

SK Telecom

Telecommunications services – use and enjoyment
– prevention of non-taxation in the EU

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ECJ 15 April 2021, C-593/19, SK Telecom Co. Ltd



SK Telecom

Austrian mobile
communications
network operator



+ Austrian VAT

+ Austrian VAT

European Union law – Directive 2006/112/EC in the version Directive 2008/8/EC

- Art. 59: The **place of supply** of the following services to a **non-taxable person** who is established or has his permanent address or usually resides outside the Community [EU], shall be the place where that person is **established**, has his **permanent address or usually resides**: [...]
 - (i) **telecommunications services**
- Art. 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 and 59: [...]
 - (b) consider the place of supply of any or all of those services, if situated outside the Community [EU], as being situated within their territory if the **effective use and enjoyment** of the services takes place **within their territory**.

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Austrian law (UStG 1994) and national VAT-guidelines (UStR)

- § 3a/13, § 3a/14 and § 3a/16 (in the version applicable to the dispute in the main proceedings)
 - Regulation of the Federal Minister of Finance, BGBl. II No 383/2003 in the version BGBl. II No 221/2009
- UStR point 643 (in the current version)
 - Is the **place of supply** of telecommunications [...] services **outside the territory of the Community** and [...] not subject to a **tax burden comparable to domestic VAT**, the place of supply shall be **deemed** to be within the territory of **Austria**.
 - This applies **regardless** of whether [...] to a **taxable person** [...] or to a **non-taxable person** [...].

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VAT Committee and OECD – place of supply

- Guideline resulting from the 89th meeting of 30 September 2009, Dokument B – taxud.d.1(2010)176579 – 645:
 - The VAT Committee almost unanimously agrees that the **effective use and enjoyment of telecommunication**, radio and television broadcasting and electronic **services** shall be regarded to take place where the **customer is actually able to use the service** which is provided to him. Under normal circumstances, this shall be **the physical place** where the service is provided to.
- OECD, International VAT/GST Guidelines 2017 (page 81)
 - Deviating from general rules of place of supply, the **place of effective use and enjoyment** is in certain cases **appropriate**.

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VAT Committee – tax treatment in third country

- Guideline resulting from the 89th meeting of 30 September 2009, Dokument B – taxud.d.1(2010)176579 – 645:
 - The VAT Committee unanimously agrees that the exercise of the option given by Member States to tax services **effectively used and enjoyed** on their territory **does not depend on the tax treatment** that the services are subject to **outside the Community**. In particular, the fact that a **service may be taxed in a third country** under the national rules of that country **shall not prevent a Member State from taxing** that service if it is effectively used and enjoyed on the territory of that Member State.

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Prevention non-taxation/distortions of competition

- **Prevention non-taxation/distortions of competition**
 - purpose of the regulation and not a prerequisite (cf. ECJ 19 February 2019, C-1/08, *Athesia Druck*)
 - VAT South Korea: 10% – not comparable to EU > non-taxation
 - Recourse to Art. 13/1 second subparagraph: ‘significant distortions of competition’, not only actual competition but also potential competition if not and not purely hypothetical (see e.g. ECJ 16 September 2008, C-288/07, *Isle of Wight Council*, ECJ 25 March 2010, C-79/09, *Commission/Netherlands*, ECJ 29 October 2015, C-174/14, *Saudaçor*, ECJ 19 January 2017, C-344/15, *National Roads Authority*).

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- [...] underlying logic of the provisions of the VAT Directive concerning the place where a service is deemed to be supplied is that **services should be taxed as far as possible at the place of consumption** (see ECJ 13 March 2019, *Srf konsulterna*)
 - [...] objective of the provisions of the VAT Directive determining the place where supplies of services are taxed is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, second, non-taxation (see ECJ 17 December 2015, C-419/14, *WebMindLicenses*).
- [...] open to Member States to make use [...] of **Article 59a** [...] where that use has the sole effect of **remedying a situation of non-taxation within the European Union**, [...].
 - [...] possible cases of double taxation, non-taxation or distortion of competition are to be assessed by reference to the **tax treatment** of the services concerned in the **Member States**, **without it being necessary** to take account of the **tax regime** to which those services are subject in the **third country** concerned.

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- Roaming services supplied by a mobile phone operator established in a third country to its customers who are also established, have their permanent address or usually reside in that third country, allowing them to use the national mobile communications network of the Member State in which they are temporarily staying, must be considered to be **'effectively used and enjoyed' within the territory of that Member State**, for the purposes of that provision, so that that Member State may consider the place of supply of those roaming services to be situated within its territory where, **regardless of the tax treatment to which those services are subject under the domestic tax law of that third country**, the exercise of such an option has the effect of preventing the non-taxation of those services within the European Union.

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Thank you for your attention!

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