TAX EXECUTIVES INSTITUTE, INC.

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Mr. Donato Raponi
European Commission
Directorate-General for Taxation and Customs Union
VAT and other turnover taxes – Unit C1
Rue Joseph II 79, Office J79 05/093
B-1049 Brussels

Via email: Donato.Raponi@ec.europa.eu

Subject: Explanatory Notes for Amendments to Implementing Regulation (EU) No 282/2011

Dear Mr. Raponi,

The European Council recently reached political agreement on amendments to Implementing Regulation (EU) No 282/2011 (the "Implementing Regulation") that will significantly alter the rules for determining the place of supply for VAT purposes within the European Union. The new rules for supplying telecommunications, broadcasting, and electronic services to EU-based customers will take effect on 1 January 2015 and will challenge both businesses and tax administrators. Recognizing the need for further clarification on the practical implications of the various rule changes, the Council working with the Commission plans to draft explanatory notes to the Implementing Regulation ("Explanatory Notes"). Tax Executives Institute ("TEI") applauds the Commission for soliciting comments from businesses in advance of drafting the Explanatory Notes. This will ensure that necessary guidance can be produced in advance of the 1 January 2015 effective date and will address the key issues where clarification is most needed. We agree with the Commission's view that the guidance should focus on practical implications and clearly describe how the rules should be applied.

TEI was founded in 1944 to serve the professional needs of business tax professionals. In 1999, TEI chartered a chapter in Europe, which encompasses a cross-section of European and multinational companies. Today the organisation has 55 chapters throughout the world. As the preeminent international association of in-house tax professionals, TEI has a significant interest in promoting sound tax policy, as well as in the fair and efficient administration of

the tax laws, at all levels of government. Our nearly 7,000 members represent 3,000 of the largest companies in Europe, the United States, Canada, and Asia. The Institute is included in the EU Interest Representative Register (Register ID number 52413445902-12; TEI's address is 1200 G Street, N.W., Suite 300, Washington, D.C., U.S.A., 20005-3814).

TEI members are accountants, lawyers, and other corporate and business employees responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity. The Institute espouses organisational values and goals that include integrity, effectiveness and efficiency, and dedication to improving the tax system for the benefit of taxpayers and tax administrators alike.

Suggested Areas of Focus for the Explanatory Notes

Today, the place of taxation for VAT on telecommunication, broadcasting, and electronic services when supplied by EU businesses to EU-based consumers is the country in which the supplier of those services is established. Effective 1 January 2015, the amended Implementing Regulation changes the place of taxation to the country where the end consumer is established, has their permanent address, or usually resides. The amended Implementing Regulation also provides a number of rules governing the methods businesses must use to identify the place of taxation and the documentation that can be used to support those determinations.

Our comments focus on five areas where the Explanatory Notes would assist businesses and tax authorities with guidance concerning the amendments to the Implementing Regulation:

1. Determining the person responsible for declaring the VAT (new Article 9a of the amended Implementing Regulation);
2. Invoicing issues;
3. Evidence requirements to substantiate the place of supply;
4. Transitional rules for transactions overlapping the effective date of the amendments to the Implementing Regulation (Article 2 of the Implementing Regulation); and
5. Miscellaneous Issues.

1. Determining the Person Responsible for Declaring the VAT (New Article 9a of the Implementing Regulation)

The existing EU legal landscape (including the Implementing Regulation prior to the recent amendments) has resulted in a patchwork of inconsistent rules for determining which taxable persons must declare the VAT associated with supplies of electronic services. Some Member States[1] require operators of mobile telecommunications networks to account for VAT on all electronic services purchased through their networks by their subscribers. Other Member States, despite obvious advantages to collecting VAT from a few large taxpayers,

[1] For example, Denmark, Italy, and Poland have enacted this rule.

employ various other rules for determining which taxable person must declare VAT on those transactions.

Member States also apply inconsistent rules for determining VAT liability where multiple suppliers are involved in the supply chain. The number of links in the distribution chain for electronic services between producer and final customer varies widely. In some instances, the transaction occurs directly between the owner of the electronic content and the ultimate consumer (*e.g.*, an individual purchases a song[2] directly from an independent artist on the artist's website). Other situations involve transactions between multiple intermediaries. For example, in the case of a ringtone, 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 with app stores where app creators contract with, for example, Apple's App Store or the Google Play platform, and customers purchase the apps they download by paying Apple or Google.

The greater the number of links in a given supply chain, the less control content owners can generally exert over the final sale of the electronic service to the ultimate consumer. Content owners have a documented legal relationship only with the aggregator with which they have contracted. While a contract might require the aggregator to utilize similar terms in its relationships further along the supply chain, each link added to the chain of transactions for a supply of electronic services weakens the ability of the content owner to control the terms of those transactions.

New Article 9a of the Implementing Regulation provides helpful general guidance in assigning VAT declaration responsibilities for businesses engaged in chains of transactions related to electronic services and specific rules where those services are provided through mobile telecommunications networks. The new rules should result in a more consistent approach throughout the EU. To aid in ensuring a common interpretation of the provisions in new Article 9a, we urge the Commission to include Explanatory Notes addressing the issues below.

a. Premium Rate SMS Text Messages

A premium rate SMS[3] operates by requiring a mobile telecommunications customer to text a unique "short code" to a specially assigned number. The "short code" can consist of words, letters, or numbers. Those text messages are directed by this "short code" to trigger a particular response (*e.g.*, your bank account balance, horoscope, or football scores delivered via a return text message). As the name indicates, premium rate SMS text messages are subject to a separate charge to which VAT may apply as an electronic service.

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[2] Electronically delivered songs are included in Annexe II to the VAT Directive, which provides a nonexclusive list of electronic services. Council Directive 2006/112/EC (as amended). Other electronically delivered services include website supply, software, films, games, and distance teaching.

[3] Short message service, commonly referred to as SMS or a text message

Some mobile telecommunications operators object to declaring the VAT for premium rate SMSs arguing that they do not always know what is being supplied to the end customer and thus cannot be responsible for correctly calculating the applicable VAT. Clearly, where the mobile telecommunications operator knows the content of the premium rate SMS, it is in the best position to accurately determine the place of supply for the electronic service supplied through the premium rate SMS and to declare the applicable VAT. Even where the underlying service being provided is unknown, it seems a reasonable imposition to require that the mobile telecommunications operator obtain sufficient information from the provider of the service to enable a VAT decision to be made.

The mobile telecommunications operator should, at a minimum, be able to access information allowing it to determine whether the premium rate SMS is providing an electronic service or some other type of supply (*e.g.*, a supply of goods). Under the VAT Directive,[4] all electronic services are subject to the same VAT rate, and, under the Implementing Regulation, the same place of supply rules. Thus, anything that is supplied by premium rate SMS that is not a supply of electronically delivered services or a telecommunications charge for the text would not be covered by these rules, but would instead fall under the normal rules for such a supply. For example, if a consumer pays for a can of soda from a vending machine using her mobile phone, the sale is a supply of goods subject to VAT in the country in which the vending machine is located. Because the soda is not telecommunications, broadcasting, or electronic services, it is not subject to the provisions in Article 9a. The parties to the agreement that allows the consumer to pay using their mobile phone should follow normal VAT place of supply rules depending on the relationship between the soda machine vendor and the mobile telecommunications network operator.

Because the mobile telecommunications operator is in the best position to obtain the information necessary to make the applicable VAT determinations for premium rate SMSs, TEI urges the Commission to include in the Explanatory Notes language clarifying that, for purposes of Article 9a, the mobile telecommunications network operator will be treated as a taxable person taking part in the supply of any electronic services provided by means of a premium rate SMS and as acting in its own name but on behalf of the electronic service provider.

b. Chain Transactions – Exception to General Rule

New Article 9a of the Implementing Regulation establishes a general rule that each transaction in a chain of transactions between an electronic service provider, intermediaries (*e.g.*, content aggregators), and the end consumer is treated separately. An exception applies if two prescribed documentation requirements are met by all parties in the supply chain.[5] If those two requirements are satisfied, the electronic service provider is deemed to be the

[4] Council Directive 2006/112/EC (as amended).

[5] Article 9a(1) of the Implementing Regulation also requires that the electronic services provider's intent to be treated as the supplier of the services to the end customer be "reflected in the contractual arrangements between the parties." That requirement is sufficiently clear.

provider of the services directly to the end consumer (notwithstanding the intermediary transactions in the supply chain) and must determine the place of supply and the VAT on the sale from the last party in the supply chain to the end consumer.

The first requirement is provided in Article 9a(1)(a), which states: "the invoice issued or made available by each taxable person taking part in the supply of the electronic services must identify the electronic services and the supplier of those electronic services." In discussions with TEI members, some Member State officials have indicated that this requirement is intended to apply only to the business-to-business transactions within the supply chain and not to the final sale to the end consumer. The language in the Implementing Regulation, however, is ambiguous and could be misinterpreted to mean the final sale to the end consumer. This should be clarified in the Explanatory Notes.

The exception to the general rule will apply in situations where the content owner sells electronic services directly to the end consumer with some assistance by a third party. Specifically, the third party will generally receive a commission from the content owner based on the sales ultimately made to the end consumer by the content owner. In VAT parlance, this arrangement is referred to as a disclosed agency relationship. The only invoices issued between the content owner and the third party earning the commission are for the amount of the commission, and are raised by the intermediary, not the content owner. The language in Article 9a(1)(a) is vague about whether it applies to payments made to disclosed agents. Guidance should be included in the Explanatory Notes to clarify whether Article 9a(1)(a) applies to commissions or other payments to third parties in disclosed agency situations.

The second requirement is provided in Article 9a(1)(b), which states: "the bill or receipt issued or made available to the customer must identify the electronic services and the supplier of those services." This provision is ambiguous for the reasons set out in the previous paragraphs. TEI suggests that the Explanatory Notes clarify the intention of Article 9a(1)(b). Specifically, the Explanatory Notes should clarify that the requirement in Article 9a(1)(b) does not require taxable persons to issue tax invoices for sales to end users in Member States that do not require the creation of such invoices.

Finally, Article 9a(1) does not indicate whether both requirements must be satisfied for the exception to apply. That omission should be addressed in the Explanatory Notes to avoid misapplication of the rule.

c. Chain Transactions – Inapplicability of Exception to General Rule

Article 9a(1) also prohibits the use of the exception to the general rule by "the taxable person who … sanctions the charge to the customer, sanctions the delivery of the services, or sets the general terms and conditions of the supply" (*i.e.*, such a taxable person shall not be able to explicitly indicate another taxable person as the supplier of the services). The meaning of the word "sanctions" in this context is unclear. For example, in a situation where an end consumer purchases an app from an app store, the sanctioning of payment for that supply would seem to occur when the app store operator authorises the payment by the end

consumer. The sanctioning of delivery would seem to apply to the authorisation by the app store operator to permit the end consumer to download the app. Assuming this is consistent with the intended meaning of the term "sanctions" in the Implementing Regulation, the Explanatory Notes should make that clear to avoid inconsistent application of the provision by businesses and Member States. If Article 9a(1) was meant to employ a broader definition of the term, the Explanatory Notes should flesh that out in significant detail.

Taxable persons that "set the general terms and conditions of the supply" of electronic services are also prohibited from deviating from the general rule of Article 9a(1). The phrase "general terms and conditions of the supply" can, however, be interpreted in a number of ways. Most app stores, market places, or similar platforms require users to agree to general terms and conditions for doing business with that website or platform. These terms and conditions are separate from the terms and conditions applicable to the purchased supplies. For example, when an end customer downloads an app from an app store there are usually terms and conditions – or a license agreement – that the end customer is required to accept before they can access the app or content. Those terms and conditions are generally set by the content owner rather than the app store operator, and the request for the end customer's agreement with those terms and conditions occurs after the purchase of the app. TEI urges the Commission to clarify in the Explanatory Notes what (or whose) terms and conditions Article 9a(1) is meant to include.

2. Invoicing issues

Many provisions in the Implementing Regulation address the documentation, including invoices, that will be used to substantiate the place of supply determinations made by sellers of electronic services and to identify which taxable persons must account for VAT on sales to end consumers. Given potentially overlapping rules on invoicing from other sources of EU law, the Explanatory Notes should address those overlaps to assist businesses in complying with the Implementing Regulation.

The VAT Directive provides common rules governing VAT invoicing in the EU and only requires tax invoices for transactions between taxable persons; no similar requirement exists for sales of services to end consumers. Some Member States, however, impose a requirement to issue tax invoices to all customers regardless of their taxable status. Examples where businesses consider the obligation especially onerous include Bulgaria, Italy, and Malta. In Malta, businesses must obtain a "fiscal receipt" provided or approved by the Commissioner of VAT. These invoicing requirements are not proportionate to the risk they are seeking to address and conflict with the provisions of the VAT Directive. Clearly, it is impractical to issue fiscal receipts provided by the tax authorities in a high volume e-business.

Many of the businesses affected by the amendments to the Implementing Regulation sell electronic services that are designed only to be used by consumers. Their systems have been designed to deal efficiently with the high volume, low value business that dominates this market. Indeed, the key to a successful business in this field is the ability to deliver content to consumers in real time with no delays; consumers today expect instant access to

their purchased content and do not want or expect to receive an invoice each time they make a low value purchase. Moreover, the number of computer files that would be generated – and need to be retained – would be huge given the volume of transactions in this marketplace. The costs of adapting systems to comply with individual Member States' requirements should not be underestimated.

Insistence on the provision of tax invoices to all customers is an administrative measure imposed by some tax authorities to address the lack of an audit trail for cash transactions. For the services covered by the Implementing Regulation, however, there is no opportunity to pay with cash; other means of payment are used (*e.g.*, credit cards, vouchers, premium rate SMS). Even in situations where customers pay cash for vouchers later used to purchase electronic services, the retailer selling the voucher normally produces an invoice (usually a till receipt) for the customer at the time of purchase. Also, because the transactions at issue are high volume, low value, and heavily automated, there is no opportunity for a person to intervene in the supply chain to divert VAT. A systems process audit will reveal quickly that all transactions are captured and relevant tax declared.

Accordingly, TEI urges the Commission to include language in the Explanatory Notes clarifying that nothing in the Implementing Regulation should be interpreted as creating a requirement that businesses issue tax receipts for transactions with end consumers. Also, the Explanatory Notes should encourage Member States to accept that tax invoices need not be required for sales to end consumers. Possible language for the Explanatory Notes could include the following:

> *The requirement to issue tax invoices does not apply to the supply of telecommunications, broadcasting or electronic services delivered via an information technology route where the following requirements are met:*
> - *the customers are not taxable persons or legal entities, and*
> - *payment does not take place in cash.*

3. Evidence Requirements to Substantiate the Place of Supply (New Articles 24fb, 24g, and 24ga)

Beginning 1 January 2015 the place of supply for sales of telecommunications, broadcasting, and electronic services to EU-based consumers will be the Member State in which the customer consumes those items. The Implementing Regulation recognizes that the identification of the Member State of consumption is often difficult to determine with certainty. To assist businesses and tax authorities, the Implementing Regulation provides a number of presumptions designed to approximate the Member State of consumption, and also affords a business the opportunity to rebut those presumptions when it has adequate information to identify the country of consumption with certainty.

For example, electronic services supplied to non-taxable persons not otherwise subject to a separate rule are presumed to be consumed in the Member State where "the customer is established, has his permanent address or usually resides at the place identified as

such by the supplier using two pieces of non-contradictory evidence."[6] That presumption can be rebutted where the supplier "has three pieces of non-contradictory evidence indicating that the customer is established, has his permanent address or usually resides elsewhere."[7]

The Implementing Regulation contains rules governing the types of documentation businesses may use as evidence supporting their use of these presumptions. Acceptable records include specific information such as "the billing address of the customer," or "the Internet Protocol (IP) address of the device used by the customer or any method of geolocation."[8] The Implementing Regulation also permits the use of "other commercially relevant information." This last, more general, category affords businesses flexibility in obtaining and maintaining records necessary to support determinations on the place of supply for these services. Additional guidance in the Explanatory Notes on different types of documentation that would be acceptable would facilitate proper compliance by businesses with the Implementing Regulation's presumptions.

a. General Comments Regarding Presumptions and Evidence Requirements

In some situations, it may be impossible for businesses to obtain two pieces of corroborating evidence to satisfy the presumptions for determining the place of supply required by the Implementing Regulation. While some suppliers of the affected services develop on-going relationships with customers who may set up accounts that are accessed regularly and include information permitting identification of their location, many other businesses may engage in infrequent transactions with customers where details about the customer's residence or location are unknown. Transactions where the customer remains anonymous are most likely to occur where prepay vouchers or gift cards are involved. The challenges for suppliers to demonstrate the location of the customer will certainly be greater where the customer is anonymous.

Customer anonymity, however, rarely reflects an intention to mask location for tax avoidance reasons. For example, a person may wish to access content not available in her country or mask her location in an effort to avoid spam emails. The prevalence of these common situations is alluded to in the preface to the amended Implementing Regulation at whereas clause (8): "Rules should be established to clarify the tax treatment of … electronic services supplied to a non-taxable person whose place of establishment or residence is practically impossible to determine or cannot be determined with certainty." Indeed, that is one of the reasons for using presumptions as a method for identifying the place of supply for these transactions. Adding language to the Explanatory Notes highlighting the fact that the documentation obtained and retained by businesses to substantiate customer location can never be accurate in 100-percent of cases would provide welcome clarification on this point.

[6] Article 24fa of the Implementing Regulation.

[7] Article 24fb of the Implementing Regulation.

[8] Article 24ga of the Implementing Regulation.

Some information used to validate customer location may be subject to data protection rules in the country of the customer, the supplier, or both. In certain countries this may mean that while information may be collected at the time of purchase and used to validate the location of the customer, the supplier will be precluded from producing this information to tax authorities to substantiate determinations used to identify the place of supply. The preface to the Implementing Regulation acknowledges this issue and encourages Member States to consider legislative changes consistent with EU data protection laws permitting the use of consumer data to minimise tax fraud.[9] Acknowledgment of this issue in the Explanatory Notes would be helpful, especially since legislation in Member States affecting data protection and privacy continues to evolve. In particular, TEI urges the Commission to consider the broader types of evidence that would satisfy the requirements of the Implementing Regulation – that is, the commercial arrangements that provide a good indication of where the customer is, but without necessarily requiring that the test be applied to the individual transaction level.

Permitting use of acceptable commercial arrangement documentation to support place of supply presumptions also makes sense where customers make multiple purchases after establishing a relationship with a business. Often the seller will require the customer to provide information such as address, credit card, *etc.*, upon registering for an account with the business. For subsequent purchases, customers need only submit an order and it will be fulfilled using the previously supplied and verified location and payment information. When subsequent purchases occur with high frequency, it may not be practical to obtain all the information necessary to verify the customer's location again. Indeed, requesting verification would create a hurdle to completing the transaction that customers would not accept since it would interrupt an otherwise smooth and rapid purchase. The Explanatory Notes should provide guidance about how often (*e.g.*, annually) businesses must engage in pro-active verification in these situations and the extent to which businesses may rely on previously collected customer information.

Under Article 24fb of the amended Implementing Regulation, Member State tax administrations may rebut the place of supply presumptions "where there are indications of misuse or abuse by the supplier." TEI supports efforts to combat tax fraud and evasion and the inclusion of this language to police the activities of suppliers. Still, the Explanatory Notes should provide guidance on what factors Member States should use as indications of misuse or abuse, and the burden of proof should be sufficiently high on the part of the Member States to justify rebutting the place of supply presumptions given the difficulty in many instances of obtaining and maintaining these types of records. Moreover, businesses should not be liable for abuse engaged in by their customers. TEI urges the inclusion of language in the Explanatory Notes clarifying this point. Similar "hold harmless" provisions exist for state sales tax purposes in some jurisdictions within the United States.

[9] Whereas Clause (15) of the Implementing Regulation.

b. Examples of "Other Commercially Relevant Information" in Article 24ga(f)

The amended Implementing Regulation recognises that businesses need flexibility in the types of documentation used to determine the Member State of consumption for supplies of telecommunications, broadcasting, and electronic services. Article 24ga(f) permits businesses to use "other commercially relevant information" to support those determinations. While the flexibility accorded here is helpful and appreciated, additional guidance would be welcome on what types of information Member States will accept. TEI suggests that the Explanatory Notes include examples of the evidence businesses could rely on under the heading "other commercially relevant information" in Article 24ga(f). Set forth below are examples TEI believes would adequately support identification of the Member State of consumption without inviting abuse.

1) Unique payment mechanisms – Many Member States use payment mechanisms unique to their country. When a customer uses one of those methods of payment, it provides accurate information identifying the Member State in which the supply was made. Examples of these payment mechanisms include, but are not limited to: (1) *bancontact* (Belgium); (2) Carte Bleue (France); (3) iDeal (Netherlands); (4) GiroPay (Germany); (5) Dankort (Denmark); and (6) CartaSi (Italy).

2) Local language websites – Many websites direct consumers to a local language version of their site by reference to the geolocation that is captured in the background when the consumer lands on the website. The IP address of the consumer and the location of that IP address may not always be retained by the business, but may be used for a number of commercial reasons, including displaying the language and currency to the consumer, marketing country-specific content, and managing licensing restrictions. For example, if a customer with a French IP address types in the address of the website they wish to access, they will be automatically directed to a page that is in French with Euro currency and French content. The customer can choose a different storefront if they are not in that country. However, if they do so and the IP address no longer matches other customer information retained by the business for that customer, systems often restrict purchase or payment methods or even prohibit purchasing at all (*e.g.*, because of licensing restrictions). (For example, Netflix will not allow customers to access content from a country outside the one in which the customer initiated the subscription.)

3) Universal pricing policies – Some business models include universal pricing policies where the same price points will be charged regardless of the country. This is especially prevalent in countries that have adopted the Euro. In practice, this means that a music download, for example, will cost the consumer 99 Eurocents regardless of the Euro-currency country from which the purchase is made. In the EU, retail prices are VAT inclusive making the consumer less likely to be aware of any difference in the VAT rate being charged in one country versus another. In cases of universal pricing, consumers have no incentive to mask their location for tax purposes, making the existence of a universal pricing policy an acceptable test for

corroborating the location of the customer identified in other businesses records of the seller.

4) Consumer trading history – When customers have an established relationship with a business, records from prior transactions can provide a reliable indicator for future transactions. This information includes the historical IP address of the customer, billing address, *etc.* For example, a customer may access their account while on holiday outside their Member State of residence. In those situations, a business should be able to rely on the customer's historically determined Member State of residence for the purposes of the current transaction.

5) Gift card point of sale – When a gift card is sold to a consumer from a physical retail establishment, it is highly likely that the consumer will be local to the country in which the establishment is located. Businesses should be permitted to rely on the location of the establishment as acceptable evidence for determining where the customer consumed an electronic service.

6) Country-locked gift cards – Some content providers sell gift cards that are country-locked. In these cases, the card can only be used in the country of issue (this restriction is stated clearly on the face of the card). In these circumstances, the Member State in which the card is locked should be acceptable evidence of the place of supply in much the same way that a café or hotel that sells Wi-Fi access in a public area is treated as being the country of that sale.

7) Documentation of third-party payment service providers – In many countries, service providers, such as Global Collect, PayPal, *etc.*, verify the billing address of a payment method before approving a transaction. This information is not shared with the payment service provider's customer (*i.e.*, sellers of electronic services) for data protection and security reasons. Sellers should be able to rely on this automatic check as a means of demonstrating the Member State of the customer, and, when combined with the country of the issuing bank for a payment method, it should be deemed two separate pieces of evidence.

8) Customer self-certification – The Explanatory Notes should clarify in what circumstances customer self-certification is acceptable as "other commercial evidence."

c. Other Issues Related to Evidence for Establishing Customer Location

In many circumstances, taxpayers rely entirely on verifications undertaken by third-party trading partners, such as payment service providers and other intermediaries. This could include for example, PayPal, Global Collect, Digital River, and Google. It is unclear to what extent (if at all) Member States expect taxpayers to exert controls over their trading partners to obtain, retain, and share information collected relevant to a customer's location. Businesses selling electronic services to end customers can attempt to place obligations on their partners to obtain and retain that evidence, but sellers are unlikely to hold such

information themselves. In some cases, payment service providers or other intermediaries may be prohibited from sharing that information because of legislative restrictions around privacy and data protection thereby forcing the seller to rely on the data collected by those third parties. The Explanatory Notes should address these situations and provide guidance on what information from these common arrangements will be acceptable evidence of a customer's location.

When sellers are able to obtain customer location information from third-party intermediaries, the sellers should be permitted to rely on the accuracy of those third parties' determinations. Checks carried out by sellers for commercial purposes, such as revenue recognition, fraud management, and licensing restrictions, are likely to be robust and highly reliable. TEI recommends that the Explanatory Notes set out best practices in this area and incorporate the use of existing verification methods as their guiding principle.

Obtaining information from third parties can be time consuming. Also, organising transactional data from myriad sources to conform to formats requested by Member State tax authorities during an audit requires refocusing limited resources and third-party contractor expenses. The Explanatory Notes should include some reference to the effect these impediments will have on the time it will take businesses to produce the requested evidence for determining the place of supply for transactions covered by the Implementing Regulation.

As the preface to the Implementing Regulation notes, data protection rules and the transactional dynamics of certain businesses will make the collection and retention of customer location information impossible or create a disproportionate burden on the businesses. These data limitations may prohibit some businesses from producing two corroborating pieces of information necessary to establish a presumption of customer location under the provisions of the Implementing Regulation. The Explanatory Notes should assist businesses in this situation. One possible solution would be to permit businesses to apply for a multilateral ruling from the Member States in which it sells telecommunications, broadcasting or electronic services. Users of the VAT Mini One Stop Shop (MOSS) should be able to request and obtain a ruling from the Member State of Identification for guidance on the information the business could rely on and that the Member States of consumption would accept.

4. Transitional Rules for Transactions Overlapping the Effective Date of the Amendments to the Implementing Regulation (Article 2 of the Implementing Regulation)

TEI applauds the Council for recognising the serious risk of double taxation for transactions that straddle the effective date of the amended Implementing Regulation and welcomes the pragmatic solution provided in Article 2. Under that provision, all supplies occurring prior to the effective date of the Implementing Regulation will be subject to the rules existing before that date, and transactions occurring on or after that date will be subject to the new rules. While generally clear, TEI recommends addressing the following areas in the Explanatory Notes.

a. Conflicting Member State Time of Supply Rules

Article 2(c) is drafted to ensure that there is no double taxation in cases where the time of supply rules in two Member States differ and would result in tax being due at different times. The Explanatory Notes should confirm this approach in instances where the time of supply rules differ between Member States affected by a transaction. That language should confirm that where tax has already been declared by the supplier in the country of the supplier in accordance with that Member State's time of supply rules for sales made prior to 1 January 2015, no further tax is due in the country of the consumer even if the rules in the country of the consumer would have set the time of supply as occurring on or after 1 January 2015.

b. Evidence for Establishing Declaration of Tax in a Member State

Businesses need clear guidance to understand what documentation or other information they are expected to provide to Member States to prove tax was declared for a supply made prior to the effective date of the Implementing Regulation. This is especially relevant for transactions involving vouchers. The Explanatory Notes should provide high-level principles that businesses and Member States can use to guide their data collection and retention polices in this area. For example, if a taxpayer is established in a particular Member State which has time of supply rules that treat prepayments as taxable at the time the pre-payment is made, this should be sufficient evidence that the tax was declared at that time. TEI urges the Commission to provide high-level principles as a general guide along with a wide range of examples illustrating how those principles should be applied.

5. Miscellaneous Issues

a. Disputes Between Member States

Despite the best efforts of the Council in drafting the amendments to the Implementing Regulation and the Commission in crafting Explanatory Notes, situations will undoubtedly arise where two Member States claim they are entitled to VAT on a single transaction. While perhaps not suitable for inclusion in the Explanatory Notes, the Commission should consider how such disputes ought to be resolved to ensure that taxpayers are not required to pay tax to two Member States on a single transaction.

b. Definition of "Electronic Service"

With the incredibly quick pace of change in the electronic commerce market, additional guidance would be helpful for determining what services will be considered an "electronic service" for purposes of the Implementing Regulation (or what services will fall outside that definition). Article 58 of the VAT Directive is clear that certain supplies are not electronic services (*e.g.*, where a report is delivered by email), and Annexe II to the VAT Directive provides limited additional guidance. To provide additional clarity, it would be helpful to incorporate further examples in the Explanatory Notes to reflect some of the many changes in what can be delivered electronically since that legislation was first contemplated.

c. Location of Supplies Delivered at Certain Fixed Locations

The Implementing Regulation presumes that when a supplier of telecommunications, broadcasting or electronic services provides services at a location such as a "telephone box, kiosk, Wi-Fi hotspot, internet café, restaurant or hotel lobby" the customer will be treated as being usually resident at that location and the supply of those services will be treated as occurring at that location.[10] Similar rules apply when customers access those services by means of a fixed landline[11] or mobile network.[12] The language in those provisions is unclear, however, about whether the rules apply only to the services allowing those customers to connect to the Internet or whether the rules apply to other services accessed during that connection ("over the top services"). For example, a customer may access a computer game or make a Skype call after connecting to the Internet at a hotel, Internet café, Wi-Fi hotspot, or mobile network. The language of the Implementing Regulation indicates that only the operator of the Wi-Fi hotspot, hotel, or mobile network would be affected by these presumptions, and that the rules would not apply to providers of the "over the top services." Still, these provisions are somewhat ambiguous and could be interpreted to include those "over the top" services.

To minimise misapplication of these rules, the Explanatory Guidelines should clarify whether "over the top services" are subject to the presumptions applicable to services allowing customers to access the Internet via the methods and locations listed in Articles 24a, 24c, and 24d. For example, when a customer uses a Wi-Fi connection in a café to download a movie, the supplier of the movie content must know whether to treat that supply as having taken place at that café or whether the presumption only applies to the provider of the Wi-Fi access, in which case the movie-content supplier would have to source the transaction using other data it collects and maintains for its end consumer.

In many cases, the end consumer will have a regular relationship with the supplier and the supplier may have already verified the customer's location from that regular relationship. Article 24fb allows suppliers to rebut the presumptions in Articles 24a, 24c, and 24d where the supplier has three corroborating pieces of information, but systems may not ordinarily be configured to collect more than two pieces of information that establish a customer's location. In the example of the consumer downloading a movie over a café Wi-Fi network, the IP address would be the one piece of information that differs from the information maintained by the electronic service provider related to that customer. In these relatively common situations, applying the presumptions of Articles 24a, 24c, and 24d to providers of "over the top services" with pre-existing customer relationships would create a result seemingly at odds with the intent of the presumption provisions of the Implementing Regulation.

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[10] Article 24a of the Implementing Regulation.

[11] Article 24c of the Implementing Regulation.

[12] Article 24d of the Implementing Regulation.

d. General Drafting Considerations

Tax regimes will always lag behind technology to some extent. Given the rapid pace of technological development and ways in which consumers obtain and use electronic services, the Explanatory Notes should be drafted in a way that ensures their continued relevance for as long as possible.

Conclusion

TEI appreciates the opportunity to suggest issues to be addressed by the Commission in the Explanatory Notes to the Implementing Regulation. Including these points in that process will improve the application of the Implementing Regulation for businesses and Member States throughout the EU, making the common market more competitive and reducing the administrative complexity for VAT. The Institute looks forward to working with the Commission as it develops additional guidance, and to participating in a workshop later this year should the Commission decide to employ such a forum to obtain additional feedback.

TEI's comments on the Explanatory Notes were prepared by the Institute's European Indirect Tax Committee, whose chair is Jean-Francois Turgeon. If you have any questions about TEI's comments, please contact Mr. Turgeon at +41 228 494 342 Turgeon_Jean-Francois@cat.com, or Daniel B. De Jong of the Institute's legal staff at +1 202 638 5601 or ddejong@tei.org.

Respectfully submitted,
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