

The image features a blurred background of various national flags. On the left side, a European Union flag is prominently displayed, showing its characteristic blue field with twelve golden stars arranged in a circle. The rest of the background is a soft-focus collage of other national flags in various colors.

VAT OBLIGATIONS OF TAXABLE PERSONS FROM THIRD COUNTRIES IN E-COMMERCE WITH EUROPE

Aleksandra Heinzer M.Phil.

October, 2020

INTRODUCTION

The purpose of this article is to introduce, in general, the European VAT system to businesses^[1], who have neither an establishment (this shall be the place where the functions of the business's central administration are carried out) nor a fixed establishment (this shall be any establishment, other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs) in the European Union to help them understand in which cases they should pay attention to potential VAT obligations related to e-commerce on the European market.

The article also contains a brief presentation of the changes that will be applied in the field of e-commerce in 2021 and concern e-retailers from third countries.

The following content is not tax advice; it is of a general and informative nature and can only be used as a tool, and it should in no way serve as the only basis for making any business decisions. When such decisions are made, prior consultation with a tax advisor is recommended.

[1] For the purposes of this article for better understanding a word "business" is used instead of a "taxable person", who is any person who independently carries out any economic activity in any place, whatever the purpose or results of this activity.

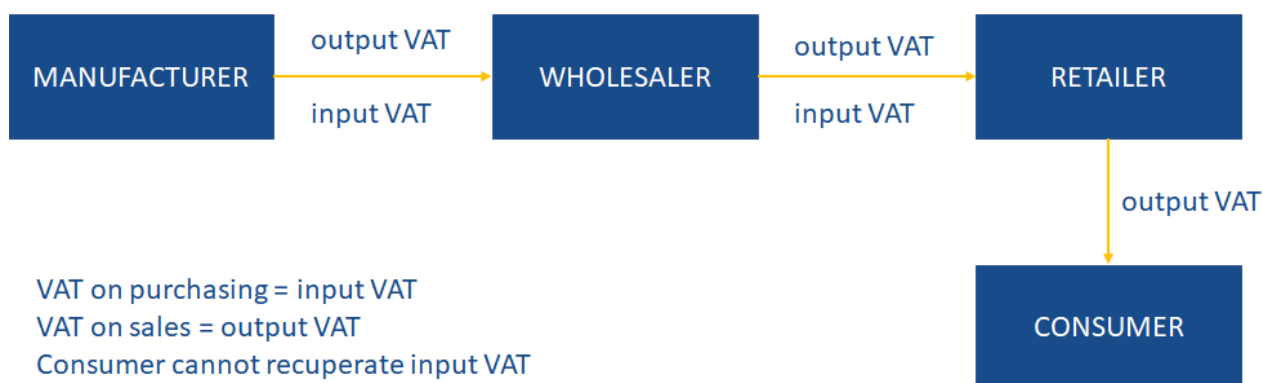
GENERAL CHARACTERISTICS OF THE EUROPEAN VAT SYSTEM

Although there are still differences between Member States in certain areas[2], the European VAT system is generally based on uniform rules contained in the Council Directive 2006/112/ EC[3] (hereinafter: the VAT Directive), which allow the smooth functioning of the European single market. While the rules on determining the place of sales of goods or services in the European Union are fully harmonized, the rules on VAT payers, VAT rates, and administrative obligations, such as mandatory identification for VAT purposes and the submission of a VAT return, may differ from one Member State to another as the said directive still allows some discretion in these areas.

VAT rates vary between Member States in the Union since they use a standard VAT rate (which may not be less than 15 %), but may apply one or two reduced rates (these may not be less than 5 %)[4].

In general, VAT is payable by any business who supplies goods or services, unless the VAT is paid by the purchaser of the goods or the recipient of the service. The business does this by paying the difference between the input VAT and the output VAT into the budget of a given Member State.

Figure: A simplified presentation of the functioning of the European VAT system



[2] The European Union currently comprises 27 Member States.

[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11 December 2006, p. 1).

[4] The rates by Member State as at 1 January 2020:

https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf.

TYPES OF TRANSACTIONS

In order for a businesses who has neither an establishment nor a permanent establishment in the European Union to understand in which cases a VAT obligation may arise in the European Union due to e-commerce, they must first understand the types of transactions used in the European VAT system.

Sale of goods

In determining which Member State collects the VAT, the principle of the destination of the goods must be followed, which means that the Member State to which the goods are destined is entitled to VAT.

In the case of local sales of goods and services (sales within a single Member State), VAT must generally be paid by the supplier of the goods or the service provider (with certain exceptions). However, if a business sells goods to another business and both are registered for VAT purposes and the goods move from one Member State to another, this is a case of what is known as intra-Community acquisition of goods, where the sale is exempt from VAT in the Member State of departure and the VAT is payable by the buyer in their Member State, i.e. where the goods are acquired (where the acquisition takes place)[5]. If, in this case, the buyer is not registered for VAT purposes (the buyer is the final consumer), the seller of these goods must take care of the VAT return (this is known as distance selling of goods)[6].

When importing goods, VAT is payable by the person liable to pay customs duties as determined in accordance with customs regulations or the recipient of the goods, regardless of whether this buyer is a business or whether the buyer is a final consumer. In this case, the Member State in which these goods are released into free circulation are entitled to VAT if these goods actually remain there.

In case, if the buyer is a business, he might not need financial resources to pay VAT by importation, if the Member State in which the goods are imported, accepted an option to pay VAT under reverse charge mechanism. Choosing such option the buyer charges and deducts VAT at the same time, so there are no obligations regarding financial payment of VAT in public exchequer.

[5] It should be noted that a transitional system is currently in place regarding such situations, and there is already a proposal for a Council Directive amending Directive 2006/112/EC as regards certain harmonisation and simplification rules within the current value added tax system and the introduction of a definitive system for the taxation of trade between Member States.

[6] Certain exceptions exist with regard to the sale of new means of transport, which is not addressed in this article.

[7] Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods.

It should be noted that, in certain cases, the import of goods is exempt from VAT. This applies to the goods with a total value of no more than EUR 10.00; however, Member States may grant an exemption for imported goods with a total value not exceeding EUR 22.00. Such VAT exemption does not apply to alcoholic products, perfumes and eau de toilette, tobacco or tobacco products.

Under European VAT rules, the sales of goods are divided into the following types of transactions[7]:

a. Local sale of goods for a consideration

- carried out by the business (the goods do not leave the Member State).

EXAMPLE:

An American company delivers the goods to the buyer (their status is irrelevant) within the territory of one Member State - the goods are already in the Member state at the moment of delivery.[8]. The buyer may deduct VAT, if it is a business (taxable person = TP).

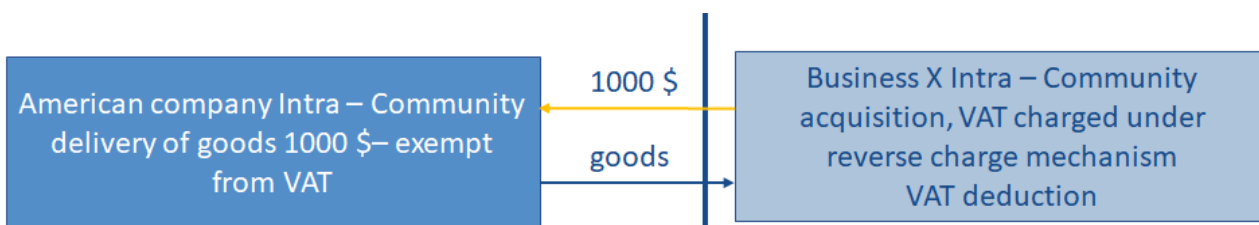


b. Intra-Community sale of goods

- carried out by a business registered for VAT purposes to another business registered for VAT purposes (i.e. movement of goods from one Member State to another).

EXAMPLE:

An American company has goods in a warehouse in Germany and sells goods from this Member State to another business X, registered for VAT purposes in Member State 2. Business X acquires the goods in Member State 2.



[8] VAT is charged in the same way if the supplier sends the goods from another Member State to Member State 1 to a buyer who is not identified for VAT purposes and exceeds the value determined by each Member State (distance sale of goods).

c. Import of goods

- from a third country to the European Union (to an individual Member State)

EXAMPLE:

An American company sells goods from the USA to a buyer in the European Union who imports these goods himself.



Sales of services

When providing services, the principle of consumption is followed, which means that the Member State in which the services are consumed is entitled to VAT. The European system distinguishes between general and specific rules for determining the place of sales of services, where the nature of the provided service is of key importance. Similarly as with the goods, VAT must be paid by the recipient of the services instead of the provider under certain conditions; this is what is known as the reverse charge procedure, but only if the recipient acts as a business.

REGISTRATION FOR VAT PURPOSES OF A BUSINESS ESTABLISHED OUTSIDE THE EUROPEAN UNION

Businesses who have neither an establishment nor a fixed establishment in the European Union must state when they commence, change, or cease their economic activity and, as a general rule, must register themselves for VAT purposes in each Member State if they:

- sell goods or services in its territory, for which they are entitled to a VAT deduction [9], with the exception of supplies of goods or services for which the recipient of the services or the buyer of the goods is required to pay the VAT (i.e. reverse charge mechanism),
- or make intra-Community acquisitions of goods subject to VAT.

Each individual VAT registration number has a prefix by which the Member State of issue can be identified. The registration number is automatically added to the VIES electronic system[10], which allows anyone to check its validity. Businesses must indicate their identification number on the issued invoices. In this case, the business must comply with the rules of the given Member State when issuing the invoice, including the application of individual rates, and fulfil all administrative obligations in the Member State, such as the submission of a VAT return. As a general rule, businesses who have neither an establishment nor a fixed establishment in the European Union must appoint a tax representative established in the EU, who fulfils VAT obligations on their behalf.

The VAT return must be submitted by a deadline determined by the Member States, but this deadline may not be more than two months after the end of each tax period. Member States may set the tax period at one month, two months, or three months, or they may set different tax periods provided that these periods do not exceed one year.

Therefore, in order to determine whether an e-trader located outside the European Union is required to register for VAT purposes, they must first examine the type of transaction and determine the place of sale. Businesses established outside the EU sell both goods and services through their websites or electronic interfaces, such as portals, markets, platforms, or similar means. The registration for VAT purposes in the EU will be mandatory for them if, with these sales, they make one of the transactions listed in the previous chapter, so let us examine whether this can also happen in e-commerce.

[9] There some businesses in which VAT may not be deducted, for example medical, cultural or sport services.

[10] In accordance with Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, the Commission, on the basis of the information provided by the Member States, publishes the identification numbers on the following website: https://ec.europa.eu/taxation_customs/vies/disclaimer.html.

a. Selling goods in the context of e-commerce

In the case of selling goods sent to the buyer in the European Union and imported into the European Union, the place of such sale is in the Member State of importation. As already mentioned above, in this case VAT must be paid by the importer of these goods (regardless of the importer's status), so a business (a supplier) from outside of EU does not have to register for VAT purposes just because of such supplies of goods.

However, VAT-related implications are different if the goods are already in storage within the EU at the time of their dispatch; here, the determination of the place depends on the status of the buyer of such goods. If the buyer is registered for VAT purposes in another Member State, the general rule applies, which determines that the place where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of sale shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins. While such a sale of goods is exempt from VAT (VAT is paid by the buyer of these goods upon the acquisition of goods in another Member State), the registration for VAT purposes of a supplier, a business who has neither an establishment nor a fixed establishment, will nevertheless be mandatory.

EXAMPLE:

An American company imports goods from China to Germany, where these goods are stored, and later sells these goods to various customers registered for VAT purposes in other Member States. In this case, the American company must register itself for VAT purposes in Germany because it sold goods in this country, even though the purchaser is obligated to charge VAT based on self-assessment.

However, if such a buyer is not registered for VAT purposes and is the final consumer, this is known as distance sale of goods, which must comply with special rules[11]. The supplier must monitor the amount of such turnover to each Member State within a calendar year[12]. Until this limit is exceeded, the place of delivery is still deemed to be the Member State of departure, otherwise it is the Member State where the transport or dispatch of such goods ends. In this case, too, the American company must register itself in the EU for VAT purposes.

EXAMPLE:

An American company sends its goods from the USA to a buyer in the European Union on the basis of an online order. Since, in this case, VAT is paid by the importer of these goods upon import, the American company does not have to register itself for VAT purposes in the EU.

[11] These rules do not apply to excisable products and new means of transport

[12]

https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/traders/vat_community/vat_in_ec_annexi.pdf.

b. Providing services in the context of e-commerce

The most common online services offered by businesses who have neither an establishment nor a fixed establishment in the European Union to recipients in the EU are telecommunications services, broadcasting services, and electronically supplied services (hereinafter: TBE services), accommodation services, entrance fees, and vehicle rental services. These services are subject to different rules for determining the place of sale, and the determination of the VAT payer may depend on the rules in each Member State.

Table: Determination of the place of sale of services and the VAT payer by types of service

Type of service	Determination of the place of sale of services		VAT payer	
	The recipient is a taxable person	The recipient is a final consumer	The recipient is business	The recipient is a final consumer
TBE services	The place where the recipient has its establishment/fixed establishment	The place where the recipient is established, or has a permanent address or habitual residence	The recipient	The service provider
Accommodations	The place where the property is located	The place where the property is located	Depending on the rules in each Member State	The service provider
Entrance fees	The place where the event takes place	The place where the event takes place	Depending on the rules in each Member State	The service provider
The rental of land vehicles on a short-term basis	The place where the means of transport is actually made available to the renter	The place where the means of transport is actually made available to the renter	Depending on the rules in each Member State	The service provider

In the case of services where the VAT is paid by the provider, the latter must identify themselves for VAT purposes in the Member State where the service is deemed to have been supplied. Therefore, it may be that a business who has neither an establishment nor a fixed establishment in the European Union may have to register for VAT purposes in several EU Member States.

Special rules regarding the sale of TBE services

A business who has neither an establishment nor a fixed establishment in the European Union and provides cross-border telecommunications services, radio and television broadcasting services or electronically supplied services to the EU to final consumers may use the special MOSS system ("mini One Stop Shop"). This system allows such a business to register in only one of the Member States, even though they provide such services in several different Member States. In doing so, a business must comply with the rules of this system in the Member State of registration. In this case, a business does not need a tax representative, is allocated an individual VAT registration number with a prefix "EU", and must indicate this number on issued invoices. The business must apply the VAT rate applicable in the Member State where the recipient of the services is located.

In this case, the business submits to the Member State of registration a VAT return for each calendar quarter, whether telecommunications services, broadcasting services, or electronic services have been provided or not. The VAT return must be submitted within 20 days following the end of the tax period covered by the return.

VAT CHANGES IN THE EU IN 2021 IN THE FIELD OF E-COMMERCE

The European Commission has adopted a package of changes to VAT in the field of e-commerce^[13] following the EU's strategy to promote cross-border e-commerce, which is also one of the objectives of the digital single market. In addition to removing administrative barriers, the reason for these changes is, inter alia, the exploitation of the current VAT exemption for imports of low-value goods, with the objective of equating the position of European businesses with those not established in the EU, as these do not have to be registered for VAT purposes. Originally, the amendments were intended to apply from 1 January 2021, but due to the current situation caused by Covid-19, the European Commission adopted a decision to postpone their application to 1 July 2021^[14]. The key changes related to VAT are as follows:

- the introduction of special rules regarding an intermediate supplier, who enables distance selling using an electronic interface such as a market, platform, portal or similar means;
- the extension of the existing MOSS system, which currently allows a simplified procedure only for telecommunications services, broadcasting services and electronically supplied services;
- the abolition of limits in terms of value set by Member States in relation to distance supplies of goods within the European Union; and
- the abolition of the VAT exemption for the import of goods of lesser value and the introduction of a new special regime for the import of goods with a value of up to EUR 150.00 through the introduction of the MOSS system for imports.

[13] Council Directive (EU) 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, 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, 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 and Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax.

[14] Council Decision (EU) 2020/1109 of 20 July 2020 amending Directives (EU) 2017/2455 and (EU) 2019/1995 as regards the dates of transposition and application in response to the COVID-19 pandemic.

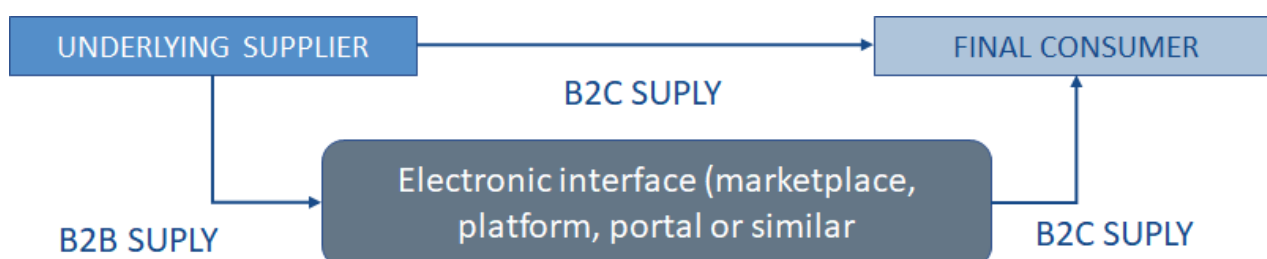
How will the changes affect e-retailers from third countries?

a. Sale of goods via electronic interfaces

Retailers often sell goods by using an electronic interface, such as a market, platform, portal, or similar means, which often includes a warehousing procedure. In such cases, the collection of VAT on such sales will also include a business providing this interface (an intermediate supplier), who will be considered as a supplier of goods. The intermediate supplier will have such a role in two cases, namely if:

- the main supplier, who has neither an establishment nor a fixed establishment in the European Union, delivers goods from a third country with a value of up to EUR 150.00 to a final consumer in the EU, or
- the goods are already located in the EU and the main supplier, who has neither an establishment nor a fixed establishment in the EU, supplies these goods (regardless of their value) in the territory of one Member State or within the EU to final consumers.

Figure: Demonstration of an intermediate supplier's operation



As the figure shows, the sale made by the main supplier to the final consumer will be divided into two transactions, namely it will be deemed that the main supplier first delivers the goods to the intermediate supplier, who then delivers them to the final consumer.

b. Extension of the existing MOSS system

As already described in this article, the current MOSS system allows businesses who have neither an establishment nor a fixed establishment in the European Union to use a simplified method of identification for VAT purposes and payment of VAT, but only for the provision of telecommunication, broadcasting, or electronic services supplied to persons in the European Union who are not businesses. Under the new system, this system will also apply to other services provided to final consumers and subject to VAT in a Member State (for example: accommodation services, tickets, transport services, vehicle rentals, services on movable and immovable property).

EXAMPLE:

An American company sells tickets to final consumers for events in Germany, France, and Hungary. In this case, the American company chooses to use the MOSS system in France and pays VAT to the other two Member States through this system as well.

c. Abolition of the exemption for imports of small value goods and introduction of a new MOSS system for imports

As already mentioned, the exemption from VAT on importation of small-value goods is currently in place which will be abolished with the new changes.

Table: Comparison of the old and new method of calculating VAT and customs duties

Value of imported goods	Situation before 1 July 2021		Situation after 1 July 2021	
	VAT	Customs duties	VAT	Customs duties
≤ EUR 10/22	/	/	YES	/
> EUR 10/22 < EUR 150	YES	/	YES	/
> EUR 150	YES	YES	YES	YES

Due to the abolition of the VAT exemption for imports of small-value goods, a new MOSS system for imports will be introduced for supplies of goods from third countries to the European Union with a value not exceeding EUR 150.00, but it will not be possible to use it for excisable goods.

EXAMPLE:

An American company sells goods to final consumers to the European Union with a value not exceeding EUR 150.00. The company will be able to register in the MOSS system for imports and it will have to appoint an intermediary established in the EU who will be liable to pay VAT and fulfil the obligations under this special scheme on the company's behalf[15]. If the American company does not register in the MOSS system for imports, VAT will be charged upon importation of these goods by the customs authority, which means that the customer will incur additional administrative costs (the customer who will be charged a higher price than stated on the portal will most likely reject such parcel).

[15] The appointment of an intermediary will not be required for businesses established in a country with which the European Union has concluded a mutual assistance agreement.

CONCLUSION

The obligation to register for VAT purposes in the European Union for e-retailers who have neither an establishment nor a fixed establishment in the EU and who do business with the EU depends on the determination of the place of sale of goods or services. If registration for VAT purposes is mandatory, such business must, as a general rule, appoint a tax representative, which is not the case if they provide TOE services and register in the MOSS system.

VAT changes, which will come into force on 1 July 2021, will also have a significant impact on the obligations of e-retailers from third countries, so proper preparation is especially important for them.

Feel free to contact us for any additional explanations:

VAT assistance, Aleksandra Heinzer, M.Phil.

T: 00386 40 580 797

aheinzer@pakta.net

www.pakta.net

www.ddvasistenca.si