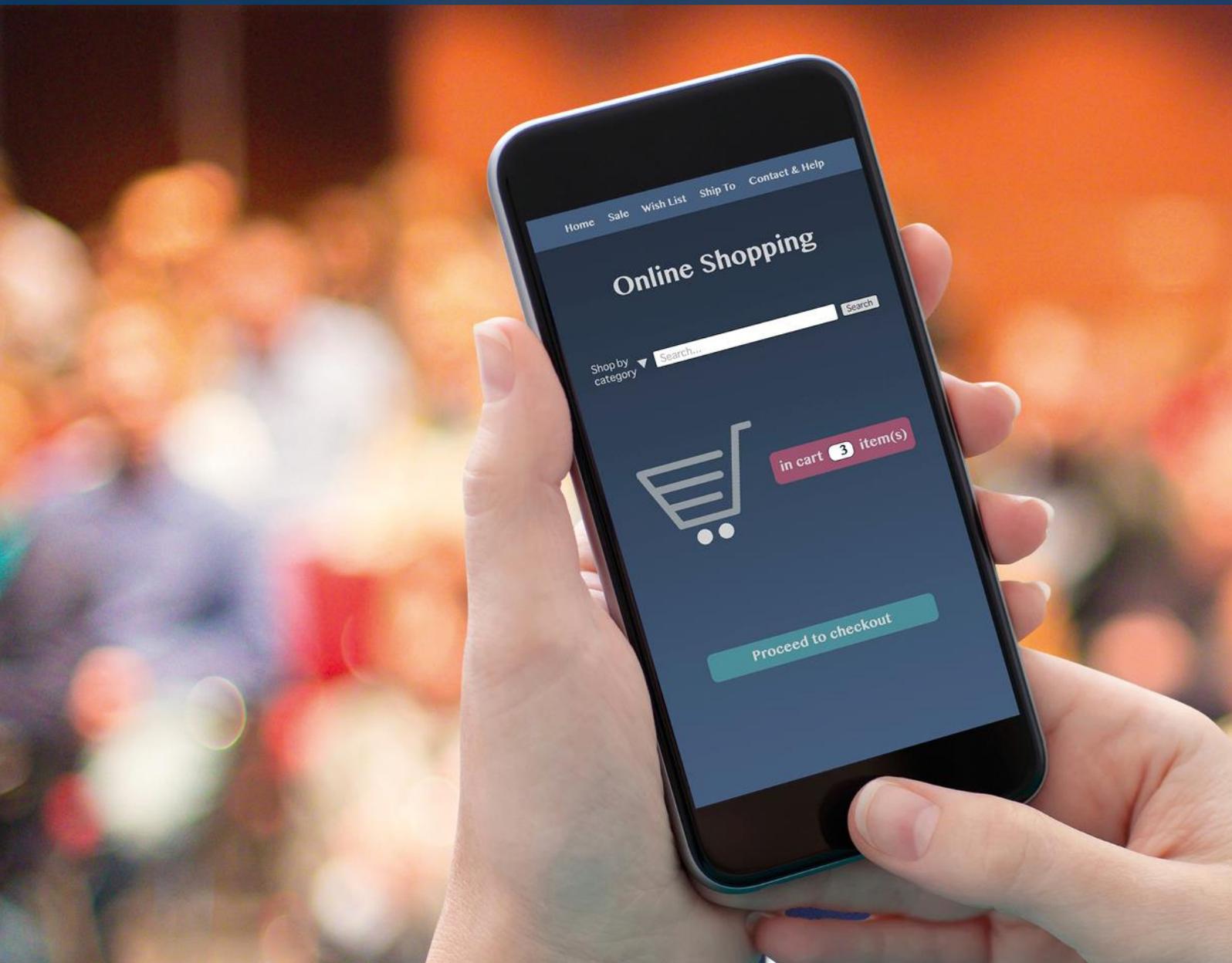


ECOMMERCE EUROPE POSITION PAPER

EU VAT Reform: pros and cons for online merchants

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TAX & LEGAL FOR E-COMMERCE

Introduction: Overall perspective on the EU VAT Reform

Ecommerce Europe is the voice of the e-commerce sector in Europe. Through its 20 national associations, Ecommerce Europe represents over 25,000 online shops across Europe. Its mission: boost the e-commerce industry by helping decision makers shape policies fit for future sustainable growth. To do so, Ecommerce Europe takes initiatives to come up with innovative market solutions and provides a platform for expert discussion, connect online retailers with relevant stakeholders. It also highlights the importance of e-commerce to the economy through the provision of in-depth research on the European and global markets. Additionally, Ecommerce Europe stimulates the industry by developing initiatives like its European Trustmark label - provided for free to more than 10,000 certified online shops across Europe.

On 1 December 2016, the European Commission published a package of legislative proposal to modernize VAT rules for cross-border e-commerce (the “VAT Package”)¹. The VAT Package aims at delivering most of what Ecommerce Europe and its members have always asked for:

- The extension of the Mini-One-Stop-Shop (the “MOSS”) to services other than electronic services, the introduction of a minimum threshold and other simplifications for service supplies;
- The extension of the MOSS to distance sales of goods and the removal of the current cross-border thresholds;
- The removal of the existing VAT exemption for the importation of small consignments from non-EU suppliers and introduction of a new Import scheme for such consignments;
- The introduction of the faculty for EU states to apply VAT at a reduced or zero rate to e-publications, as they apply to their printed equivalents.

Ecommerce Europe has always supported the extension of the MOSS. However, even with an extended One Stop Shop, online merchants will still have to deal with different VAT rates when selling abroad. The European Union currently has more than 75 different VAT rates and this creates a disturbance of the level playing field needed to foster cross-border trade and to complete the internal market. Therefore, Ecommerce Europe is advocating for further simplification in the field of the VAT rate system.

Ecommerce Europe welcomes the fact that the Proposal also presents solutions to the issue related to a lack of threshold for intra-EU B2C supplies of electronic services. The lack of a threshold has caused several problems, specifically for SMEs, since 2015. Ecommerce Europe is also pleased to see that, with the proposed new rules, a business which has intra-EU B2C supplies of electronic services of a value of less than a certain amount will be able to identify the place where the customer is located based on only one piece of evidence rather than two, thus simplifying the procedure for web shops with less resources.

In addition, Ecommerce Europe supports provisions in the Proposal to remove the current VAT exemption on importation of goods up to 22 EUR. With this exemption, VAT is not payable when goods below this threshold are bought from outside the EU. This exception has created market distortions, to

¹ Proposal for a COUNCIL DIRECTIVE 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 {SWD(2016) 379 final} {SWD(2016) 382 final} (“Proposal for a Council Directive”); Proposal for a COUNCIL IMPLEMENTING REGULATION amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax {SWD(2016) 379}{SWD(2016) 382} (“Proposal for a Council Implementing Regulation”); Proposal for a COUNCIL DIRECTIVE amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals {SWD(2016) 392 final} {SWD(2016) 393 final} (“Proposal for a Council Directive on VAT on E-publications”).

the disadvantage of EU businesses, and thus Ecommerce Europe supports the Commission's initiative to abolish it. Ecommerce Europe also suggests that EU policymakers work together with the industry and its representatives to find workable solutions to inform businesses about the new rules, in an easy way and in a timely manner. The creation of a single web portal containing all relevant information concerning VAT in all Member States, in all the EU languages, would be a possible solution.

The present document examines the various features of the VAT reform on cross-border e-commerce envisaged by the VAT Package and, also, gives practical adjustments to the VAT Package recommended in light of the need of online merchants.

Key recommendations for European policymakers

- 1. Ensure the extension of the MOSS to services other than electronic services, the introduction of a minimum threshold and other simplifications for service supplies**
- 2. Ensure the extension of the MOSS to the distance sales of goods, remove the current cross-border thresholds and replace it with a Pan-European one**
- 3. Ensure the removal of the existing VAT exemption for the importation of small consignments from non-EU suppliers**
- 4. Support the introduction of the faculty for EU states to apply VAT at a reduced or zero rate to e-publications**
- 5. VAT and online marketplaces: a careful approach is needed**
- 6. Remove hurdles related to VAT and excise duties hindering the growth of cross-border e-commerce sales of beer, wine and spirits**

1. Ensure the extension of the MOSS to services other than electronic services, the introduction of a minimum threshold and other simplifications for service supplies

The introduction of the MOSS in 2015 has embodied an important simplification for the benefit of European suppliers of electronic services. The MOSS enables such suppliers to account for and pay the VAT due on cross-border sales to consumers in other EU states without the need of registering for VAT in each EU state where VAT does apply.

As highlighted by the European Commission in the Impact assessment document that accompanies the VAT Package: “instead of having to declare and pay VAT directly to each individual Member State where their customers are based, businesses are able to make a single declaration and payment in their own Member State”². However, the current version of the MOSS applies to telecommunication, radio/television broadcasting services and electronically-supplied services only (for brevity, electronic services).

All other B2C services are not covered by the MOSS. In those cases, thus, the seller still needs to register in each jurisdiction where VAT is due on business-to-consumer activities, which is more costly and burdensome, specifically for smaller online merchants. Moreover, the nature of “electronic services”, to which the MOSS applies alongside telecommunication and broadcasting services, is not always clear. Indeed, EU statutory law sets forth a rather generic definition of electronic services for VAT purposes:

Electronically supplied services’ as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology (Article 7, par. 1 Council Implementing Regulation (EU) No. 282/2011).

Regulation No. 282/2011 also includes a non-exhaustive list of services that shall be considered electronic services (par. 2 of Article 7) and non-exhaustive a list of services that shall not be considered electronic services (par. 3 of Article 7)³. As indicated in the Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services issued by the European Commission in 2015, the European policymakers have decided not to implement a fully-fledged definition of electronic services in order to offer “the flexibility that is necessary to take account of technological developments, or any new guidelines agreed by the VAT Committee or decisions taken by the Court of Justice of the European Union”⁴. As a matter of fact, only a limited number of services supplied via the internet is considered electronic service for the purpose of allowing suppliers to use the MOSS system and avoid VAT registration in multiple countries.

Ecommerce Europe believes that it is a missed chance that many services that heavily rely on the internet for their own distribution are not considered electronic services for the purpose of falling within the scope of the MOSS. It is the case of online booking and/or selling of tickets to access cultural, artistic,

² IMPACT ASSESSMENT Accompanying the document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for cross-border B2C e-Commerce (COM(2016) 757 final) {SWD(2016) 382 final} (“Impact Assessment Document”).

³ Regulation No. 282/2011 points out that these lists are non-exhaustive: “In order to enhance clarity, the transactions identified as electronically supplied services should be listed without the lists being definitive or exhaustive” (Recital n. 11).

⁴ Page 15. “Lists of examples have been drawn up for telecommunications, broadcasting and electronic services. To provide legal certainty, preference was given to qualifying the listed services in positive terms. These lists, as pointed out in Recital 3 of Regulation 1042/2013, are not exhaustive, nor are they definitive. This is clearly confirmed by the wording used “cover, in particular, the following...”

sporting, scientific, educational, entertainment or similar events/activities that do not fall under the application of the MOSS scheme under the specific provision of Art. 7, par. 3, of Council Implementing Regulation (EU) No. 282/2011. This exclusion owes to the fact that sales of tickets to events are subject to VAT in the EU state where the event takes place and not in the EU state where the customer is situated, as in the case of electronic services⁵. In practical terms, the current setting implies that any website selling tickets to consumers for access to events held in various EU states needs to register for VAT in all these EU states.

Such obligation is in stark contrast with the beneficial VAT treatment applicable, on the contrary, to European tour operators supplying tickets for events alongside travel and accommodation solutions, who can opt to apply VAT in their own EU state, even if the concerned events are held in other EU states (under the Tour Operator Margin Scheme - TOMS)⁶. Other services supplied via the internet that fall outside the scope of MOSS are, for instance, live webinars, online tuition or bespoke design of websites.

Under the current scenario, issues also arise with respect to the VAT-treatment of bundled services/package of services (e.g., an online course consisting of pre-recorded videos plus support from a live tutor). Businesses can be asked to treat in a different manner, from a VAT standpoint, activities which are closely related economic-wise⁷. In case of bundled services, thus, the current VAT framework demands digital businesses to undertake difficult evaluations of the economic/functional weight of each activity within the service supply to assess the correct VAT treatment of the concerned transaction - leading to a lack of legal certainty and, in the end, to potential tax violations.

For all the above-mentioned reasons, Ecommerce Europe is convinced that room should be made for other services to access the MOSS. The VAT Package acknowledges this need and opens the MOSS to other B2C services, albeit still with some questionable limitations. Under the system envisaged by the VAT Package, EU states will be required to permit access to the MOSS to any taxable person carrying out intra-Community supplies of services to a non-taxable person established or having his/her permanent address or usually residing in the Member State of consumption of the service (that, is the place of supply for VAT purpose) when the same taxable person is not established in the Member State of consumption⁸.

While the current MOSS only applies to telecommunication, radio/television broadcasting services and electronic services, the proposed new MOSS will cover a wider array of services. Therefore, Ecommerce Europe is convinced that this is an important first step forward. However, from the wording of the proposed new Art. 369 of Directive 112/2006, it seems that the MOSS regime will cover cross-border services supplied to European consumers only to the extent that the place of supply for VAT purposes is the same Member State where the consumer belongs⁹. Ecommerce Europe believes that this is a sub-optimal option and that the proposed setting would still leave online cross-border sales of tickets and other services outside the scope of the new MOSS in those cases where the event is held in another

⁵ Article 53 of the VAT Directive 112/2006.

⁶ Article 306-310 of the VAT Directive 112/2006.

⁷ "Where a bundle includes goods or others services not covered by the 2015 changes, it is necessary to determine whether the bundle is a single supply and, if so, how to qualify the supply.

A supply can consist of one or more elements. If there are more elements, a transaction comprising a single supply from an economic point of view should not be artificially split. The essential features of the supply must be ascertained in order to determine whether the customer, being a typical customer, receives several distinct principal supplies or a single supply". European Commission, Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services, p. 20.

⁸ Article 2 of the Proposal for a Council Directive replacing Article 369b the VAT Directive 112/2006.

⁹ "Member States shall permit any taxable person carrying out intra-Community distance sales of goods and any taxable person not established in the Member State of consumption supplying services to a non-taxable person who is established or has his permanent address or usually resides in that Member State, to use this special scheme. This special scheme applies to all those goods or services supplied in the Community".

Member State than that where the consumer belongs.

The different VAT treatment of services in terms of accessibility to the MOSS or not, based on the place of service supply follows the fact that the Proposal for a Council Directive has simply replaced the words “telecommunications, broadcasting or electronic services” with the general expression “services”. While the place of supply for telecommunications, broadcasting or electronic services is always the place where the customer belongs, this is not the case in other business-to-consumer services. Transportation services, for instance, derogate to the criteria whereby VAT applies in the place where the customer belongs. The place of supply for transport of people for VAT purposes is the place where the transport takes place, proportionately in terms of distances covered¹⁰. Even under the new regime envisaged by the VAT Package, thus, suppliers of cross-border transportation services within the EU will still be required to register and file returns in multiple jurisdictions, even when they use a website to sell their services. Rentals of immovable property in multiple EU states via an online website will also fall outside the scope of the extended MOSS, as in this case the place of supply for VAT purposes is the place where the property is situated.

Ecommerce Europe notices that the range of services not qualifying for access to the MOSS is quite wide. With respect to this matter, now that the MOSS is likely to be extended to services other than digital services, it appears a rather unjustified and restrictive condition to limit its application only to the case where the place of supply of the service is the place where the consumer belongs.

To avoid unreasonable discrepancies, Ecommerce Europe calls on EU Policymakers to extend the application of the MOSS in order to cover all cross-border supplies of services to non-taxable persons belonging within the territory of the Community, as it is proposed for distance sales of goods¹¹.

Otherwise, businesses will be called to undertake difficult assessments for determining whether the customer belongs to the same Member State where the supply is consumed for the purpose of assessing whether the supply falls within the scope of the MOSS.

The VAT reform also introduces many simplifications to the current framework, including but not limited to the following. Indeed, the VAT reform:

- Sets forth a minimum yearly revenue threshold (€ 10,000) for intra-community supplies within which all B2C supplies of electronic services are deemed to be supplied in the EU state where the supplier is established¹²;
- Enables sellers making use of the MOSS to be subject to the invoicing and record-keeping rules of the EU state of identification even with respect to operations subject to VAT in other EU states¹³;
- No longer requires sellers to store tax records for the period provided for by the EU state of identification instead of the current 10-year storage period requirement¹⁴;
- Reduces to a single piece of evidence the requirement to determine where the customer is located¹⁵.

¹⁰ Article 48 of the VAT Directive 112/2006.

¹¹ As evidenced in the following paragraph, the extension of the MOSS to distance sales of goods envisaged by the VAT proposal is independent from the fact that the place of supply of the goods (that is, where the goods are delivered) is the place where the customer belongs.

¹² Article 1 of the Proposal for a Council Directive adding paragraphs 2 to 5 to Article 58 of the VAT Directive 112/2006.

¹³ Article 1 of the Proposal for a Council Directive replaces Article 219a of the VAT Directive 112/2006.

¹⁴ Article 1 of the Proposal for a Council Directive modifies Articles 369, para 2, and 369k, para 2, of the VAT Directive 112/2006.

¹⁵ Article 1 of the Proposal for a Council Implementing Regulation adds 2 paragraphs to Article 24b of Implementing Regulation (EU) No 282/2011.

It is evident that these simplifications will make cross-border e-commerce less burdensome for sellers from an administrative standpoint.

2. Ensure the extension of the MOSS to the distance sales of goods, remove the current cross-border thresholds and replace it with a Pan-European one

Ecommerce Europe is convinced that the Commission's proposal to extend the MOSS to intra-community distance sales of goods will have an extremely positive impact on e-commerce businesses. Ecommerce Europe has always advocated for such an extension because the current VAT scheme for distance sales is particularly burdensome for online merchants that want to sell to consumers cross-border in the EU. In fact, under the current scenario, EU online merchants exceeding specific revenue thresholds in distance sales to other EU member states - usually ranging from € 35,000 to € 100,000 - are required to register for VAT and file periodic returns in the latter EU member states. This is an extremely costly compliance environment for businesses.

As highlighted in the impact assessment document accompanying the VAT Package, the estimation is that *"the costs for complying with VAT obligations are on average € 8,000 annually for each Member State which a business supplies to"*¹⁶. Compliance with the current regime is even made more difficult by the obligation for EU sellers to follow the invoicing and record keeping regulations of the Member State where VAT is due, instead of their home country rules.

Moreover, there are still significant discrepancies between the rules applying in different EU member states: for instance, some countries require sellers to issue invoices on distance sales (i.e. France), while others not (i.e. Italy and the United Kingdom). To address these issues, the VAT Package:

- extends the application of the MOSS to distance sales of goods¹⁷ and, simultaneously,
- replaces the current thresholds with a single threshold of € 10,000 for micro-businesses, below which the place of the supplies remains in the Member State where the supplier is established¹⁸.

Consequently, merchants making intra-community distance sales for fewer than € 10,000, or the equivalent in national currency, of revenues in the calendar year (and in the previous calendar year) will treat those sales as domestic sales in the Member State where the goods are dispatched from. Ecommerce Europe welcomes the introduction of a single, uniform threshold for micro-businesses as it is convinced that it will make cross-border e-commerce even more attractive for small businesses. Considering that complying with the MOSS regulations costs € 2,200 per year per business on average¹⁹, a higher threshold would have been preferable. Nevertheless, Ecommerce Europe is supporting the Commission's proposal of € 10,000 for the exemption threshold, provided that online merchants can rely on an extended MOSS, which will be easy to use, especially for smaller sellers that have fewer resources.

It should also be ensured that the extension of the MOSS to distance sales of goods within the EU cover cross-border sales made under drop-shipment solutions, where a whole-seller based in one EU state (State A) ships products to a consumer situated in a second EU State (State B) on behalf of a merchant based in a third state (State C). In this case, the seller in State A is actually selling the products to the State C merchant, who on its turn is re-selling the products to the consumer in State B. VAT on the

¹⁶ Impact Assessment Document, pag. 75.

¹⁷ Proposal for a Council Directive modifies Article 34 and Article 369b of the VAT Directive 112/2006.

¹⁸ Proposal for a Council Directive modifies Article 34 of the VAT Directive 112/2006.

¹⁹ Impact Assessment Document, pag. 75.

resale is due in State B. This is a growing business model in e-commerce.

Moreover, Ecommerce Europe seems as positive that the VAT Package includes provisions that will allow EU sellers to apply home country rules in areas such as invoicing and record keeping in order to make VAT compliance easier and less burdensome.

3. Ensure the removal of the existing VAT exemption for the importation of small consignments from non-EU suppliers

Since 1983, consignments with a value below € 10/22 (depending on the Member State of import) supplied directly from non-EU countries to EU consumers are import VAT-exempt. The small consignment threshold “*was introduced as a simplification measure to avoid that too much time is devoted by customs administrations and economic operators in the customs clearance of low value goods*”²⁰. However, over time, owing to the growth of e-commerce, the number of parcels benefiting from the exemption has increased dramatically. This trend has led to a significant hemorrhage of VAT revenues for EU member states.

Furthermore, it is increasingly evident that some non-EU sellers abuse the threshold by under-declaring the value of goods to keep the latter within the exemption amount²¹. Accordingly, the small consignment exemption has become a source of complaint by EU businesses, which rightfully feel to be at a competitive disadvantage towards non-EU businesses. Therefore, Ecommerce Europe welcomes the proposed solution included in the VAT Package of the Commission which envisages:

- The complete removal of the existing VAT exemption for the importation of small consignments from non-EU suppliers²²;
- A new import scheme (hereafter “Import Scheme”) for distance sales of goods in consignments of intrinsic value not exceeding € 150 from non-EU countries²³;
- The introduction of a simplified arrangement for global declaration and payment of import VAT when the new Import Scheme does not apply²⁴.

Under the new Import Scheme, non-EU sellers will first have to identify themselves for VAT purposes in at least one EU State, designated by the seller under one of the alternative criteria indicated by the VAT Package²⁵. Upon identification, the non-EU seller will be able to declare and pay import VAT on shipments destined to European consumers by filing quarterly VAT returns through an extension of the MOSS. Unlike today, VAT will be collected at the point of sale by sellers or marketplaces. These consignments will then benefit from a fast-track customs mechanism.

Indeed, inbound shipments will no longer be subject to payment of VAT at the specific moment of importation. VAT will become chargeable at the precedent time when the online payment has been accepted and will be subsequently reported in the relevant VAT return through the extended MOSS. The VAT Package also introduces simplification measures for goods in consignments of a value for which VAT is not accounted for via the new Import Scheme (> € 150). The Proposal for a Council

²⁰ Impact Assessment Document, p. 15.

²¹ A study carried out by Copenhagen Economics in 2016, based on a sample of 400 real purchases, found that 65% of consignments from non-EU suppliers through the public postal channels were non-compliant. The study is mentioned at p. 16 of the Impact Assessment Document.

²² Article 3 of Proposal for a Council Directive eliminates Title IV of Directive 2009/132/EC.

²³ Article 2 of Proposal for a Council Directive adds Section 4 to Chapter 6 of Title XII of the VAT Directive 112/2006.

²⁴ Article 2 of Proposal for a Council Directive adds Section 7 to Chapter 6 of Title XII of the VAT Directive 112/2006.

²⁵ Proposed new Article 369I of the VAT Directive 112/2006.

Directive sets forth, in particular, that Member States should allow the person presenting the goods to EU customs (usually, the postal operators or express couriers) to report and pay import VAT due on these consignments by filing electronic monthly returns on behalf of the person for whom the goods are destined²⁶.

In Ecommerce Europe's view, it seems that the new Import Scheme will allow, by one side, Member States to increase collection of VAT revenues on small consignment importations and, by the other side, help protecting European online merchants from unfair tax competition by non-EU sellers without creating burdensome customs clearance procedures for small consignment imports. Ecommerce Europe calls on policymakers to ensure that truly effective and simplified procedures will be implemented in this context in order to reduce the costs of levying the taxes for all parties involved. To this purpose, it is essential that the European institutions and the national authorities will consult the industry.

4. Support the introduction of the faculty for EU Member States to apply VAT at a reduced or zero rate to e-publications

The current legal framework allows Member States to tax printed publications (i.e. books and newspapers, etc.) at reduced rates or, in some cases, super-reduced or zero rates. At the same time, EU member states are obliged to apply their standard VAT rates to e-books and other online publications²⁷. The distinction originates from the fact that, from a VAT standpoint, the supply of e-publications is considered a supply of electronic services. Up to the end of 2014, B2C supplies of electronic services were subject to VAT in the EU member state where the supplier was established.

Under such system, allowing any EU state to apply a reduced/zero rate to the supply of electronic services (including e-publications) might have tempted EU member states to attract e-suppliers by applying of a low or nil VAT rate on digital services, thus fostering harmful tax competition. This is the main reason why EU States are banned from applying a low or nil rate to the supply of e-publications. Since then, this issue has been partially resolved with the reform that, starting from 2015, has shifted the application of VAT on B2C supplies of electronic services to the EU state where the consumer belongs (destination principle). Hence, Ecommerce Europe believes that the preoccupation of triggering harmful tax competition should no longer be a reasonable cause to prevent e-books and other digital publications from qualifying for the same beneficial VAT treatment of printed publication²⁸.

Ecommerce Europe welcomes the fact that the VAT Package acknowledges the change in the current scenario, and that the new legal framework will allow - but not oblige - Member States to align the rates on e-publications to those on printed publications²⁹. In the view of Ecommerce Europe, this is an extremely important achievement. While printed publications still hold an important role in fostering education, culture and knowledge in Europe, the market share of e-books and other similar tools is growing year after year, therefore a different VAT treatment is no longer justified.

²⁶ Proposed new Article 369y of the VAT Directive 112/2006.

²⁷ "According to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter 'the VAT Directive') electronically supplied services including electronically supplied publications (hereinafter 'e-publications') have to be taxed at the standard VAT rate (minimum 15%). On the other hand, Member States have the option to tax publications on any means of physical support at a reduced VAT rate (minimum 5%) and some Member States were granted the possibility to continue to apply VAT rates lower than the current minimum of 5% (super-reduced rates) including exemptions with the deductibility of the VAT paid at the preceding stage (so called zero rates) to certain printed publications": Explanatory Memorandum to the Proposal of a Council Directive for VAT on e-publications.

²⁸ "Since 1 January 2015, VAT on all electronically supplied services has been levied in the Member State where the customer is based. Given the implementation of the destination-based principle, it is no longer necessary to apply the standard rate to electronically supplied publications in order to ensure the establishment and the functioning of the internal market and to avoid distortion of competition". Recital 4 of the Proposal for a Council Directive for VAT on e-publications.

²⁹ Article 1 of the Proposal for a Council Directive on VAT on e-publications modifies Article 99 of the VAT Directive 112/2006.

5. VAT and online marketplaces: a careful approach is needed

A growing share of cross-border online sales in Europe are carried out by merchants through their own stores on marketplaces. Under the most common solution, parties to the contracts of sale of products sold via a marketplace are only the seller and the individual consumer. The marketplace is not party to the sale, in the sense that the marketplace does not purchase the products from the seller for resale to customers (neither directly nor under a consignment stock arrangement). The marketplace represents a channel to facilitate sales of products. Accordingly, marketplaces usually provide various pre-and-post sales services to their clients: advertisement tools, payment solutions, purchase rating systems and other features. For these services, the marketplace usually charges fees to the seller, determined under various methods. For instance, when a sale on the website takes place, the marketplace immediately collects the purchase price from the customer on behalf of the seller and deducts a percentage-based commission from the payment due to the seller.

More and more frequently, sellers established outside the EU employ European-based facilities operated by third-parties to fulfil orders received on the marketplaces (warehouses, etc.). In these circumstances, goods sold on European marketplaces are previously bulk-shipped from overseas to the EU facility. Following customs clearance, the freight reaches the warehouse, where it is stocked in the wait for future B2C sales on the marketplace. Most EU member states require businesses established outside their territory that carry out VAT-able transactions within their territory to register for and apply national VAT regardless of the volume of local sales (that, is even a single, low-value sale sets forth the obligation to apply VAT). Businesses established within these EU territories are usually treated more favorable than non-established businesses.

For instance, UK-established businesses are mandated to register for VAT only when they reach a £ 83,000 yearly threshold. But if a non-UK company starts to carry out sales from a UK-based warehouse, the non-UK company will need to apply UK VAT starting from the first sale. Not only most EU countries do not apply minimum revenue thresholds for VAT registration to businesses established outside their territories, but when the foreign business is established outside the EU, some EU states even require the latter to appoint a VAT representative (a local chartered accountant, law firm, etc.), jointly and liable with the seller for any local VAT liability.

The above-described measures are mostly aimed at preventing VAT evasion by non-EU sellers, fostered by the difficulty for local tax authorities of monitoring VAT compliance by businesses with no offices or personnel in the jurisdictions where online sales take place. Nonetheless, cases of VAT abuse and non-compliance by overseas businesses importing goods sold via online marketplaces into the EU have widely been reported by the tax authorities of various EU states in recent years. The systematic loss of VAT revenues on marketplace sales of foreign sellers has brought various EU states to consider the introduction of measures to prevent VAT evasion that make the marketplaces potentially liable for unpaid VAT. For instance, in 2016 the UK introduced regulations whereby operators of an online marketplace in which an overseas seller is failing to meet UK VAT requirements can be held jointly and severally liable for the VAT owed by the seller selling to UK consumer via the concerned marketplace³⁰.

³⁰ According to the new procedure, the UK tax authorities (HMRC) will first attempt to contact the marketplace to try to work together before issuing any formal joint and several liability notice (known as a liability notice). This initial period is known as the pre-notification period. However, sometimes the urgency of a situation may require HMRC to issue a liability notice straight away. Any liability notice issued to the online marketplace operator will continue until withdrawn by HMRC. This may be the case even if the overseas seller pays the VAT they owe.

However, HMRC can withdraw the notice:

- if they are satisfied the overseas seller has fully met all their VAT obligations and continues to do so;
- where the overseas seller is removed from the online marketplace and, after a sufficient period of time, HMRC are satisfied that the overseas seller is no longer a significant risk.

Also, the UK tax authorities (HMRC) can direct an overseas seller trading through a UK marketplace to appoint a UK-based VAT representative (held liable for all aspects of the sellers' VAT) and can also request security from an overseas seller. As a result, as many as 7,185 online retailers have applied to be VAT registered in the UK in 2016, contrasted with just 695 retailers who registered throughout the whole of 2015³¹. Measures such as those enacted in the UK aim at ensuring that sellers established in the EU and outside the EU alike are subject and pay VAT with no failure.

In Ecommerce Europe's opinion, singular, unilateral measures to tackle VAT evasions on digital activities enacted by a single EU member state (as it is in the case of the United Kingdom) are likely to foster harmful tax competition between EU countries. Indeed, sellers not intending to comply with VAT regulations of one EU state can opt to use fulfilment facilities situated in EU countries with less strict VAT regulations regarding VAT on e-commerce sales.

Ecommerce Europe believes that it is of utmost importance for the EU institutions to adopt a careful approach with regard to this discussion around different VAT collection models and the potential involvement of payment service providers, parcel delivery operators and online marketplaces. An in-depth impact assessment, supported by stakeholders consultations with the industry and their representatives should be launched before undertaking any actions.

6. Remove hurdles related to VAT and excise duties hindering the growth of cross-border e-commerce sales of beer, wine and spirits

Ecommerce Europe wants to stress that the current VAT and excise-duty framework for cross-border B2C sales of wine and other excisable duties within the EU is severely hindering the growth of cross-border e-commerce sales of beer, wine and spirits. First, unlikely the general regime applicable to distance sales of goods, sales of excisable products from a EU member state to consumers situated in other EU member states are subject to VAT in the country of delivery, regardless of any revenue threshold reached. Such a derogation from the general regime of distance selling, set forth by Article of 34 of the VAT Directive EU/112/2006, has been transposed into national law by all EU states. As a matter of fact, each EU seller intending to ship even a very limited amount of beer, wine or other excisable products to consumers in ten different European countries, will need to register for and pay VAT in those ten countries. Under the current scenario, the undertaking of intra-EU distance sales of alcohol products is unavoidably linked to onerous VAT compliance obligations for the concerned seller. In Ecommerce Europe's view, the VAT Package attempts to ease such VAT obligations from 2021 by enabling online stores to use the MOSS for reporting and paying VAT on distance sales of goods in multiple countries, including the case of sales of excisable products³², and Ecommerce Europe welcomes this provision proposed by the Commission.

Nonetheless, Ecommerce Europe wants to stress that sellers engaging in the trade of alcohol products are also subject to extremely complicated and expensive obligations to report and pay excise duties on alcohol products. That is because excise duties on cross-border shipments of alcohol products are always due in the EU state of final delivery of the products. Moreover, sellers are legally required to appoint a tax representative for compliance purposes in every single EU state where excisable products will be finally delivered. For every shipment of alcohol products, the tax representative must notify the

The marketplace won't be assessed for the overseas seller's VAT if it removes the seller liable for unpaid VAT from the online marketplace within the time specified in the liability notice.

³¹ <https://www.gov.uk/government/news/hmrc-tackles-online-vat-fraud-in-time-for-christmas>

³² "This special scheme applies to all those goods or services supplied in the Community" (Proposed new Art. 369b).

local customs authorities of the EU state of delivery with a detailed description of the alcohol products included in the shipment before the goods are dispatched. After that the excise goods arrive at destination, the tax representative must then pay the excise duties declared on behalf of the seller and store all records of the delivery³³. Under this scenario, it is not unexpected that the volume of B2C online sales of alcohol in Europe is still small if compared to traditional cross-border B2B trade of wine between wineries and importers. Accordingly, most logistical operators within the EU alcohol industry engage in B2B shipments of alcohol products under duty suspension in the EU. This type of trade is subject to a specific excise-monitoring, the Excise Movement and Control System (EMCS). The ECMS is a computerized system for monitoring the movement of excise goods under duty suspension in the EU. It cannot be used for distance selling purposes. The circumstance that the system to monitor transport of excisable goods under B2B shipments diverges from the system applicable to distance selling of excisable goods does not definitely help European online wine sellers, who cannot rely on a more traditional and consolidated distribution channel.

The system to monitor European distance sales of alcohol products can be then defined as a “niche procedure”, whose functioning appears sometimes to be unclear even to customs officials³⁴. Furthermore, albeit the rules to monitor the movement of excisable goods are harmonized at the EU level, it appears that some EU states have transposed these rules into their national law with even more trade-hostile effects. In Ireland, for instance, it is currently illegal to deliver excisable goods to Irish consumers directly from overseas without the goods being held ready at a local facility for inspection by customs official (if any)³⁵. The serious incompatibility between the current regulatory framework of EU excise duties and the growth of the European e-commerce market of alcohol products has been also highlighted at a meeting of the Fiscalis Project Group FPG/090 on arrangements of distance selling and business to business sales of excise goods released for consumption: “*The current distance selling system where fiscal agents are involved is too complicated, costly for consumers, and sometimes even impossible to use*”³⁶.

Ecommerce Europe urges policymakers to take into account an extension of the application of the MOSS to the reporting and payment of excise duties on B2C cross-border sales. This solution would reduce the administrative and economic burden for online sellers of alcohol products and it was also hinted during a meeting of the Excise Contact Group (TAXUD.C.2): “*the Chairman clarified that the priority of the COM is to propose the establishment of a One Stop System for distance selling of goods which would be an expansion of the existing Mini-One Stop Shop. The expansion requires an agreement by Member States on a new definitive system of VAT which would establish the principle that the VAT is paid in the country of consumption. If the legal and technical approach for VAT is successful, the same approach could be adopted for the distance selling of excise goods*”³⁷. Extending the application of the MOSS to the monitoring and payment of excise duties would remove most of the tax obstacles that are preventing the European wine e-trade from growing.

³³ When asked whether EU actions were required to improve the coordination between excise and customs procedures, 22 Member States agreed. They suggested that there would be scope to develop a common vocabulary for customs and excise, to create an interface between the EMCS and the ECS at the EU level, to increase coordination between the Member States, and to describe procedures in greater detail, such as via the completion of an export declaration relating to excise. An official way to request ARC numbers from other Member States could limit the current complications. Many referred to the Fiscalis/Customs 2020 project group.

³⁴ An enquiry to the German customs about the correct procedure to import wines from Germany to Italy has received this written answer from the German customs official: “*The transport of wine from Italy to Germany is no question of taxes and duties. I would like to recommend to contact the Chamber of Commerce*”.

³⁵ <http://www.revenue.ie/en/tax/excise/leaflets/pn1879.html>

³⁶ 18.11.2013 Brussels. Meeting: Fiscalis Project Group FPG/090 on arrangements of distance selling and business to business sales of excise goods released for consumption. It was also said that “*some traders exploit this situation to avoid the responsibility of acting as a distance seller and encourage consumers to think that they can buy excise goods via an internet site in another Member State for consumption in their Member State of residence without paying excise duty in the country where they reside*”.

³⁷ Excise Contact Group of 03/07/2015



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This paper has been drafted in strict cooperation with Taxmen. Taxmen is the global company specialising in tax and legal services for the e-commerce sector. It was established in 2012 to provide one-stop-shop compliance services for VAT on distance selling and environmental regulations on e-commerce packaging in all the European jurisdictions. It has subsequently widened its tax activities, which now range from customs planning to transfer pricing. From 2014, the company provides legal services specifically tailored for the IT sector under the brand Lawmen.