

Online Marketplaces and EU VAT: Global Reach but Compliance Still Local

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Aleksandra Bal (Indirect tax technology specialist)

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Online platforms are an important part of the digital economy and one of the key enablers of the tremendous growth of the e-commerce sector. According to data published by Ecommerce Europe, business-to-consumer (B2C) ecommerce turnover in Europe is worth over EUR 621 billion and continues to grow at around 13%.^[1] This is quite fast considering the diversity of the European market (over 40 different countries, 24 official languages spoken and 28 currencies used).

One of the challenges that platform operators face is the complexity of the legal rules that they must comply with. In the near future, this complexity is going to increase, at least in the area of VAT. Next year, the E-commerce VAT Package will take effect, and one of its key elements is a new rule establishing the primary liability of online platforms that facilitate certain transactions. The introduction of this rule was prompted by the fact that third-country businesses selling goods to EU consumers via online marketplaces do not always meet their EU VAT compliance obligations and this leads to revenue shortfalls.

As from 1 January 2021, platforms that facilitate B2C imports of goods of a value below EUR 150 will be deemed to receive the supply from the initial seller (a deemed B2B supply) and to sell the goods onwards to the final consumer (a deemed B2C supply). The same will apply to platforms facilitating intra-EU sales of goods by non-EU businesses. Both domestic sales (i.e. if goods are already located in the Member State of the customer at the time of sale) and sales involving transport from another Member State are covered by the new provision. The consequence of the new provisions is that the online platform is liable for the collection of VAT on the supplies to final consumers and for the remittance of this VAT to the tax administration. The online marketplace will have to determine where the consumer is located and what VAT rate applies. This can be challenging as the VAT rates vary per county and platforms may not always have a detailed description of the goods that they sell.

Some EU Member States did not want to wait until an EU-wide solution is implemented and enacted their own domestic rules, prescribing new recordkeeping obligations and imposing a secondary VAT liability on online platforms. Special VAT rules for online platforms are already in force in the United Kingdom, Germany, France, Italy and Austria.

The United Kingdom was the first EU country to enact special provisions for online marketplaces. Since September 2016, the UK tax authorities (HMRC) have been permitted to make online marketplaces jointly and severally liable for the unpaid VAT of overseas businesses selling goods to UK consumers. In 2018, the scope of the joint and several liability rules was expanded to include situations where UK businesses selling goods via the online marketplace failed to account for VAT. Finance Act 2018 also introduced legislation requiring platforms to ensure that VAT numbers displayed on their websites are valid.

In Germany, marketplace operators facilitating supplies of goods by third parties have to comply with certain recordkeeping obligations since 1 January 2019. They are required to record transactions where the transport ends or begins in Germany, irrespective of whether these supplies are subject to German VAT or not. This requirement can be difficult to meet if the platform simply facilitates a transaction and is not aware of where the goods come from and what their destination is. Moreover, platform operators may be held liable for any unpaid VAT on supplies that were legally established via their online marketplaces unless they are in possession of a certificate from the taxable person or an electronic confirmation from the Federal Central Tax Office that the seller is registered for VAT purposes in Germany. This exception does not apply if the operator knew or should have known (based on the due diligence obligations of a prudent businessperson) that the seller did not fulfil his VAT compliance obligations.

On 10 October 2019, the European Commission sent Germany a letter of formal notice asking it to withdraw its legislation on the liability of online marketplaces^[2]. The Commission considers the German rules to produce a registration certificate an inefficient and disproportionate measure that hinders the free access of EU businesses to the German market, thereby violating EU Law. It believes that the obligations imposed on marketplace operators to avoid joint and several liability go beyond what is provided for by the EU rules and are at odds with the goals of the Digital Single Market Strategy for Europe.

In Italy, online platforms that facilitate distance sales of goods are required to report certain information to the tax authorities on a quarterly basis. This obligation was introduced by Law Decree 34 of 30 April 2019 (the Growth Decree) and applies from May 2019 until 31 December 2020. The marketplace operator may be held liable for VAT due on distance sales of goods if (1) the prescribed information has not been transmitted; or (2) incomplete information has been transmitted, unless the operator provides evidence that VAT has been correctly remitted by the supplier. The Italian tax administration clarified that to fulfill the new quarterly reporting obligation, foreign online marketplaces without an Italian permanent establishment will be required to register for VAT purposes in Italy or appoint a fiscal representative.

The French reporting obligations for online platforms took effect in January 2020. They apply irrespective of whether the platform is established in France or abroad. One of the most troublesome reporting requirements is the obligation to determine whether the seller's transactions are subject to French VAT. This goes well beyond a passive reporting of data that is generally available in the platform databases and entails an obligation to verify the VAT treatment of each transaction (i.e. whether the place of supply is in France and whether the supply is taxable in France). The aim of this provision is to ensure an active involvement of online platforms in the fight against VAT fraud. If a non-compliant seller is detected but not removed from the marketplace, the platform operator may face a joint and several VAT liability.

In Austria, platforms are required to report certain data on supplies of goods and services to Austrian private individuals as from January 2020. A platform will not be held liable for transmitting incorrect data it received from the seller if it did not know or could not have known that the data is incorrect. The records are to be submitted electronically by 31 January of the following year if the total value of the sales to be reported exceeds EUR 1,000,000 in a calendar year. If the amount of reportable sales is below this threshold, platforms must submit the data only upon request of the tax authorities.

Looking at the divergent national approaches, it becomes clear that the European Commission's objective to establish a balanced and uniform regulatory framework for online platforms has not been achieved yet. It remains to be seen how the present reporting obligations will be affected by the E-commerce VAT package taking effect next year. They seem to become obsolete for transactions where the online platform will be deemed to act as a seller and face a primary VAT liability.

Having enacted new VAT compliance rules for online platforms, the European Union is now turning its attention to online sellers who do not report to the tax administration what they earn via online platforms. The European Commission is planning to propose a directive to strengthen the exchange of tax information and to tackle tax evasion by non-compliant online sellers.^[3]

[1] Ecommerce News Europe, <https://ecommercenews.eu/ecommerce-in-europe-e621-billion-in-2019/>

[2] October Infringements Package: Key Decisions (10 Oct. 2019), https://ec.europa.eu/commission/presscorner/detail/en/INF_19_5950.

[3] https://ec.europa.eu/info/law/better-regulation/initiatives/dac_renewal_en