

VAT Newsflash

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VAT record keeping and joint and several liability for operators of electronic interfaces as of 1 July 2021

With effect from 1 July 2021, the second stage of the so-called “e-commerce package” will be implemented throughout the EU, necessitating far-reaching adjustments to the EU VAT system, particularly with regard to supplies of goods and services to private individuals. In Germany, this will also entail amendments to the provision hitherto applicable to joint and several liability for the operators of online marketplaces. Under certain conditions, these operators will be liable for VAT not accounted for by merchants who concluded sales contracts on the operator’s marketplace. In addition, recording obligations will be imposed e. g. on certain operators of electronic interfaces dealing with services. The German Federal Ministry of Finance (Bundesministerium der Finanzen, or BMF) has now issued a decree on joint and several liability and on relevant recording obligations.

General information

Please note that this newsletter only deals with the most important matters relating to joint and several liability of operators of electronic interfaces, not with the e-commerce package itself. For a summary of the package, please refer to [Issue 5](#) of our VAT Newsflash from October 2020.

The first amendment concerning joint and several liability for electronic interface operators entails an adjustment of the scope of liability. Among other things, the e-commerce package provides that, where a taxable person (operator) facilitates certain supplies of goods through use of an electronic interface – such as a marketplace, platform, portal or similar means – the operator themselves will be deemed to have received and supplied those goods. Hence, the operator will be obligated to account for VAT on those sales and will be liable for it. This concerns the supply of goods within the EU by a taxable person not established within the EU to a non-taxable person, as well as distance sales of goods imported from outside the EU in consignments with an intrinsic value not exceeding €150. It should be noted that – under certain conditions – Article 5c of the VAT Implementing Regulation provides for protection of the operator’s legitimate expectation if the supplier or a third person has provided incorrect information about the applicable price, and the operator has not correctly accounted for VAT as a result of this incorrect information.

Another important amendment to the liability rules provides that a certificate issued by the supplier’s responsible tax office is no longer necessary for the purpose of avoiding joint and several liability. Rather,

liability may generally be waived if the supplier's German VAT ID number, valid at the time of the supply of goods, is obtained and recorded by the operator. As before, the joint and several liability is not waived if the operator was aware or should have been aware according to the due diligence of a prudent businessman that the supplier has not, or not fully, complied with his fiscal obligations. Accordingly, a facility for checking German VAT ID numbers will be (as a general matter, see below) provided for interface operators.

The recording obligations for operators connected with the aforementioned liability have been amended and extended. Apart from such obligations connected to joint and several liability, a number of new recording obligations have been created, e.g. for persons involved in certain services supplied through a telecommunications network, an interface or a portal, such as a marketplace for apps.

BMF decree on joint and several liability

The BMF decree of 20 April 2021 partly resembles the decree of 28 January 2019 (see [Issue 2](#) of our VAT Newsflash from March 2019). The following comments are not intended to provide a comprehensive survey of the new provisions, but to highlight some major differences compared to the January 2019 decree.

Owing to the complexity of the matter, we recommend that operators seek professional advice.

Notwithstanding the aforementioned reduction in scope, the provisions on joint and several liability remain very important for operators of electronic interfaces. As the BMF emphasises, the provisions still include e.g. supplies carried out to other taxable persons, supplies within the EU carried out by EU suppliers to private individuals (and certain equated persons), or supplies from outside the EU with an intrinsic value exceeding €150 and a place of supply within Germany. As before, e.g. interfaces that function purely as "bulletin boards", as defined in more detail by the BMF, do not fall under the scope of joint and several liability.

In general, the operator will not be liable if the supplier has a German VAT ID number valid at the time of supply. It is therefore highly recommended to check, by means of a qualified confirmation request, any VAT IDs provided by a supplier prior to his first supply of goods. Although the BMF does not explicitly mention it in the letter, the due diligence obligations of a prudent businessman should also require repeated checks thereafter on a regular basis. In order to check the validity of VAT IDs, interface operators will be able to submit requests for qualified confirmation of VAT IDs, subject to several conditions – including but not limited to the requirement that they themselves have a valid German VAT ID number. Operators of interfaces who only have a VAT ID from another EU Member State should use confirmation facilities provided by that state. It is currently unclear whether and how third-country providers not VAT registered within the EU can check the validity of their customers' VAT ID. It should be noted that the decree does not comment on cases where a supplier's VAT ID has been applied for but not yet issued, meaning that the issuing of a valid VAT ID does not retroactively waive joint and several liability for supplies performed prior to issuance of the VAT ID.

The BMF has, however, commented on cases where a supplier is not obliged to register in Germany for VAT purposes and therefore cannot provide a valid German VAT ID. For example, this concerns EU taxable persons exclusively performing intra-Community distance sales under the scope of German VAT, for which VAT is declared using the EU's simplified "one-stop shop" (OSS) reporting procedure; or intra-Community distance sales performed by small and medium-sized enterprises established in other EU countries and not exceeding a certain turnover threshold (among other conditions). The same applies to non-EU taxable persons supplying goods of an intrinsic value exceeding €150 if the place of supply is not shifted to Germany. Where suppliers declare to the interface operator that the conditions for issuing a German VAT ID number have not been met for reasons such as those above, the BMF allows the substitution of a German VAT ID. Depending on the circumstances, either the VAT ID of another EU Member State or certain other evidence (stipulated in more detail in the BMF decree) may be obtained and documented by the operator.

The decree also sets out examples of "VAT deficiencies", i.e. VAT-related non-compliance. A supplier will run the risk of the tax authorities notifying the operator (who might then terminate the supplier's account so as not to be held liable themselves) if no preliminary or annual VAT returns at all are submitted, if incorrect VAT returns are submitted, if the VAT liability is not paid at all or not paid on time, or if a third-country supplier not established in the European Economic Area fails to appoint a receiving agent established in Germany. Independent from the requirement that the supplier should have a VAT ID valid at the time of supply, in order to comply with their due diligence obligations, operators will also need to take action if they become aware of circumstances suggesting non-compliance of the supplier – e.g. if suppliers previously not obliged to register in Germany are required to register at a later point in time but fail to do so. As for suppliers who have registered with the electronic interface as private individuals, the BMF considers it a "clear indication" that a supplier is considered a taxable person if his turnover achieved through the electronic interface exceeds €22,000 per calendar year.

Recording obligations

As stated above, records for supplies of goods which start or end within Germany must be kept by the operator for the purposes of the aforementioned conditions of joint and several liability. It should be noted that the operator must record different information than was previously required, both for suppliers registered with the electronic interface as taxable persons and for suppliers registered as private individuals.

Generally speaking, the implementation of the second stage of the e-commerce package entails several new recording obligations, including but not limited to taxable persons performing supplies of goods or services reported using the simplified EU taxation procedures (OSS and “import one-stop shop” – IOSS), appointed IOSS VAT representatives and the simplified import procedure mostly designed for postal operators and couriers. Taxable persons are not only obliged to keep records in cases where they are deemed to have received and supplied the goods themselves (as explained above), but also where they facilitate services through the use of an electronic interface, including but not restricted to cases where they take part in certain services for which they are presumed to be acting in their own name. . The provisions make quite complicated distinctions as to whether the electronic interface operator is included in the chain of supply of goods or services himself, whether the OSS is applied, etc. The BMF does not explicitly comment on the IOSS in this context

It should be noted that the above mentioned recording obligations have not been included in the German VAT Act (Umsatzsteuergesetz) in their entirety; some of them are to be found only in the VAT Implementing Regulation.

Transitional provisions

The provisions of the BMF decrees of 20 April and of 1 April 2021 highlighted in this newsflash will be effective from 1 July 2021. Until 15 August 2021, objections will not be raised if an operator holds a certificate issued by the supplier's responsible tax office (as required by the previous rules) instead of the supplier's valid German VAT ID number.

Sources

BMF decree of [20 April 2021](#) on joint and several liability for VAT on trade of goods in the internet (in German only);

BMF decree of 28 January 2019, reference no. III C 5 - S 7420/19/10002 :002, document no. 2019/0069610, Federal Tax Gazette (Bundessteuerblatt, or BStBl.) I 2019, 106 (in German only);

BMF decree of [1 April 2021](#) on the implementation of the second stage of the e-commerce package from 1 April 2021 respectively 1 July 2021 (in German only);

[Annual Tax Act 2020](#) (Jahressteuergesetz 2020, or JStG 2020) – survey on the BMF website (in German only);

Council Implementing Regulation (EU) [2019/2026](#) of 21 November 2019 (amendments of the VAT Implementing Regulation from 1 July 2021)

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