



VAT NEWSLETTER

Electronic marketplaces shall be liable for tax shortfalls – now, it's the online retailers' turn

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1 Tax shortfalls in the three-digit million range

Via online marketplaces retailers from Asia – mainly from China – are increasingly appearing on the German market. Products are often sold without the retailers paying German VAT. The annual tax loss for the German budget is estimated to be in the three-digit million range. It is difficult for the tax authorities to proceed against such criminal retailers. The fact that the retailers are based abroad makes it difficult to enforce claims and to prosecute the responsible persons.

2 Europe-wide E-Commerce reform as of 2021

On 5 December 2017, the EU Council agreed with the proposals of the European Commission on the E-Commerce reform. In order to tackle tax evasion via online marketplaces, a supply chain, similar to a commissionaire or undisclosed agent scheme (sec 3 para 3 German VAT Act), will be assumed in the future. According to the new sec 14a para 2 VAT Directive, this will always apply when an intra-Community sale of goods takes place, but the supplier is not established in the EU and the buyers are not taxable persons. Consequently, the marketplace thus become liable for the VAT for the supply to the buyer. According to the new sec 14a para 1 VAT Directive, the same applies to situations in which the goods are imported directly from a non-EU country and the value of the goods does not exceed EUR 150.

3 Government draft of the law to avoid VAT shortfalls on the trade with goods on the Internet

Due to the high tax shortfalls, the German federal government does not want to wait until 2021, but wants to close the existing tax gap beforehand by a special national regulation. The government's draft published at the beginning of August 2018, stipulates in sec 22f German VAT Act (draft) special reservation obligations for operators of an electronic marketplace as well as a certificate of the tax registration (registration certificate) for the supplying entrepreneur (retailer).



Prof. Dr. Oliver Zugmaier
Lawyer

+49 (0) 89 217 50 12-60
oliver.zugmaier@kmlz.de

According to sec 25e German VAT Act (draft), the operator of the marketplace shall be liable for the unpaid VAT on the retailer's supply.

3.1. Operator of an electronic marketplace

An electronic marketplace is a website or every other instrument that can be used to provide information via the internet enabling a third person who is not the operator to execute sales. The operator is the one who runs an electronic marketplace and enables third persons to execute sales on this marketplace. All platforms will be subject to the legal definition. According to estimates in the official justification for the law, there are about 129 marketplace operators in Germany.

3.2. Registration certificate

In the registration certificate planned according to sec 22f para 1 German VAT Act (draft), the tax office responsible for the retailer confirms that he or she is registered for tax purposes. A retailer has the legal right to this registration certificate.

3.3. Operator's liability and notification procedure

According to sec 25e para 1 German VAT Act (draft), the operator of the electronic marketplace is liable for the VAT resulting from the retailer's supply via the marketplace which was not paid. The operator can avoid this liability by presenting the retailer's registration certificate. However, the liability is revived if the operator knew or had to know that the retailer was not fulfilling his or her tax obligations.

If the retailer does not fulfil his or her tax obligations (declaration and payment obligations), the tax office responsible for the retailer can inform the marketplace operator of these omissions. After receipt of the notification, the operator is liable for the VAT on future sales for which the retailer does not pay the VAT. The operator can avoid this liability if the retailer can no longer offer goods via the marketplace and the operator proves this.

3.4. Legal protection of the online retailer?

How can the retailer defend himself against this notification, which can threaten his or her very existence? The bill is silent on this. According to sec 122 para 1 German Federal Fiscal Code, an administrative act shall be announced to the person for whom it is intended or to whom it applies. There are good arguments in favour of the retailer being considered a third party affected within the meaning of this provision. The notification must then be made both to the operator and to the retailer, so that the retailer can take action against an incorrect notification with objection/claim and suspension of execution.

3.5. Coming into effect

The new regulations are to come into force on 1 January 2019. The certificate should be issued in paper form until the planned electronic procedure begins (draft of sec 27 para 25 German VAT Act) following a separate notification by the German Federal Ministry of Finance. The liability of marketplace operators is effective for retailers from third countries as of 1 March 2019 and for retailers from Germany, the EU and the EEA region as of 1 October 2019.

4 Recommendations for online retailers

Retailers who are not registered for VAT yet should apply for it as soon as possible. After the law was promulgated in December, all retailers should request a registration certificate. If they neglect their tax declaration and payment obligations, they may face the exclusion from the marketplace via the notification to the operator.