



C/M/S/

Law . Tax

VAT e-commerce

January 2021

Contents

General approach	3
Context and timeline	3
Brief description of the VAT package	4
Conclusions	6
Intra-Community Distance Sales	7
Distance sales of imported goods	8
Definition	8
Place of taxation	9
Creation of the “Import one stop shop” or IOSS	12
Special scheme	12
Platform deemed supplier	13
Contributors	15
Where you can find CMS	15

General approach

Context and timeline

The VAT e-commerce package, first approved in 2017 (Directive 2017/2455) and added to in 2019 (Directive 2019/1995), is finally due to enter into force on 1 July 2021 (after being postponed due to the coronavirus crisis).

This new, extensive and bold package aims to adapt the VAT system, which was mostly designed for offline transactions, to the explosive growth of business-to-consumer ("B2C") online transactions¹ in the context of our technology-driven world.

The new rules are set to facilitate online sales within the EU Single Market, by easing compliance with e-commerce while promoting a level playing field between EU and non-EU businesses, thus increasing VAT revenue² and targeting fraudulent businesses.

¹ In 2019, the EU online market is estimated to have reached EUR 620bn.

² In 2020, the EU estimates a EUR 7bn loss in tax revenues in the e-commerce sector.

Brief description of the VAT package

One of the cornerstones of this package is the generalisation of taxation at the place of consumption by non-taxable persons.

To better achieve this goal and help businesses operating in the Single Market, the EU has approved the extension of the current mini one-stop-shop ("MOSS") to enable the declaration and payment of VAT on sales of goods and supplies of services rendered to non-taxable persons by businesses – both EU and non-EU taxable persons – not established in the Member State of consumption.

This means that from July 2021 all businesses operating

in the EU Single Market can take advantage of a broad scope one-stop-shop ("OSS") to comply with their VAT obligations although the deduction or the refund of input tax remains governed by the current rules.

This significant step was designed to enable a smooth implementation of the wide-ranging changes. While they mostly deal with sales of goods (intra-EU transactions, import of goods and local sales), they will also impact the VAT treatment of supplies of services to non-taxable persons in the EU. Hence, both EU and non-EU businesses will be liable to new VAT obligations and need to adapt their systems accordingly.

As a way of introduction to the new VAT rules, we summarise below the main features of the VAT e-commerce package that will apply from July 2021:

1. Extension of the Mini one-stop-shop ("MOSS")

Taxation at the place of consumption will apply to all businesses.³

To simplify the VAT obligations of EU and non-EU businesses when operating in the Single Market, i.e. to avoid businesses having to be identified for VAT purposes in each and every Member State where their customers are based, the OSS shall enable the declaration and payment of VAT of the following operations:

- i. All services rendered to non-taxable persons based in the EU (telecommunications, broadcasting and electronically supplied services are already covered by the current MOSS);
- ii. Intra-Community distance sales of goods; and
- iii. Distance sales of goods imported from third territories or countries.

Hence, the OSS will be available for the following VAT schemes:

- a) Union scheme:
 - a. For EU businesses not established in the Member State of consumption to declare and pay VAT on services rendered to their EU private customers;
 - b. For EU and non-EU businesses (i.e. all taxable persons whether or not, they are established within the Community) carrying out intra-Community distance sales of goods, to declare and pay the respective VAT on these sales;
 - c. For electronic platforms that facilitate local sales of goods, to declare and pay the respective VAT on those sales;
- b) Non-union regime – for businesses not established within the Community to declare and pay VAT on services supplied to their non-taxable clients based in the EU;
- c) Import scheme ("IOSS") – for EU and non-EU businesses and facilitating electronic platforms to declare and pay VAT on distance sales of imported goods from third territories or countries, in consignments with an intrinsic value not exceeding EUR 150.

³ Except for businesses whose annual turnover – all EU supplies of goods and services combined, does not exceed EUR 10,000, in which case they can continue to apply VAT at the rate of the country of departure of the goods / country of establishment.

2. Removal of distance sales of goods' threshold

Intra-EU trade is already taxed at the country of consumption, as a general rule. However, there are country thresholds for distance sales of goods, notably EUR 35,000 and EUR 100,000 (depending on the Member States) that allow businesses, for simplification purposes, to apply the VAT rate of the country of departure of the goods (rather than the VAT rate of the consumption country).

To promote a broader application of the taxation at the country of consumption and to avoid distortion of competition and even intra-community fraud, these country thresholds will cease to apply. From July 2021 all intra-EU trade will be taxed at the VAT rate of the country where the respective consumers are based.⁴

3. Special arrangements for declaration and payment of import VAT

Special arrangements are also introduced to simplify the collection of import VAT on small consignments which are not imported via the IOSS scheme.

4. Removal of the small consignments' import exemption

Following the significant changes that the IOSS and the special import arrangements described above will trigger to the sale of goods from countries or territories outside the EU, the current VAT exemption applicable upon the importation of small consignments of negligible value (EUR 22) into the Single Market, which is fostering unfair competition between EU and non-EU businesses and is being used in a fraudulent way by some operators, will be removed.

Therefore, all imports of goods into the Single Market will be subject to VAT at the appropriate rate, regardless of their value, with a view to promoting a level playing field between businesses and avoiding loss of tax revenue.

5. VAT liability of electronic interfaces

A major share of distance sales of goods, both goods supplied within the Single Market and goods imported from third territories or countries to the Community, are facilitated through the use of an electronic interface (e.g. a marketplace, platform, portal or similar means). In particular, non-EU businesses supplying goods to non-taxable persons in the EU often resort to fulfilment warehousing arrangements within the EU without collecting the VAT due on such sales.

From July 2021, electronic interfaces will be deemed to make the sales for VAT purposes (i.e. deemed to have received from the businesses and supplied

the goods themselves to the EU consumers) when facilitating

- distance sales of imported goods from third territories or countries in consignments of an intrinsic value not exceeding EUR 150 ("LVG"); and/or
- supply of goods within the Community carried out by non-EU businesses to EU non-taxable persons.

The involvement of these electronic interfaces is expected to be a significant game-changer for the e-commerce sector within the EU.

⁴ As per above, businesses not exceeding an annual EU turnover of EUR 10,000 shall be able to continue to apply the VAT rate of the country of departure of the goods.

Conclusions

The EU is finally moving in the right direction to handle the explosive growth of e-commerce and to tackle the distortion of competition fostered by the current rules. This being said, the implementation of this new VAT package is a huge challenge for both businesses and tax administrations.

Despite the recent postponement to July 2021, time is of essence for taxpayers to appropriately set up the respective systems and acknowledge the new VAT rules and obligations. Businesses should quickly move forward to ensure readiness on day one.

In the following chapters we shall detail at length the main features of the VAT e-commerce package, to help businesses prepare in the most efficient way.



Intra-Community Distance Sales

The European Union intends to combat distortion of competition (tariff shopping) and to extend taxation in the Member States of consumption by introducing changes in the regulation regarding intra-Community distance sales.

In the context of VAT, a “distance sale” means a cross-border supply of goods by a supplier in one EU Member State to a private consumer or legal entity that is not VAT registered in another EU Member State (a “B2C” transaction), where the respective goods are transported or dispatched by, or on behalf of, the supplier to the customer.

Under the current system, the supplier charges its local VAT only if the amount of supplies has not reached a certain annual threshold in the Member State of destination, and this threshold has not been exceeded in the previous calendar year. Once the threshold is exceeded in a particular destination Member State, the supplier must register and apply VAT as determined by that Member State. Distance selling thresholds vary between Member States and are currently either EUR 35,000 or EUR 100,000, excluding VAT.

In order to harmonise and simplify the current system, the VAT e-commerce package sets a single annual threshold of EUR 10,000 excluding VAT for all distance sales and all telecommunications, broadcasting and electronic services (“TBE”) irrespective of in which Member State the customer is located. Under this threshold, distant sales shall be taxable in the Member State of departure, but the provider may apply for the taxation at the place of destination which becomes the general rule.

In other words, from July 2021, practically all intra-community distance sales will be taxed in the Member State of consumption.

This distance sales regime will apply to all situations where the supplier directly or indirectly intervenes with the cross-border movement of the purchased items. It is no longer required that the transportation or dispatch is carried out by him or on his behalf.

In order to avoid registration in each Member State of destination and to limit the administrative burden, suppliers may use the One-Stop-Shop to declare VAT due on all their distance sales. This online reporting system, currently known as the Mini-One-Stop-Shop (“MOSS”) and limited to TBE, will allow suppliers to report and pay the VAT due on their EU-wide distance sales in their home Member State.

Distance sales of imported goods

The VAT e-commerce package encompasses both VAT and customs-related issues.

For customs purposes, among other measures, a new declaration (H7 declaration) is created to facilitate the free circulation of consignments of low value (i.e. consignments with an intrinsic value not exceeding EUR 150 or “LVG” for low value goods) which are not subject to excise duties, such as alcoholic beverages or tobacco products.

This H7 declaration, containing a reduced data set, will notably include the intrinsic value of the goods and an “additional tax references” box allowing to take into account the potential distinction between the person mentioned as importer and the person liable for VAT.⁵

For VAT purposes, a new type of supply is created: the distance sales of imported goods.

Definition

This new type of supply will apply to goods dispatched or transported by, or on behalf of, the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods from a third territory or third country to a customer in a Member State, where the two following conditions are met:

- the supply of goods is carried out for a private consumer or legal entity that is not VAT⁶ registered (a “B2C” transaction);
- the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by, or on behalf of, the supplier.

⁵ Article 143a of the Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code

⁶ Article 3(1) of the Directive 2006/112/CE

Place of taxation

The Directive provides for the following new VAT rules depending on whether the delivery to the customer takes place in the import Member State or not:

1. The place of the import is located in the Member State in which dispatch or transport of the goods to the customer ends (Member State of import = Member State of delivery)

Two situations can be identified depending on whether the supplier opts for the declaration and the payment of the VAT on distance sales of imported goods under the new special scheme "Import one stop shop" or "IOSS" (see below).

a) *The supplier opts for the IOSS scheme (option available only for LVG)*

In this case, the distance sales of imported goods will be subject to VAT in the Member State in which dispatch or transport of the goods to the customer ends (MS 1).

The prior import of the goods in that Member State (MS 1) will be exempted from VAT.

b) *The supplier does not opt for the IOSS scheme (the intrinsic value of the consignment exceeds EUR 150 – "HVG" for high value goods, or the supplier does not want to use the IOSS scheme for LVG)*

Insofar as the Directive does not provide for a place of taxation when the supplier does not opt for the use of the IOSS scheme, no distance sale of imported goods should be taxable in the EU.⁷

Import VAT will be paid by the person designated by the Member State of import regulations. Note that special (simplified) arrangements for the declaration and payment of VAT upon importation is implemented for LVG (see below).

2. The place of the import is not located in the Member State in which dispatch or transport of the goods to the customer ends (Member State of import ≠ Member State of delivery)

Under the new rules this situation will only occur for LVG when the Seller has opted for IOSS (see below) or for HVG.⁸ Again, these two situations lead to different VAT treatments.

a) *LVG when the supplier opts for the IOSS scheme*

In that case, the distance sales of imported goods will be subject to VAT in the Member State in which dispatch or transport of the goods to the customer ends (MS 2).

The prior import of the goods in the import Member State (MS 1) will be exempted from VAT.

b) *HVG*

In that case, two taxable supplies have to be distinguished for VAT purposes:

- an import in the Member State of import (MS 1) for which VAT will be paid by the person designated by the Member State of import regulations;
- a distance sale of imported goods subject to VAT in the Member State in which dispatch or transport of the goods to the customer ends (MS 2).

⁷ Local regulations of each Member State must be checked. For example, by designating the platform facilitating the sale liable for import VAT on some cases, France created mechanically a case of distance sale of imported good taxable in France not provided by the e-commerce Directive.

⁸ Based on the adaptation of the customs clearance rules following the adoption of the VAT e-Commerce package, for distance sales of imported LVG when the Seller has not opted for IOSS, the customs clearance will necessarily have to be conducted in the Member State in which dispatch or transport of the goods to the customer ends.

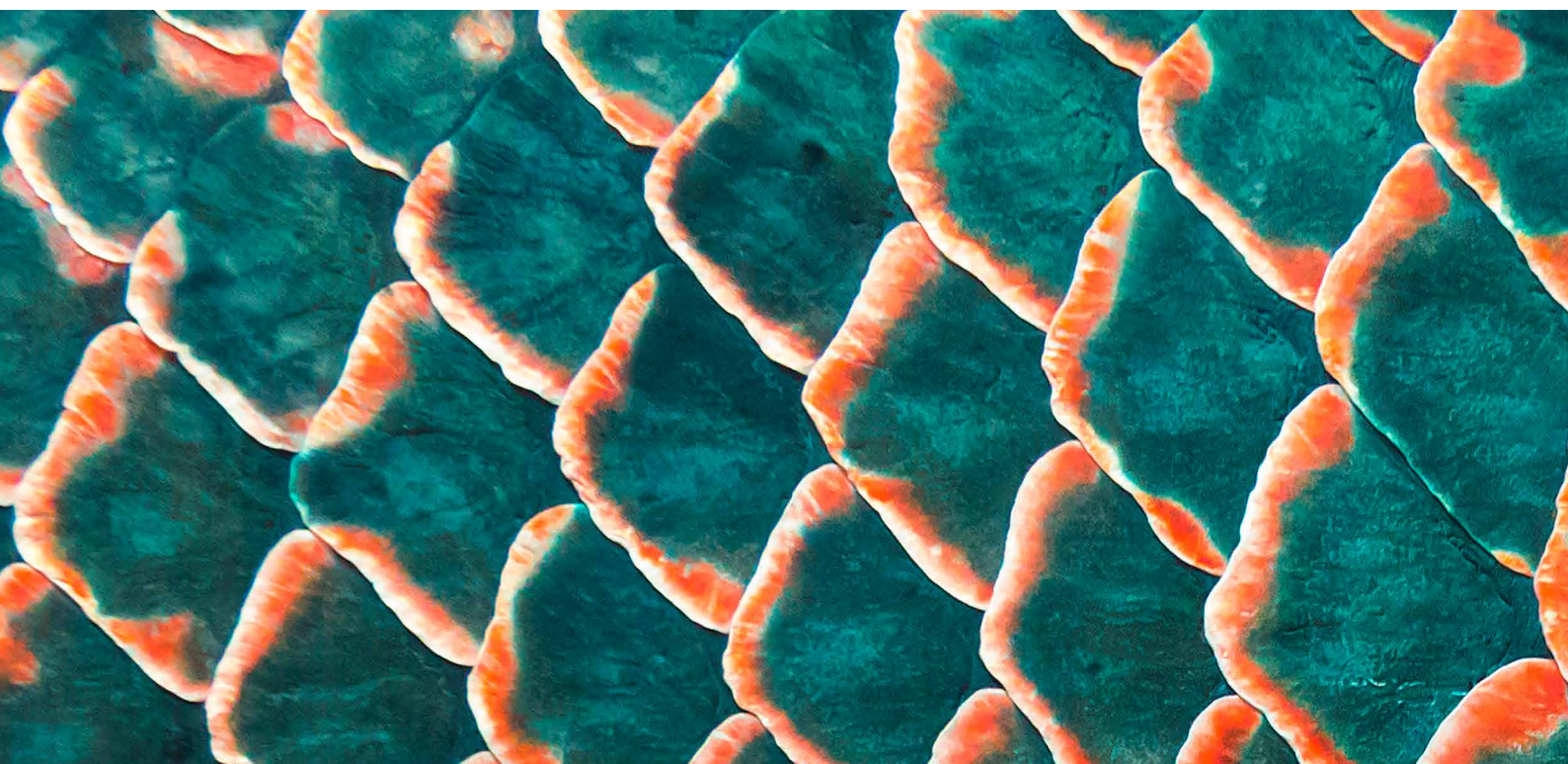
The supplies and applicable schemes can be summarised as follows:

Member State of import = Member State of delivery

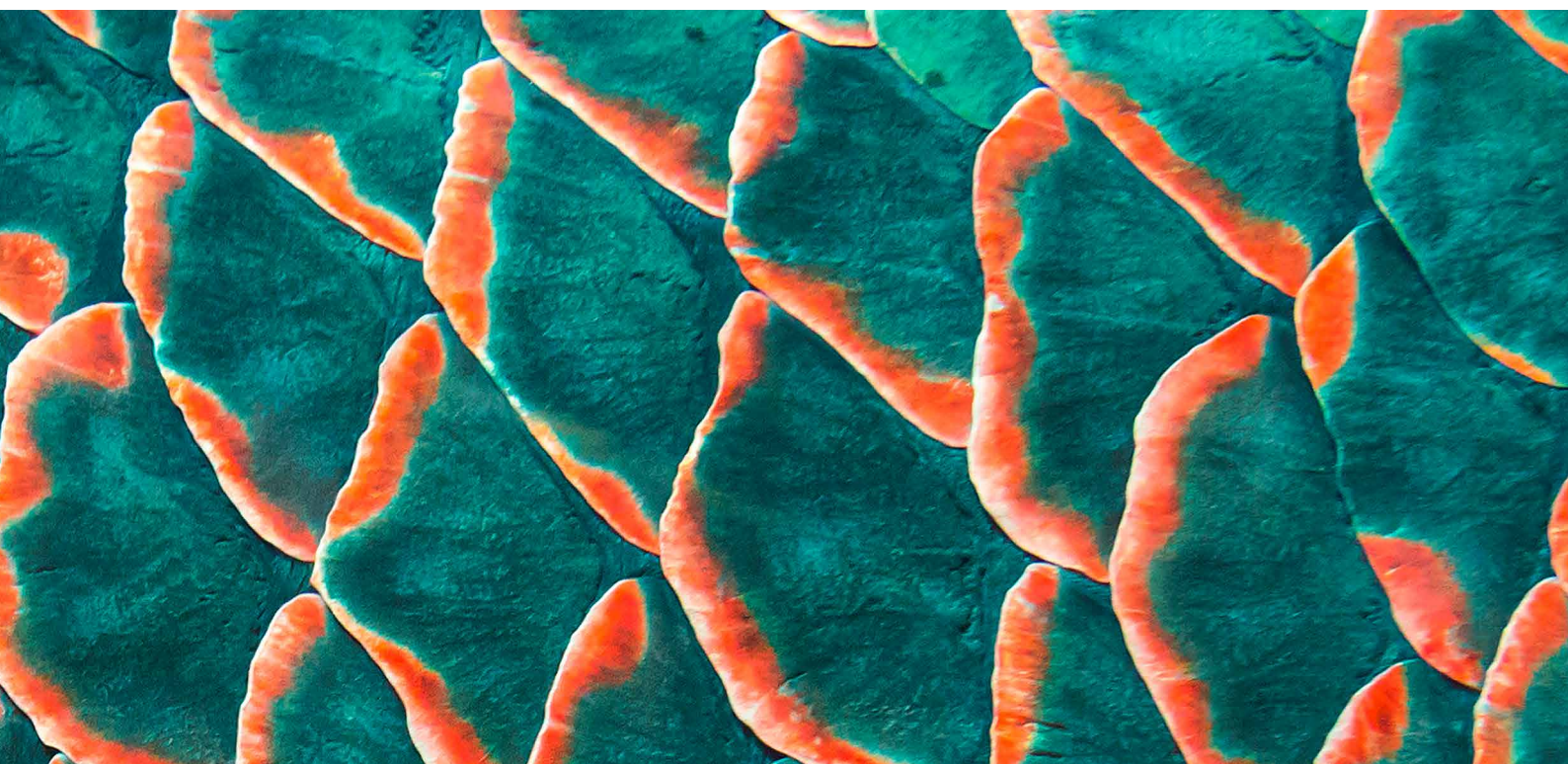
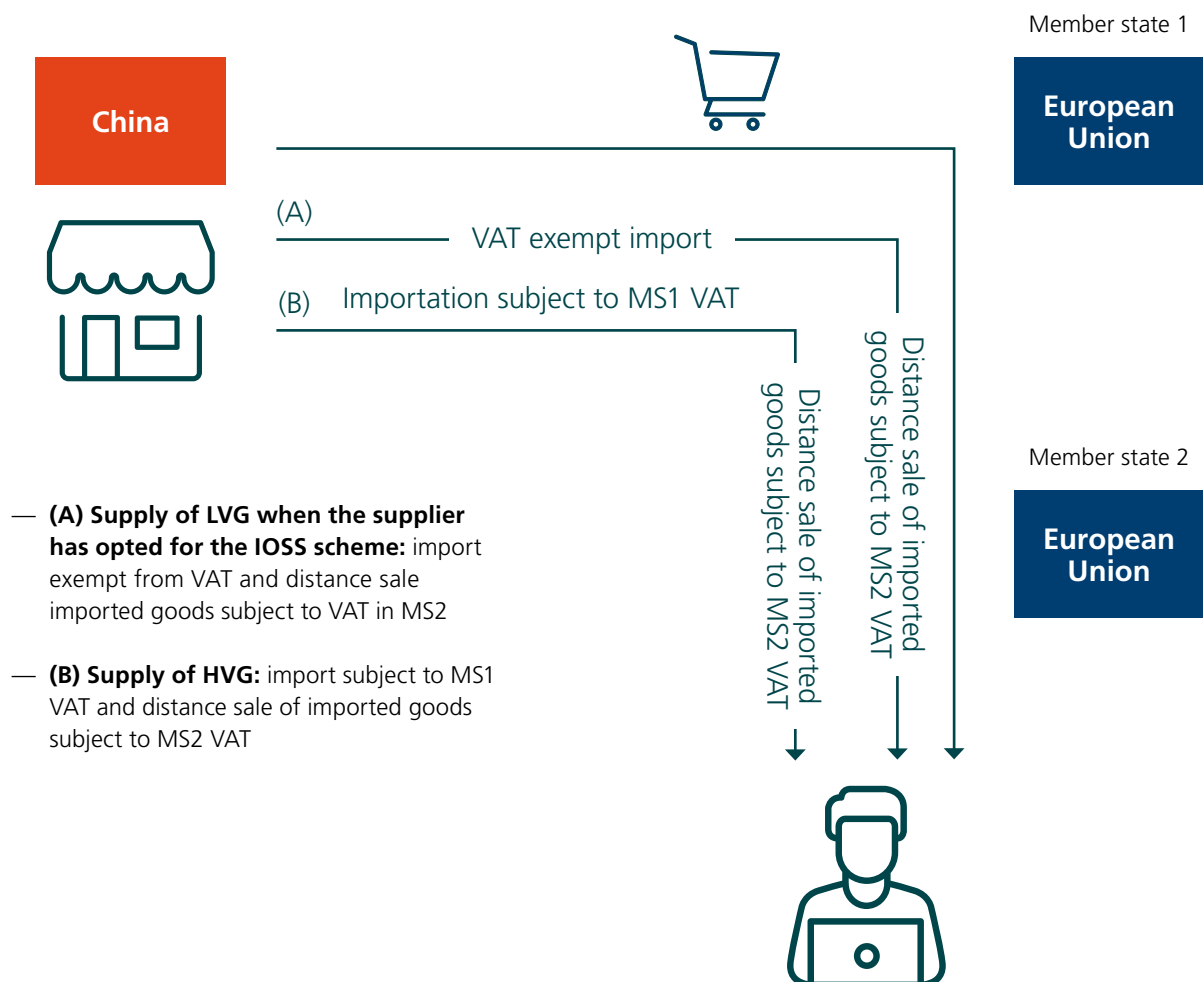


- **(A) The supplier has opted for IOSS scheme:**
import exempt from VAT and distance sale
imported goods subject to VAT in MS of dispatch
- **(B) The supplier has not opted for IOSS scheme:**
no distance sale of imported goods taxable in the EU

The supplier's customs declarant can opt for the simplified arrangements for declaration and payment of VAT upon importation: no impact on the VAT qualification of the operation



Member State of import ≠ Member State of delivery



Creation of the “Import one stop shop” or IOSS

As seen above, from 1st July 2021, the taxable persons (EU and non-EU) selling goods contained in consignments of LVG, except products subject to excise duty, will be able to opt for the use of the new import scheme.

This option would allow the taxable person to declare and pay VAT due on the distance sales of imported goods, carried out all over the European Union, on one single portal (the IOSS portal of its Member State of identification).

The taxable person will be granted for a special VAT identification number for the purposes of its activity of distance sales of imported goods. The chargeable event will occur, and VAT will become chargeable at the time of supply (i.e. when the payment will be accepted).

The distance sales of imported goods declared and paid through the IOSS will be exempted from import VAT provided that the taxable person would have transmitted its IOSS identification number for distance sales of imported goods to the competent customs, at the latest upon lodging of the import declaration.

Special scheme

From July 2021, consignments of an intrinsic value not exceeding EUR 150 which are not imported via the IOSS scheme and which are imported within the Member State of delivery can be subject to special (simplified) arrangements for the declaration and payment of VAT upon importation, by the person presenting the goods to customs on behalf of the acquirer of the goods (e.g. courier or postal services). Products subject to excise duty are excluded from this simplified scheme.

Under these special arrangements, import VAT shall be collected by the courier or postal services from the acquirers of the goods and subsequently paid to the respective Member State. This new approach is intended to both simplify the current importing procedures and to promote a more efficient collection of the respective VAT.

Platform deemed supplier

Although it was added late in the draft directive, the platform deemed supplier mechanism (article 14a of the Directive) is an essential component of the e-commerce package.

In order to ensure and simplify the collection of VAT on distance sales, platforms facilitating the transaction will, from July 2021 be deemed to receive the goods from the underlying supplier and supply it to the final consumer. For the distance sales falling into the scope of this mechanism, the liability of the platforms goes far beyond the joint and several liability for payment of VAT provided by article 205 of the VAT Directive.

Which platforms are involved?

According to the new rules⁹, the deemed supplier mechanism may apply to “electronic interfaces” i.e. a marketplace, platform, portal or similar instruments. The term “facilitates” means the use of an electronic interface to allow a customer and a supplier offering goods for sale through the electronic interface to enter into contract which results in a supply of goods through that electronic interface.

However, a taxable person is **not** facilitating where **all** the following conditions are met:

- (a) that taxable person does not set, either directly or indirectly, any of the terms and conditions under which the supply of goods is made;
- (b) that taxable person is not, either directly or indirectly, involved in authorising the charge to the customer in respect of the payment made;
- (c) that taxable person is not, either directly or indirectly, involved in the ordering or delivery of the goods.

Moreover, taxable persons shall not be deemed to have received and supplied goods where they only provide any of the following services:

- the processing of payments in relation to the supply of goods;
- the listing or advertising of goods;
- the redirecting or transferring of customers to other electronic interfaces where goods are offered for sale, without any further intervention in the supply.

Which transactions are covered by the deemed supplier provision?

The platform shall be treated as a deemed supplier where it facilitates, through the use of an electronic interface:

- Distance sales of LVG imported from third territories or third countries,
- Supplies of goods within the Community¹⁰ by a taxable person not established within the Community to a non-taxable person.

For VAT purposes, the single supply from the supplier to the EU customer is therefore split into two supplies:

- Supply from the supplier to the platform (B2B supply¹¹)
- Supply from the platform to the EU customer (B2C supply).

How does it work?

Under new article 36b of the EU VAT Directive, the transport of the goods must be allocated to the supply realised by the deemed supplier (the platform).

As a result, the platform will be liable for the VAT due on the sale to the EU customer.

The platform will have to declare distance sales of imported goods, domestic sales or intra-EU distance sales. For this purpose, the platform will have the possibility to use the IOSS or the OSS (for Intra-EU distance sales and possibly domestic sales).

The taxable event shall occur and VAT shall become due at the time when the payment has been accepted¹².

The supply from the supplier to the platform will either be outside the territorial scope of EU VAT or, exempt with a right to deduct¹³.

⁹ Article 5b of the Council Implementing Regulation (EU) 2019/2026.

¹⁰ Which includes both domestic sales and intra-EU distance sales.

¹¹ Indeed, unless he has information to the contrary, the taxable person is deemed to have received and supplied the goods shall regard (i) the person selling goods through an electronic interface as a taxable person (ii) the person buying those goods as a non-taxable person.

¹² See new article 66a of the EU VAT Directive and new article 41 a of the Council implementing regulation (EU) 282/2011 amended by regulation (EU) 2019/2026

¹³ See new articles 136a and 169 §b of the EU VAT Directive.



What are the obligations for the deemed supplier platforms?

As deemed to be the purchaser and the seller of the goods, platforms which facilitate sales using electronic interfaces will have to fulfil VAT obligations.

In order to collect the VAT and comply with their VAT obligations, they will have to rely on the information provided by the supplier because, in most cases, they do not directly have access to this information.

This is the reason why a specific provision has also been made in the interest of such platforms. They shall not be held liable for the payment of VAT in excess of the VAT which they declared and paid on these supplies where all of the following conditions are met:

- (a) they are dependent on information provided by the supplier or by other third parties in order to correctly declare and pay the VAT on those supplies;
- (b) the information referred to in point (a) is erroneous;
- (c) the platforms can demonstrate that they did not and could not reasonably know that this information was incorrect.

Furthermore, platforms which facilitate the supply will be required to keep records of those supplies¹⁴. The record-keeping applies for a period of 10 years from the end of the year during which the transaction was carried out. The aim is to assist Member States in verifying that VAT has been correctly accounted for on those supplies; in this regard, those records shall be sufficiently detailed to enable the tax authorities of the Member States to carry out such checks. The records must be made available electronically on request to the Member States concerned.

¹⁴ See new article 242a of the EU VAT Directive.

Contributors

Armelle Abadie

E armelle.abadie@cms-fl.com

Elisabeth Ashworth

E elisabeth.ashworth@cms-fl.com

Etienne Cox

E etienne.cox@cms-dsb.com

Emilie Dufour

E emilie.dufour@cms-fl.com

Marie-Odile Duparc

E marie-odile.duparc@cms-fl.com

Armonie Duverdier

E armonie.duverdier@cms-fl.com

Eszter Kalman

E eszter.kalman@cms-cmno.com

Olinka Kowalski

E olinka.kowalski@cms-fl.com

Berardo Lanci

E berardo.lanci@cms-aacs.com

Roxana Popel

E roxana.popel@cms-cmno.com

Denis Redon

E denis.redon@cms-fl.com

Corinne Reinbold

E corinne.reinbold@cms-fl.com

Amelie Retureau

E amelie.retureau@cms-fl.com

Where you can find CMS

The Americas

Bogotá
Lima
Mexico City
Rio de Janeiro
Santiago de Chile

Europe

Aberdeen	Cologne	Lisbon	Paris	Strasbourg
Amsterdam	Duesseldorf	Ljubljana	Podgorica	Stuttgart
Antwerp	Edinburgh	London	Poznan	Tirana
Barcelona	Frankfurt	Luxembourg	Prague	Utrecht
Belgrade	Funchal	Lyon	Reading	Vienna
Berlin	Geneva	Madrid	Rome	Warsaw
Bratislava	Glasgow	Manchester	Sarajevo	Zagreb
Bristol	Hamburg	Milan	Seville	Zurich
Brussels	Istanbul	Monaco	Sheffield	
Bucharest	Kyiv	Moscow	Skopje	
Budapest	Leipzig	Munich	Sofia	

Africa

Algiers
Casablanca
Johannesburg
Luanda
Mombasa
Nairobi

Middle East

Abu Dhabi
Dubai
Muscat
Riyadh

Asia-Pacific

Beijing
Hong Kong
Shanghai
Singapore



Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law