



# UK Indirect Tax Conference 2014 TMT Breakout

David Latief and Sanj Sharma,  
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# Agenda

**Holding companies (BAA brief) – *Group Discussion***

**Place of Establishment – (i) *Société Fonderie 2A*, (ii) *Welmory*; and (iii) non-EU Fixed Establishments**

**B2C supplies – Non-EU PoS changes**

**K Oy & Belgium update – VAT on e-publishing**

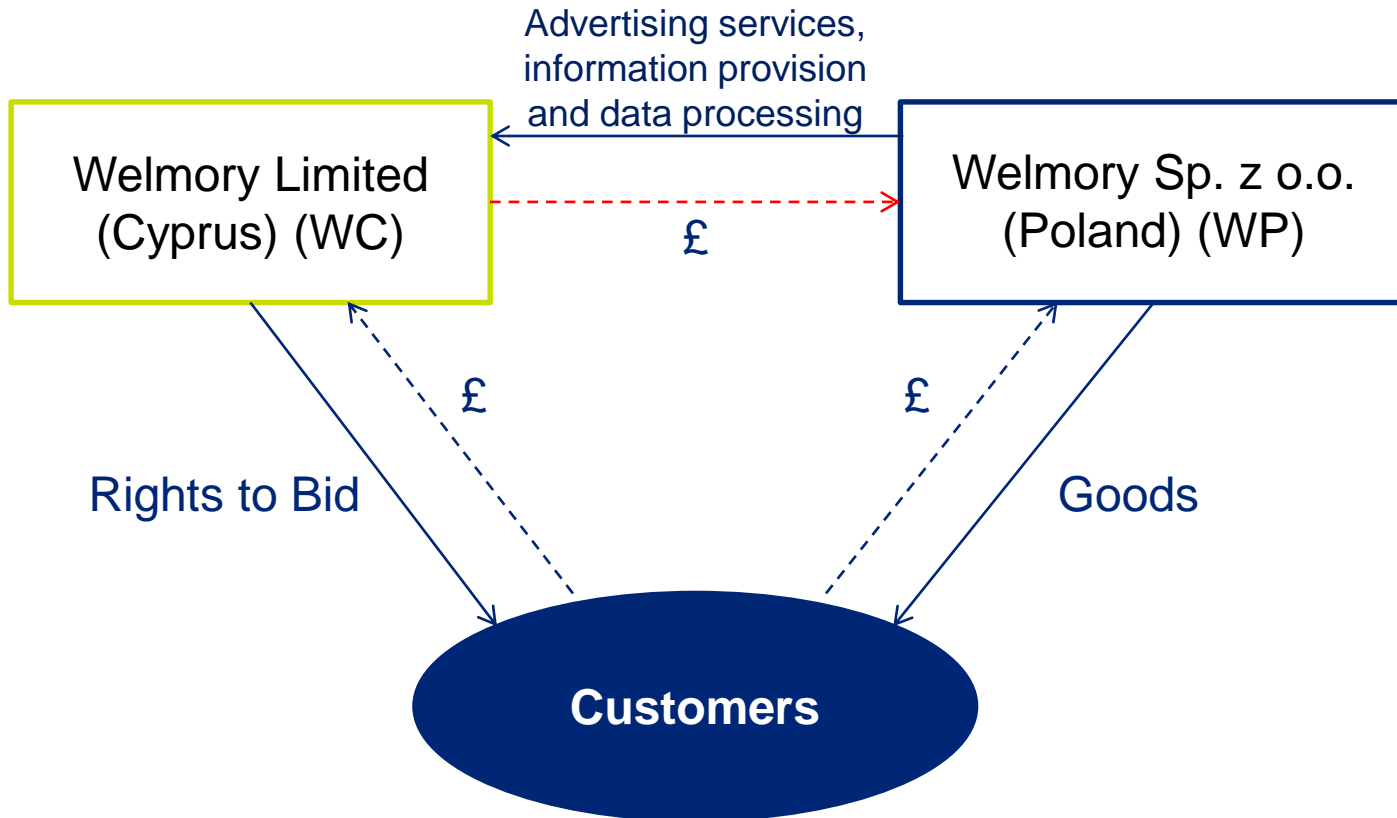
**Use and Enjoyment – Changing Landscape**

**Mobile Consumer Survey**

# Fixed Establishments and PoS

# Welmory C-605/12

## CJEU Judgment



# Fixed Establishments

## Non-EU Fixed Establishments

### Our analysis

The CJEU judgment does not provide much commentary on the issues surrounding establishments over and above what we already know, specifically:

The starting point for determining the place of supply of services is where the taxable person has established its business and only if that place of business leads to an irrational result does another (fixed) establishment come into consideration; and

Establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, and this is something for the national courts to decide.

# Fixed Establishments

## Non-EU Fixed Establishments

### Key Considerations

- Outside of the EU, a local subsidiary and / or a third party can sometimes create an indirect tax FE for an overseas business.
- This could happen when the subsidiary / third party is acting in an agency capacity.
- However, the concept of agency can vary:
  - In Australia the concept of agency is fairly broad, whereas in Canada FEs could be created by 'dependent agents'.
- Elsewhere the concept of fixed establishment does not exist for indirect tax purposes (E.g. Japan).

# Fixed Establishments

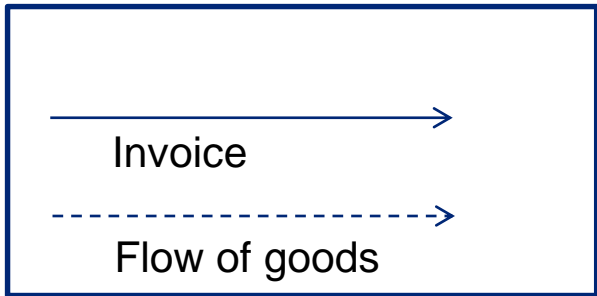
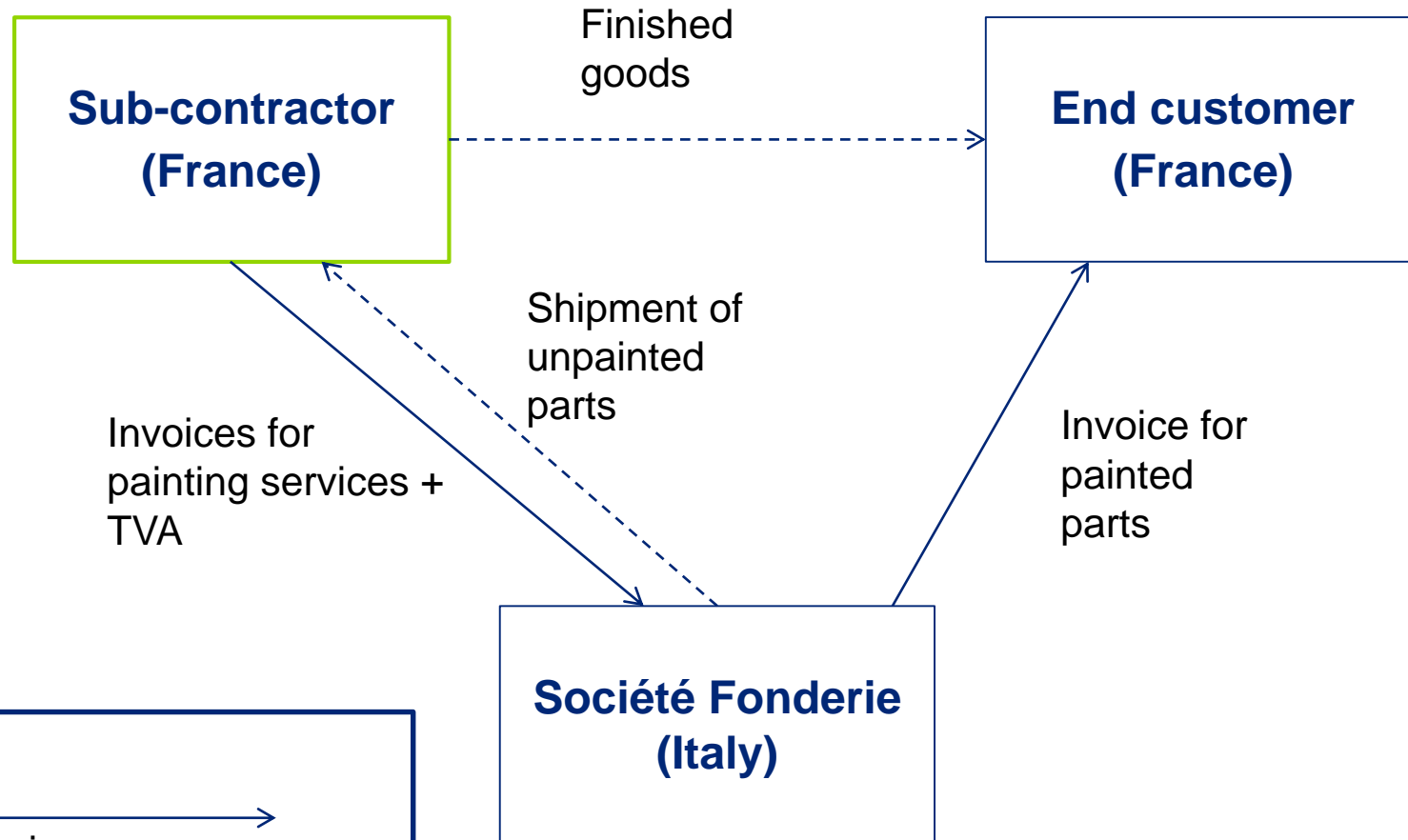
## Non-EU Fixed Establishments

### Key Considerations

- Does my business carry on business through third parties / subsidiaries overseas?
- Is this creating a fixed establishment for VAT/GST purposes?
- If so, what are the local compliance obligations? E.g. what are the reverse charge rules in place?
- Are the risks prospective and/or retrospective?
- How can I mitigate against these risks? Contractual provisions? Local rulings?

# Société Fonderie 2A [C-46/13]

## Work on Goods and the PoS





# **Société Fonderie 2A [C-46/13]**

## Work on Goods and the PoS

### **CJEU judgment** (following the AG's opinion)

- Société Fonderie 2A made a domestic supply of the goods in France and should have accounted for TVA on this supply.
- This is because the goods were at the premises of the French sub-contractor when delivery to the French customer commenced i.e. when the supplier of goods dispatches the goods to the service provider, he does not transfer the right to dispose of the goods as owner to the ultimate customer.
- The judgment suggests that Société Fonderie should have registered for TVA and also have accounted for TVA on intra-EU movement of own goods.
- It also confirms that the time and place of supply can only be determined once (i) the goods themselves exist and (ii) ownership rights are capable of being transferred.

# **Société Fonderie 2A [C-46/13]**

## **Work on Goods and the PoS**

### **Impact**

- The judgment increases the risk of non-compliance and VAT costs for our clients in relatively conventional manufacturing and supply chain scenarios.
- This is the case even when the net tax effect is “neutral”.

### **Questions to Consider**

- Where are the goods when they finally satisfy the contractual conditions of being “finished”?
- Do goods move straight to the customer, or is further work carried out on them in the customer’s country prior to customer delivery?

# B2C PoS Changes – Non-EU update

# Non-EU PoS changes (B2C)

## Overview

### PoS changes

- The EU's 2015 PoS changes for B2C supplies of digital services are close to being rolled out.
- However, many non-EU countries are considering or have implemented similar changes for electronic supplies.
  - E.g. Malaysia, Japan, South Africa, Iceland.
- The proposed changes shift the place of supply to the place of consumption and are intended to eliminate a competitive distortion by obliging overseas suppliers to charge GST / VAT.
- This could significantly increase the compliance burden on overseas businesses, and in some cases represent a permanent cost.

# Non-EU PoS changes (B2C)

## Questions to consider

- Which countries are implementing PoS changes?
- Will these changes create VAT liabilities and / or registration liabilities?
- Can the procedures and systems put in place to cope with the EU 2015 changes be replicated?
  - E.g. systems to determine customers' locations.

# Japanese Consumption Tax Reform

## JCT treatment of e-services

### Treatment of e-services

- As part of the JCT reform (scheduled to come in next year), the PoS rules for cross-border services will change so that the PoS of most e-services will be **where the recipient is located**.
- Overseas companies will therefore have to account for JCT on their supplies of e-services to Japanese customers.

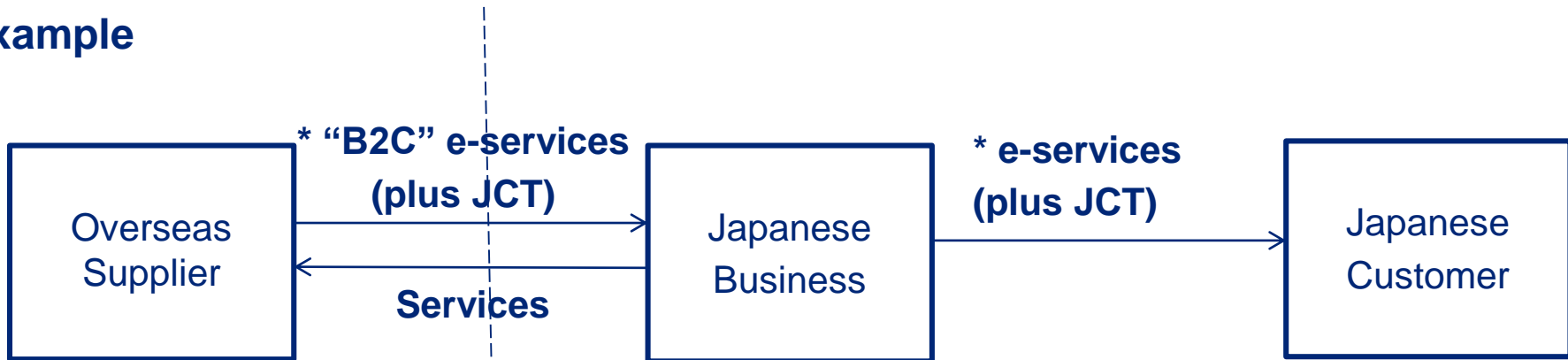
### Under the current proposal...

- Distinction between B2B and B2C to be determined by the nature of the services (as opposed to the nature of the customer).
- Japanese businesses will not be able to deduct the JCT it is charged on 'B2C' supplies of e-service received from overseas.

# Japanese Consumption Tax Reform

## JCT treatment of e-services

### Example



- Overseas Supplier charges JCT on e-services to Japanese Business (acting as principal).
- As this is treated as a B2C supply, the Japanese Business cannot recover this JCT.
- **Japanese marketplaces may not wish to act as 'Principal'?**

# Update on e-publishing



# Update on e-publishing

## K Oy – CJEU judgment

### Overview

- One of a number of cases concerning the appropriate rate of VAT for e-publishing.
- Should the principal of fiscal neutrality prevent Member States from applying different VAT rates to hard copy publications and e-publications?

### CJEU Judgment

- Endorsed the A-G's opinion that fiscal neutrality alone could not preclude the application of different VAT rates to both types of books.
- However, in markets where both types of books were viewed in the same way by customers, and considered to fulfil the same needs, such differential treatment may not be allowed

# Belgium - VAT on e-publishing

## Historic Treatment

- Since 1 January 1971, periodicals issued on paper are subject to the zero-rate providing they:
  - Are published at least 48 times a year;
  - Are informative and accessible to the general public;
  - Do not contain advertising pullouts, catalogues etc; and
  - Are not made up of >60% advertisements.
- N.B. This treatment is based on a circular letter – no statutory basis.

# Belgium - VAT on e-publishing

## Extension to e-publications

- Recently, the tax authorities have (on an individual basis) agreed to extend the application of the zero rate to e-publications, providing that certain conditions are met.
  - E.g. the e-publication must be a reproduction of the paper format.
- Therefore, once the 2015 PoS changes are introduced, overseas businesses could potentially benefit from the zero-rated treatment on B2C supplies to Belgian customers.
- However, as there is no statutory basis, the zero-rated treatment will rely on an individual ruling from the Belgian Tax Authorities.

Use and Enjoyment

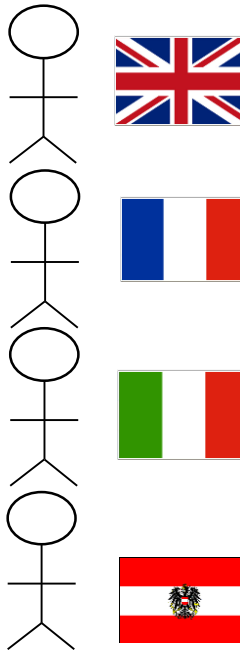
# Use and Enjoyment

## Changing Landscape

### Before 2015 Changes

EU supplies of digital services  
(B2C)

**UK  
Business**



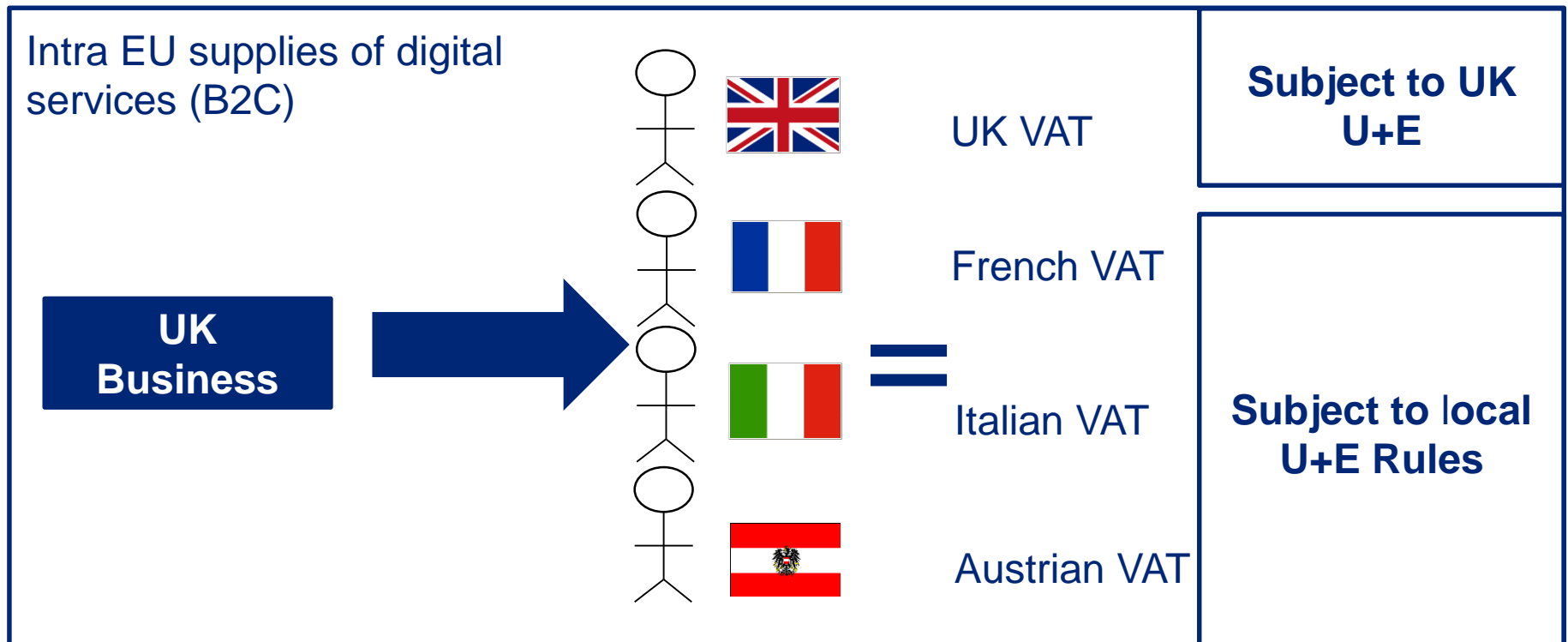
**= UK VAT**

**Subject to UK  
U+E**

# Use and Enjoyment

## Changing Landscape

After 2015 Changes



# Use and Enjoyment

## Changing Landscape

### HMRC approach

- HMRC are currently reviewing business' application of the U+E rules in some industries
- Has your business received an information requests from HMRC?
- Calculation methods are likely to be reviewed, if applicable
- Shift from estimation to actual usage calculations?
- Business Brief?

# The Mobile Consumer Survey 2014



# Smartphones

## Always checking in...

- The waking routine of most smartphone owners now involves checking who has been in touch with them overnight.

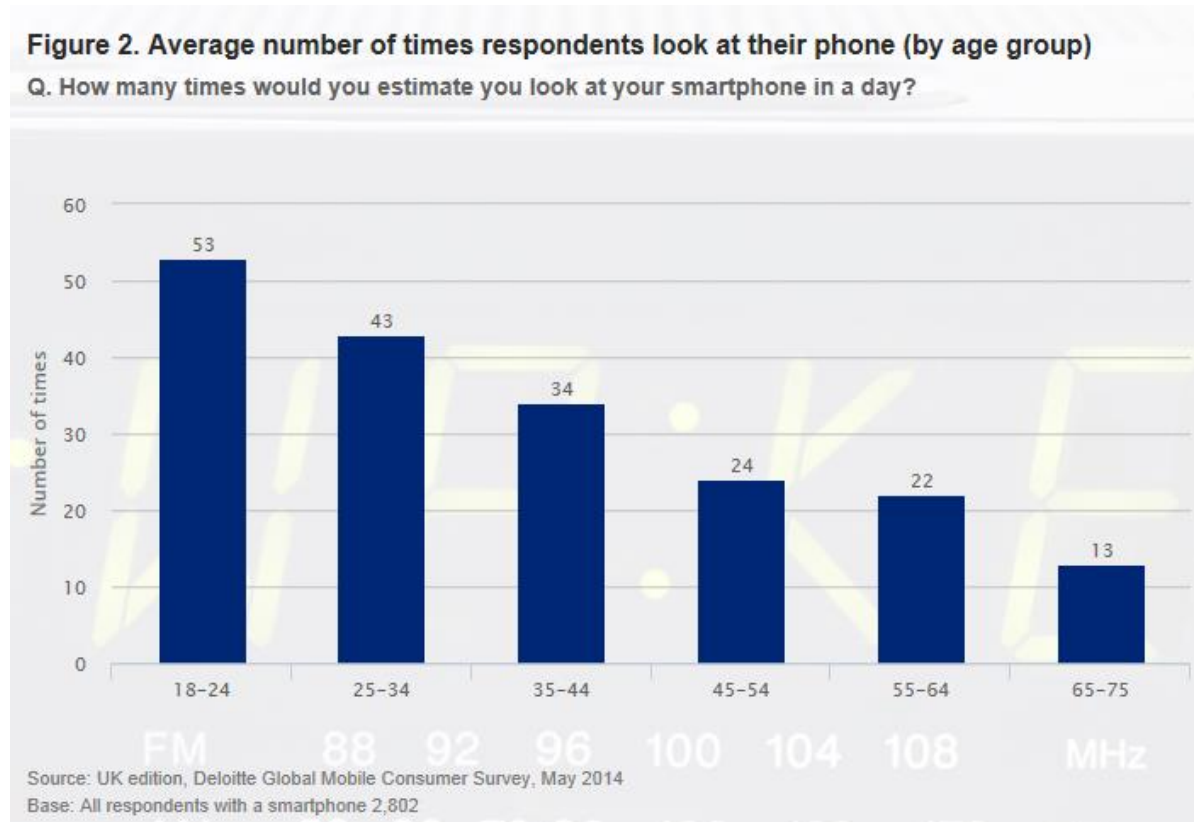
## The Interval between waking up and checking smartphones



# Smartphones

## Always checking in...

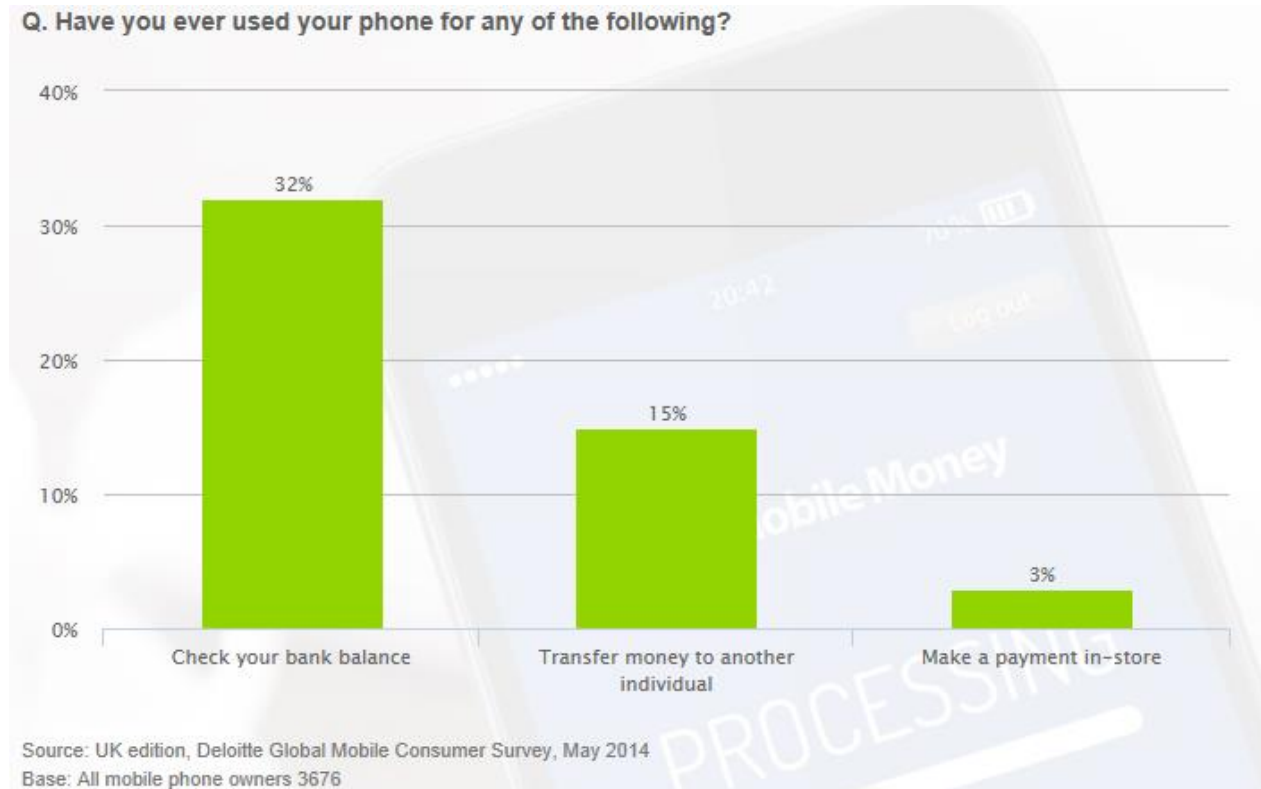
- While overall usage is increasing, there is a continuing gap in intensity of usage between age groups.
- 18-24 year-olds check their device on average 53 times a day whilst 65-75 year olds check their device a mere 13 times a day on average (see Figure 2).



# Mobile Money

## How many of use mobile 'money' services?

- UK consumers are currently more open to the use of apps for checking bank balances, than they are to transferring funds (15%) or making in-store payments (3%).



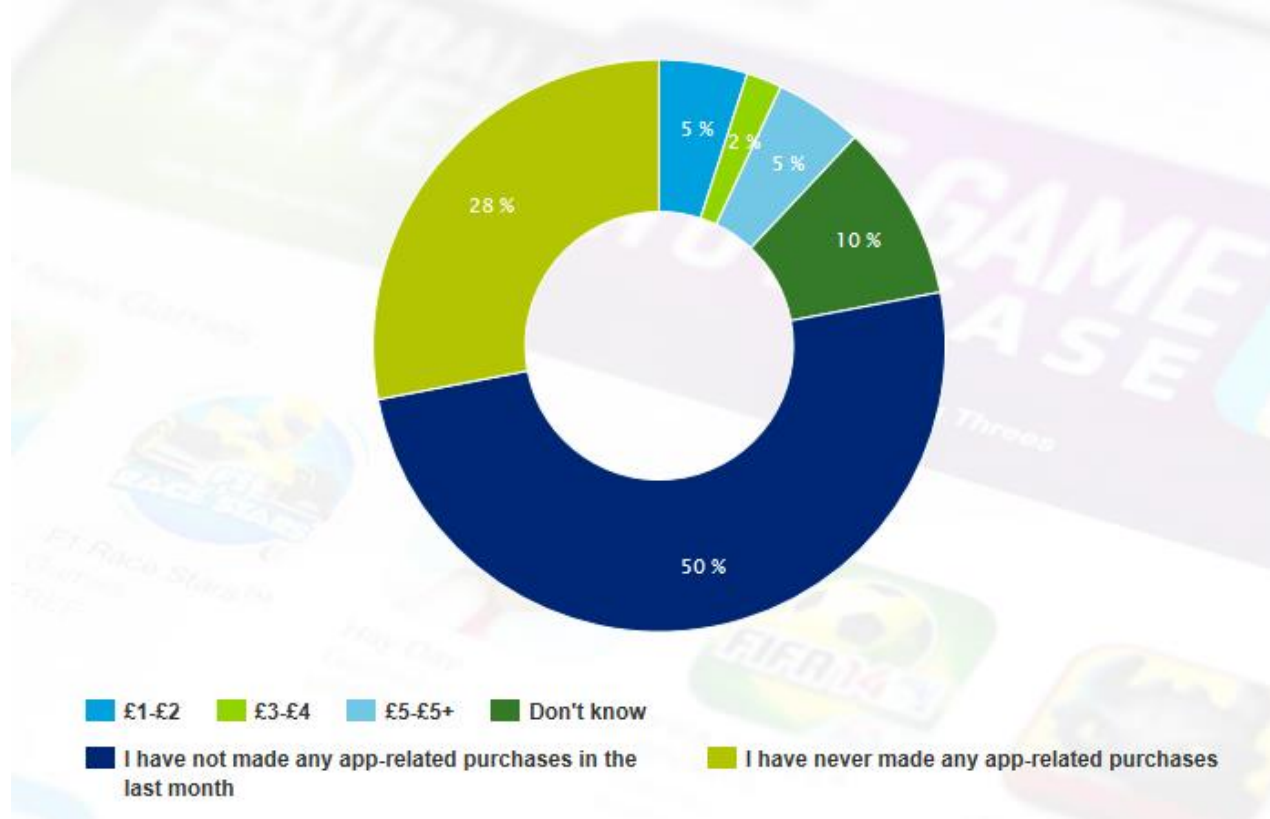
# The rise of App-athy?

## Decline of App downloads

- In addition to showing a decline in average number of apps downloaded, this year's survey findings shows a limited take-up of app-related purchases.

**Figure 2. Smartphone users' monthly app-related expenditure**

Q. How much do you spend per month on apps/games, including purchases that you make via the apps on your phone? Please include any app subscriptions that you have and pay per month.





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