European Banking Federation

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Subject: EBF Comment Letter on the OECD International VAT/GST Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles

Dear Mr Battiau,

The European Banking Federation (EBF) welcomes the opportunity to comment on the OECD Discussion Draft on two new draft elements of the International VAT/GST Guidelines.

As a European organisation, the EBF would like to first recall the particular situation for EU member states arising from the fact that there is a competency of the EU in matters of indirect tax law, notably VAT. According to settled EU case law (beginning with the seminal *van Gend en Loos* judgement in 1962), EU law is hierarchically superior to bilateral or multilateral agreements between EU member states. As a large majority of the EU member states are also members of the OECD and represent a significant portion of the OECD members, this consequently leads to the situation that changes affecting the EU VAT regime need also to comply with the legal rules enshrined in the EU Treaty, in the first instance the fundamental freedoms of the EU internal market.

The EBF could theoretically agree that, if one follows the premise set forth in the Discussion Draft that tax on services and intangibles is ultimately levied in the jurisdiction where the final consumption takes place, such a reasoning would even be more straightforward in B2C than in a B2B context.

In fact, the two step rule for B2C should lead to taxation at the place of consumption, by ensuring, under 'guideline 3.5' that the place where the service is physically performed, with the fall back under 'guideline 3.6' being where the customer has its usual residence. From the outset, requirements for a business to verify the usual residence and the status (VAT taxable person or not) of consumers who are mainly individuals must, however, be based on readily available information that they will collect in the normal course of events under normal commercial circumstances. At least within the EU, where the fundamental freedoms of the EU internal market ought to be respected, there is thus a clear need to avoid creating onerous requirements for customer residence verifications.

For the purposes of the application of the B2C place of supply rules suggested in the OECD Discussion Draft, readily manageable definitions of the key concepts (e.g. "consumer", “usual residence of the customer”) are of particular importance. For instance, an individual entrepreneur might act as a consumer or as a business, depending on the circumstances.

Furthermore, under the EU VAT law businesses that do not qualify as taxable persons for VAT purposes should be considered as consumers for the purposes of the place of supply rules as well. The latter is often a relevant point for holding companies and investment vehicles.

Also, the principle of taxation of the services where the customer is established in combination with the non-application of the reverse-charge mechanism in the case of B2C supplies would likely result in the supplier’s obligation to determine the applicable VAT treatment of the supply of services under review in accordance with the applicable local VAT laws.

It is however a known fact, that – despite the harmonisation of VAT law – EU member states often have diverging interpretations of the EU VAT Directives. This is especially true in the financial and insurance sector, where VAT is not neutral, as part of the activities are VAT exempt. Thus, the combination of

- different delimitations established by EU member states between exempt and non-exempt services,
- sensibly diverging qualifications attached to the (same) services provided in different member states leading to the application of different VAT rates to the same services in different EU member states and,
- a vast array of commercial possibilities for businesses to combine services and fees invoiced,

is at risk of creating disproportionate requirements on the part of business in terms of knowledge of the local VAT rules and interpretations in the destination country. For an entrepreneur looking at the bottom line, such extensive requirements may lead to the conclusion that providing cross-border services to a multitude of countries might become too onerous. It follows that, for the case of financial services, determination of the VAT treatment applicable in the customer’s country (and thus the application of the destination country principle in B2C relations within the EU) might be not only particularly challenging due its complexity, but also conflict with the (legally higher ranking) fundamental freedoms of the EU Treaty, such as the freedom to provide services, the freedom of movement of capital and the freedom of establishment. As the majority of EU member states are also OECD members, we feel that appropriate consideration should be paid to this point at OECD level.

Finally, we note that there is an underlying assumption in the guidelines that countries will be encouraged to implement a simplified registration and compliance regime. In practice, and especially outside the EU, a key risk will be on what basis countries adopt and apply this principle. It is imperative that business cost is not increased through tax jurisdictions’ failure to implement and allow for a simplified registration process and also simplified compliance regime.

The European Commission's implementation of the VAT Mini One Stop Shop is one option that could be considered as part of the simplification aim and could enable businesses to potentially run all non-established VAT registrations through one central hub. It is acknowledged that any move towards the consumer location on a global uniform basis will require uniform implementation to avoid double, and potentially, no taxation if there is piecemeal implementation.

Another key consideration is ensuring that compliance requirements are also simplified and applied consistently on a global basis to minimise unnecessary compliance burdens. The main two areas for concern here are VAT return filing procedure and invoice requirements. Firstly looking at the VAT return filing procedure, the reduced list of information to be provided Annex 3, item 7, seems reasonable and provides tax jurisdictions with the key information required. Tax authorities must be discouraged from introducing data requirements over and above this. The guidelines state that electronic filing is essential, which we would see as a fundamental requirement to support global VAT registrations. The guidelines recognise that invoicing requirements for VAT purposes are one of the most burdensome requirements and therefore the recommendation that tax authorities should consider eliminating invoices for B2C transactions is encouraged. The fact that some tax jurisdictions will still require to see invoices with VAT amounts shown will create a significant burden for companies where VAT invoices are not required on a domestic basis for B2C supplies and this point must therefore be addressed to avoid the unnecessary burden, which could also result in companies deliberately avoiding making supplies to consumers in those jurisdictions, which is clearly not the objective of this proposal.

We appreciate your consideration of our comments and remain at your entire disposal to provide clarity on any of the points raised within our response or participate in any future discussions in respect of this initiative.

Yours sincerely,

Wim Mijs