

New German VAT Legislation Impacts US Online Sellers and Marketplaces

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Closing the VAT Collection Gap for Online Sales of Goods to Europe

On January 1, 2019, German legislation took effect for enhanced value added tax (“VAT”) compliance obligations for marketplace providers facilitating the sale of physical goods to German consumers by sellers, wherever those sellers are located. This alert focuses on the impact of the German legislation on US sellers of physical goods online to German consumers.

German VAT on Consumer Goods Sold Online

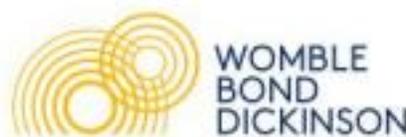
Under EU law, physical goods sold to German consumers are subject to VAT at the applicable rate (typically at the standard German VAT rate of 19%), without regard to where the seller is established, if the goods are sent from a location (e.g., warehouse) in Germany or the seller is importing the goods into Germany or the goods are sent from another member state and certain revenue thresholds are met. In the latter case, the sale is subject to VAT in the country from where the goods are sent. The seller of the goods is responsible for collecting, reporting and paying VAT on those goods to the German VAT authorities. The VAT compliance relationship is established by the seller registering for VAT in the country of the consumer, in this case Germany, before the seller starts to sell into Germany. Reporting and payment of the VAT is made to the responsible German VAT office* on a quarterly basis**. In addition, annual VAT returns have to be filed.

The global growth of marketplaces like Amazon has greatly expanded cross-border sales of consumer (B2C) goods and services online and provided remote vendors with relatively low-cost access to new markets through the marketplace platform. The relatively easy access to EU markets brings with it indirect tax and privacy law compliance obligations for the US seller.

Prior German Law

Under prior German law, an online marketplace operator for German consumers had relatively little legal responsibility vis a vis the German VAT compliance requirements for the out of country seller (“remote seller”) transacting sales through the marketplace platform. Most significantly, the marketplace was not financially liable for any non-German VAT compliance by remote vendors selling to German consumers through the marketplace platform.

What is not changed by the new legislation is the obligation for a US seller to register for VAT in Germany if it is selling to German consumers, whether those sales are direct through the seller’s online platform or through the marketplace platform. Many marketplaces operate as sellers of goods as well. The marketplace must register for VAT for sales to German consumers in its own right, and that will usually be as a German (or EU) established



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seller.

VAT Gap from Lack of Remote Seller Compliance

VAT authorities and bricks and mortar businesses in the EU were getting increasingly frustrated by the ability of remote sellers (defined as sellers not established in the EU) to sell their goods into the EU and avoid German VAT, whether those sales were transacted on the seller's platform or through a marketplace platform.

Compliance Risk for US Sellers to German Consumers

The German legislation impacts the sale of goods to German consumers by US sellers through the marketplace platform. US sellers transacting in the EU that are still not familiar with the EU VAT system will need to understand the new VAT compliance significance of the marketplace role beyond the boilerplate clauses in the marketplace terms of service, in order to avoid unanticipated economic losses from doing online sales in Germany remotely. For VAT compliance purposes, the advertised retail price of a consumer good or service on a website is considered to be VAT inclusive. VAT represents a significant portion of the retail price (VAT standard rates in the EU vary from 16-28%, depending on the country of consumption). US sellers must take into account the economic impact of VAT on pricing when setting the retail prices of goods and service in the EU (including Germany) and may want to use a single average VAT rate to fix a common retail price across all of its EU consumer countries.

Scope and Key Definitions

The new legislation applies to the sale of goods through an online marketplace by third-party sellers located outside of Germany to consumers in Germany. An operator of a marketplace in Germany now has two substantive compliance obligations related to transactions by remote sellers. First, the operator must collect and retain data regarding any seller active on its platform and all VAT taxable transactions made through the marketplace. This data must be provided to the German tax authorities on request. Second, the operator will be liable for VAT on the taxable transactions generated by sellers that do not properly collect and pay VAT to the German authority.

Data Collected by the Marketplace

The seller data that must be collected include:

- Name and address of seller.
- For professional seller, taxpayer identification number and – if available – German VAT number.
- For private seller, date of birth.
- The date and location of the shipment as well as the date and location of the delivery.
- The date the VAT liability arises and the amount of VAT due.
- For corporate professional seller, a certificate, provided by the seller, issued to the seller by the responsible German VAT office including seller's name and address and the taxpayer identification number.

Most of the seller-specific data above can be easily obtained in the marketplace registration process. This data must be retained for 10 years and is within the scope of permissible data processing under the EU GDPR. More imposing for the US seller will be the requirement to obtain a certificate from the responsible German VAT office* and then provide that certificate to the marketplace.

Covered Transactions

The new legislation only applies to the sale of consumer goods. Covered are all transactions with respect to which the order or the delivery of the good takes place in Germany, without regard to whether the transaction is subject to German VAT.

The legislation applies only to transactions that legally occur on the marketplace platform. Transactions that "arise" through the marketplace but in which the vendor and the consumer negotiate the terms of the transaction directly, before the transaction is consummated, are not within the scope of the marketplace legislation.

The requirement for the seller to obtain a certificate is seen as the greatest compliance obstacle for covered transactions. Under similar legislation enacted in the UK prior to this German legislation, non-compliance by non-EU vendors resulted in those vendors being banned from the marketplace and that is the same result that is likely to happen here if the US seller does not timely provide the information to the marketplace.

Transition Rules for Marketplace Operator's Joint Liability

The marketplace operator is liable for any German VAT with respect to a covered transaction that is not properly collected, reported and paid. The operator can mitigate its liability by demonstrating it timely collected the required vendor information. This relief is subject to a “reasonable doubt” exception. If the operator knew or had reason to know that the vendor was not compliant partially or wholly, the operator remains fully liable for any VAT due on the transaction.

The operator’s joint liability arises for non-EU sellers transactions beginning March 1, 2019 and for all other sellers beginning October 1, 2019.

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