IZBA GOSPODARKI ELEKTRONICZNEJ

Position of the Chamber of Digital Economy on the draft of October 22, 2020, of the Act on amending the Value Added Tax Act and certain other acts

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Document ref. no.: ……

Warsaw, 2021-04-27

Chamber of Digital Economy (e-Chamber)
T + 48 506 577 824 E BIURO@EIZBA.PL I WWW.E-IZBA.PL
A PAŃSKA 96, UNIT 4, 00-837 WARSZAWA Tax ID no. (NIP) 701-039—19-22 National Court Register (KRS) 0000474028

INTRODUCTION

The draft of the Minister of Finance of October 22, 2020, of the Act on amending the Value Added Tax and other acts, hereinafter referred to as the **"draft Amendment"**, contains the implementation of the provisions of Directive (EU) 2017/2455 and Directive (EU) 2019/1995 amending Directive 2006/112/EC and Directive 2009/132/EC and the accompanying executive acts with regard to the provisions of the value-added tax on the provision of services and the sale of goods at a distance and selected supplies of domestic goods.

The provisions of the draft Amendment are to enter into force on July 1, 2021, providing for the introduction of the so-called "e-commerce VAT package", which concerns new rules for VAT settlements on cross-border sales of goods and services at a distance (via the Internet) to consumers (B2C).

Below, the Chamber of Digital Economy, hereinafter referred to as the **"e-Chamber"**, provides its comments on the problems and effects of the application of the provisions of the draft Amendment and proposes solutions pertaining to the matter.

COMMENTS AND LEGAL ASSESSMENT

1. Change in distance sales rules

The provisions of the draft Amendment provide for a change in the rules of taxation of distance sales:

- Introduction of the concept of intra-Community distance sales of goods (ICDSG, Polish acronym: WSTO) instead of distance selling from and to a national territory;
- Establishment of a single EU-wide quota threshold of 10,000 EUR net, up to which the place of VAT taxation on supplies of goods and services to consumers (B2C) is the country where the seller is established – the taxpayer is therefore free from the obligation to register and account for VAT in the EU country of destination.

According to the e-Chamber, the effect of the significant reduction of the threshold to 10,000 EUR (currently, it cannot be lower than 35,000 EUR and higher than 100,000 EUR) proposed in the draft Amendment will make a larger group of taxpayers making ICDSG transactions subject to the obligation to register for VAT in the EU country of destination, i.e. the country to which the goods and services are delivered, and to settle VAT in this country once the threshold is exceeded.

The e-Chamber would like to propose that the conversion of the EUR 10,000 limit into PLN should be increased or updated, as – due to an increase in average exchange rates – it is higher than 42,000 PLN (Art. 22a sec. 1 item 3 of the draft).

2. New special VAT-OSS procedure

According to the explanatory memorandum to the draft Amendment, the e-commerce VAT package introduces solutions aimed at extending simplified VAT settlements in the e-commerce sector and collecting tax on goods purchased by consumers by:

- Replacing the simplified procedure of the so-called mini one-stop-shop VAT applicable to telecommunications, broadcasting, and electronic services (TBE) with an extended and modified VAT-OSS procedure that covers sales to consumers (B2C) in the EU in small consignments (up to 150 EUR). Using the VAT-OSS procedure makes it possible to avoid the obligation to register for VAT purposes in the consumer's country.

- The possibility of conducting settlements under the simplified VAT-OSS procedure for telecommunications, broadcasting, and electronic services (TBE) and other services provided to consumers (B2C), intra-Community distance sales of goods (ICDSG), and selected domestic supplies to consumers (B2C) made through electronic interface (IE) operators facilitating these supplies.

In the opinion of the e-Chamber, the provisions of the draft Amendment concerning the introduction of the VAT-OSS procedure are, in principle, beneficial for taxpayers as they will simplify the handling of VAT settlements for cross-border consumer transactions (B2C) in EU countries, thus reducing the costs of running the business.

The e-Chamber, on the other hand, wishes to make comments with respect to the following:

- the adoption, as part of the e-commerce VAT package, of an extended invoicing obligation for domestic supplies accounted for under the VAT-OSS procedure by IE operators facilitating such supplies, in view of the adoption of the legal fiction that the operator (as *deemed supplier*) first purchases the goods from the so-called underlying supplier (B2B) and then sells them on to the consumer (B2C). The IE operator then becomes a VAT payer obliged to issue an invoice documenting the supply to the consumer (Art. 106b sec. 1 item 2 of the draft).

We request that the obligation for an IE operator to issue invoices documenting domestic supplies of goods to consumers (B2C) and to issue invoices on request when settling transactions under the VAT-OSS procedure be excluded by amending Art. 106b sec. 1 item 2. of the draft Amendment.

3. New rules on taxation of imports of goods through e-commerce transactions

The e-commerce VAT package includes new rules for reporting and accounting for VAT on consumers' imports of goods from third countries (B2C) by means of e-commerce; in particular, it introduces the following:

- ❑ Definition of distance selling of goods imported from third countries to final consumers based in EU countries (DSGI, Polish acronym: SOTI).
- ❑ Elimination of the VAT exemption for imports of goods in consignments of up to 22 EUR (which was not applicable in Poland for e-commerce transactions).
- ❑ A new VAT-IOSS import special procedure and a second special mechanism (SPREG, Polish acronym: USZ) covering simplified distance selling of goods imported from third countries (DSGI) to EU consumers (B2C) in low-value consignments (up to 150 EUR). Tax is to be collected and paid on the sales of goods – under the VAT-IOSS procedure, while on import, goods will be subject to VAT exemption or on supply – under the SPREG procedure.
- ❑ The obligation to account for VAT on the import of goods will be independent of whether the taxpayers performing DSGI have their registered seat or permanent business premises within the EU or the territory of a third country.

According to the justification of the draft Amendment, the introduced solutions are aimed at simplifying VAT settlements in the e-commerce sector and streamlining the collection of this tax on goods from outside the EU purchased by consumers.

The e-Chamber supports legislative changes that aim at eliminating tax avoidance and tightening the system for collecting VAT on imports of goods purchased by consumers from non-EU sellers, which contribute to a level playing field between EU and Asian sellers operating in the e-commerce sector.

The planned procedures for DSGI settlements, i.e. the VAT-IOSS procedure and the SPREG procedure, assume that tax should be paid on each product ordered *online* from third countries and sent to an EU consumer.

However, the e-Chamber doubts whether the new model for VAT settlements of e-commerce transactions provided for in the so-called e-commerce VAT package will be effective.

This applies, in particular, to the taxation of goods purchased by EU consumers *online* directly from non-EU sellers or via IE operators (e.g. retail platforms) from third countries – mainly China, which will make it more difficult in practice to enforce the tax obligations to register, account for, and pay VAT.

The e-Chamber has significant concerns, **mainly about the obligations imposed on IE operators in connection with the new rules for settlements concerning imports of goods**, in particular:

- the fulfilment of IE operators' obligation to collect and pay the tax on the sale of goods to EU consumers, especially the deduction of the amount of VAT due from the

price of the goods paid by the consumer.

- the obligation to issue a fiscal receipt (fiscalisation) when platforms become taxable for VAT purposes.
- the adoption of a 23% VAT base rate for goods accounted for under the SPREG procedure.

1. Collection and payment of VAT by IE operators

The draft Amendment provides for the liability of IE operators for the collection and payment of VAT in cases of intermediation (facilitation) in:

– Distance selling of goods imported from third countries (DSGI) in consignments with an intrinsic value of up to 150 EUR to EU consumers (B2C).

– Supplies of goods from a non-EU supplier to EU consumers (B2C), (including ICDSG transactions and local deliveries within one EU country or sales to another EU country)

In the opinion of the e-Chamber, the burden of fulfilling obligations connected with VAT settlements with respect to supplies of goods will be shifted from sellers, so-called underlying suppliers, from the EU and non-EU countries, as well as Polish consumers, to EU-based IE operators, despite their being able to benefit from simplified VAT settlements under the VAT-OSS and VAT-IOSS procedures. IE operators will need to take steps to prepare and put in place relevant internal procedures to identify transactions that fall under their responsibility to collect and pay VAT.

The draft amendment provides that the tax obligation for an IE operator to collect and pay VAT will arise on the purchase of goods – at the time of payment acceptance of (Art. 19a sec. 1b of the draft). Payment for most goods purchased *online* is made using payment cards and fast electronic payment intermediaries (PayPal, PayU, Przelewy24 etc.), whose payment services are offered by the operator. **There are no grounds in the tax legislation for IE operators to "deduct" the VAT amount from such payments or from the virtual account//wallet of the vendor (underlying supplier) into which the paid funds go.** In addition, it should be noted that some transactions are paid for directly by traditional bank transfers to the sellers' bank accounts or paid on delivery by cash or payment card (to the courier). In such cases, IE operators do not even know what bank account or which financial institution the funds have gone to.

The operator may not demand the transfer of the tax amount from purchasers of goods (consumers) either, as indicated in the justification of the draft Amendment, since – as was also emphasised in the justification – in the light of civil law, it is not the owner of the goods being sold and does not sell them to consumers within the meaning of the Civil Code. There are, therefore, no legal grounds for demanding payment of part of the price in the amount of VAT due, despite its being the payer of this tax.

Consequently, this would mean that the IE operator would first have to bear the actual burden of payment of that VAT and then seek its return from the seller (the underlying

supplier).

For this reason, the e-Chamber calls for the introduction of powers for IE operators to deduct the amount of VAT from the product price paid and consideration to be given to introducing joint and several liability of operators and sellers (underlying suppliers) for VAT arrears along the lines of the provisions of Art. 105a of the VAT Act on *split payment*.

Such a mechanism will protect IE operators from sellers (underlying suppliers) without registered seats in the EU or those who go out of business before remitting VAT due on their sales.

2. IE operators' obligation to issue fiscal receipts

The draft Amendment does not contain provisions exempting the obligation to record sales using cash registers and issue a fiscal receipt (fiscalisation) in the event that for VAT purposes IE operators become taxpayers responsible for the collection and payment of this tax in transactions to consumers (B2C).
In the opinion of the e-Chamber, it would be advisable to apply an exemption to the aforementioned obligation of IE operators or at least a restriction with respect to domestic supplies and DSGI transactions accounted for by operators as taxpayers *(deemed supplier*).

As with invoices, the issuing of receipts by IE operators can result in operators being incorrectly recognised by consumers to be a party to the sales transaction.

At the same time, the e-Chamber requests that IE operators be covered by the exemption from the obligation to fiscalise ICDSG and DSGI transactions, which applies to the supply of goods by shipping listed in item 36 of the Annex to the Regulation of December 28, 2018, of the Minister of Finance on exemptions from the obligation to keep records using cash registers. Currently, this exemption cannot be applied as IE operators will not receive full payment for the delivery of goods through the post, bank, or SKOK services. Moreover, this exemption should apply to all types of goods and all methods of payment (including cash on delivery), as otherwise, due to the specific nature of IE operators' activities and the need to automate sales and payment processes, they would be forced to fiscalise all transactions. Thus, the exemption would not be applied in practice.

3. Collection and payment of VAT by the Polish Post or parcel delivery companies

In cases where the seller/IE operator chooses not to use the DSGI settlement under the VAT-OSS procedure, it will be possible to use a second simplified procedure, i.e. SPREG, under which VAT on the import of goods will be collected from consumers at the time of supply by the entity making the customs declaration, e.g. a postal services operator or parcel delivery company.

The e-Chamber generally positively views the introduction of a simplified procedure for collecting VAT on imported consignments from outside the EU to

be handled by the Polish Post and parcel delivery companies when goods are supplied to consumers, something it has long called for**.** The new solution means phasing out of the current system, consisting in consumers themselves declaring and settling VAT. **However, we have doubts as to whether the objective of the draft Amendment to improve the effectiveness of tax collection in cross-border transactions will be achieved, particularly with goods purchased from or through entities (e-tailers and trading platforms) outside the EU, which might not provide correct and complete data on transactions.**

The current system of customs and fiscal control of consignments of goods from outside the EU is inefficient, which is, among other things, due to the impossibility of verifying a large number of parcels from China and the paper-based process of circulation and exchange of documents between The National Revenue Administration and the Polish Post. It is common practice to undervalue consignments, fail to describe goods or to describe them falsely, split consignments into smaller ones to avoid customs duties, or declare commercial consignments as “gifts”. The entry into force of the e-commerce VAT package will not change this.

The settlement and collection of VAT under the new simplified SPREG procedure by postal operators and parcel delivery companies when supplying goods to EU consumers (B2C) will require an even greater extent of verification of the details of goods in low-value consignments (declared value of goods, origin and classification of goods, their code, etc.). **It is necessary to ensure that customs and tax authorities (The National Revenue Administration) have access to transaction data relating to goods purchased using e-commerce channels, especially from e-retailers and platforms outside the EU, as well as develop IT systems to analyse this transactional data for the Polish Post and parcel delivery companies for the purposes of VAT settlement and collection and tax fraud detection.**

The e-Chamber is concerned whether, after July 1, 2021, the Polish Post and The National Revenue Administration will implement effective control and supervision systems for the circulation of low-value postal and courier parcels from outside the EU.

At the same time, the e-Chamber negatively views the imposition of a 23% base VAT rate and the exclusion of reduced rates for the import of goods settled under the SPREG procedure (Art. 138i sec. of the draft). In the e-Chamber’s view, data on DSGI transactions obtained from sellers (underlying suppliers), IE operators, or purchasers (consumers) will allow for correct VAT settlements with respect to these transactions under the SPREG procedure by postal operators and parcel delivery companies, including the assignment of the correct VAT rate for imported goods.

This will lead to unjustified differentiation of VAT rates for the same goods and thus to an increase in price, depending on the procedure applied for settling this tax, i.e. VAT-IOSS or SPREG, which is often beyond the consumer’s control.

Furthermore, if consumers do not agree to apply the base rate of tax to goods imported for them, they will declare these goods to customs under the general rules, which will

increase the burden on customs and tax authorities.

For this reason, the e-Chamber calls for creating a possibility to apply reduced VAT rates to the importation of goods under the SPREG procedure, if they can be established based on data communicated and collected, by amending Art. 138i sec. 4 of the draft.

5. Comments on the provisions

A		Comments on the draft act		
No.	**Provision of the draft act**	**Content of the comment**	**Reason for the comment**	**Proposal for modification of the provision**
	Art. 1 item 7(b) of the draft (Art. 19a sec. 1b of the VAT Act)	The introduction of provisions enabling **to authorise** IE operators to **deduct VAT from the accounts/wallets of virtual sellers (underlying suppliers)**, to which funds obtained through the sale of goods paid mainly by electronic payment are transferred.	IE operators must be able to to deduct the VAT amount from the price of the goods paid by means of electronic payment. Such a mechanism will protect IE operators from EU sellers (underlying suppliers) who go out of business before settling VAT on sales.	Introduction of relevant provisions in Art. 19a sec. 1b of the VAT Act**,** the provisions of the Act of August 129, 1997, – the Banking Law and the Act of August 19, 2011, on payment services.

A		Comments on the draft act		
No.	**Provision of the draft act**	**Content of the comment**	**Reason for the comment**	**Proposal for modification of the provision**

	Art. 1 item 25(b) of the draft (Art. 106a item 4 of the VAT Act)	Removal of the provision of Art. 106a item 4 providing for the obligation to invoice in the case of DSGI (distance selling of imported goods) by an IE operator.	The introduction of such an obligation may result in **consumers' doubts as to who, in legal terms, is the other party to the transaction**, i.e. the seller.	~~Art. 106a, item 4 "distance selling of imported goods, settled under the special procedure referred to in Chapter 12, Section 9, by taxpayers identified for the purpose of this procedure, for which the Member State of identification is the Republic of Poland.";~~
	Art. 1, item 26(a) of the draft act (Art. 106b sec. 1 item 2 of the VAT Act)	Amendment of the wording of Art. 106b sec. 1 item 2 consisting in **exempting** IE operators obliged to settle transactions executed by underlying suppliers *(deemed supplier*) **from the obligation of invoicing domestic supplies** when accounting for such transactions under VAT-OSS.		Art. 106b sec. 1 item 2 "distance intra-Community sales of goods **or supply of goods to an entity which is not a taxpayer, referred to in Art. 7a sec. 2**, unless the supplier applies the special procedure referred to in Chapter 12, Section 6a"

A		**Comments on the draft act**		
No.	**Provision of of the draft act**	**Content of the comment**	**Reason for the comment**	**Proposal for modification of the provision**
	Art. 1 item 33(c) of the draft act (Art. 130a item 2b of the VAT Act)	Amendment of the wording of Art. 130a item 2(b) "for supplies of goods made by a taxpayer who facilitates such supplies pursuant to Art. 7a sec. 2, where shipping or transport of goods which are the subject of such deliveries begins and ends in the territory of the Republic of Poland"	Art. 130a, item 2(b), incorrectly implements Art. 369b of the VAT Directive.	Art. 130a item 2(b) "for supplies of goods effected by a taxpayer facilitating such supplies pursuant to Art. 7a sec. 2, where the dispatch or transport of goods which are the subject of such deliveries begins and ends **in the same member country;"**

	Art. 1 item 42 of the draft act (Article 138i sec. 4 of the VAT Act)	Amendment of the wording of Art. 138i sec. 4 in the case of VAT settlements under the SPREG procedure	Change of 23% base rate for import of goods under the SPREG procedure.	Art. 138i sec. 4 "For the import of goods, referred to in sec. 1, the tax rate is the rate **applicable to the goods concerned, and if, based on the provided and collected data, this appropriate rate cannot be determined, the tax rate shall be 22%,"**

SUMMARY

In the opinion of the e-Chamber, the provisions of the draft Amendment concerning the introduction of the e-commerce VAT package are a step in the right direction, as they aim to level the legal and competitive framework for EU e-entrepreneurs' business. A change in the model for VAT settlements with respect to low-value goods imported from outside the EU should improve the effectiveness of tax collection in cross-border e-commerce from outside the EU under the B2C model. **None the less, we have our doubts as to whether this objective can be fully achieved in practice.**

On the other hand, the e-Chamber takes a negative view of the proposed obligations concerning invoicing, fiscalisation, and recording of transactions being settled imposed on IE operators.
In addition, the introduction of a new obligation for IE operators to collect and pay VAT based on the legal fiction of the supply of goods by these operators to consumers (B2C) will make operators build a new sales and payment system as well as new technological solutions in a very short time. Also, it will be necessary to adapt the tools and applications used by professional entities engaged in sales using IE operators to operate their store/account.

For this reason, the e-Chamber calls for the **introduction of a 3-month transition period for Polish taxpayers after the draft Amendment enters into force**, during which time tax and penal-fiscal sanctions would not be imposed on taxpayers for incorrect application of the new rules, including non-compliance with the new obligations related to the collection and payment of VAT by IE operators.

Although in principle, the obligation to account for VAT will be independent of whether IE operators have their registered office or permanent place of business within the EU or in the territory of a third country, e.g. China or the USA, **in practice, it will be difficult to enforce these obligations against IE operators from third countries – located mainly in Asia**.

As a result, instead of improving the situation, the new system for accounting for VAT with respect to DSGI transactions will worsen the situation of online

sellers and IE operators from EU countries intermediating in the sale of goods from outside the EU and most sales of Asian goods will move to e-commerce and IE operators outside the EU.

Then, the collection and payment of VAT when delivering imported goods will have to be handled by parcel delivery companies or the Polish Post, which will increase the costs of logistics processes and transport of consignments.

Furthermore, the e-Chamber doubts that the Polish Post and the National Revenue Administration will implement effective systems for control and supervision over the circulation of low-value postal and courier parcels in order to fulfil the new obligations to account for and collect VAT on imports of goods from outside the EU by consumers (B2C) under the e-commerce VAT Package.