



Infringement procedure against Germany regarding new legislation on marketplace liability

1 Background

On 10.10.2019 the European Commission decided to initiate formal infringement proceedings against Germany in relation to its new legislation on the liability of online marketplaces (INF/19/5950). This is based on the new regulations in secs 22f and 25e of the German VAT Act on the liability of online marketplaces, which came into force on 1 January 2019. The legislator inserted sec 22f dealing with the special obligations for operators of online marketplaces into the German VAT Act. According to sec 25e of the German VAT Act, the operator of an online marketplace can be held liable if an online merchant supplies goods in Germany via the online marketplace and is not, or only partially, fulfilling its VAT obligations (see KMLZ Newsletter 08/2019 and 32/2018).

Operators of online marketplaces can be held liable under sec 25 para 1 of the German VAT Act if an online merchant carries out taxable supplies of goods on their marketplace without paying VAT in Germany. This provision constitutes a strict liability for operators of online marketplaces. These operators of online marketplaces can prevent liability arising pursuant to sec 25e para 1 of the German VAT Act, if they can prove that the relevant online merchant is registered in Germany for VAT purposes (sec 25e para 2 of the German VAT Act). This is achieved by means of a VAT registration certificate of the online merchant (sec 22f para 1 sent 2 of the German VAT Act). This said certificate is issued to the online merchant, in paper form, by the competent German tax office, at the request of the online merchant. The procedures for the electronic production of this certificate and the electronic enquiry option have yet to be introduced by the German tax authorities.



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2 Opinion of the Commission

In the opinion of the EU-Commission, the new regulations contained in secs 22f and 25e of the German VAT Act infringe EU law. This results from the obligation of the operators of online marketplaces to submit a so-called registration certificate of the online merchant. According to the Commission, this obligation is inefficient and disproportionate. Doubts as to the proportionality of the new regulations in secs 22f and 25e of the German VAT Act (particularly with regard to the certification procedure) were voiced before the new regulations came into force.

It is the EU-Commission's view that the obligation of the operators of online marketplaces to submit a registration certificate hinders the free access of European online merchants to the German market, which results in a violation of EU law.

Furthermore, Member States have already agreed on common and more efficient measures to combat VAT fraud which will come into force on 1 January 2021. A supply chain, similar to a commissionaire or undisclosed agent scheme (sec 3 para 3 of the German VAT Act), will be assumed in the future. According to the new sec 14a para 2 of the VAT Directive, this will always apply when an intra-Community supply of goods takes place, but the supplier is not established in the EU and the buyers are not taxable persons. Consequently, the online marketplace thus becomes liable for the VAT for the supply of goods to the buyer.

According to the new sec 14a para 1 of the 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.

Ultimately, the obligations put on the marketplace operators to avoid 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.

3 Consequences for the practice

The Commission has requested Germany to act within the next two months, i.e. to withdraw the new regulations in secs 22f and 25e of the German VAT Act affecting European online merchants. The scope of the new regulations in secs 22f and 25e of the German VAT Act could possibly be limited in the future to online merchants from third countries.

The letter of formal notice sent by the Commission to Germany is the first of several steps in the formal infringement procedure laid out in the EU treaties, each concluding with a formal decision. If the Commission considers Germany to be failing to fulfil its obligations under EU law, it may send the German authorities a reasoned opinion to this effect. If Germany still fails to comply, the Commission may decide to refer the matter to the European Court of Justice.