customer belongs will provide, as from 2015, a level playing field and should also ensure that the VAT receipts accrue to the Member State of consumption.

1.2. Transactions covered by the 2015 changes

The various parts of the VAT Package are entering into force over the period 2010-2015. The main changes came about in 2010 and included two general rules for the place of supply of services – Articles 44 and 45 of the VAT Directive. The final part of the VAT Package, concerning telecommunications, broadcasting and electronic services supplied to final consumers, will enter into force in 2015.

In accordance with Article 44, services supplied by a business to another business (B2B) are taxable at the place where the business customer is established. This also covers telecommunications, broadcasting and electronic services, so there will be no change in 2015 in that respect.

Article 45 provides that services supplied by a business to a final consumer (B2C) are taxed in the country where the supplier is established. Therefore telecommunications, broadcasting and electronic services provided by a supplier established in the EU to a non-taxable person who is also established or resides there fall under the general rule and are taxable in the country where the supplier is established. Articles 58, 59 and 59b (until 31 December 2014) provide that supplies of these services to and from third countries are taxed in the country where the customer is established or resides.

[1] See Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ L 44, 20.2.2008, p. 11).

As from 1 January 2015, with changes being made to Article 58 B2C supplies of telecommunications, broadcasting and electronic services will, in all cases, be taxable in the country of the customer irrespective of where the supplier is established.

If the services supplied are actually consumed outside the European Union, Member States could decide to avail themselves of the effective use and enjoyment rule provided for in point (a) of Article 59a and refrain from taxing the supply. Member States can only apply the effective use and enjoyment rule provided for in point (b) of Article 59a to tax services actually consumed within their territory if those services are supplied to customers that belong in a third country. This rule does not apply to services supplied to customers who belong in a country within the European Union.

1.3. Transactions not covered by the 2015 changes

The notion of 'e-commerce' when commonly used covers various types of economic activity, including supplies of goods or services carried out over electronic systems such as the Internet. Not all of those activities are covered by the VAT changes that will enter into force on 1 January 2015. In particular the following activities are not covered by these changes: 1) the supply of goods (including distance selling) where use is made of electronic systems only to place the order, and 2) the supply of services **other than** telecommunications, broadcasting and electronic services. These types of transactions are not included in the arrangements for the mini One Stop Shop (MOSS).

The scope of the 2015 VAT changes is limited and, as explained above, **only** covers telecommunications, broadcasting and electronic services. Those changes are relevant only insofar as the customer is a final consumer.

1.4. Preparing for the 2015 changes

Soon after the adoption of the VAT Package, the Commission undertook various steps with a view to agreeing on a more harmonised approach at EU level for these upcoming changes. For telecommunications, broadcasting and electronic services, the Commission concentrated on preparing the necessary legal framework in order to ensure a smooth transition to the new rules of taxation. This work focussed on both the MOSS, the means by which a supplier can opt to account for the VAT due in Member States where he is not established, and on the application of the place-of-supply rules themselves.

Concerning the **MOSS**, a practical Guide has already been prepared by the Commission services[2] and published in the languages of the Community as well as Japanese, Chinese and Russian. In addition, recommendations on the coordination of audit of the MOSS are in the process of being produced, with the intention that those recommendations of relevance to businesses will be published on the TAXUD website.

As regards **the place of supply rules**, the last legal element in this package of measures needed to facilitate the implementation of the 2015 changes is Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 (the VAT Implementing Regulation)[3].

[2] Telecommunications, broadcasting & electronic services – European Commission

[3] The provisions concerning services connected with immovable property only apply from 1 January 2017.

The measures that are being included in the VAT Implementing Regulation only aim at clarifying how the rules on the place of supply for telecommunications, broadcasting and electronic services, as laid down by the VAT Directive, should be understood and applied in practice.

All the other general rules of the VAT Directive (for example on the territorial application or as regards the chargeable event and the chargeability of VAT) will, as for any other supply of services or goods, continue to apply but in deciding the correct VAT treatment of these three services account will need to be taken of the impact that the particular rules on the place of supply and the MOSS may have.

During the discussions leading up to the adoption of Regulation 1042/2013, it was widely recognised that more detailed explanatory notes would be useful for businesses and Member States.

The purpose of these explanatory notes is to present further, more detailed information on the practical application of the provisions that are being included in the VAT Implementing Regulation in view of the changes to the place of supply of telecommunications, broadcasting and electronic services that will enter into force on 1 January 2015.

1.5. Relevant legal acts

The legal acts referred to in these explanatory notes include:

- Council Directive 2006/112/EC on the common system of value added tax as amended by Directive 2008/8/EC (hereinafter 'the VAT Directive')

- 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 Regulation (EU) No 1042/2013 of 7 October 2013 (hereinafter 'VAT Implementing Regulation')

- 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 (hereinafter 'Regulation 1042/2013')

All relevant legal provisions are cited at the end of the explanatory notes in the wording applicable as from 1 January 2015. You can find links to these provisions at the beginning of each chapter.

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned. In all other instances, it is specified to which legal act reference is made.

1.6. Glossary

The '**VAT system**' should be understood as the EU VAT system.

When in the explanatory notes there is a reference to '**place where the customer belongs**' it should be understood as the place (country) where the customer is established, has his permanent address or usually resides. That is also sometimes referred to as 'customer location'.

For the purposes of these explanatory notes '**digital services**' cover telecommunications, broadcasting and electronic services.

'**Broadcasting services**' shall include services consisting of audio and audio-visual content, such as radio or television programmes which are provided to the general public via communications networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programme schedule (see more under point 2.3.2).

'**Electronically supplied services**' (hereinafter 'electronic services') shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology (see more under point 2.3.3).

'**Telecommunications services**' shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks (see more under point 2.3.1).

'**Over the top**' services – services which can only be delivered thanks to a connection that is established via communication networks (*i.e.* an underlying telecommunications service is necessary) and therefore do not required the physical presence of the recipient at the location where the service is supplied.

'**Telecommunications networks**' are networks that can be used to transfer voice and data. They include but are not necessarily limited to cable networks, telecom networks and ISP (Internet Service Provider) networks. They should cover any facility which allows access to telecommunications, broadcasting or electronic services.

For VAT purposes the terms 'telecommunication **networks**' and 'communication networks' are interchangeable. 'Mobile networks' (referred to in Article 24b(b)) is a wholly contained subset of telecommunications networks.

A '**fixed land line**' should cover elements that connect to a network which allows transmission and downloads (*e.g.* broadband, Ethernet) and where there is a requirement for installation of hardware to send/receive a signal with a degree of permanence (not designed to be easily or frequently moved). It could cover therefore any type of cable used to transmit data to or from the premises (for example copper wire, fibre optic cable, broadband cable) and also a satellite when this requires the installation of a satellite dish at the premises.

A '**portal**' is any type of electronic shop, website or similar environment that offers electronic services directly to the consumer without diverting them to another supplier's website, portal etc. to conclude the transaction. Common examples of this include app stores, electronic marketplaces and websites offering e-services for sale.

An '**interface**' includes a portal but it is a wider concept. In computing it should be understand as a device or a program which allows two independent systems or the system or the end user to communicate.

A '**wi-fi hot spot**' should be understood as a reference to a specific location and not to a vast geographic territory covered by wi-fi.

2. TELECOMMUNICATIONS, BROADCASTING AND ELECTRONIC SERVICES (ARTICLES 6A, 6B, 7 AND ANNEX I)

2.1. Relevant provisions

The relevant provisions can be found in the VAT Implementing Regulation:

Telecommunications services:

- Article 6a

Broadcasting services:

- Article 6b

Electronic services:

- Article 7
- Annex I

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

2.2. Why was there a need for clarification?

Most B2C supplies are taxable at the place of the supplier. If the supplier is providing telecommunications, broadcasting or electronic services, from 1 January 2015 the place of taxation is however in the country where the customer is established or resides.

To draw the line between those services and other services, it was necessary to clarify the concepts of telecommunications, broadcasting and electronic services. Without such guidance, it can be difficult for a business to know with certainty whether it will actually have to charge VAT in the country of its customer.

Current EU VAT legislation already provides elements of clarification but only for telecommunications and electronic services. It was silent on broadcasting services.

To give as full a picture as possible of the services concerned, new provisions are included in the VAT Implementing Regulation. With their inclusion, all three types of services are now defined and in each case, non-exhaustive lists are drawn up with concrete examples of the services covered and those not covered.

This should provide certainty and consistency for businesses and Member States alike. Without certainty and consistency there is a risk that differences could arise as to the scope of application of Article 58 of the VAT Directive. If one and the same service is regarded as covered by one Member State and not covered by another, this could result in double taxation or non-taxation. To avoid that, it was necessary to provide for definitions of the three types of services in question.

With regard to broadcasting and electronic services, these are not fully-fledged definitions as it is only indicated that these concepts '*...shall include ...*'. This offers the flexibility that is necessary to take account of technological developments, or any new guidelines

agreed by the VAT Committee or decisions taken by the Court of Justice of the European Union.

Lists of examples have been drawn up for telecommunications, broadcasting and electronic services. To provide legal certainty, preference was given to qualifying the listed services in positive terms. These lists, as pointed out in Recital 3 of Regulation 1042/2013, are not exhaustive, nor are they definitive. This is clearly confirmed by the wording used '*... cover, in particular, the following: ...*'.

Any service captured by one of the definitions given will be covered by Article 58 of the VAT Directive, and become taxable at the place of the customer, regardless of whether the service features amongst the examples given. The approach of using open-ended lists was necessary as not all existing services could be identified and also to take account of new types of services which may emerge.

2.3. What do the provisions do?

2.3.1. Telecommunications services

The concept of telecommunications services is already defined by Article 24(2) of the VAT Directive. That definition remains unchanged.

To illustrate which services are covered by this definition, a list of examples has been drawn up. The list which is non-exhaustive, has been derived mainly from examples discussed and agreed by the VAT Committee. Those examples are now included in Article 6a(1).

Examples are also given of services which do not qualify as telecommunications services. That list of examples can be found in Article 6a(2). It is neither exhaustive nor definitive.

2.3.2. Broadcasting services

Before the adoption of Regulation 1042/2013, EU VAT legislation did not provide any definition of broadcasting services. Such a definition has now been included in Article 6b and examples are given of the services that qualify as broadcasting services and those which do not.

The definition of broadcasting services is, to a large extent, derived from the Audiovisual Media Services Directive[4], as indicated in Recital 2 of Regulation 1042/2013, but it is not intended to replicate the definition put in place for regulatory purposes. Changes in that field would therefore not impact the definition in the VAT Implementing Regulation.

A basic principle of EU law is that concepts need to be applied consistently across the legislation. This means that in EU VAT legislation a concept such as broadcasting services is relevant not only for determining the place of supply but also with regard to the rate that could be applied to that supply.

The definition agreed by the Council is relatively narrow and only covers services consisting of audio and audio-visual content provided by and under the editorial

[4] Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

responsibility of a media service provider (where he has the effective control both over the selection of the programmes and over their organisation). Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided to the general public.

In practice this means that a broadcaster who, for example provides premium sports channels and has the editorial responsibility over them is regarded as supplying broadcasting services. Such services could be subject to the reduced rate in certain Member States. However, if the right of access to the same channels is provided by a supplier who buys the right of access wholesale and then forwards the signals but has no editorial responsibility over the content provided, then this supplier will be regarded as supplying electronic services and the standard rate would apply in the Member State of supply.

The definition covers the distribution of radio and television programmes via electronic networks such as the Internet but only if they are broadcast for simultaneous listening or viewing. Where the audio or audio-visual content is not delivered in a synchronic way (at the same time) to the recipients (the general public) it would normally fall under the definition of electronic services.

At the same time it seems correct to include within the concept of simultaneous listening or viewing for the purpose of the broadcasting definition, listening or viewing which is quasi-simultaneous. Indeed, these services are normally available to the customer without the need to pay an additional fee for it.

Quasi-simultaneous listening or viewing would cover the following:

(1) Situations where a time lag occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process or as a result of the connection;

(2) Situations where the customer is able to record for later listening or viewing, pause, forward or rewind the signal/programme;

(3) Situations where the customer is able to programme in advance that the particular audio or audio-visual content would be recorded at the time when it is broadcast for simultaneous listening or viewing. The recorded programme can then be listened to or viewed afterwards by the customer.

In any case quasi-simultaneous listening or viewing should only cover situations where the customer may influence within certain limits when he can listen to or view a program but without impacting the transmission of the signal itself.

Quasi-simultaneous listening or viewing should not cover cases where the customer can demand individually the program that he wants to watch from a list and he is paying a specific fee for this extra service.

2.3.3. Electronic services

The concept of electronic services is defined in Article 7 which also includes examples of services qualifying as electronic services and those that do not. In addition some guidance

is given by the indicative list of services to be regarded as electronic services that are included in Annex II of VAT Directive[5] which is further developed in Annex I.

The changes introduced to Article 7 and Annex I are made to align it with the definitions and the lists provided in respect of telecommunications and broadcasting services. In other words the goal of the changes introduced is to make sure that there are no overlaps or repetitions in the lists provided in Articles 6a, 6b and 7. Furthermore these modifications ensured that where possible positive lists (*i.e.* listing what is a telecommunications, broadcasting or electronic service) were used in place of negative lists.

That is why videophone services, access to Internet and World Wide Web and telephone services provided through the Internet have been deleted from the negative list of electronic services and instead included in the positive list of telecommunications services.

It also explains the changes made to point (4) of Annex I (including on-demand services and services not qualifying as broadcasting) which specifies in a more detailed way what is covered by the electronic services listed in point (4) of Annex II of the VAT Directive (supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events).

2.4. Detailed issues arising from these provisions

2.4.1. Telecommunications services

2.4.1.1. Could helpdesk services qualify as telecommunications services?

Helpdesk services are listed among the examples of services which would not qualify as electronic services. They are not included among the examples given of services that qualify as telecommunications services nor are they listed among the services that would not qualify as such.

The main feature of helpdesk services is to provide assistance. Such services cannot, in general, be seen as services relating to the transmission, emission or reception of signals, words, images or sounds and as such, they would not fall under the definition of telecommunications services when supplied as 'stand-alone' services.

That may however change where the support provided to users only consists in assisting in case of problems with their telecommunications network, radio or television network or similar electronic network for which the user is charged separately. The helpdesk service does not in that case constitute an aim in itself but rather a means of better enjoying the principal service supplied.

If supplied by the network provider, the service could be qualified as an ancillary service which shares the tax treatment of the principal service, implying that the helpdesk service would be treated as a telecommunications service in such circumstances.

Where the customer receives more than one supply, namely, first, access to the network from a network provider, and, second, helpdesk services from another supplier, the supply

[5] Annex II of the VAT Directive was first included with the change brought by Council Directive 2002/38/EC, has not been modified by Directive 2008/8 and remains unchanged in 2015.

of helpdesk services cannot be regarded as ancillary to the supply of that access (unless those supplies could be considered indissociable economically)[6].

2.4.2. Broadcasting services

2.4.2.1. When are programmes 'provided to the general public'?

The transmission or retransmission of radio and television programmes qualifies as broadcasting services only if the programmes are provided to the general public. If a wider audience is not targeted, the transmission or retransmission of programmes could not be seen as broadcasting services.

This condition does not mean that programmes need to be provided to everyone. Transmission or retransmission can be limited to the general public in one country, or even a particular region of that country. In situations where access to programmes is restricted to customers who pay for the services, transmission or retransmission is still seen as provided to the general public.

2.4.2.2. When are programmes for 'simultaneous listening or viewing'?

Broadcasting services only include the transmission or retransmission (repetition) of programmes for simultaneous listening or viewing by the general public to which they are provided.

Programmes are covered no matter which media is used for their transmission or retransmission. It is irrelevant whether they are transmitted or retransmitted over traditional radio or television networks or the Internet or similar electronic networks.

Simultaneous listening or viewing covers also quasi-simultaneous listening or viewing (see also point 2.3.2).

2.4.2.3. What is the distinction between broadcasting services and programmes on demand?

The notion of broadcasting services as defined by Article 6b(1) covers several elements including the requirement that to be regarded as such the services have to be broadcast for simultaneous listening or viewing.

With programmes supplied on demand, an individual customer is provided, against payment, access to specific programmes at the time he wants to: in such case, simultaneous listening or viewing of the programme does not take place. Therefore programmes supplied on demand cannot be seen as broadcasting services but have to be qualified as electronic services.

These programmes supplied on demand have to be distinguished from 'pay per view'. In the latter case, the program is normally transmitted or retransmitted by the supplier and the customer decides whether or not to see it by paying or not the fee. Therefore, if in the 'pay per view' system there is simultaneous listening or viewing then it will qualify as broadcasting services.

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[6] See, in particular, judgment of the CJEU in case C-366/12 *Klinikum Dortmund*.

2.4.3. Electronic services

2.4.3.1. Could services of price comparison and similar websites be qualified as electronic services?

The nature of services consisting of price comparison (and services offered by similar webpages) should be assessed against the definition included in Article 7(1). They are provided over the Internet and normally their supply is automated without human intervention. Therefore, usually, these services should be qualified as electronic services.

Of course the reply to the question whether price comparison services provided by such websites to final consumers will actually be taxable as such depends on whether they are supplied for a consideration. Where these are provided to the consumer for free, that particular supply will fall outside the scope of VAT.

2.4.3.2. What is not covered as electronic services: certain services of a tangible nature booked online

The notion of 'electronically supplied services' does not, according to Article 7(3)(t) and (u), cover admission to certain events and other services of a tangible nature booked online. Those include cultural, artistic, sporting, scientific, educational, entertainment or similar events as well as accommodation, car-hire, restaurant services, passenger transport and similar services.

Point (t) of Article 7(3) refers to events similar to cultural, artistic, sporting, scientific, educational and entertainment ones. The reference to 'similar events' reflects what is the scope of Articles 53 and 54 of the VAT Directive and should be read in that context. It would certainly cover the events listed in Article 32(2) which are shows, theatrical performances, circus performances, fairs, amusement parks, concerts, exhibitions and other similar cultural events (point (a)), sporting events such as sport matches or competitions (point (b)) and educational and scientific events such as conferences and seminars (point (c)).

Point (u) of Article 7(3) includes services similar to accommodation, car-hire, restaurant services and passenger transport. To be regarded as similar, these would need to be services principally and habitually carried out as part of the activities undertaken by any of the sectors concerned. It would therefore certainly include, for example, a service consisting in the hiring of boats.

2.4.3.3. Would the reference to 'booked online' cover bookings made through any device?

Online booking could be made by a person using any device which allows for booking over the Internet or any other electronic network. That includes devices such as computers, smart phones, tablets, smart watches and smart glasses.

2.4.4. All three services in general

2.4.4.1. What if services are bundled with other supplies?

Each of the services (telecommunications, broadcasting or electronic) can be bundled with other goods or services.

Bundling the services themselves, like for example with Triple Play (where internet, television and telephone are provided in a package for example over a single broadband connection or via a satellite) causes no particular problems with regard to the place of supply.

Where a bundle includes goods or other services not covered by the 2015 changes, it is necessary to determine whether the bundle is a single supply and if so, how to qualify 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 customer, being a typical consumer, receives several distinct principal supplies or a single supply.

The decision will very much depend on facts and therefore has to be taken on a case-by-case basis taking into consideration relevant case law of the Court of Justice of the European Union[7].

[7] See for example judgment of the CJEU in case C-349/96 *Card Protection Plan Ltd*.

3. ELECTRONIC AND TELEPHONE SERVICES PROVIDED THROUGH THE INTERNET, AND SUPPLIED BY AN INTERMEDIARY (ARTICLE 9A)

3.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 9a

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

3.2. Background

Where telecommunications and electronic services are supplied to a final consumer (B2C), it is the supplier of the services who is liable to pay the VAT to the tax authorities. It is therefore essential to identify with certainty who is the supplier of the services provided, in particular when these are not supplied directly to the final customer but via intermediaries.

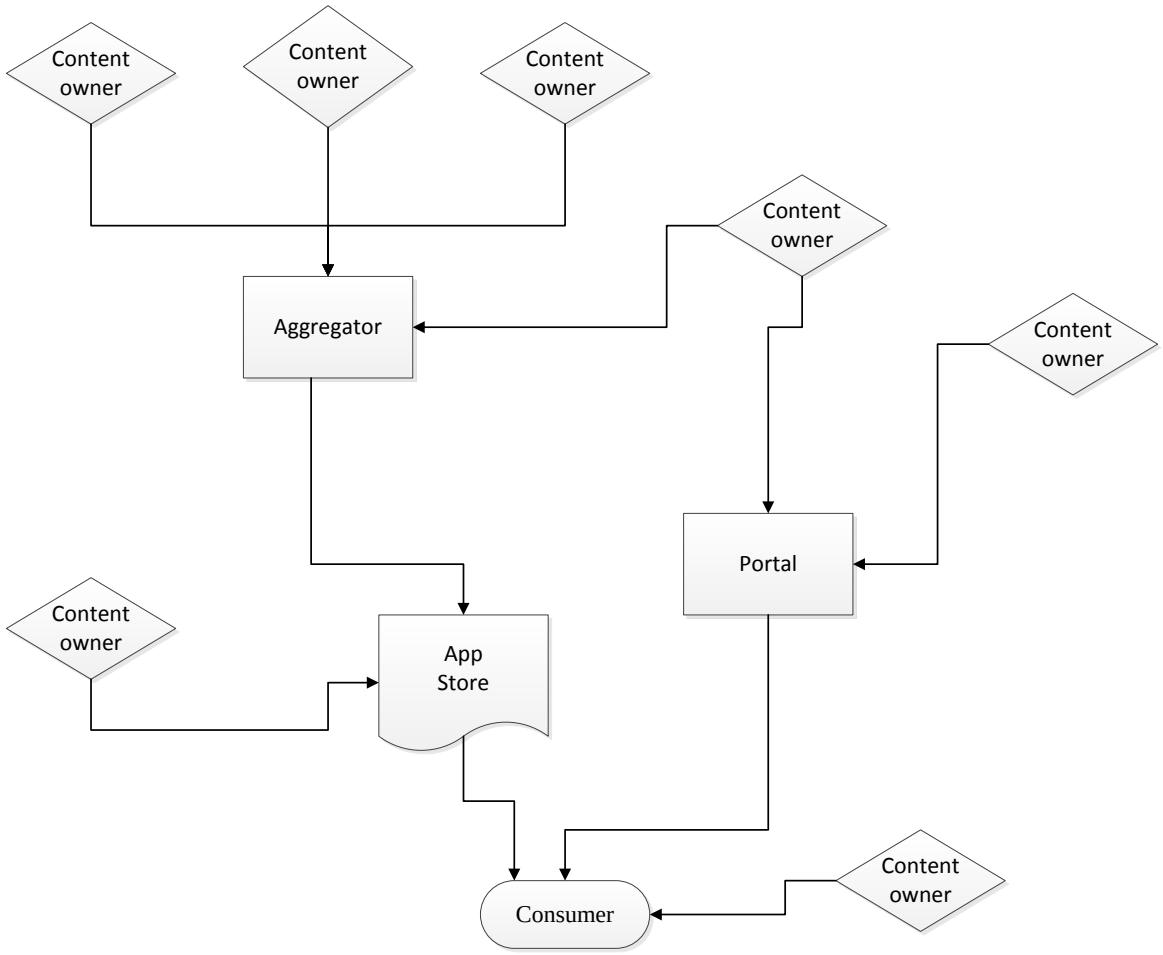
3.3. Why was there a need for clarification?

A whole range of digital services supplied through a telecommunications network, via an interface or a portal, can be delivered to the final consumer by an intermediary. As well as accessing and downloading music or games on to mobile phones, the services can include for instance directory enquiries, weather forecasts, competitions, voting and all kinds of apps. Sometimes these services are available through the use of premium rate services, for example via the short message service (SMS), a texting facility on the mobile phone for which higher prices than normal are charged. The surcharge serves as payment for the digital service. In other instances a customer will have an account at an app store, platform or other similar place and will pay for the services through a credit card or some other payment method.

The number of parties involved in the distribution of these services can vary. In some instances, the service may be supplied directly by the owner of the electronic content to the ultimate consumer. That is for example the case where an individual purchases a song directly from an independent artist via his or her website. Other situations however involve transactions between multiple intermediaries. For example, in the case of a ring tone, the content owner may enter into a licensing agreement with an aggregator of ring tones that enters into agreements with mobile telecommunications providers that sell the ringtones to their mobile customers. Similar arrangements exist when creators of apps contract with app stores or platforms and where customers purchase those downloaded apps by paying to the store or the platform via which the app was bought.

Supply chains are often long and can stretch across borders. Where that is the case, it can be difficult to know when the services are finally supplied to a final consumer, and who is responsible for the VAT on that supply. To provide legal certainty for all parties involved and to ensure collection of the tax, it was necessary to define who in the chain must be seen as the supplier of the service to the final consumer.

The chart below illustrates some typical situations where Article 9a can help to clarify who the supplier of the service to the final consumer would be.



The arrows show how the content is being delivered to the final consumer. The chart does not include the aspects of payment processing.

3.4. What does the provision do?

3.4.1. Presumption provided

The first subparagraph of Article 9a(1) introduces the rebuttable presumption that a taxable person who takes part in the supply of electronic or internet telephone services is acting in his own name but on behalf of the provider of these services. This provision reflects the legal situation laid down in Article 28 of the VAT Directive when the following three requirements are fulfilled: (i) participation of a taxable person in the supply of service, (ii) acting in his own name, (iii) but on behalf of another person.

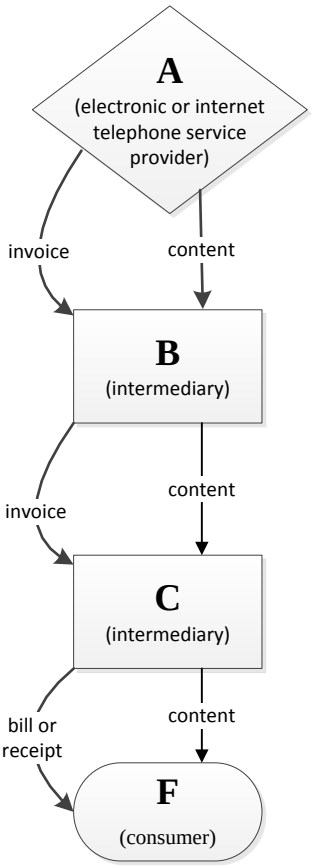
This presumption means that for each transaction in the supply chain between an electronic service provider and the end consumer, each intermediary (such as a content aggregator or a telecom operator, etc.) is deemed (seen) to have received and supplied further the electronic (or internet telephone) service himself. To illustrate with an example, a business making apps available via a web site would be deemed to be the one selling those apps to the final customer and therefore responsible for the VAT[8] and not the business that owns the app (content owner).

There are some exceptions to this presumption – those are explained later in this chapter.

[8] See in particular scenarios 7-10 on pages 36 to 42.

The chart below shows the situation where all the intermediaries are caught by the presumption. Intermediary B is deemed (seen) to receive the service and supply it further to intermediary C as if he was the service provider. Intermediary C is deemed (seen) to receive the service from B and supply it further to the final consumer as if he was the service provider.

Scenario 1:



3.4.2. *<u>Rebuttal of the presumption</u>*

Article 9a also provides that this presumption may be rebutted by an intermediary under certain conditions. It means that if an intermediary rebuts the presumption he is no longer deemed (seen) as receiving and further supplying the service. The conditions for rebuttal to take place are listed at the end of the first subparagraph of Article 9a(1) and are further developed in the second and third subparagraphs of the same provision.

The provision is constructed in such a way that the presumption will apply unless it is rebutted by a taxable person taking part in the supply meeting all of the following conditions:

(1) ***the provider of the service is explicitly indicated as the supplier by this taxable person*** which means that:

(a) the invoice issued or made available by each taxable person taking part in the supply identifies (*i.e.* there is a sufficiently clear indication) the service in question and its supplier (in normal commercial transactions a VAT invoice is issued between two taxable persons); and

(b) the customer's bill or receipt identifies the service in question and its supplier (the taxable person must issue or make available a bill or receipt to the final customer stating what has been supplied and providing details of the supplier *e.g.* business name, VAT identification number); and

(c) the taxable person taking part in the supply does not authorise the charge to the customer (it means for instance that the app store is not responsible for the payment between the final consumer and the content owner of the app); and

(d) the taxable person taking part in the supply does not authorise delivery (it means that the delivery for instance of the app from the content owner via the app store is not authorised by the app store); and

(e) the taxable person taking part in the supply does not set the general terms and conditions of the supply (it means by way of example that the terms of the sale of an app via an app store are not set by the app store);

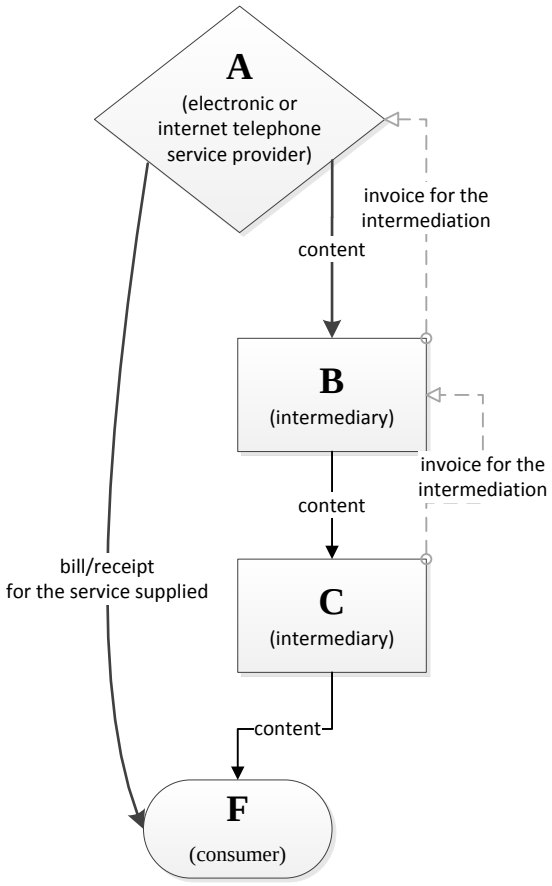
AND

(2) this is reflected in the contractual arrangements (all points from 1(a) to (e) must be reflected in the contractual arrangements for instance between the app store and the app content owner. If this is not the case the rebuttal of the presumption cannot take place.).

If those conditions are met for each intermediary in the chain, the presumption in Article 9a is rebutted and the electronic service provider will remain the supplier of the services provided to the end consumer (notwithstanding the transactions by the intermediaries in the supply chain): this implies that this service provider is the one responsible for determining the place of supply and for the VAT on the service supplied to the end consumer.

The chart below shows the situation where all the intermediaries rebutted the presumption. In such a situation for example the content owner of an app is known by all parties as the one selling the app to the final consumer. This is indicated on the invoices and on the bill or receipt issued and it is also included in the contractual arrangements.

Scenario 2



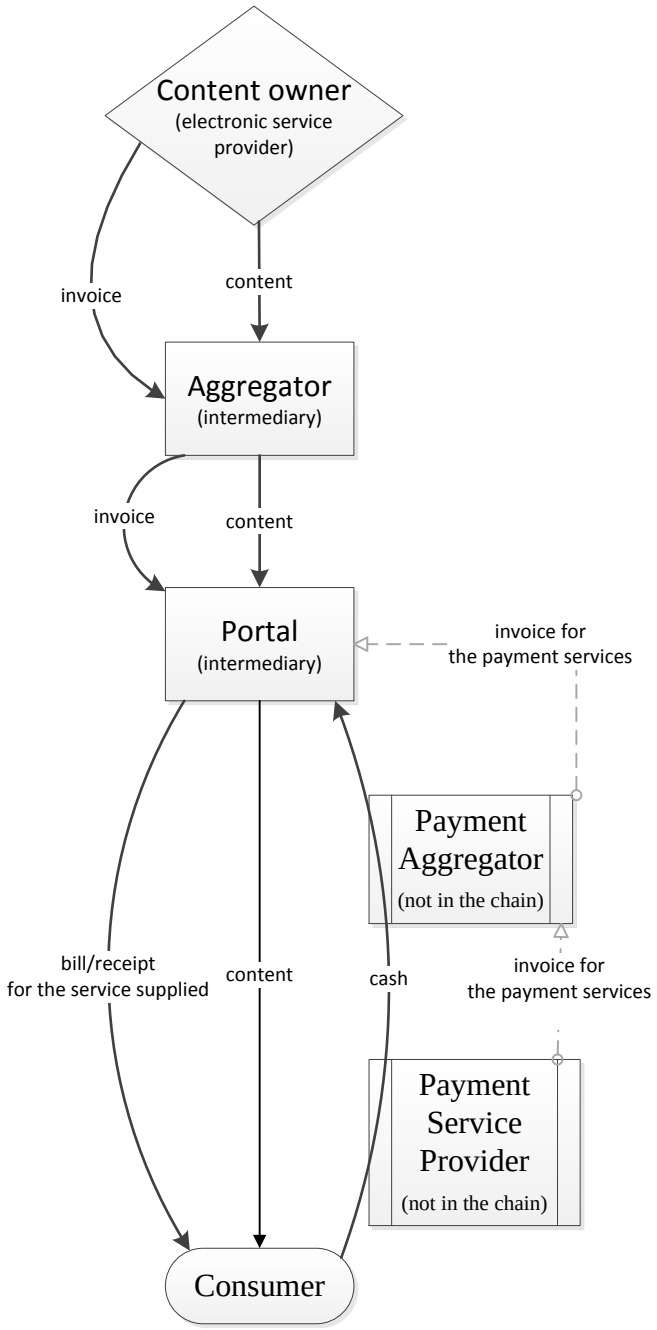
In a case where an intermediary in the supply chain authorises payment or delivery or sets the terms and conditions of the supply to the consumer, that intermediary cannot rebut the presumption in Article 9a and will be treated as making the supply to the final consumer for VAT purposes.

If, at any stage, in a supply chain involving several intermediaries an intermediary cannot or did not rebut the presumption it is not possible for intermediaries further down the chain to indicate the (original) service provider as the supplier of the services. In that case, it will only be possible for them to go back up to the (first) intermediary caught by the presumption (see also point 3.4.7).

On the other hand a taxable person who only provides for processing of payments for services (*e.g.* a credit card company) cannot, on account of having processed the payment, be regarded as taking part in the supply of services. Accordingly, the presumption does not apply to such a taxable person and consequently that person cannot be taken to make the supply to the final customer unless in any other way he takes part in the supply of the service.

In the below chart all the intermediaries taking part in the supply are covered by the presumption (the aggregator and the portal receive and further supply the service). Businesses providing payment services are not taking part in the supply and therefore they cannot be caught by the presumption.

Scenario 3



3.4.3. <u>Application of presumption – detailed indicators</u>

The presumption in Article 9a applies when a taxable person is taking part in the supply (and therefore is deemed (seen) to act in his own name but on behalf of the provider of the service).

In order for a taxpayer or a tax authority to assess whether a taxable person is taking part in the supply of services provided through a telecommunications network, an interface or a portal, the facts have to be assessed **<u>and</u>** the nature of the contractual relations examined. If there is a contradiction between contractual arrangements and economic reality then the latter prevails.

The reference to 'taking part in the supply' in Article 9a should not be given a different meaning than that covered by Article 28 of the VAT Directive where reference is made to 'a taxable person [who] takes part in the supply of services'. At all times the interpretation of Article 28 of the VAT Directive should be based on EU law and not on national laws.

Normally a taxable person is taking part in the supply if contractual or legal arrangements clearly stipulate that this taxable person is acting in his own name but on behalf of the provider of those services and this reflects the reality (the factual features of the supply).

However it is also possible that contractual or legal arrangements are not sufficiently well-defined in that regard. In such a situation the initial assessment of the supply in question already requires an analysis of all the features of the transaction.

To sum up, both facts and legal relations need to be taken into account in assessing whether a taxable person takes part in the supply. For that reason a clause in a contract (whether signed before or after 1 January 2015) excluding a taxable person from a chain of transactions (as not taking part in the supply) is not sufficient if that is not reflected in the economic reality.

Concerning specific indicators, there is no doubt that a taxable person authorising the charge to the customer and/or the delivery of the service, and/or setting the general terms and conditions of the supply, takes part in that supply. More details on that issue are included under point 3.4.6.

Furthermore, various other elements can be indicative of a taxable person taking part in a supply who may then, as a result of the rule included in the first subparagraph of Article 9a(1), be captured by the presumption. However before arriving at a final conclusion in that respect all the features of the supply need to be taken into account.

Some indicators suggesting that a taxable person takes part in the supply are listed below:

– Owning or managing the technical platform over which the services are delivered;

– Being responsible for the actual delivery;

– Being responsible for collecting payment unless the only involvement of the taxable person is the processing of payment;

– Controlling or exerting influence over the pricing;

– Being the one legally required to issue a VAT invoice, receipt or bill to the end user in respect of the supply;

– Providing customer care or support in relation to queries about or problems with the service itself;

– Exerting control or influence over the presentation and format of the virtual market place (such as app stores or websites) such that the brand and identity of the taxable person are significantly more prominent than those of other persons involved in the supply;

– Having legal obligations or liabilities in relation to the service provided;

– Owning the customer data related to the supply in question;

– Being in a position to credit a sale without the supplier's permission or prior approval in cases where the supply was not properly received.

Not all taxable persons involved in the supply of electronic or internet telephone services can be seen as taking part in the supply as envisaged by Article 9a. Below five different situations are identified in that respect. The first three deal with cases where an intermediary is not seen as taking part in the supply in the sense of Article 9a. The last two cases (fourth and fifth) refer to situations where an intermediary is taking part in the supply as referred to in Article 9a.

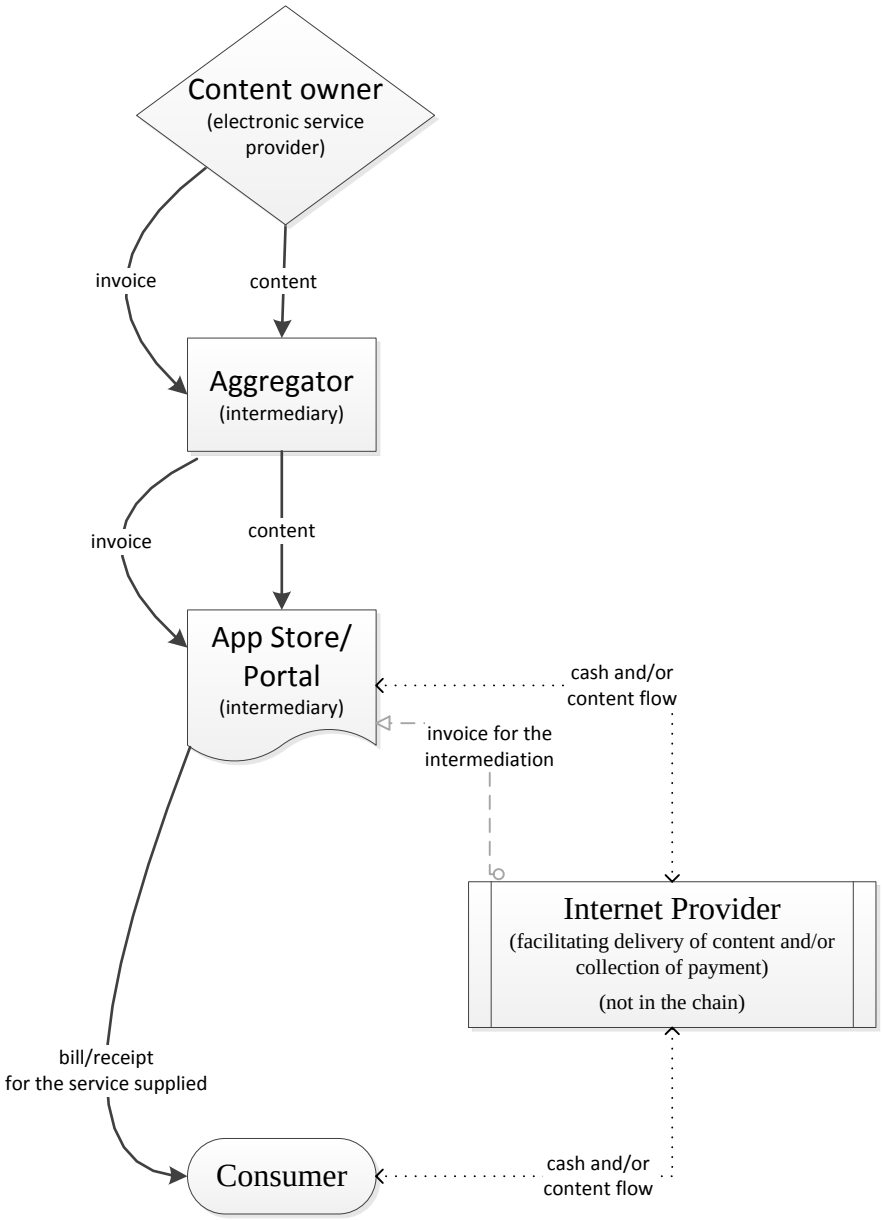
1) As illustrated in Scenario 3 a provider of payment services (*e.g.* a credit card company) is not seen as taking part in the supply of the services to the final customer if that provider only processes the payment (see point 3.4.4).

2) The internet provider is not taking part in the supply when he is only making the internet network available for carrying of the content and/or collection of payment (via wi-fi, cable, satellite, other). In this situation his participation is not sufficient to be considered as taking part in the supply.

3) In cases where a mobile operator only performs the functions of carrying the content and/or processing payment (in the same way that an internet provider makes the internet network made available) as described above, that mobile operator should be treated in the same way and not be seen as taking part in the supply.

The chart below illustrates the situation where an internet provider or a mobile operator facilitates the flow of cash and/or content.

Scenario 4

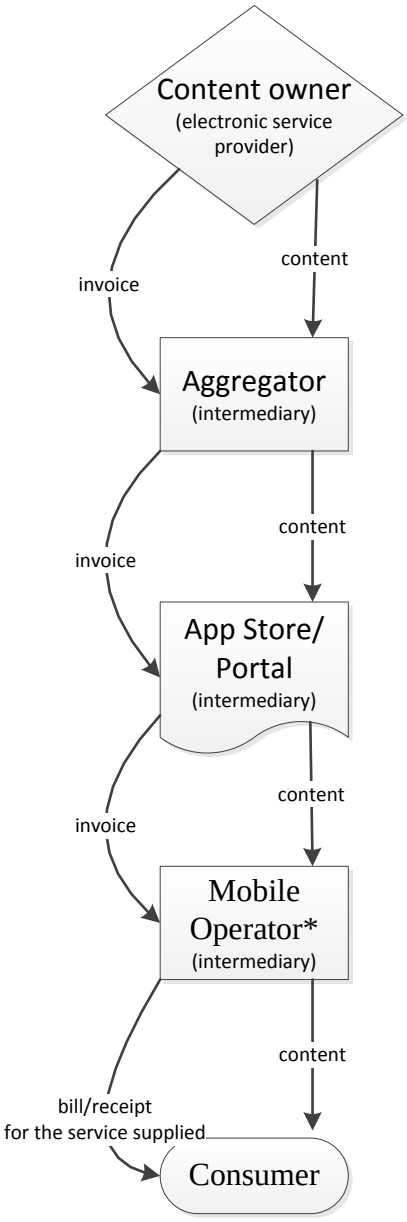


4) If a mobile operator is involved in any way other than that described above (carrying of the content or processing of payment) his participation cannot be disregarded. In other words his involvement in the supply would then become sufficiently predominant and therefore he should be seen as taking part in the supply in the sense of Article 9a. One of the tests which should help to identify whether a mobile operator takes part in the supply is to verify whether the network is essential for the supply. Another possible point is to verify whether the payment collection covers only a simple charge to a bill.

5) There is no doubt that where an app store or a portal puts up an electronic service for sale it must be seen as predominantly involved in the supply of that service and it should therefore be regarded as taking part in the supply in the sense of Article 9a. The fact that there is an additional intermediary taking part in that supply who is placed between the app store or portal and the final customer (*e.g.* a mobile operator), does not automatically change the situation of the app store or portal.

The chart below illustrates the situation where a mobile operator, an app store or a portal is taking part in the supply and therefore is caught by the presumption.

Scenario 5



* Mobile operator acts as more than a payment service provider or an internet provider

Taking part or not in the supply? Additional illustrations

The following three situations illustrate further the issue of who is and who is not taking part in the supply:

Situation 1

Where,

(1) a customer of an app store company purchases an electronic service (a subscription for an e-magazine, a game, in-game credits) from a content owner;

(2) the contract for the supply of the electronic service is made directly between the content owner and the customer;

(3) the charge is collected directly by the app store but the electronic service is delivered (*i.e.* technical carrying of the data) to the customer's phone through the network of the mobile operator;

then the mobile operator should not be seen as taking part in the supply.

Situation 2

Where in comparison to situation 1, circumstances differ as compared to point (3) and the charge would be also collected by the mobile operator, the mobile operator should still not be seen as taking part in the supply.

Situation 3

However, where the collection of payment by the mobile operator would be done through more than only a simple charge to a bill (as is the case in situation 2) and it would include other elements, then the mobile operator has to be seen as taking part in the supply. Additional elements may cover the use of a premium SMS when used not only for processing of payment.

Nevertheless it has to be kept in mind that the market of electronic and telecommunications services is developing quickly, and it is therefore neither possible nor advisable to cover all possible practical situations in these Explanatory Notes. It should in any event be clear that the assessment in each case needs to include the aforementioned elements.

3.4.4. When to exclude application of the presumption – processing of payment

Paragraph 3 of Article 9a excludes taxable persons who solely provide the processing of payments and who are not seen as taking part in the supply (in the main chain of transactions). This would for example cover payment by a credit card company.

For the assessment of whether a taxable person is only providing processing of payments, the economic reality and the contractual arrangements (insofar as these are not contradicted by facts) are decisive.

In addition to providing a method of payment the taxable person may undertake other activities directly related to this processing of payments – but not linked with the main supply. That could for example be accepting bad debt risk or providing first line customer care which in essence would mean redirecting to the supplier except for situations linked with the payment processing as such. These activities would not be sufficient to consider that taxable person as having taken part in the supply.

3.4.5. Conditions for rebuttal of the presumption

An electronic or internet telephone service provider is regarded as explicitly indicated where it can be clearly demonstrated, both in terms of the contractual arrangements and of the information provided by **each** taxable person taking part in the supply and finally communicated to the final customer, that he is the person from whom the service is being supplied.

Both conditions mentioned in the second subparagraph of Article 9a(1) have to be met simultanously in order to be able to explicitly indicate the service provider *e.g.* the app content owner as the supplier of the services. Throughout the supply chain, the first condition (point (a) – issue of a VAT invoice) applies to the B2B transactions whilst the second condition (point (b) – issue of a bill or receipt, although this can include a VAT invoice when a B2C invoice is required) deals with the final B2C transaction in the chain.

For the service provider (of electronic services or telephone services provided over the internet) to be explicitly indicated, he must be identified in a sufficiently clear way as being the supplier on the VAT invoice issued or made available by each taxable person taking part in the supply, and on the bill or receipt which is issued or made available (where there is no obligation to issue a VAT invoice) to the final customer. Where this information has not been provided by each taxable person taking part in the supply and communicated (by issuing or making avaiable a bill or receipt or VAT invoice) to the final customer, the service provider *e.g.* app content owner cannot be regarded as being explicitly indicated as the supplier.

At the same time, even if a taxable person meets all the conditions to rebut the presumption in Article 9a, it does not mean that he could not be seen as taking part in the supply (in accordance with Article 28 of VAT Directive).

When identifying the supplier as well as the service, reference can be made either in full or by using a specific and unique reference, code or similar identifier provided that the reference used is clear enough for all parties concerned. The description of the supplier should be sufficiently unambiguous to identify that supplier to any of the customers but it should not be necessary to include full details such as full legal name, address or VAT identification number of the supplier. No specific identification method should be prescribed or privileged as otherwise it would introduce additional constraints for businesses applying different commercial practices.

Concerning the B2B invoice, this should comply with the normal VAT rules[9].

When reference is made to a 'bill or receipt' issued or made available to the customer, that concerns, as explained above, B2C transactions. This should be seen as a minimum condition which is necessary together with the other elements taken from Article 9a, to allow the taxable person to explicitly indicate the service provider as the supplier. It in no way changes the rules on invoicing included in the VAT Directive and their application at national level. In particular this condition neither imposes an obligation to issue invoices for supplies to final consumers in Member States where this is not required nor does it exclude an obligation to do so in Member States where invoicing is compulsory also for B2C supplies. In cases where a B2C invoice is required then the details mentioned in Article 226 of the VAT Directive must be provided which includes more information than on the bill or receipt[10].

[9] According to the Explanatory notes on invoicing, document reference: A-2, Topic: Definition of an e-invoice, 'an invoice should be regarded as issued when the supplier or a third party acting on behalf of the supplier, or the customer for self-billed invoices, makes the invoice available so that it can be received by the customer. This may mean the electronic invoice is transmitted directly to the customer through for instance email or a secure link, or indirectly through for instance one or several service providers, or that it is made available and accessible to the customer through a web portal or any other method'.

[10] Information regarding Member States' rules on invoicing will also be made available on the Commission's website.

3.4.6. When the presumption cannot be rebutted

A taxable person who is either authorising the charge to the customer, authorising the delivery of the service or setting the general terms and conditions, will always be presumed to act in his own name, but on behalf of another taxable person. It is sufficient that **only one** of these three conditions is met to exclude that taxable person from explicitly indicating another taxable person as the supplier of the service to the final consumer.

It is enough that, in the chain, one taxable person meets one of the three conditions to prevent the rest of the chain from indicating the original service provider as the supplier to the final consumer. Thus for example if a phone network meets one of the three conditions in setting the payment, delivery or contract terms the app content owner cannot be the one making the supply to the final customer.

Therefore when several parties in the supply chain authorise the charge and/or delivery and/or set the general terms and conditions of the supply none of them may explicitly indicate the original service provider as the supplier of the service to the final consumer. The correct identification of all the intermediaries in the supply chain should take into account the contractual relations between the parties. Further the perception by the final consumer as to who is supplying the service to him cannot be disregarded (see also point 3.4.7 where you will find further clarification).

Authorisation of the charge to the customer

The phrase 'authorises the charge to the customer' is not the same as taking payment or collecting payment. It refers to the situation where the taxable person can influence whether, at what time, or under which preconditions the customer pays. A taxable person authorises payment when he decides that the customer's account, credit or bank card, or similar, can be debited/charged as payment for the service. In practice, the person who authorises payment is likely to be the person who controls the technical platform (*e.g.* app store, portal) over which the services are offered or provided.

Authorisation of the delivery of the services

The phrase 'authorises … the delivery of the services' is a broader concept than making the delivery. It refers to the situation where the taxable person can influence whether, at what time, or under which preconditions the delivery is made. A taxable person authorises the delivery when he either sends approval to commence the delivery of the service, delivers the service himself or instructs a third party to make the delivery. In practice, the person who authorises delivery is likely to be the person who controls the technical platform (*e.g.* app store, portal) over which the services are provided.

Setting the general terms and conditions of the supply

In the context of application of Article 9a the phrase 'the general terms and conditions of the supply' covers any general terms and conditions that are set by a taxable person taking part in the supply and with which a final customer has to agree before purchasing the service. For example it includes the terms and conditions set by market places and similar platforms requiring users to agree to general terms and conditions for using that website or platform (that could be to maintain an account) as well as the general terms and conditions (including license agreement) which the final customer has to agree to before receiving any access to a app or content.

As for the meaning of 'setting' the general terms and conditions of the supply it covers the situation where a taxable person takes the decision on the general terms and specific conditions (*e.g.* rights and obligations such as price, payment terms, delivery conditions, warranty rules, etc.) and can impose them on other participants (by formally accepting them).

3.4.7. How to proceed where at least one intermediary in the chain rebuts the presumption?

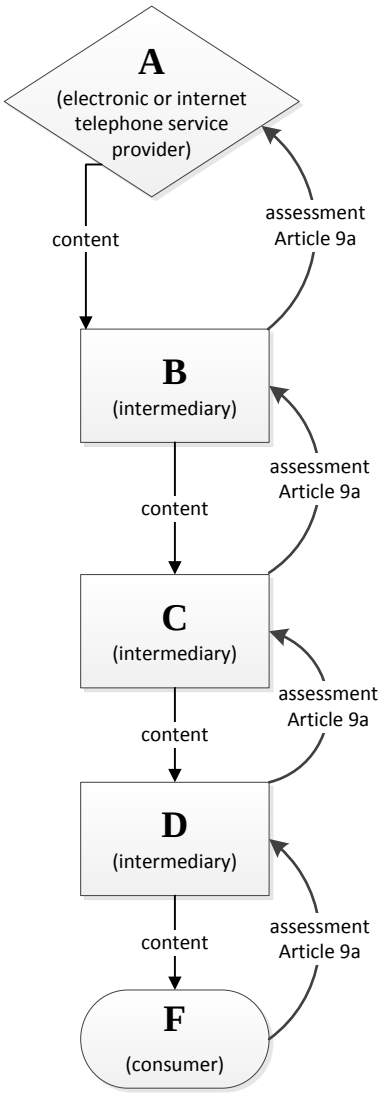
Normally an intermediary who takes part in the supply is covered by the presumption from Article 9a. Nevertheless it can be rebutted where all the required conditions are met.

Any intermediary in the supply chain who does not meet the conditions to rebut the presumption in Article 9a is caught by it and will be deemed to have received and supplied the service himself to the next intermediary in the chain or to the final consumer. That will see him being treated as the service provider.

In order to correctly analyse the situation of each of the intermediary, **the assessment of this chain supply of a service should start at the final consumer's level and move upstream in the chain** as indicated in the chart below (scenario 6). This approach is closely linked with the purpose of Article 9a which is to tax as close as possible to the final consumer unless there is a sufficient level of information allowing to identify the taxable person supplying to the final consumer at an earlier point in the chain.

The chart below illustrates the correct order when assessing the transactions in the chain for the application of Article 9a.

Scenario 6

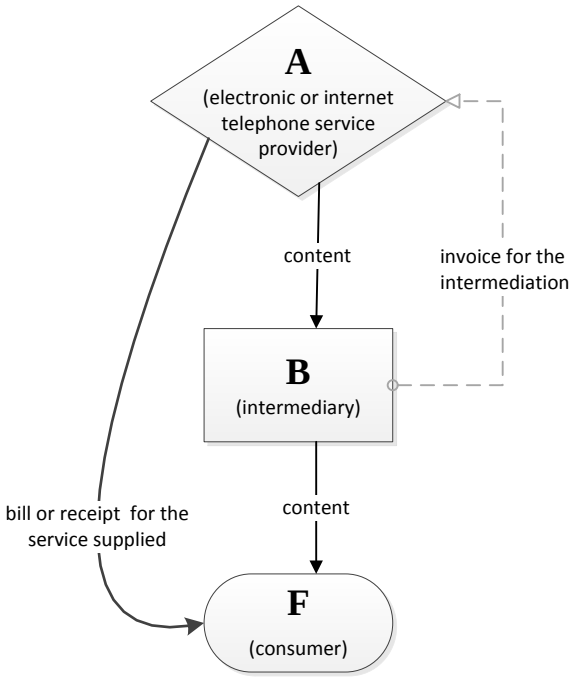


The four charts below (scenarios 7-10) present some general scenarios for the application of the presumption from Article 9a, where at least one intermediary in the chain rebuts the presumption.

Scenarios 7 to 10 deal with **the most basic types of situations** possible under Article 9a. The purpose of these charts is to provide additional guidance in **the most common generic settings**. Real life situations would often differ in details from what is presented in the charts. It is important to keep that in mind each time that the information included in any of the charts in these Explanatory Notes is applied to concrete real life situations.

As one should always start at the level of the final consumer and move up in the chain in order to correctly assess the transactions, the simplest situation where a rebuttal can take place will be the following:

Scenario 7



Comments to scenario 7:

Intermediary B rebuts the presumption.

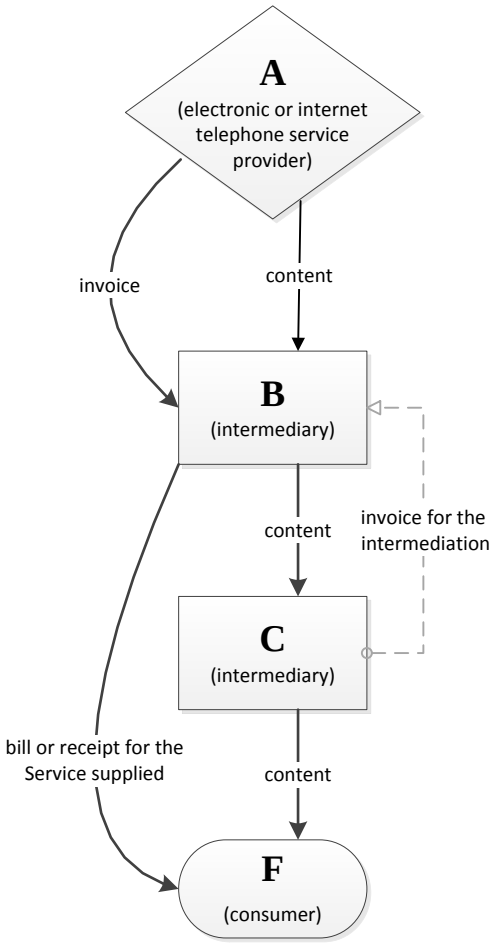
B can do so because he fulfilled the required conditions: in the invoice issued by B to A there is a sufficiently clear reference to the main service and the service supplier (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); in the bill or receipt issued by A to the consumer F the service and the service supplier are identified (the requirement from point (b) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that B is supplying only some intermediation services and that the main service is provided by A.

At the same time B is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** he is authorising the delivery of the service **nor** he is setting the general terms and conditions.

A (the content owner/developer/initial service provider) is in this case seen as a provider supplying the service to the final consumer. He issues the bill or receipt to final consumer F. A will normally be responsible for the VAT in respect of the supply of the service to the final consumer.

Scenarios 8 and 9 below show some more complex situations.

Scenario 8



Comments to scenario 8:

Intermediary C rebuts the presumption.

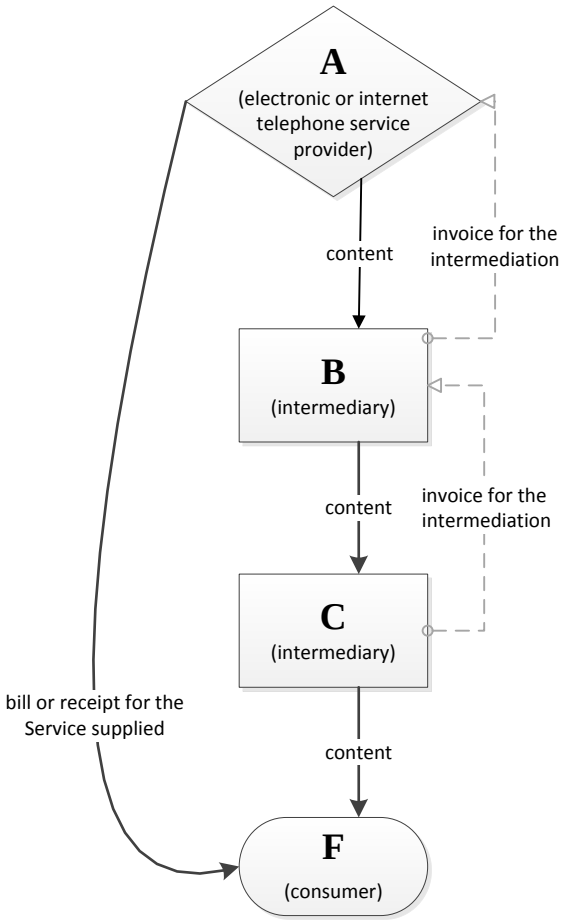
C can do so because he fulfilled the required conditions: in the invoice issued by C to B, there is a sufficiently clear reference to the main service and the service supplier (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); in the bill or receipt issued by B to the consumer F the service and the service supplier are identified (the requirement from point (b) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that C is supplying only some intermediation services and that the main service is provided by B.

At the same time C is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** he is authorising the delivery of the service **nor** he is setting the general terms and conditions.

Intermediary B cannot (does not fulfil the conditions) or does not want to rebut the presumption *i.e.* he is deemed to receive the service from A and to supply it further to final consumer F (by which he is seen as a service provider). B will normally be responsible for the VAT in respect of the supply of the service to the final consumer.

A (the content owner/developer/initial service provider) supplies the service to B and issues a normal B2B invoice. He does not have a direct contact with the final consumer.

Scenario 9



Comments to scenario 9:

Intermediary C rebuts the presumption.

C can do this because he fulfilled the required conditions: in the invoice issued by C to B there is a sufficiently clear reference to the main service and the service supplier (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); in the bill or receipt issued by A to consumer F the service and the service supplier are identified (the requirement from point (b) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that C is supplying only some intermediation services and that the responsibility for the main service to provide moves to B.

At the same time C is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** he is authorising the delivery of the service **nor** he is setting the general terms and conditions.

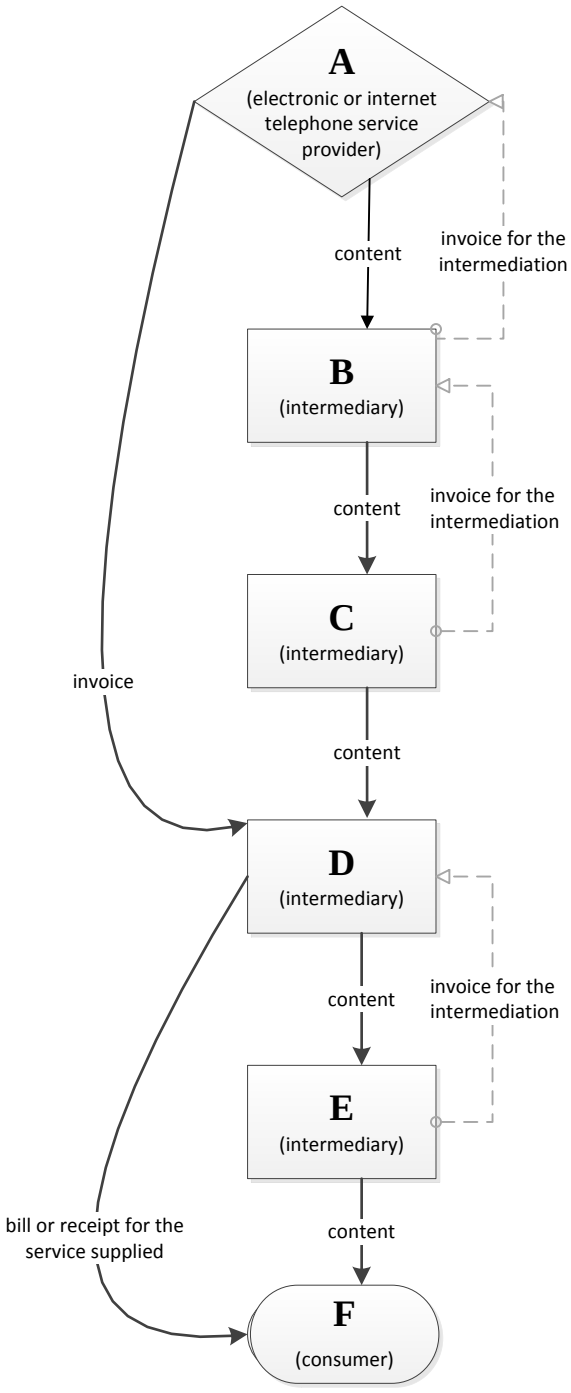
Intermediary B also rebuts the presumption. B can do so because he fulfilled the required conditions: in the invoice issued by B to A there is a sufficiently clear reference to the main service and the service supplier (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); in the bill or receipt issued by A to consumer F the service and the service supplier are identified (the requirement from point (b) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that B is supplying only some intermediation services and that the responsibility for the main service to provide moves to A.

At the same time B is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** is he authorising the delivery of the service **nor** is he setting the general terms and conditions.

A (the content owner/developer/initial service provider) is in this case seen as a provider supplying the service to the final consumer. He issues the bill or receipt to final consumer F. A will normally be responsible for the VAT in respect of the supply of the service to the final consumer.

In the last scenario 10 a more complex situation – in comparison to scenario 8 – is presented, where not all the intermediaries rebutted the presumption from Article 9a.

Scenario 10



Comments to scenario 10:

Intermediary E rebuts the presumption.

E can do so because he fulfilled the required conditions: in the invoice issued by E to D, there is a sufficiently clear reference to the main service and the service supplier (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); in the bill or receipt issued by D to consumer F the service and the service supplier are identified (the requirement from point (b) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that E is supplying only some intermediation services and that the main service is provided by D.

At the same time E is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** is he authorising the delivery of the service **nor** is he setting the general terms and conditions.

Intermediary D cannot (does not fulfil the conditions) or does not want to rebut the presumption *i.e.* he is deemed to receive the service from A (in our scenario) and to supply it further to final consumer F (by which he is seen as a service provider). D will normally be responsible for the VAT in respect of the supply of the service to the final consumer.

Intermediary C rebuts the presumption.

C can do so because the required conditions are fulfilled: in the invoice issued by C to B (for his intermediation service), there is a sufficiently clear reference to the main service and the service provider (in this 'upper' part of the supply chain the identified service provider is A) (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that C is supplying only some intermediation services to B and that the responsibility for providing the main service moves to B. The requirement from point (b) of the second subparagraph of Article 9a(1) is fulfilled by D who issues the bill or receipt to consumer F where the service and the service supplier are identified (the service provider in this 'lower part' of the chain is D).

At the same time C is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** is he authorising the delivery of the service **nor** is he setting the general terms and conditions.

It is important to note that C in order to fulfil the requirements from Article 9a needs to have sufficient information about the main service and the service provider. Normally C would need to rely on information provided by B who in turn should receive it from A (the content owner/developer/initial service provider).

In the case C does not have enough information he will be caught by the presumption.

Intermediary B rebuts the presumption.

B can do so because the required conditions are fulfilled: in the invoice issued by B to A (for his intermediation service), there is a sufficiently clear reference to the main service and the service provider and in the invoice issued by A to D the main service and the service supplier (in this 'upper' part of the supply chain the identified service provider is A) are identified (the requirement from point (a) of the second subparagraph of Article 9a(1) is met); contractual arrangements confirm that B is supplying only some intermediation services and that the main service is provided by A. The requirement from

point (b) of the second subparagraph of Article 9a (1) is fulfilled by D who issues the bill or receipt to consumer F where the service and the service supplier are identified (the service provider in this 'lower part' of the chain is D).

At the same time B is not excluded from the possibility to rebut the presumption because he is **not** authorising the charge to the customer **nor** is he authorising the delivery of the service **nor** is he setting the general terms and conditions.

It is important to note that B in order to fulfil the requirements from Article 9a needs to have sufficient information about the main service and the service provider. Normally B would need to rely on information provided by A.

In the case B does not have enough information he will be caught by the presumption.

A (the content owner/the developer/initial service provider) supplies the service to D and issues a normal B2B invoice. He does not have a direct contact with the final consumer.

3.4.8. How does the presumption apply in respect of telephone services provided over the Internet?

Article 9a, in its paragraph 2, provides that where internet telephone services are supplied through a telecommunications network, an interface or a portal under the same conditions as set out in paragraph 1 then this paragraph applies.

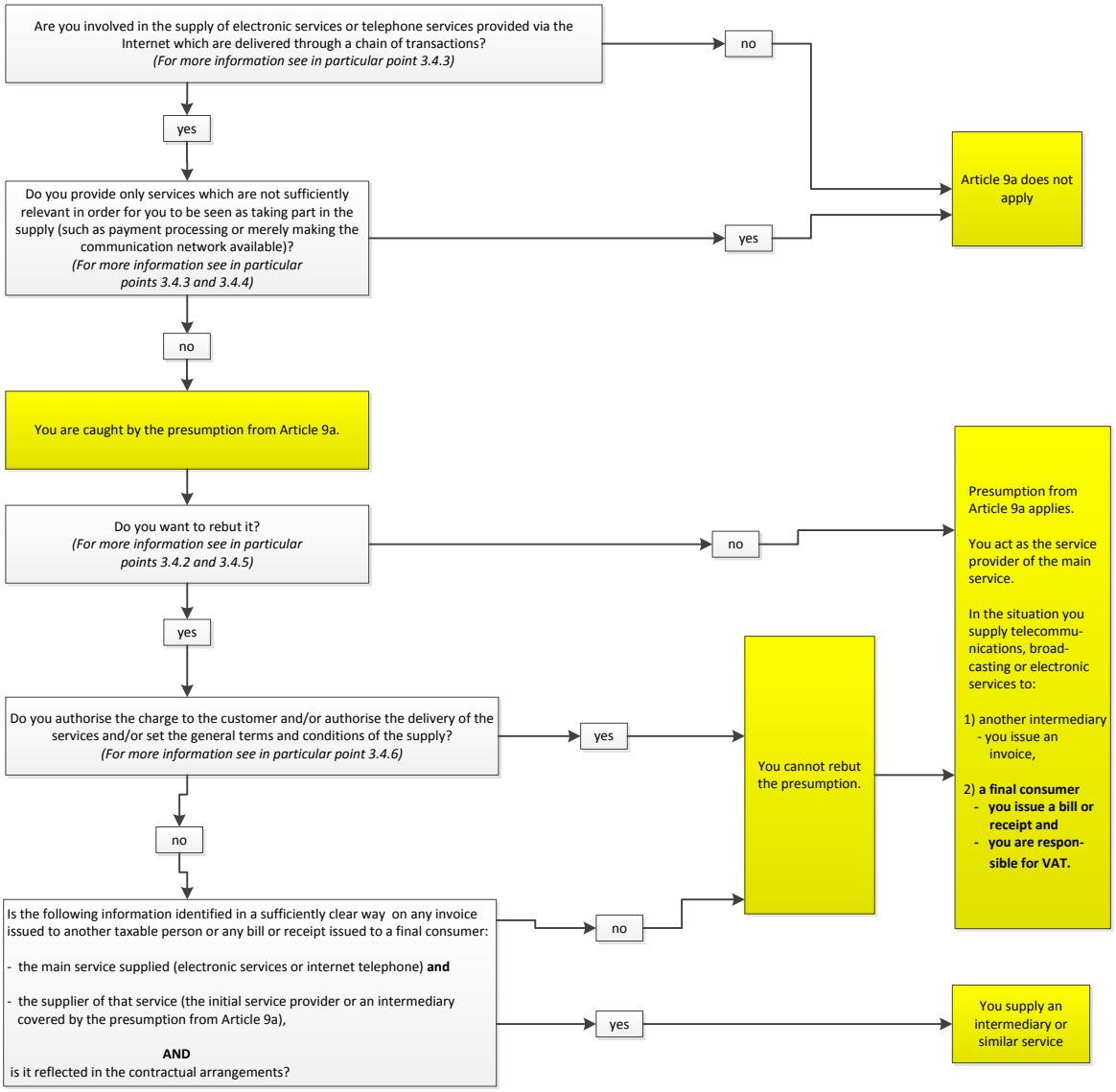
Since telephone services can be supplied via intermediaries, there is also a need for a presumption as to who is actually supplying the service to the final consumer. Telephone services provided over the Internet, including voice over Internet Protocol (VoIP) are to be treated in the same way as electronic services in the context of Article 9a.

3.5. Detailed issues arising from this provision

3.5.1. When does Article 9a apply? – the chart

The chart below presents a high level illustration on how Article 9a should be applied.

For more detailed information please read the whole Chapter 3. The definitions of electronic and telecommunications services are dealt with in Chapter 2.



3.5.2. Why is this presumption not placed together with the other presumptions?

This provision provides for a presumption, as do the provisions in subsection 3a. It should be noted however that subsection 3a focuses on the *location of the customer*, whereas Article 9a provides a presumption for *who the supplier* of the services is. The right approach, in line with the logic of the VAT Directive, is first to identify correctly the supplier of a service. The next step is then to correctly assess the nature of the service and only after that to determine where the customer belongs. For that reason Article 9a could not be placed together with the rest of the presumptions.

3.5.3. Why does this presumption not cover broadcasting services?

As explained under point 2.4.2 the definition of broadcasting services in Article 6b is relatively narrow and requires that the supplier has 'editorial responsibility' over the content in order for the service to be covered by it.

Under Article 9a, in accordance with the presumption where it applies, the 'intermediary' in the supply of broadcasting would become the service provider (broadcaster) as he could

not exclude himself from this position because of the additional conditions included in this provision (as a result of the third subparagraph of paragraph 1).

For that reason (since it would not be possible to exclude the application of the presumption under the first subparagraph of paragraph 1) it was not found appropriate to include broadcasting services in Article 9a.

3.5.4. What are telecommunications networks?

See the glossary under point 1.6.

3.5.5. What is an interface or a portal?

See the glossary under point 1.6.

4. PLACE WHERE A NON-TAXABLE LEGAL PERSON IS ESTABLISHED (ARTICLE 13A)

4.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 13a

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

4.2. Background

Within the VAT system, a final consumer (also referred to as a non-taxable person) can be a natural person (that is a private individual) or a legal person (such as a public authority).

Where telecommunications, broadcasting or electronic services are supplied to a private individual, VAT, as a rule, will be due at the place where the private individual has his permanent address or usually resides (as from 2015).

If for these supplies the customer is a (non-taxable) legal person, the determining factor will be the place where that person is established.

In that respect, for the application of the place-of-supply rules it is important to remember that in accordance with Article 43(2) of the VAT Directive a non-taxable legal person identified for VAT purposes must be regarded as a taxable person.

When VAT will need to be charged at the place where the final consumer is '**established**' (if it is a legal person) or at the place where he has his '**permanent address**' or '**usually resides**' (when the customer is a natural person), it is necessary to be clear on the meaning of these three concepts.

Articles 12 and 13 already provide guidance on the concepts of permanent address and usual residence. The permanent address is the address of a natural person entered in the population or similar register, or the address indicated by that person to the relevant tax authorities. It is also made clear that a natural person usually resides at the place where that person usually lives as a result of personal and occupational ties. Where these ties are in different countries, the usual residence will be determined by the personal ties which show close links between the person and a place where he is living.

4.3. Why was there a need for clarification?

A legal person belongs to the place where it is established. For legal persons carrying out economic activity (taxable persons), guidance on the place of establishment can be found in Articles 10 and 11 but there is no such guidance as regards legal persons without economic activity (non-taxable legal persons).

In that context, it was necessary to clarify the concept of 'established', which is now included in Article 13a.

4.4. What does the provision do?

Article 13a defines the place where a non-taxable legal person is established or has an establishment.

That is the place where the functions of its central administration are carried out (performed/executed), or any other place characterised by a sufficient degree of permanence and a suitable structure in terms or human and technical resources to enable it to receive and use the services supplied to it for its own needs (that is the place from which it operates activities).

Unlike a taxable person, a non-taxable legal person will normally not be engaged in economic activities. It was therefore necessary to give separate guidance on the place where a non-taxable legal person is established.

The definition, and the tests to be applied, however reflects the existing principles for determining the place of business of a taxable person (Article 10) and any fixed establishment that it may have (Article 11(1)).

The elements used are similar to those applied in the case of a taxable person but have been adapted to tailor the situation of a non-taxable person who will not be involved in business.

5. STATUS OF CUSTOMER NOT COMMUNICATING HIS VAT IDENTIFICATION NUMBER (ARTICLE 18)

5.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 18(2), second subparagraph

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned

5.2. Background

As from 1 January 2015, the place of taxation for the supply of telecommunications, broadcasting and electronic services will be the same for B2B (business to business) and B2C (business to final consumer) supplies.

Regardless of this change it will still be necessary for the supplier to determine the status of the customer (whether he is a business or a final consumer) as it will influence the VAT liability of the supplier. Where the supply is made to a final consumer, or if the customer is established in the same Member State as the supplier, the supplier will be liable to account for the tax. In cases where the supply is made to a taxable customer who is established in a Member State other than that of the supplier the latter should not charge VAT as it will be for the customer to account for the tax under the reverse charge mechanism.

5.3. Why was there a need for clarification?

Article 18[11] is relevant when identifying the status of the customer is necessary in order to correctly apply rules for the place of supply of services. To verify the status of the customer and the place where he belongs, a supplier will often rely heavily on the VAT identification number communicated by his customer.

Paragraph 1 tells the supplier when he can regard an EU customer as a taxable person. That is the case when the customer communicates his VAT identification number, or shows that he is in the process of registering for VAT.

Where no VAT identification number has been communicated, the first subparagraph of paragraph 2 tells the supplier that the customer can be regarded as a non-taxable person but only if there is no information to the contrary.

In relation to telecommunications, broadcasting and electronic services as from 2015 the status of the customer will not influence the identification of the place of supply. Therefore, regardless of whether the customer is a taxable person or a final consumer, the revenues will accrue to the same Member State.

[11] Article 18 helps the supplier to identify the status of the customer but the provision does not change it. It is important to remember that any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity, must be regarded as a taxable person. To be a taxable person, registration is not required. In other words the fact that a taxable person does not have a VAT identification number does not change his status.

For these services, there is often a high volume of low value supplies taking place and therefore it is particularly important that the business is able to establish the status of its customers rapidly and with certainty. In other words it is necessary for a business to have more certainty when deciding whether or not to charge VAT. For these reasons the second subparagraph of Article 18(2) was introduced. It aims to simplify the application of rules in respect of telecommunications, broadcasting and electronic services.

5.4. What does the provision do?

The second subparagraph of Article 18(2), facilitates businesses in distinguishing business customers from customers who are final consumers. Its main purpose is to provide more legal certainty for the supplier as to the status of his customer by disregarding information other than the VAT identification number.

The supplier of telecommunications, broadcasting and electronic services **may** regard any customer who does not provide him with a VAT identification number as a non-taxable person. This will allow the supplier to determine immediately and with certainty whether payment of VAT falls to him (as it does for any supply to a non-taxable person, or to a taxable person in the same Member State) or whether the customer needs to account for the tax (because the supply is to a taxable person in another Member State).

It is optional for the supplier to avail himself of this provision.

The supplier can treat customers without a VAT identification number as final consumers. By doing this, he protects himself against any liability later on if the customer never communicates his VAT identification number to him, which could be taken as an indication that the customer did in fact **not** act as a taxable person.

However the supplier is not compelled to treat a customer who is a taxable person acting as such, as a final consumer: if he would want to treat him as a taxable person, although his client has not yet communicated him his VAT identification number, he can do so. The burden of proof will however then be on his shoulders and to avoid liability he will need sufficient information to substantiate the status of his customer.

Concerning the customer, once the VAT identification number is attributed to him, he is obviously obliged, under Article 55, to communicate it forthwith to the supplier to enable him to submit a recapitulative statement as required.

This option is available for the supplier **as long as** the customer has not communicated his VAT identification number. Where, despite being a taxable person, the customer is treated as a final consumer, the customer cannot recover the VAT which instead becomes a final cost for him. To avoid depriving the customer of his rights, he should be given the possibility to rectify the situation with his supplier. The option for the supplier therefore only applies until the moment that the customer communicates his VAT identification number. In that case, the supplier will need to make the necessary adjustments in accordance with the normal rules. That could include refunding any VAT previously charged to the customer and making the necessary adjustments in his VAT (MOSS) return.

The customer should communicate his VAT identification number within a reasonable time of the supply. If a customer is very late in doing so, normally it could be assumed that he was not acting as a taxable person when buying the service.

When dealing with concrete cases it should be kept in mind that this facilitation measure will not have any revenue implication for the Member State of the customer.

5.5. Detailed issues arising from this provision

5.5.1. Is a supplier compelled to treat a customer without a VAT identification number as a final consumer?

Irrespective of information to the contrary, the supplier 'may' regard a customer as a non-taxable person as long as that customer has not communicated his individual VAT identification number. The second subparagraph of Article 18(2) does not, however, compel him to do so. If he has other information to substantiate the status of the customer as a taxable person, the supplier can treat him as such but he then assumes the risk in case things go wrong with his customer.

5.5.2. How should a supplier treat a customer established outside the EU?

Where telecommunications, broadcasting and electronic services are supplied to customers established or residing outside the EU, the supply falls outside the scope of EU VAT. That is so irrespective of the status of the customer.

Unless the rule of effective use and enjoyment as laid down in Article 59a of the VAT Directive is applied, the supplier does not need to know the status of the customer but only needs to determine the place where that customer belongs. That is also confirmed by Article 3.

5.5.3. What was the reason for using 'may' instead of 'shall' in Article 18(2)?

The use of 'may' in the second subparagraph of Article 18(2) makes it optional for the supplier to use this provision.

A reference to 'shall' would have forced a supplier who did not receive a VAT identification number from his customer to treat this customer as a non-taxable person. However it is not excluded that, even in the absence of a VAT identification number, the supplier knows that his customer is in fact a taxable person and the reference to 'may' then allows him to refrain from treating that customer as a non-taxable person.

If the supplier has sufficient information to substantiate that the customer is in fact a taxable person, he is therefore not compelled to treat that customer as a non-taxable person and can issue an invoice without VAT if, in accordance with Article 196 of the VAT Directive, the latter is required to account for VAT.

5.5.4. What are the repercussions if the supplier decides not to avail of the option included in the second subparagraph of Article 18(2)?

In the absence of a VAT identification number, when the supplier does not use the option in the second subparagraph of Article 18(2), he needs to be able to substantiate that the customer is in fact a taxable person. If this is not possible, the supplier could be held liable for payment of the VAT on account of the customer being a non-taxable person.

5.5.5. What would the supplier need to do if the customer later communicates his VAT identification number to him?

Where the customer has not supplied a VAT identification number and the supplier has doubts about the status of the customer, the supplier can protect himself by treating the customer as a non-taxable person until such VAT identification number is provided (if ever).

However, this initial assessment will have to be reviewed and corrected should the customer subsequently communicate his VAT identification number to the supplier. In this place it is important to remember Article 25 which states that **for the application of the rules governing the place of supply of services, only the circumstances existing at the time of the chargeable event shall be taken into account.**

Once the customer communicates his VAT identification number, the supplier will need to make the necessary adjustments (issue of corrected invoice, refund of VAT charged to the customer, correcting his VAT (MOSS) return …).

5.5.6. When should the customer communicate his VAT identification?

A customer who upon purchase is in the process of registering, will be unable to communicate a VAT identification number and could then see himself be treated as a non-taxable person by the supplier. Once registered, the customer will however be in a position to communicate his VAT identification number. If he does so, the supplier can no longer rely on the option laid down in the second subparagraph of Article 18(2).

Communication would need to be timely and should therefore be done within a reasonable time span. Suppliers are able to foresee in their contractual arrangements what they consider as a "reasonable time span". It could also be that under national law, communication would need to be made within a certain time span.

5.5.7. Can a customer who is a taxable person but has been treated as a non-taxable person by the supplier recover the VAT charged to him by that supplier?

If the customer does not communicate his VAT identification number, the supplier may decide to treat him as a final consumer and charge VAT. That VAT should not, in normal circumstances, have been charged by the supplier. If this is the case, the VAT that has been charged can be recovered but not from the tax authority through any of the normal deduction/refund procedures. The customer will instead need to engage with the supplier to rectify the situation.

5.5.8. What should be done where a customer communicates a VAT identification number but the supplier has doubts about the status of the customer or the capacity in which he is acting?

In accordance with Article 18(1)(a) the supplier may regard the customer as a taxable person when the latter communicated his VAT identification number, the number was sucessfully verified in VIES and there is no information suggesting that the customer is not a taxable person. Therefore in the case where, on the basis of other available information, the supplier has doubts about the status of the customer or the capacity in which he is acting, he could decide that the communication of the VAT identification number in itself is not sufficient to treat the customer as a taxable person. In his decision the supplier should take into account the wording of Article 19.

5.5.9. Is there a contradiction between the option provided under the second subparagraph of Article 18(2) and the requirement existing in some Member States to include the VAT identification number on the invoice in order for the supplier to be able not to charge VAT in respect of cross-border supplies of services?

No, there is no contradiction between those two elements. The second subparagraph of Article 18(2) gives an option for the supplier when the customer did not communicate his VAT identification number. However in the cases where Member States are more strict in their requirements for accepting that it is justified, in the absence of the VAT number of the client, that VAT is not charged by the supplier on cross-border supplies of services, the choice for the supplier not to use this option (to treat the customer as a final consumer) will in practice be limited.

6. CUSTOMER ESTABLISHED OR RESIDING IN MORE THAN ONE COUNTRY (ARTICLE 24)

6.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 24

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned

6.2. Background

For B2C supplies, the place of taxation depends on where the final consumer is established or has an establishment (if it is a non-taxable legal person) or where he has his permanent address or usually resides (in the case of a natural person).

6.3. Why was there a need for clarification?

Where a customer is established or resides in more than one country, this could give rise to conflicts concerning jurisdiction between Member States as to which, if any, would have the right to tax. This could result in double taxation.

Priority should be given to the place that best ensures taxation at the place of actual consumption of the services. To clarify that concept, further guidance was however necessary.

6.4. What does the provision do?

Article 24 gives the necessary guidance to avoid conflicts between Member States that could see the supplier being faced with double taxation where the final consumer is established or resides in more than one country.

It is relevant in those situations where the services supplied to a final consumer are taxable at the place where the final consumer belongs like in the case of telecommunications, broadcasting and electronic services (Article 58 of the VAT Directive).

Where such services are supplied to a non-taxable legal person priority will be given to the place where the functions of its central administration are carried out (point (a)). This is the case unless there is evidence that the services are used at another establishment of that non-taxable legal person.

If the supply is made to a natural person, the usual residence of that person should be given priority (point (b)). The permanent address should be used only if there is evidence that the services are used there.

The purpose is, as pointed out in Recital 7 of Regulation 1042/2013, to give priority to the place that best ensures taxation at the place of actual consumption of the services.

6.5. Detailed issues arising from this provision

6.5.1. How should the presumptions in Articles 24a and 24b be applied where the customer is established or resides in more than one country?

This provision seeks to avert conflicts of jurisdiction between Member States as to which, if any, has the right to tax.

Where one of the specific presumptions laid down in Article 24a or in points (a), (b) or (c) of Article 24b applies the place of supply is identified by reference to particular indicators that point to the place where the customer is established or resides[12]. Therefore a conflict between two places of establishment or residence could only arise if a tax authority would rebut one of the specific presumptions because there are indications of misuse or abuse by the supplier. If after the rebuttal of one of those presumptions, on the basis of available information, the customer is identified as being established or residing in more than one Member State Article 24 would be relevant.

If none of the specific presumptions applies, the place where the customer belongs is presumed to be the place identified as such by the supplier on the basis of two items of non-contradictory evidence pursuant to point (d) of Article 24b. It is particularly relevant in that case, if on the basis of available information, the customer is identified as being established or residing in more than one Member State, to look to Article 24 for guidance.

6.5.2. How should Article 24f dealing with evidence, be applied where the customer is established or resides in more than one country?

Article 24f gives a non-exhaustive list of items of evidence which could be used by the supplier when identifying the place where a final customer is established, has a permanent address or usually resides. In the cases where, on the basis of available evidence, the supplier identifies two countries where the customer is established or resides, he must choose the country of taxation in accordance with Article 24 (see also point 6.4).

[12] The scope of the specific presumptions from Articles 24a and 24b(a)-(c) is described in more detail in Chapter 7.

7. PRESUMPTIONS FOR LOCATION OF CUSTOMER (ARTICLES 24A AND 24B)

7.1. Relevant provisions

The relevant provisions can be found in the VAT Implementing Regulation:

Digital supplies at a physical location of the supplier:

- Article 24a

Digital supplies through a fixed land line:

- Article 24b, point (a)

Digital supplies via mobile networks:

- Article 24b, point (b)

Digital supplies using a decoder:

- Article 24b, point (c)

Other digital supplies:

- Article 24b, point (d)

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

7.2. Background

As from 1 January 2015, in accordance with Articles 44 and 58 of the VAT Directive, telecommunications, broadcasting and electronic services will, in all cases, be taxable at the place of the customer. That is the case irrespective of whether those services are supplied by EU or non-EU businesses and independently of the status of their customer (as a taxable or a non-taxable person).

7.3. Why was there a need for clarification?

Telecommunications, broadcasting and electronic services (digital services) are usually supplied at a distance and the supplier needs to be able to determine in an easy way the location of his customer, so that the VAT treatment can be automated imposing as little administrative burden as possible.

Where each single supply may be of small value but at the same time the number of transactions is very high, there is a need for presumptions to facilitate the practical application of the rules applicable from 2015. There are also situations where, because of the particular setting in which the digital service is supplied it is very difficult to identify not only the location but also the status of the customer. Also in those cases a presumption is needed. All these presumptions must obviously be consistent with the rules set by the VAT Directive.

The presumptions are intended to offer some flexibility in terms of future IT developments. With technology constantly changing, it is likely that new telecommunications, broadcasting and electronic services will come on to the market. If the scope of the presumptions is too restrictive, there would be a risk that they may not serve their purpose.

7.4. What do the provisions do?

The provisions included in subsection 3a provide for presumptions where it is extremely difficult, if not practically impossible, for the supplier to know where the customer is actually established, has his permanent address or usually resides. To facilitate application, presumptions are given for the location of the customer.

Most of the presumptions deal with the application of the rules applicable as from 1 January 2015 (Articles 24a and 24b)[13]. In setting those presumptions, account is taken of the technical IT solutions currently available for businesses.

For a given presumption to apply the supply needs to be made under certain prescribed circumstances. It is also important to remember that all of the presumptions included in subsection 3a are rebuttable.

Subsection 3a is closely linked with subsections 3b and 3c. Subsection 3b deals with the rebuttal of presumptions by the supplier or by a tax authority (in the latter case only if there are indications of misuse or abuse by the supplier). Subsection 3c focuses on evidence for the identification of the location of the customer and rebuttal of presumptions. Further explanations on subsections 3b and 3c are given in Chapters 8 and 9.

7.4.1. Presumption applicable for both B2B and B2C supplies

Article 24a provides for a rebuttable presumption applicable for Articles 44, 58 and 59a of the VAT Directive. That means that it covers both B2B and B2C supplies. If that had not been the case the initial purpose of the presumption would be lost as the supplier would then have to monitor each transaction in order to check whether his customer is a business or a private individual.

This presumption applies to digital services provided at certain physical locations (paragraph 1). That is also the case where the physical location is situated on board a ship, aircraft or train carrying out a passenger transport operation (paragraph 2).

It does not cover however ‘over the top’ services. Those are services which can only be delivered thanks to a connection that is established via the communication networks but do not require the physical presence of the recipient at the location where the service is supplied. The underlying service (which under specific conditions may be covered by Article 24a) allowing for ‘over the top’ services to be delivered is normally a telecommunications service.

[13] Subsection 3a also contains Article 24c which provides a presumption for the application of Article 56(2) of the VAT Directive according to which the hiring of means of transport, other than short-term hiring, to a non-taxable person is taxable at the location of the customer. There will be separate Explanatory Notes on the VAT changes on the place-of-supply rules for long-term hiring of means of transport that entered into force in 2013.

The applicability of each presumption has to be assessed by the supplier on the basis of available information (*i.e.* any information a supplier has or should have had).

7.4.1.1. Digital supplies at a physical location of the supplier

With the presumption as laid down in Article 24a(1) a supplier can assume that the customer is established, has his permanent address or usually resides at the place of the location where the service is being supplied by him and where the customer is present in person because his physical presence is required for receiving that service. That would then be the place where the service supplied by that supplier is taxable.

The list of examples of locations (telephone box, telephone kiosk, wi-fi hot spot, internet café, restaurant, hotel lobby) is only illustrative and the presumption could therefore apply where supply is made at another similar location. It however requires that the basic conditions of the presumption are met.

This presumption only covers the services rendered by the supplier at his location but not services supplied by other service providers. Therefore it will cover the case where a fee is paid by the customer to be able to surf on the Internet during 1 hour spent in an internet café, but not downloads made by him from the Internet. The latter services (which can be referred to as 'over the top' services) do not require to be supplied at the physical location of the supplier and are therefore not covered by the presumption in Article 24a(1).

For example, a UK resident customer goes on a holiday in Spain and buys a two-hour access credit to be able to use an internet connection at a resort's internet café. Pursuant to Article 24a(1), the credit is subject to Spanish VAT. Any other supplies (over the top services) bought by the customer while using the connection will not be covered.

If the same customer would buy and download MP3 songs from an online-sales platform **not** through the wi-fi connection of the internet café but through his UK mobile operator's network then Article 24a does not apply. Firstly the telecommunications service does not in that instance require the physical presence of the customer at the internet café. Secondly downloading MP3 songs is in any case an 'over the top' service. Therefore in this second situation if the customer is using his UK mobile phone (*i.e.* the mobile country code of the SIM card is the UK), then UK VAT will be applicable on the telecommunications service and on the sale of the MP3 song.

The presumption covers all three types of services so as to accommodate for services with similar features being supplied under the same circumstances (supplied to a customer at the physical location of the supplier, without knowing the exact location of the customer – *i.e.* where he is established, has a permanent address or usually resides).

It is first and foremost relevant for telecommunications services as the services mainly concerned would be 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). However, it could also apply to certain broadcasting and electronic services, for example in the situation where gaming machines are being operated (in arcades, in pubs, in bars) or entertainment is on offer (gaming relying on localised servers for example in cafés or kiosks).

As the physical presence of the customer at the location is needed for him to receive the services, it is also presumed that these services are effectively used and enjoyed at the place of that location. Only services which do not require physical presence of the customer at the supplier's location can be used and enjoyed elsewhere.

7.4.1.2. Digital supplies at a physical location of the supplier on board means of transport

Complications could arise if telecommunications, broadcasting or electronic services are being supplied at a location which is moving. Where the location is situated on board a ship, an aircraft or a train carrying out a passenger transport operation effected within the EU, the country of that location is therefore deemed to be the country of departure of the transport. That follows from Article 24a(2).

Reference is made to *'passenger transport operation effected within the Community pursuant to Articles 37 and 57 of the VAT Directive'*. That means that the deeming provision in Article 24a(2) only covers **the section of the passenger transport operation effected within the Community** as defined in Articles 37(2) and 57(2) of the VAT Directive. Other parts of a passenger transport operation (including journeys outside the EU) are therefore not covered by that provision.

Article 37(2) (as well as Article 57(2)) of the VAT Directive defines **the section of passenger transport operation effected within the Community** as being *'the section of the transport operation which takes place, without a stopover outside the Community, between the point of departure and the point of arrival of the transport'*. It also clarifies that the point of departure of a passenger transport operation is the first scheduled point of passenger embarkation within the EU, where applicable after a stopover outside the EU.

It should be underlined that in accordance with Articles 15 and 35 the section of passenger transport operation effected within the EU needs to be determined by the journey of the means of transport and not by the journey completed by each of the passengers.

As the territorial scope of the presumption in this case is directly based on that definition, the reference to '*the country of departure*' should be understood in the same way as '**the point of departure**' is defined by Articles 37 and 57 of the VAT Directive. No room for manoeuvre is left for an extension of its territorial application.

To illustrate this, if a cruise starts in Spain, calls at Portugal and France and completes its voyage in the UK and the cruise operator provides telecommunications, broadcasting or electronic services in such a way that the physical presence of the customer is required (for example via a bespoke network) then Spanish VAT should be paid by the supplier in relation to these services.

The application of the presumption in Article 24a(2) has not been extended to the situation where the supply is made outside the section of a passenger transport operation effected within the EU (which also includes international journeys) as that would run counter to the logic currently applied for on-board supplies in general (as included in Articles 37 and 57 of the VAT Directive). In other words the presumption included in paragraph 2 cannot be applied to on-board supplies beyond the section of passenger transport operation effected within the EU.

Telecommunications, broadcasting and electronic services supplied on board ships, aircraft or trains carried out **outside the section of passenger transport operation effected within the Community** (in the sense as explained above) are therefore covered by Article 24a(1) or, if the conditions of that presumption are not met, by one of the other presumptions included in Article 24b (in practice that will be either the specific presumption based on the use of a SIM card or the general presumption).

Therefore if a cruise starts in Spain, calls in Morocco and Tunisia and completes its journey in Italy, Article 24a(2) will not apply as the journey will not take place within the section of passenger transport operation effected within the Community.

In such a case if services (*e.g.* roaming services) provided on board require the physical presence of the customer then Article 24a(1) will need to be used, *i.e.* the physical location of the boat at the moment a service is provided will be decisive. In practice in the example where a cruise starts in Spain, calls in Morocco and Tunisia and completes its journey in Italy, this means that in Spanish territorial waters, Spanish VAT will apply; in Italian territorial waters, Italian VAT will apply; outside EU territorial waters no EU VAT will apply.

However where a customer purchases such services from his normal operator as an element of the overall package of mobile services it should be clear that these services are exclusively covered by Article 24b(b) and the country code of the customer's SIM card will be decisive.

7.4.2. Presumptions applicable only to B2C supplies

Article 24b provides for rebuttable presumptions for certain supplies covered by Article 58 of the VAT Directive. The presumptions apply to B2C supplies only.

These presumptions are limited in scope and therefore do not extend to B2B supplies including cases of mixed use, where Article 44 of the VAT Directive instead applies.

The applicability of each presumption has to be assessed by the supplier on the basis of available information (*i.e.* any information a supplier has or should have had). Therefore it may happen that some services will not be covered by these specific presumptions because of the lack of available information on how they were delivered to the customer. In some instances it may concern certain 'over the top' services[14] but other services may also be affected.

7.4.2.1. Digital supplies through a fixed land line

Point (a) of Article 24b deals with cases where services are supplied to the customer (a non-taxable person) via a fixed land line connected to a building. As that is normally the place where the service will be used, the presumption is that the customer belongs there.

This presumption is not limited in scope but will cover any supply of telecommunications, broadcasting and electronic services made via a fixed land line. For the presumption to apply the supply must be made to the non-taxable person via **his** fixed land line. There must therefore be a link between the fixed line and the customer in question to indicate that the customer actually belongs at the place of installation of the fixed land line. That would cover a fixed land line which is residential (whether installation is made for the owner of the building or for a tenant) or the like (where installation is made at a building used by a non-taxable legal person for its activities) but not the situation where the place of installation of the fixed land line is one used for running a business.

This means that when services are supplied to a customer via his fixed land line, the customer is presumed to be actually located there and the supplier will be able to rely on that (regardless of whether the fixed land line belongs to that supplier or to a third party)

[14] A definition of 'over the top' services can be found in point 1.6.

unless he can rebut this presumption on the basis of three items of evidence. If, for example, the services are supplied to a fixed land line installed in a summer house but the supplier has 3 items of non-contradictory evidence indicating that his customer is established or resides elsewhere (*e.g.* the billing address, bank details and other commercially relevant information indicating another Member State than that of the fixed land line), then the presumption could be rebutted by the supplier. Where the supplier rebuts the presumption the supply will be deemed to be supplied at the location indicated by those 3 items of evidence.

In the case where, in a given location, apart from a fixed land line, a decoding device or a viewing card is also being used for supplying the services then the presumption that has its basis in the fixed land line, takes precedence.

7.4.2.2. Digital supplies via mobile networks

Point (b) of Article 24b covers the cases where the customer (a non-taxable person) makes use of a SIM card to receive telecommunications, broadcasting or electronic services (regardless of whether these are pre-paid credits or post-paid services).

A SIM card will mostly be used in the country indicated by the mobile country code attributed to the card and the country of issue of the SIM card is therefore key in establishing where the customer belongs for the purposes of determining in the place of supply. The presumption is that the customer is established, has his permanent address or usually resides there.

This presumption is particularly useful in the case of pre-paid credits on a SIM card because such credits can be used for much more than paying for telephone calls or accessing the Internet[15] and the supplier of the credits cannot know in advance what the customer will use those credits for.

In both cases (pre-paid credits and post-paid services) the supplier will be able to rebut the presumption if he has 3 items of non-contradictory evidence indicating that his customer is established elsewhere.

7.4.2.3. Digital supplies using a decoder

Point (c) of Article 24b states that where a decoder or similar device or a viewing card is needed to receive the services, the customer (a non-taxable person) can be presumed to belong where the device is located or where the viewing card is sent to for use there. The presumption does not apply in cases where the device is sold and the supplier does not and cannot know where it will be located or where the viewing card is sold but not sent to the customer. If, in a given location, a fixed land line is used together with a device or viewing card for the services to be supplied then the presumption in point (a) of Article 24b applies.

7.4.2.4. Other digital supplies

All supplies of telecommunications, broadcasting and electronic services not covered by a specific presumption (included in Article 24a or points (a), (b) or (c) of Article 24b), are

[15] The SIM card country code presumption is only relevant for supplies of telecommunications, broadcasting and electronic services to determine their place of taxation and not for other supplies that the pre-pay credits may be used for as payment.

dealt with by point (d) of Article 24b. Under that provision, the customer will be presumed to belong at the place identified by the supplier on the basis of two items of non-contradictory evidence.

This general presumption should apply only if it is not possible for a specific presumption to be used. Therefore if the supplier does not have and could not have collected (in normal commercial circumstances) information or evidence which would have seen the specific presumption apply he should go beyond that and apply the general presumption. So for example if a service can be supplied via at least two different channels (a fixed land line or mobile networks) and the supplier cannot know and should not have known which one actually was used by the customer for receiving the service he should opt for the general presumption.

This general presumption is directly linked with Article 24f and provides greater certainty to the supplier, when determining where to tax. It will be for the supplier to decide which two items of non-contradictory evidence he considers most reliable in determining the place where his customer belongs (see also Chapter 9). A balance is struck between the requirement that the burden of proof should not be disproportionate and the need to avoid manipulation and abuse. The perception can vary depending on each stakeholder. It is important to keep it easy and practicable for businesses to comply. On the other hand, it is also important that Member States have sufficient assurance that the services are taxed at the right place.

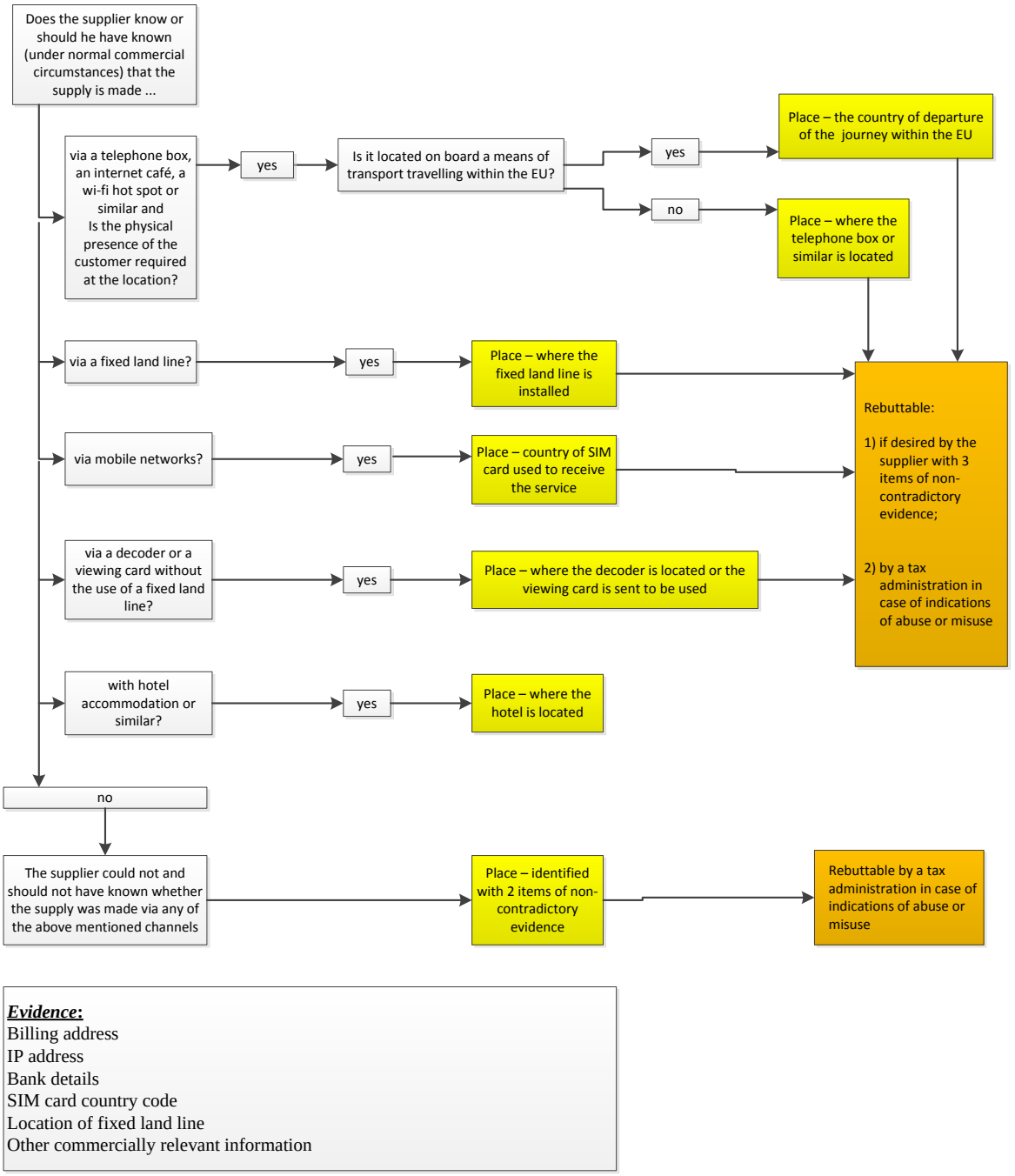
Even if, in some cases, it might be difficult for the supplier to have more than one item of evidence, it should be emphasised that any commercially relevant information can serve as evidence and this should allow sufficient flexibility for the supplier to determine in the right way the location of his customer. The tax administration will be able to contest the supplier's assessment only in the case there are indications of misuse or abuse by the latter (see also Chapter 8).

This presumption, in acting as a 'catch-it-all', has the potential to be 'future-proof' which should ensure that account can be taken of new services and emerging technologies.

7.5. Detailed issues arising from these provisions

7.5.1. What is the interaction between the various presumptions? – the chart

The interaction is illustrated by the following decision chart which shows the presumptions for each type of supply:



7.5.2. *What does a wi-fi hot spot mean?*

See the glossary under point 1.6.

7.5.3. *Are prepaid services covered by the presumption for supplies at a physical location?*

No, as normally those services will not require the physical presence of the customer to be supplied. So where access to *e.g.* wi-fi hot spots is not limited to a specific location, this would not be covered Article 24(a).

7.5.4. Which presumption prevails if there is a possible clash between presumptions?

There might be cases where the various presumptions laid down in Articles 24a and 24b could clash. Seeing that every presumption refers to telecommunications, broadcasting

and electronic services, there could perhaps be some confusion as to which one of the presumptions should be used.

As a first step before answering the question whether there is a clash between presumptions and if so which one should prevail, a factual assessment of the supply should be made. In this respect the supplier is required to use all available information. This obligation extends also to information he should have known (see also Chapter 9).

The problem exists only if one and the same supply of telecommunications, broadcasting or electronic services fulfils the conditions covered by two separate presumptions.

For supplies made through a fixed land line (governed by point (a) of Article 24b) where a decoding device is also required (covered by point (c) of Article 24b), it is clearly stated in the VAT Implementing Regulation that the presumption of the fixed land line prevails.

Further, in situations where there is a doubt whether one of the specific presumptions (included in Articles 24a and 24b(a)-(c)) or the general presumption (Article 24b(d)) applies the former will always prevail.

For example 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 his service. Will the App Store in such a situation be able to use the specific presumption of Article 24b(b) or should it use the general presumption in Article 24b(d)? 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 evidence as required by Article 24b(d).

To sum up if the supplier does not have and could not have collected information which would fulfil the conditions for the specific presumption to apply he should use the general presumption (see also Chapter 9).

7.5.5. How should supplies provided via a SIM card be treated where the mobile country code also covers territories excluded from the application of EU VAT?

Taxation will, under the presumption laid down in Article 24b(b), be based on the country code of the SIM card. For some territories outside the scope of the VAT Directive, there are separate codes whilst for others there are not. For the latter, the presumption could see credits used in those territories subjected to EU VAT.

It is difficult to see how, with the presumption, this issue can be avoided as, at the moment the credits are sold, there would be no knowing where exactly the credits will be used (to take an example: on mainland Spain or in the Canary Islands).

The presumption could be rebutted by the supplier in the case where he has three items of non-contradictory evidence to substantiate that the customer actually belongs outside the EU. That would, however, be subject to any use made of the effective use and enjoyment rule laid down in Article 59a of the VAT Directive.

7.5.6. How to understand the reference to a 'fixed land line'?

The term 'fixed land line' should not be understood too restrictively in order to cover developing new technologies.

See the glossary under point 1.6.

8. REBUTTAL OF PRESUMPTIONS (ARTICLE 24D)

8.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 24d (subsection 3b)

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

8.2. Background

To clarify the tax treatment of B2C supplies of telecommunications, broadcasting and electronic services (as from 1 January 2015), presumptions for the place where the customer belongs have been put in place. They are included in Articles 24a and 24b featured in subsection 3a.

8.3. Why was there a need for clarification?

All the presumptions included in subsection 3a are rebuttable. Most presumptions are put in place to provide suppliers with guidance on where the place of taxation is in situations where the place where the customer belongs is practically impossible to determine or cannot be determined with certainty.

This does not change the basic rule by which these services are taxable at the place where the customer is established, has his permanent address or usually resides. Where information is available to determine the place where the customer actually belongs, the possibility therefore still remains for a presumption to be rebutted.

In this context, clarity is needed as to what would be required to rebut a presumption and who could do so.

8.4. What does the provision do?

Article 24d clarifies that a presumption can be rebutted by the supplier and, under certain conditions, by a tax authority. Rebuttal by the customer is not possible: determining the actual place of taxation is the responsibility of the supplier who is the one liable to pay over VAT on the services supplied to the right tax authority. This provision also specifies the level of evidence required to rebut a presumption.

8.4.1. Rebuttal by the supplier

Where a presumption is not already linked to the collection of evidence by the supplier from his customer, rebuttal is possible on the basis of three items of non-contradictory evidence. It is relevant with regard to the presumptions in Article 24a and in points (a), (b) and (c) of Article 24b. Those are specific presumptions.

Where, in the case of any of those presumptions, a supplier has sufficient evidence to indicate that the customer is established, has his permanent address or usually resides elsewhere, he can rebut the presumption.

A supplier is not obliged to rebut a presumption. Even though there can be evidence to the contrary, the supplier may for determining the place where the customer belongs decide to rely on the presumption and disregard evidence to the contrary.

For supplies not covered by any of the specific presumptions, evidence is needed to determine where the customer belongs. That is dealt with by the general presumption in point (d) of Article 24b.

If neither Article 24a nor Article 24b(a)-(c) applies, the presumption is that the customer is established, has his permanent address or usually resides at the place identified by the supplier based on two items of non-contradictory evidence collected by him. By setting in Article 24b(d) the level of evidence at two items, the general presumption already allows for adjustment where more than two items of evidence are available. It is therefore only in the case of the specific presumptions that the rebuttal provided for in Article 24d is relevant.

8.4.2. Rebuttal by a tax authority

Presumptions have been put in place to clarify the tax treatment of B2C supplies that are taxable at the place where the customer is established, has his permanent address or usually resides. For the supplier it is important to know that he can rely on a presumption.

To ensure legal certainty, the scope for a tax authority to rebut a presumption is limited to situations where there are indications of **misuse or abuse by the supplier**. That could include cases where a supplier adopts a practice that would see the place of supply incorrectly determined in relation to a proportion of his customers that is not negligible, even if this may not necessarily result in a clear tax advantage for the supplier or his customers. It however only implies deliberate actions or negligence on the part of the supplier and would therefore not cover genuine mistakes.

For example, it could be taken as misuse or abuse if a mobile virtual network operator[16] established in low VAT rate Member State A would market mobile telephony services to customers in high VAT rate Member State B, issuing and selling SIM cards to those customers with the country code of Member State A.

A tax authority can rebut any of the presumptions in cases where there are indications of misuse or abuse by the supplier. That includes the general presumption that allows the supplier to determine the location of the customer on the basis of two items of non-contradictory evidence. If that evidence is manipulated, the tax authority could decide to rebut the presumption.

There is no particular mention of the evidence that a tax authority could use to rebut a presumption. A list of items of evidence is included in Article 24f but given that the presumption can only be rebutted if there are indications of misuse or abuse, it does not restrict the tax authority in its use of evidence.

The provision and control of evidence of the actual place where the customer belongs could, in some instances, impose a disproportionate burden, or pose problems of data protection. Therefore rebuttal should be kept to a minimum. That is particularly so where the service is occasional, habitually involves small amounts and requires the physical

[16] A Mobile Virtual Network Operator (MVNO) is a wireless communications service provider who does not own the wireless network infrastructure over which services are provided to its customers.

presence of the customer as is the case with supplies covered by the presumption in Article 24a.

8.5. Detailed issues arising from this provision

8.5.1. Where a presumption applies, is the supplier required to look for further evidence?

Articles 24a and 24b provide for presumptions to be made regarding the place where the customer belongs. The supplier may rely on the relevant presumption to determine the customer's place (provided that requirements for that presumption are fulfilled) unless he chooses to rebut the presumption under Article 24d.

The supplier is not required to look for other evidence or to undertake an examination of items of evidence already available unless he chooses to do so. It is only when he decides to rebut the presumption that Article 24d requires the use of three items of non-contradictory evidence. In either case (use of the presumption or rebuttal of it by the supplier), a tax authority will only be able to rebut the assessment made by the supplier if there are indications of misuse or abuse by him.

8.5.2. Can presumptions always be rebutted?

As a rule all the presumptions in subsection 3a can be rebutted in accordance with Article 24d.

The rebuttal of the presumptions is however limited. It is true in particular where Article 24a applies.

Article 24a provides that when telecommunications, broadcasting and electronic services are supplied at certain physical locations where it is extremely difficult for the supplier to know who the customer is or to verify where that customer actually belongs, the customer is deemed to belong at the place of that location.

Article 24a should be read together with Recital 10 of Regulation 1042/2013 according to which it could impose disproportionate burden or pose problems of data protection to do so if a service is occasional, habitually involves small amounts and requires the physical presence of the customer.

In many of the cases covered by Article 24a, each supply made at those locations will in practice be occasional and of a very low value. It was therefore agreed that normally in those cases a 'de minimis'[17] rule should be applied. This should ensure that a disproportionate burden is not put on businesses which would otherwise have to verify whether there could be evidence to rebut the presumption for each single service supplied in those locations.

[17] The term 'de minimis' is generally used to describe something that is too small or insignificant to be considered. The term comes from the Latin phrase, 'de minimis non curat lex', which means that the law does not deal with trivial matters.

8.5.3. Is it possible to rebut the presumption in Article 24a when supply is made to a taxable person?

Telecommunications, broadcasting or electronic services supplied to a taxable person are taxable at the place where that taxable person is established. If the supplier provides those services at the location of the supplier and where the physical presence of the taxable person is required for him to receive these services, the presumption in Article 24a will however apply and the supplier should be able to rely on it.

For the rebuttal of this presumption, the provision has to be read in conjunction with Article 24d(1).

Article 24d(1) only refers to Article 58 of the VAT Directive in order to list the three types of services covered – telecommunications, broadcasting and electronic services. This reference does not limit its application only to non-taxable persons (final consumers) and it therefore also covers taxable persons as far as Article 24a is concerned.

The presumption could therefore be rebutted if the customer provides sufficient evidence accepted by the supplier, although the scope for such rebuttal would be limited given that this presumption should be seen as a 'de minimis' rule (see also point 8.5.2).

8.5.4. Can the presumption in Article 24a be rebutted where a Member State applies the effective use and enjoyment rule in Article 59a of the VAT Directive?

The effective use and enjoyment rule (from Article 59a of the VAT Directive) derogates from the general rules according to which the place of supply of services should be determined according to Articles 44, 45, 56, 58 and 59 of the VAT Directive (for Article 58 it applies as from 1 January 2015).

Article 59a of the VAT Directive states that in order to prevent double taxation, non-taxation or distortion of competition, Member States may decide to shift the place of supply of services. Therefore Member States could consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the EU if those services are effectively used and enjoyed outside the EU and vice versa.

The presumption in Article 24a allows a supplier to assume that the customer is established, has his permanent address or usually resides at the place of the location where the services are being supplied by him and where the customer is present in person because his physical presence is required for receiving those services.

As the physical presence of the customer at the location is needed for him to receive the services, it must be presumed that these services are effectively used and enjoyed at the place of that location. Services used and enjoyed elsewhere are likely to be the subsequent services supplied by a service provider other than the one supplying at the physical location. These subsequent services (for example downloads made over the Internet) referred to as 'over the top' services (see the glossary under point 1.6) are not covered by the presumption.

Taking into account the underlying assumption of effective use and enjoyment of the services at the location where they are rendered, the situations where this presumption could be rebutted as a result of the services effectively being used and enjoyed elsewhere will be very limited if any.

9. EVIDENCE FOR IDENTIFICATION OF LOCATION OF CUSTOMER AND REBUTTAL OF PRESUMPTIONS (ARTICLE 24F)

9.1. Relevant provisions

The relevant provision can be found in the VAT Implementing Regulation:

- Article 24f (subsection 3c)

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

9.2. Background

As from 1 January 2015, the supply of telecommunications, broadcasting and electronic services will, in all cases, be taxable at the place where the customer is established, has his permanent address or usually resides.

To clarify the tax treatment of B2C supplies, rebuttable presumptions for the location of the customer have been put in place.

9.3. Why was there a need for clarification?

Specific presumptions are put in place with guidance on what is the place of taxation in situations where the place where the customer belongs is practically impossible to determine or cannot be determined with certainty. Each specific presumption can be rebutted by the supplier on the basis of three items of non-contradictory evidence.

Where no specific presumption applies, it is presumed that the customer is established, has his permanent address or usually resides at the place identified as such by the supplier on the basis of two items of non-contradictory evidence.

In this context it was necessary to clarify what type of evidence could be used to identify the place where the customer belongs or to rebut a presumption.

9.4. What does the provision do?

For telecommunications, broadcasting or electronic services, Article 24f lists evidence which in particular should be used by the supplier to identify the place where his customer is established, has a permanent address or usually resides or which could be used by him to determine where that customer actually belongs.

The provision is relevant where, according to point (d) of Article 24b, it is presumed that the place where the customer belongs is that identified by the supplier as such on the basis of two items of non-contradictory evidence. It could also be relevant where, on the basis of three items of non-contradictory evidence, the supplier would want to rebut one of the specific presumptions.

This list of evidence is illustrative: the words ‘in particular’ are included to ensure that Member States and business are fully aware that it is an indicative, non-exhaustive list. Businesses operate different business models and the evidence that they collect in relation to their customers can differ.

For that reason, the list also includes a reference to 'other commercially relevant information'. It allows for other items of information not specifically included in the list to be used as evidence for the identification of the place where the customer belongs and rebuttal of presumptions.

No one item of evidence suits all businesses nor would it necessarily be appropriate for the same items to be used in all circumstances. There is therefore no priority given to one or the other item of evidence included in the list. This should give sufficient flexibility for businesses so that the changes they will be facing in the run up to 2015 would be more limited.

9.5. Detailed issues arising from the provision

9.5.1. What is covered by 'other commercially relevant information'?

The list of evidence in Article 24f includes a reference to other commercially relevant information. This point takes into account the fact that businesses have very different business models and makes it more flexible for them to apply these provisions in practice.

It cannot be excluded that there will be cases where the only items of evidence available will be those referred to as 'commercially relevant information'. That does not imply that only one item of evidence in itself will be sufficient to determine the place where the customer belongs. Rather commercially relevant information as a whole (two separate items or more) may provide supporting evidence overall – when taken together – as to the customer and where he belongs.

In such a situation the choice made by the supplier has to take into account the reliability of the information available. The supplier should also be able to justify why this information is relevant to him.

It would be impossible to mention all the different items that could be covered under 'commercially relevant information'. As previously said, business models are very different and one item which would be reliable for one of them could be highly unreliable for another one.

Some of the items which, depending on the circumstances under which the concrete business is conducted, could be used as 'commercially relevant information' are the following:

(1) Unique payment mechanisms – When a customer uses one of the methods of payment unique to a particular Member State, it provides accurate information identifying the Member State in which the supply was made. It could be taken as an indication as to where the customer belongs.

(2) Consumer trading history – When a customer has an established relationship with a business, records from prior transactions could provide a reliable indicator for future transactions. This information includes the historical IP address of the customer, billing address, place of predominant consumption, *etc*.

(3) Gift card point of sale – When a gift card is sold to a customer who is physically present at a retail establishment, it is likely that the customer will be local to the country in which the establishment is located.

(4) Country-locked gift cards – When gift cards are country-locked and can only be used in the country of issue (this restriction is stated clearly on the face of the card), the Member State in which the card is locked could be indicative of where the customer belongs in much the same way that a café or hotel that sells wi-fi access in a public area is treated as being the place of that customer.

(5) Documentation of third-party payment service providers – In many countries, payment service providers verify at least part of the billing address of a payment method before approving a transaction. Usually this information is not shared with the payment service provider's customer (*i.e.*, sellers of electronic services) for data protection and security reasons. However, when the payment service provider shares the information with the supplier of the service acquired, that information could be used as 'commercially relevant information'.

(6) Customer self-certification – When the subscriber provides confirmation (*e.g.* within the online ordering process) regarding his country, his bank details (especially information where a bank account is) and credit card information, this could be taken to be 'commercially relevant information'.

9.5.2. What may or may not be considered as a 'billing address'?

Article 24f refers to the billing address which could serve as evidence when identifying the place where the customer actually belongs or rebutting the relevant presumption. Its purpose is to help the supplier to pinpoint where the customer is established, has a permanent address or usually resides.

For those reasons an electronic address to which an electronic invoice is sent, seen by many as a billing address, cannot serve as an item of evidence in this respect. For telecommunications, broadcasting or electronic services although the IP address cannot be taken as a billing address, it is recognised as a valid item of evidence which can be used by the supplier when identifying the customer.

In addition, a postal address (PO box) should not be seen as sufficient to indicate the place where a non-taxable customer belongs. That reflects the approach taken as regards taxable persons in Article 10(3).

9.5.3. What is the relation between Article 24f (list of evidence) and Article 24d(1) (rebuttal of a specific presumption by the supplier)?

The list of evidence in Article 24f is only of importance when a supplier would want to rebut one of the specific presumptions determining the place where the customer belongs included in Articles 24a and 24b(a)-(c)[18]. It is only in these circumstances then that the evidence listed in Article 24f may be used to rebut the presumption.

9.5.4. How much detail does the supplier need when verifying the evidence?

Article 23 states that when establishing the place where the customer belongs, the supplier should base himself on factual information provided by the customer and that he should verify it by normal commercial security measures such as those relating to identity or payment checks.

[18] The scope of the specific presumptions from Articles 24a and 24b(a)-(c) is described in more detail in Chapter 7.

It should be recognised that 'normal commercial security checks' in many instances will not provide 100% accuracy in identifying the place where each individual customer belongs.

In many cases, the customer will have a regular relationship with the supplier. In those situations it seems reasonable that after the initial more in-depth verification of the information regarding the customer made by the supplier (examination of address, credit card, etc., in particular upon registering for an account with the business), the latter should not be required to verify it once again for each separate transaction. For subsequent purchases (especially for frequent ones), customers will need only to submit an order and the supplier should then be able to use the previously supplied and verified location and payment information.

Nevertheless a pro-active verification should take place on a regular basis (in line with normal commercial practice) but it should not be required to do so for each purchase.

9.5.5. When are two and when are three items of non-contradictory evidence needed?

Two items of evidence are needed in all the cases where none of the specific presumptions for telecommunications, broadcasting and electronic services (included in Articles 24a and 24b(a)-(c)[19]) can be applied.

All other supplies comprised by Article 58 of the VAT Directive are covered by Article 24b(d) which requires two items of non-contradictory evidence when identifying the place where the customer belongs.

Three items of non-contradictory evidence are only necessary when the supplier would want to rebut one of the specific presumptions from Articles 24a and 24b(a)-(c).

Therefore, when one of the presumptions in Articles 24a and 24b(a)-(c) can be applied, the place where the customer belongs will be determined according to the relevant presumption, unless the supplier would want to rebut it using three items of non-contradictory evidence.

In cases where no specific presumption could be applied, the place where the customer belongs should be determined using two items of non-contradictory evidence.

In any case, it should be borne in mind that the items of evidence have to be different and should not duplicate each other. For instance, when the customer gives a billing address and later confirms that same address through self-certification, that can only be taken to constitute a single item of evidence. The same is the case when the customer gives his bank details which in turn refer to an unique payment mechanism or are confirmed by the payment service provider, or when an IP address and the geolocation point to one and the same location. In those cases the supplier can only be seen to have one item of evidence.

9.5.6. What if the items of evidence are contradictory?

It might happen that some businesses collect four or more items of information resulting in two (or more) separate sets of non-contradictory evidence, which point to different places where the customer could belong. It should be underlined that it is the supplier who

[19] The scope of the specific presumptions from Articles 24a and 24b(a)-(c) is described in more detail in Chapter 7.

decides which items of evidence to collect and further, if information gathered is conflicting, which elements he considers as most commercially relevant for identifying most accurately the place where the customer belongs.

In this respect, the criteria to determine the place where the customer belongs are included in Article 24. Where the services in question are supplied to a non-taxable legal person priority should be given to the place where the functions of its central administration are carried out (point (a)). That is so unless there is evidence that the services are used at another establishment of that non-taxable legal person.

If the supply is made to a natural person, the usual residence of that person should be given priority (point (b)). The permanent address should be used only if there is evidence that the services are used there.

The supplier will have to decide which are the items of evidence that are more reliable in determining the place where the customer belongs for his concrete business. For instance, when universal pricing policy is applied *i.e.* the same price will be charged regardless of the country of the customer, consumers have no incentive to mask the place where they belong for tax purposes. In that case, the billing address provided by the customer would therefore be a quite a reliable indicator. Consumer trading history would also be useful in cases where there are different sets of evidence due to purchases made while travelling (holidays, business travels).

To sum up the purpose in the case of conflict is to give priority to the place that best ensures taxation at the place of actual consumption of the services.

In cases where items of evidence are contradictory, verification by the supplier on a regular basis is more needed.

9.5.7. *What if the supplier does not have two items of non-contradictory evidence in the context of Article 24b(d)?*

In the event that a supplier has difficulties to collect two items of non-contradictory evidence to determine the place where the customer belongs, he should nevertheless continue to seek further evidence such as relevant commercial information.

In cases of doubt priority should be given to the place that best ensures taxation at the place of actual consumption of the services supplied.

9.5.8. *What are the indicators of misuse or abuse by a supplier mentioned in Article 24d(2)?*

It is not possible to list possible indicators of misuse or abuse by the supplier. Possibilities are too wide.

As a rule, businesses should not be held liable for misuse or abuse by their customers. However, situations where a supplier applies a presumption (solely) to the benefit of his customer, or where the supplier applies a presumption based on wrong information by his customer although he knew or should have known that the information was wrong cannot as such be excluded from the application of Article 24d(2).

A tax authority may also rebut a presumption in cases of indications of misuse or abuse, such as where the supplier has taken steps to manipulate the presumption to arrange a preferential treatment. This may include, but is not limited to, a lower rate of taxation.

9.5.9. *To what extent may the supplier rely on information provided by a third party (in particular a payment service provider)?*

In many circumstances, taxpayers rely entirely on verifications undertaken by third party trading partners, such as payment service providers and other intermediaries. It is necessary to stress that the correct determination of the place of supply remains with the supplier. Therefore, the fact that verifications are made by third parties does not relieve the supplier of his responsibility in cases of misuse or abuse

9.5.10. *Application of data protection rules in the light of the VAT changes that will enter into force in 2015*

Recital 17 of Regulation 1042/2013 states that '*for the purposes of this Regulation, it may be appropriate for Member States to adopt legislative measures limiting certain rights and obligations laid down by Directive 95/46/EC of the European Parliament and of the Council*[20] *in order to safeguard an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters, where such measures are necessary and proportionate in view of the risk of tax fraud and tax evasion in Member States, and in view of the need to ensure the correct collection of VAT covered by this Regulation*'.

The processing of data may therefore be 'necessary for compliance with a legal obligation to which the controller[21] is subject' (Article 7(c) Directive 95/46/EC) or it can be 'necessary for the purposes of legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed [...]' (Article 7(f)) Directive 95/46/EC).

In other words, the relevant taxable persons would need to be able to process personal data of their customers in order to prove to the tax authorities that they correctly applied the VAT rules on place of supply.

In any case, where data protection rights are limited in order to allow certain processing operations, the characteristics and especially the purpose of such processing should, according to the European Data Protection Supervisor, be specified and explicitly provided for in national law.

[20] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

[21] In accordance with Article 2(d) of Directive 95/46/EC "'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;".

10. SUPPLY AT HOTELS AND SIMILAR LOCATIONS (ARTICLE 31C)

10.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 31c

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

10.2. Why was there a need for clarification?

For all telecommunications, broadcasting and electronic services, as from 1 January 2015, the place of supply will be at the place where the customer belongs, irrespective of whether services are being supplied to a taxable person (B2B) or to a non-taxable person (B2C).

Where these services are supplied in the hotel sector, the status of a customer taken together with the place where that customer belongs can be difficult to ascertain. For the supplier of accommodation, there is a risk of liability which needs to be mitigated.

To alleviate burdens on the businesses concerned and to safeguard revenues, guidance was necessary to clarify the place-of-supply related issues that arise when these services are being provided together with the accommodation.

10.3. What does the provision do?

A practical and pragmatic solution is found with Article 31c which clarifies that when telecommunications, broadcasting or electronic services are supplied together with accommodation in the hotel sector or in sectors with a similar function, the services are regarded as being supplied at those locations.

That only applies where the services are provided by a supplier of accommodation acting in his own name, together with the accommodation provided by that supplier. For Article 31c to apply there must be a distinct supply of these services where the customer is required to pay separately.

It covers supplies made together with accommodation provided in the hotel sector but also where the accommodation is provided in sectors with a similar function, such as holiday camps or sites developed for use as camping sites. Those are the sectors listed in Article 47 of the VAT Directive.

11. SUPPLY OF TICKETS BY INTERMEDIARY (ARTICLE 33A)

11.1. Relevant provision

The relevant provision can be found in the VAT Implementing Regulation:

- Article 33a

Whenever reference is made to an article of the VAT Implementing Regulation, the reference to that particular legal act is omitted and only the article is mentioned.

11.2. Background

The entry to cultural, artistic, sporting, scientific, educational, entertainment and similar events is taxable at the place where the event actually takes place. For a concert, to take an example, that would be the place the concert is performed.

The place of taxation will be the same for supplies made to another business (B2B) or to a final consumer (B2C).

11.3. Why was there a need for clarification?

Where the organiser of an event sells tickets to the event directly to the customer wanting to attend the event, it is clear that any VAT to be paid on the tickets will be due at the place where the event actually takes place.

The tickets sold by the organiser could be distributed through an intermediary. It may be that the taxable person intermediating in the sale of tickets actually buys and sells the tickets in his own name and on his own behalf. The intermediary can however also act in the name and on behalf of the organiser or can be acting in his own name but on behalf of the organiser.

More guidance was needed in order to ensure that the tax is not obscured by the way in which tickets are distributed.

11.4. What does the provision do?

Tickets granting access to a cultural, artistic, sporting, scientific, educational, entertainment and similar event should in all circumstances be taxable at the place where the event actually takes place as provided for under Articles 53 and 54 of the VAT Directive. It should also be the case where the tickets are distributed through an intermediary.

Where the intermediary acts in the name and on behalf of the organiser of the event, the actual sale of the tickets is, in legal terms, made by the organiser.

If the intermediary intervenes in the sale of tickets, acting in his own name and on his own behalf, he acts as a principal when selling the tickets.

The intermediary can however also intervene in the sale of tickets acting in his own name but on behalf of an organiser of the event. In that case, Article 33a clarifies that the intermediary selling the tickets is deemed to have received the service consisting in

granting access to the event and supplied it himself. It is consistent with the legal fiction provided for under Article 28 of the VAT Directive.

In all the three cases, it is evident that the sale of tickets will be taxable at the place where the event actually takes place.

11.5. Detailed issues arising from this provision

11.5.1. Where should tickets booked online be taxed?

Tickets granting access to a cultural, artistic, sporting, scientific, educational, entertainment and similar event are taxable at the place where the event actually takes place. No matter how the tickets are distributed, the tax treatment remains the same.

Where tickets are distributed by electronic means, this does not change the nature of the service supplied. Also, tickets booked online are taxable at the place where the event actually takes place. That is confirmed by Article 7(3)(t) which excludes such supplies from being electronic services (see also point 2.4.3.2).

12. TRANSITIONAL MEASURES (ARTICLE 2 OF REGULATION 1042/2013)

12.1. Relevant provision

- Article 2 of Regulation 1042/2013

12.2. Background

As from 1 January 2015, the supply of telecommunications, broadcasting and electronic services will, in all cases, be taxable at the place where the customer is established, has his permanent address or usually resides.

That is already the case for business to final consumer (B2C) supplies but only where services are supplied to or from the European Union (although for telecommunications and broadcasting services, this is based on effective use and enjoyment).

Within the EU such supplies however remain taxable in the Member State where the supplier is established until the end of 2014. From 2015, those supplies will also be taxable at the location of the customer.

12.3. Why was there a need for clarification?

The moment that VAT must be paid is decided by when the chargeable event occurs (liability) and VAT becomes chargeable (collection).

The chargeable event is defined in Articles 63 and 64 of the VAT Directive. Under Article 63, the chargeable event takes place when goods or services are supplied. In the case of continous supplies Article 64 clarifies that the chargeable event occurs at the expiry of the period for which a successive statement of account or successive payments should be made. By that time, the supply will have been made.

If payment is made on account under Article 65 of the VAT Directive or if a Member State has availed itself of the option in Article 66 of the VAT Directive, VAT can, however, become chargeable prior to or soon after supply, that is to say, prior to or soon after the chargeable event occurs.

Where telecommunications, broadcasting and electronic services are supplied close to 1 January 2015, the change in the place of supply could result in double taxation or non-taxation if the rules applied by Member States as to when VAT becomes chargeable differ.

To avoid situations of double and non-taxation and with a view to facilitate this shift in taxation, transitional measures had to be adopted determining, in a common way, which services supplied around that date would fall under the new rules and which would not.

12.4. What does the provision do?

Article 2 of Regulation 1042/2013 makes it clear that the decisive moment for determining the place of supply is when the chargeable event occurs (and liability is incurred). This applies to normal and continous supplies.

Where the chargeable event occurs before 1 January 2015 the place of supply is where the supplier is established and no tax shall become chargeable in the Member State of the

customer in relation to the same chargeable event (point (c) of Article 2). That would apply irrespective of when the payment is made or when the invoice is issued.

If the chargeable event occurs on or after 1 January 2015, the place where the customer belongs is decisive when establishing where the tax is due (point (b) of Article 2). The moment when the invoice has been issued has no relevance in that respect.

However, where a payment on account regarding the supply in question has been made prior to 1 January 2015, VAT on that payment on account shall become chargeable in the Member State where the supplier is established according to the rules laid down in Article 65 of the VAT Directive (point (a) of Article 2). For any payment that remains and is paid subsequently (on or after 1 January 2015), VAT will be due at the place where the customer belongs.

12.5. Detailed issues arising from this provision

12.5.1. Payments on account made before the supply takes place

Where a payment on account is made before 1 January 2015, the supplier shall charge VAT on it according to Article 65 of the VAT Directive. As the rules in force are still the ones for 2014, VAT on that payment shall become chargeable in the Member State where the supplier is established.

If the service is only supplied on or after 1 January 2015, the rule in point (b) of Article 2 of Regulation 1042/2013 implies that the place of supply for that service would be the place where the customer is established or resides.

It could be thought that, as the place of supply of the service is the Member State of the customer, the supplier should then rectify the invoice, receipt or bill referring to the payment made on account, refunding the VAT paid in the Member State of the supplier and charging the VAT on the Member State of the customer.

That would however imply a huge burden for all parties involved: suppliers, customers and tax administrations, and would run counter to the objective pursued by the transitional measures.

For that reason, guidelines[22] were agreed by the VAT Committee almost unanimously in order to clarify the interpretation that should be conferred to the transitional measures in Article 2 of Regulation 1042/2013, regarding payments made on account.

In those guidelines it was expressly clarified that, where payment on account is made prior to 1 January 2015, the rule in Article 65 of the VAT Directive would apply in all cases, so VAT would be charged in the Member State where the supplier is established, on receipt of the payment and on the amount received.

When the supply is finally made on or after 1 January 2015, VAT shall become chargeable in the Member State of the customer, but only on the amount not covered by any previous payment made on account.

22 http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf

Therefore, if the customer pays on account prior to 1 January 2015 the total amount of the price of the service, VAT shall be charged in the Member State of the supplier and no VAT shall be charged in the Member State of the customer.

Where prior to 1 January 2015 a customer pays on account, for instance, 40 per cent of the total price of the service, VAT shall be charged in the Member State of the supplier (on that 40 per cent). The remaining 60 per cent shall be charged with VAT in the Member State of the customer at the moment the chargeable event takes place or when another payment on account is made on or after 1 January 2015 but before the supply.

The guidelines also make it clear that this rule would only apply in cases where the payment on account is made according to the normal commercial practice of the supplier, that is to say when the supplier had been using that policy to those supplies in the past. If the circumstances of the supply are such as to show that the payment on account was made with the only intention of avoiding taxation in the Member State of the customer (for instance, when the payment on account was not required by the contract or it exceeded the amount stipulated in that contract), this Member State could claim VAT on the transaction according to the rule provided for in point (b) of Article 2 of Regulation 1042/2013.

It should also be borne in mind that, as taxation is split between two Member States, the supplier should be able to prove to the Member State of the customer that a payment on account was actually made before 1 January 2015 and the VAT on that amount was paid to the Member State of the supplier. Therefore, in the invoice, bill or receipt issued when the supply takes place it would be appropriate to include a reference to the invoice, bill or receipt issued when the payment on account was made, and the date when that payment was made.

12.5.2. What impact does the issue of an invoice have on the place of supply?

The date on which the invoice is issued has no relevance regarding the place of supply of the service.

VAT shall be chargeable in the Member State of the supplier or that of the customer depending on the moment the chargeable event occurs or the payment is made. The issue of an invoice does not alter that rule.

12.5.3. What level of proof is required in order to show that a chargeable event has occurred or a payment has been made before 1 January 2015?

The means of proof used by taxable persons in regard to their usual transactions would be those also to be used to prove that a chargeable event has occurred prior to or after 1 January 2015. No special means of proof are required in that respect.

12.5.4. List of examples

Prepaid supplies

Example 1: An advanced payment or a payment on account is made before 1 January 2015 and the supply is also carried out or completed before that date. VAT then becomes chargeable before 1 January 2015 in the Member State of the supplier.

Example 2: An advanced payment or a payment on account is made before 1 January 2015 but the supply is only carried out or completed in 2015 or later. In this case VAT becomes chargeable on the amount of the payment made on account in the Member State of the supplier, at the moment that payment is made. For the amount not covered by the payment on account, VAT becomes chargeable on in the Member State of the customer at the moment the chargeable event takes place.

Example 3: Both the advanced payment and the chargeable event take place after 31 December 2014. VAT then becomes chargeable in 2015 in the Member State of the customer.

Example 4: An advanced payment of 20 per cent of the price is made before 1 January 2015. Another payment on account of 40 per cent is made after 31 December 2014. The service is finally supplied after that second payment on account. VAT becomes chargeable in 2014 in the Member State of the supplier on the first payment on account (20 per cent of the price). VAT becomes chargeable in 2015 in the Member State of the customer on the second payment on account (40 per cent of the price) and on the amount remaining when the supply is completed (40 per cent of the price).

Continuous supplies

Example 5: A continuous supply where the expiry of a period for which a successive statement of account or a successive payment should be made, takes place before 1 January 2015. In this case VAT on the statement or payment should be charged in the Member State where the supplier is established.

Example 6: A continuous supply where the expiry of a period for which a successive statement of account or a successive payment should be made, takes place on or after 1 January 2015, even though the supply began in 2014. In this case, there are three scenarios possible:

(a) The payment is made at the expiry of the period. In this case, as the chargeable event occurs on or after 1 January 2015 and there is nothing to trigger the chargeability of VAT prior to that date, VAT will be due to the Member State of the customer.

(b) The payment of the total amount of the supply is made in advance before 1 January 2015. In this case, VAT is charged in the Member State of the supplier, as the payment triggers the chargeability of the tax.

(c) A payment on account (a forfeit) is made in advance before 1 January 2015. Once the period expires, the customer pays the remaining price of the supply. In this case, VAT is charged on the amount of the payment on account in the Member State of the supplier, at the moment that payment is made. VAT on the amount not covered by the payment on account becomes chargeable in the Member State of the customer at the moment where the period expires.

Supplies for which an invoice is issued before a supply takes place

Example 7: An invoice (or a bill or receipt where no invoice is required) for a one year online access (beginning in 2014 and finalising in 2015) to a newspaper is issued on 20 December 2014. The invoice is paid by the customer on 29 December 2014. In this case, VAT becomes chargeable before 1 January 2015 due to the payment having been

made prior to that date, so it will be charged in the Member State where the supplier is established.

Example 8: An invoice (or a bill or receipt where no invoice is required) for a one year online access (beginning in 2014 and finalising in 2015) to a newspaper is issued on 20 December 2014. The invoice is paid by the customer on 3 January 2015. In this case, the chargeable event takes place after 1 January 2015. The payment is also made after that date. VAT will need to be charged in the Member State of the customer irrespective of the date on which the invoice was issued.

Supplies for which an invoice is issued after the supply takes place

Example 9: The service is completed before 1 January 2015, but an invoice is issued and the payment is made only after that date. In this case the chargeable event has taken place before 1 January 2015, so VAT will be due to the Member State of the supplier.

13. RELEVANT LEGAL PROVISIONS

13.1. VAT Directive

Article 24(2)

….
2. 'Telecommunications services' shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks.

Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.

Article 58

The place of supply of the following services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides:

(a) telecommunications services;

(b) radio and television broadcasting services;

(c) electronically supplied services, in particular those referred to in Annex II.

Where the supplier of a service and the customer communicate via electronic mail, that shall not of itself mean that the service supplied is an electronically supplied service.

Article 59a

In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56, 58 and 59:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community;

(b) consider the place of supply of any or all of those services, if situated outside the Community, as being situated within their territory if the effective use and enjoyment of the services takes place within their territory.

Annex II

(1) Website supply, web-hosting, distance maintenance of programmes and equipment;

(2) supply of software and updating thereof;

(3) supply of images, text and information and making available of databases;

(4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events;

(5) supply of distance teaching.

13.2. VAT Implementing Regulation

Article 6a

1. Telecommunications services within the meaning of Article 24(2) of Directive 2006/112/EC shall cover, in particular, the following:

(a) fixed and mobile telephone services for the transmission and switching of voice, data and video, including telephone services with an imaging component (videophone services);

(b) telephone services provided through the Internet, including voice over Internet Protocol (VoIP);

(c) voice mail, call waiting, call forwarding, caller identification, three-way calling and other call management services;

(d) paging services;

(e) audiotext services;

(f) facsimile, telegraph and telex;

(g) access to the Internet, including the World Wide Web;

(h) private network connections providing telecommunications links for the exclusive use of the client.

2. Telecommunications services within the meaning of Article 24(2) of Directive 2006/112/EC shall not cover the following:

(a) electronically supplied services;

(b) radio and television broadcasting (hereinafter 'broadcasting') services.

Article 6b

1. Broadcasting services shall include services consisting of audio and audio-visual content, such as radio or television programmes which are provided to the general public via communications networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programme schedule.

2. Paragraph 1 shall cover, in particular, the following:

(a) radio or television programmes transmitted or retransmitted over a radio or television network;

(b) radio or television programmes 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.

3. Paragraph 1 shall not cover the following:

(a) telecommunications services;

(b) electronically supplied services;

(c) the provision of information about particular programmes on demand;

(d) the transfer of broadcasting or transmission rights;

(e) the leasing of technical equipment or facilities for use to receive a broadcast;

(f) radio or television programmes distribute via the Internet or similar electronic network (IP streaming), unless they are broadcast simultaneously over traditional radio or television networks

Article 7

1. 'Electronically supplied services' as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.

2. Paragraph 1 shall cover, in particular, the following:

(a) the supply of digitised products generally, including software and changes to or upgrades of software;

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

(c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;

(d) 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;

(e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (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.);

(f) the services listed in Annex I.

3. Paragraph 1 shall not, in particular, cover the following:

(a) broadcasting services;

(b) telecommunications services;

(c) goods, where the order and processing is done electronically;

(d) CD-ROMs, floppy disks and similar tangible media;

(e) printed matter, such as books, newsletters, newspapers or journals;

(f) CDs and audio cassettes;

(g) video cassettes and DVDs;

(h) games on a CD-ROM;

(i) services of professionals such as lawyers and financial consultants, who advise clients by e-mail;

(j) teaching services, where the course content is delivered by a teacher over the Internet or an electronic network (namely via a remote link);

(k) offline physical repair services of computer equipment;

(l) offline data warehousing services;

(m) advertising services, in particular as in newspapers, on posters and on television;

(n) telephone helpdesk services;

(o) teaching services purely involving correspondence courses, such as postal courses;

(p) conventional auctioneers' services reliant on direct human intervention, irrespective of how bids are made;

(t) tickets to cultural, artistic, sporting, scientific, educational, entertainment or similar events booked online;

(u) accommodation, car-hire, restaurant services, passenger transport or similar services booked online.

Annex I

(1) Point (1) of Annex II to Directive 2006/112/EC:

(a) Website hosting and webpage hosting;

(b) automated, online and distance maintenance of programmes;

(c) remote systems administration;

(d) online data warehousing where specific data is stored and retrieved electronically;

(e) online supply of on-demand disc space.

(2) Point (2) of Annex II to Directive 2006/112/EC:

(a) Accessing or downloading software (including procurement/accountancy programmes and anti-virus software) plus updates;

(b) software to block banner adverts showing, otherwise known as Bannerblockers;

(c) download drivers, such as software that interfaces computers with peripheral equipment (such as printers);

(d) online automated installation of filters on websites;

(e) online automated installation of firewalls.

(3) Point (3) of Annex II to Directive 2006/112/EC:

(a) Accessing or downloading desktop themes;

(b) accessing or downloading photographic or pictorial images or screensavers;

(c) the digitised content of books and other electronic publications;

(d) subscription to online newspapers and journals;

(e) weblogs and website statistics;

(f) online news, traffic information and weather reports;

(g) 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);

(h) the provision of advertising space including banner ads on a website/web page;

(i) use of search engines and Internet directories.

(4) Point (4) of Annex II to Directive 2006/112/EC:

(a) Accessing or downloading of music on to computers and mobile phones;

(b) accessing or downloading of jingles, excerpts, ringtones, or other sounds;

(c) accessing or downloading of films;

(d) downloading of games on to computers and mobile phones;

(e) accessing automated online games which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another.

(f) receiving radio or television programmes distributed via a radio or television network, the Internet or similar electronic network for listening to or viewing programmes at the moment chosen by the user and at the user's individual request on the basis of a catalogue of programmes selected by the media service provider such as TV or video on demand;

(g) receiving radio or television programmes via the Internet or similar electronic network (IP streaming) unless the programmes are broadcast simultaneously over traditional radio and television networks.

(5) Point (5) of Annex II to Directive 2006/112/EC:

(a) Automated distance teaching dependent on the Internet or similar electronic network to function and the supply of which requires limited or no human intervention, including virtual classrooms, except where the Internet or similar electronic network is used as a tool simply for communication between the teacher and student;

(b) workbooks completed by pupils online and marked in an automated fashion without human intervention.

Article 9a

1. For the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.

In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

(a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;

(b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.

2. Paragraph 1 shall also apply where telephone services provided through the Internet, including voice over Internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.

3. This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the Internet, including voice over Internet Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services.

Article 13a

The place where a non-taxable legal person is established, as referred to in the first subparagraph of Article 56(2) and Articles 58 and 59 of Directive 2006/112/EC, shall be:

(a) the place where the functions of its central administration are carried out, or

(b) the place of any other establishment characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

Article 18(2)

2. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him.

However, irrespective of information to the contrary, the supplier of telecommunications, broadcasting or electronically supplied services may regard a customer established within the Community as a non-taxable person as long as that customer has not communicated his individual VAT identification number to him.

Article 24

Where services covered by the first subparagraph of Article 56(2) or Articles 58 and 59 of Directive 2006/112/EC are supplied to a non-taxable person who is established in more than one country or who has his permanent address in one country and his usual residence in another, priority shall be given:

(a) in the case of a non-taxable legal person, to the place referred to in point (a) of Article 13a of this Regulation, unless there is evidence that the service is used at the establishment referred to in point (b) of that article;

(b) in the case of a natural person, to the place where he usually resides, unless there is evidence that the service is used at his permanent address.

Subsection 3a
Presumptions for the location of the customer

Article 24a

1. For the application of Articles 44, 58 and 59a of Directive 2006/112/EC, where a supplier of telecommunications, broadcasting or electronically supplied services provides those services at a location such as a telephone box, a telephone kiosk, a wi-fi hot spot, an internet café, a restaurant or a hotel lobby where the physical presence of the recipient of the service at that location is needed for the service to be provided to him by that supplier, it shall be presumed that the customer is established, has his permanent address or usually resides at the place of that location and that the service is effectively used and enjoyed there.

2. If the location referred to in paragraph 1 of this Article is on board a ship, aircraft or train carrying out a passenger transport operation effected within the Community

pursuant to Articles 37 and 57 of Directive 2006/112/EC, the country of the location shall be the country of departure of the passenger transport operation.

Article 24b

For the application of Article 58 of Directive 2006/112/EC, where telecommunications, broadcasting or electronically supplied services are supplied to a non-taxable person:

(a) through his fixed land line, it shall be presumed that the customer is established, has his permanent address or usually resides at the place of installation of the fixed land line;

(b) through mobile networks, it shall be presumed that the place where the customer is established, has his permanent address or usually resides is the country identified by the mobile country code of the SIM card used when receiving those services;

(c) for which the use of a decoder or similar device or a viewing card is needed and a fixed land line is not used, it shall be presumed that the customer is established, has his permanent address or usually resides at the place where that decoder or similar device is located, or if that place is not known, at the place to which the viewing card is sent with a view to being used there;

(d) under circumstances other than those referred to in Article 24a and in points (a), (b) and (c) of this Article, it shall be presumed that the customer is established, has his permanent address or usually resides at the place identified as such by the supplier on the basis of two items of non-contradictory evidence as listed in Article 24f of this Regulation.

Subsection 3b
Rebuttal of presumptions

Article 24d

1. Where a supplier supplies a service listed in Article 58 of Directive 2006/112/EC, he may rebut a presumption referred to in Article 24a or in point (a), (b) or (c) of Article 24b of this Regulation on the basis of three items of non-contradictory evidence indicating that the customer is established, has his permanent address or usually resides elsewhere.

2. A tax authority may rebut presumptions that have been made under Article 24a, 24b or 24c where there are indications of misuse or abuse by the supplier.

Subsection 3c
Evidence for the identification of the location of the customer and rebuttal of presumptions

Article 24f

For the purpose of applying the rules in Article 58 of Directive 2006/112/EC and fulfilling the requirements of point (d) of Article 24b or Article 24d(1) of this Regulation, the following shall, in particular, serve as evidence:

(a) the billing address of the customer;

(b) the Internet Protocol (IP) address of the device used by the customer or any method of geolocation;

(c) bank details such as the location of the bank account used for payment or the billing address of the customer held by that bank;

(d) the Mobile Country Code (MCC) of the International Mobile Subscriber Identity (IMSI) stored on the Subscriber Identity Module (SIM) card used by the customer;

(e) the location of the customer's fixed land line through which the service is supplied to him;

(f) other commercially relevant information.

Article 31c

For the purpose of determining the place of supply of telecommunications, broadcasting or electronically supplied services provided by a taxable person acting in his own name together with accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, those services shall be regarded as being supplied at those locations.

Article 33a

The supply of tickets granting access to a cultural, artistic, sporting, scientific, educational, entertainment or similar event by an intermediary acting in his own name but on behalf of the organiser or by a taxable person, other than the organiser, acting on his own behalf, shall be covered by Article 53 and Article 54(1) of Directive 2006/112/EC.

13.3. Implementing Regulation (EU) No 1042/2013

Article 2

For telecommunications, radio and television broadcasting or electronically supplied services supplied by a supplier established within the Community to a non-taxable person who is established, has his permanent address or usually resides there, the following shall apply:

(a) the place of supply in respect of each chargeable event that occurs before 1 January 2015 shall be the place where the supplier is established, as provided for in Article 45 of Directive 2006/112/EC, regardless of when the supply, or continuous supply, of those services is completed;

(b) the place of supply in respect of each chargeable event that occurs on or after 1 January 2015 shall be the place where the customer is established, has his permanent address or usually resides, regardless of when the supply, or continuous supply, of those services commenced;

(c) where the chargeable event occurred before 1 January 2015 in the Member State where the supplier is established, no tax shall become chargeable in the Member State of the customer on or after 1 January 2015 in relation to the same chargeable event.