

Fundamentals of the e-Commerce VAT Package

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Last month, the second edition of the book 'Fundamentals of EU VAT Law' was published.^[1] It was written by Herman van Kesteren, Simon Cornielje, Frank Nellen and me. The second edition received a major update and contains – among other things – new key CJEU case law and new EU VAT legislation (such as the quick fixes^[2]) and the so-called e-commerce VAT package^[3].

The book follows the structure of the VAT Directive with additional topical chapters on immovable property, intra-Community transactions, importation and exportation of goods, and a newly included chapter on the EU VAT treatment of shares and other securities. With its detailed attention to the meaning and interpretation of the most prominent legislative provisions and court rulings, the book serves as guide for all tax professionals in the field.

Quite some effort was put into updating the book with the e-commerce VAT package. This package contains new rules on the EU VAT treatment of cross-border supplies of goods to private consumers (B2C supplies), nowadays often ordered via the internet. In this blog, I will explain the core of the current rules and why the new rules do not achieve all objectives with which they have been adopted.

Current rules

A distinction can be made between supplies of goods shipped from other member states and those shipped from third countries.

If the goods are shipped by or on behalf of the supplier from one EU Member State to another, then the rather complex “distance selling” rules apply. Based on different thresholds per Member State, it must be determined whether the VAT of the Member State of dispatch of the goods or the Member State of arrival of the goods is to be applied. If the VAT of the Member State of arrival of the goods has to be applied, this means for the supplier that he has to register, declare and pay VAT in that Member State. It is safe to say that the current distance selling rules create a considerable administrative burden for businesses.

If the goods come from outside the EU, for example from China, then – under the current rules – the supply of the goods is in principle not subject to European VAT, if the parcel is imported in the customer's name.^[4] Upon entry into the European Union, a separate taxable event, “importation of goods” takes place. However, the importation of parcels with a value of less than or equal to 22 euros is currently exempt from import duties and VAT. This effectively means that such goods can reach the consumer VAT-free.

The issues

The aforementioned non-taxation of cross-border B2C supplies of goods by non-EU suppliers creates a distortion of competition in comparison with B2C supplies from other EU Member States. Moreover, a considerable fraud takes place with regard to parcels originating from third countries (e.g. underreporting of the customs value). Besides that, entrepreneurs have put certain schemes in place to circumvent the distance sales rules.^[5] For these and other reasons, it has proven to be difficult enforcing compliance of non-EU businesses.

Legislative changes

Not long ago, the EU institutions have decided to take legislative action. After the adoption of Directives 2017/2455 and 2019/1995 and Implementing Regulations 2017/2459 and 2019/2026, the new rules were scheduled to come into effect on 1 January 2021. However, this has been postponed to 1 July 2021 due to implementation problems (and allegedly also due to the Corona crisis). Germany and The Netherlands seek to further postpone the implementation deadline to 1 January 2022. Meanwhile, the issues continue to exist...

New rules

The newly introduced rules are rather detailed and complex. The core of the new rules is formed by new rules on:

1. cross-border B2C supplies of goods within the EU (intra-EU distance sales)
2. cross-border B2C supplies of goods from a non-EU country to an EU Member State (non-EU distance sales)
3. cross-border B2C supplies via so-called ‘platforms’.

Ad 1. Intra-EU distance sales

For cross-border B2C supplies within the EU, a single threshold of 10,000 euros will apply per business. If a trader supplies goods or services (!) for more than 10,000 euros to private individuals in other Member States, he will have to pay the VAT of the Member State of arrival of the package. The trader does not, however, have to register in that Member State for this purpose. Instead, he can use the so-called One Stop Shop mechanism. He may opt to complete and file a new OSS filing on a quarterly basis. This ‘OSS return’ will be standardized across all the EU member states. For this purpose, tax authorities will put digital portal in place and a mechanism that ensures that the (foreign) VAT payable is forwarded to the Member State of arrival of the goods.

Ad 2. Non-EU distance sales

For cross-border B2C supplies of parcels from a non-EU country to an EU Member State, the starting point will be that the supply to private individuals is taxed in the Member State of arrival. The exemption on importation for packages with a value of 22 euros or less will be abolished.

If, for example, a Chinese entrepreneur delivers a parcel to a Dutch private individual, the Chinese supplier will be liable to pay Dutch VAT. And if the package is shipped to a private individual in Germany, the Chinese supplier will be liable to pay German VAT. He can pay this VAT via the One Stop Shop mechanism (the so-called ‘import One Stop Shop’ or ‘iOSS’), provided that the value of the parcel is equal to or less than 150 euros. As a result of the application of the iOSS, he does not have to register in all Member States to which he supplies goods. However, he will have to appoint a representative established in the EU in order to pay VAT via the iOSS.

If the Chinese supplier uses the iOSS, the importation of the parcel into the EU is exempt. It would go too far here to discuss the situations in which the packages are imported in the name of the consumer, or in which the importing Member State is a different Member State than the consumer's Member State. In such situations, I merely point out that different rules apply.

Ad 3. Platforms

B2C trade on the Internet often takes place via large (online) platforms, such as Alibaba and Amazon. They connect the many suppliers with the many, many buyers of their goods. Under the new rules, the platforms will have a pivotal role.

The new rules introduce the fiction that if goods are sold via a platform, they are deemed to have been supplied by the supplier to the platform and, subsequently, by the platform to the (final) EU consumer. In addition, the supply to the consumer is in principle deemed to be a distance sale (through a legal fiction attributing the transport of the goods to the supply by the platform to the customer).

As a result of this, the numerous suppliers outside the EU do not have any EU VAT obligations. Instead, the platforms become responsible for VAT on non-EU distance sales to private individuals in the EU. This is easier for the tax authorities of the EU Member States and, moreover, it is assumed that large platforms are better able and more willing to be compliant.

This is the essence of the new rules that will come into effect on 1 July 2021. I emphasize that the rules are much more detailed than I have been able to outline in this brief explanation. In the new, second edition of our book, Fundamentals of EU VAT Law we discuss the new rules in more detail.

Impact of the new rules

The postponement of the implementation deadline to 1 July 2021 (or maybe even to 1 January 2022) shows the impact these rules have on tax administrations. But the impact on businesses should also not be underestimated. For example, existing VAT registrations may need to be changed or cancelled, ERP systems need to be reconfigured so that the OSS declaration can be compiled, a system to monitor the VAT rates in the various Member States must be implemented to enable a timely adjustment of sales prices we needed. And to realize this all, relationships with logistics service providers, marketplaces and other stakeholders may need to be revisited.

Problems solved?

The e-commerce VAT package was introduced to create a level playing field, to combat fraud and to reduce administrative obligations for businesses. It is however doubtful whether these objectives have all been met to the fullest extent possible.

Although from an EU perspective the playing field may seem to have been levelled, it is doubtful whether small non-EU businesses will have a similar perception, since the 10,000 euros threshold does not apply to them.

But more importantly, the rules do not substantially improve the possibilities to enforce compliance by non-Union suppliers. Also, they do not reduce the risk of fraudulent behavior such as underreporting and undervaluation of imported goods and the hijacking of OSS registration numbers. The introduction of reporting requirements for payment service providers with effect of 1 January 2024 will probably contribute to the combating of fraud, but also that measure is in my view not a panacea.^[6]

Moreover, under the e-commerce VAT package, I see some situations in which double taxation may occur. This is for example the case if goods are imported on behalf of the customer in a Member State other than that of arrival of the goods and the iOSS is not applied. The option for Member States to force businesses to apply the standard VAT rate if the special arrangements for declaration and payment of import VAT apply (Art. 369y and further of Directive 2017/2455) in my view creates distortions, confusion and administrative burdens. And lastly, one may doubt whether the comprehensive set of rules and the formal and de facto obligations imposed on businesses (such as the monitoring of VAT rates in all Member States) indeed reduce the complexity of the requirements for businesses.

In conclusion

The example of the e-commerce VAT package shows that the rules on EU VAT are getting increasingly complex. The introduction of new rules such as the ones set out in foregoing are one cause, but there are other causes as well. Think only of the ever-growing body of CJEU case law! With such increasing complexity, it is easy to lose overview. The second edition of ‘Fundamentals of EU VAT Law’, aims at helping the reader to put the various elements of the VAT system in context. The authors hope that you will enjoy the read!

[1] Ad van Doesum, Herman van Kesteren, Simon Cornielje and Frank Nellen, *Fundamentals of EU VAT Law*

(second edition), Kluwer Law International, Alphen aan den Rijn, 2020.

[2] See: Council Directive 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States [2018] OJ L 311/3 and Council Implementing regulation (EU) 2018/1912 of 4 December 2018 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions [2018] OJ L 311/10. Further changes have been introduced by Council Directive (EU) 2019/1995 of 21 November 2019 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods [2019] OJ L 310/1 and Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods [2019] OJ L 313/14. See also: M. Horsthuis and F.J.G. Nellen, *A Critical Analysis of the Quick Fixes for the EU Intra-Community B2B VAT System* (2019) 3 International VAT Monitor.

[3] See: Council Directive 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods [2017] OJ L 348/7 and Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods [2019] OJ L 313/4.

[4] It is different if the supplier imports the goods.

[5] See in this regard: CJEU 18 June 2020, Case C-276/18 *KrakVet Marek Batko sp. K. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:485.

[6] Council Directive 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers [2020] OJ L 62/7.