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Draft Legislation of the German Government to Combat VAT Evasion in Ecommerce

德国政府关于打击电子商务中逃税行为的立法草案

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The German federal government presented a legislative proposal on tax- and especially VAT law with the focus to combat VAT fraud in (international) ecommerce on July 31st 2018. The draft is titled “*Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften*“¹ (translation of the title: “*Draft legislation to prevent tax evasion in ecommerce concerning the sale of goods and for changing other tax laws*”). This draft is not passed by the German legislator yet.²

A. Background

Motivation of the German government is to combat VAT fraud in international ecommerce, to protect VAT revenues and to ensure equal competitive conditions.³ In the focus is VAT evasion of sellers from third countries⁴ like from the P. R. of China with Hong Kong.⁵ However, the government does not mention the P. R. of China with Hong Kong explicitly in the draft. The intended law should bridge the time until the (main) provisions of the EU-regulations on combating VAT evasion in international ecommerce will be enacted by the EU-member states on January 1st 2021⁶. Germany lobbied for the regulations on EU-level and Germany became a driving force to combat VAT fraud in international ecommerce in the EU behind the UK.

Combating VAT evasion in international ecommerce is not a question of legislation only, but of investigations and pressure on platform operators. Since end of 2017 a change in Amazon’s business policy concerning the VAT question (under the pressure of German tax authorities) had a big impact on VAT compliance, which changed the situation substantially already. Since end of December 2017 Amazon blocked the accounts of a not defined number of Chinese ecommerce sellers. The

¹ Cf. Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, B., p. 1; Article 9, p. 17-19, for an explanation of the proposed rules see p. 67 ff. (<http://dipbt.bundestag.de/dip21/brd/2018/0372-18.pdf>).

² Vgl. <https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2018/0301-0400/0372-18.html>.

³ Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 1, 27.

⁴ Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 1.

⁵ A lot of Chinese companies/ecommerce sellers have letter-box companies in Hong Kong.

⁶ Richtlinie (EU) 2017/2455 des Rates vom 5. Dezember 2017 zur Änderung der Richtlinie 2006/112/EG und der Richtlinie 2009/132/EG in Bezug auf bestimmte mehrwertsteuerliche Pflichten für die Erbringung von Dienstleistungen und für Fernverkäufe von Gegenständen, ABL. EU Nr. L 348, p. 7 ff.; Council of the European Union, 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, Interinstitutional File: 2016/0370. Cf. Kommission, Modernisierung der Mehrwertsteuer für den grenzübergreifenden elektronischen Geschäftsverkehr zwischen Unternehmen und Verbrauchern (B2C), Vorschlag für eine Richtlinie des Rates zur Änderung der Richtlinie 2006/112/EG und der Richtlinie 2009/132/EG in Bezug auf bestimmte mehrwertsteuerliche Pflichten für die Erbringung von Dienstleistungen und für Fernverkäufe von Gegenständen, COM(2016) 757 final.; *Brettschneider*, *Steuererleichterung E-Commerce und ihre Auswirkung*, Herausforderung für die EU, die EU-Mitgliedstaaten und Overseas-Händler, 3rd Ed, p. 112 ff.

first account-blockings happened end of December 2017. In the case of account blockings, the sellers receive a message from Amazon that informs them about the blocking. An example of an Amazon notification to an Amazon seller from China:

“[...]
Action required for your Amazon.de seller account
Hello,

We received notification from the German Tax Authorities, indicating that you do not currently meet VAT requirements in Germany. Sellers on Amazon must comply with all applicable laws and regulations.

As a result, you may no longer sell on www.amazon.de. If you have funds in your Selling on Amazon payment account, they are also required to be withheld by Amazon Payments Europe S.C.A. on the instruction of the German Tax Authorities. The funds will be made available once the German Tax Authorities provide confirmation that you meet VAT requirements in Germany.

We will block your FBA inventory in our fulfilment centers in Germany until the German Tax Authorities provide confirmation that you meet VAT requirements in Germany and so you will not be able to remove this inventory. Additionally, you may no longer offer to ship items into Germany on any of Amazon's European marketplaces. You may also no longer use our FBA service to ship items into Germany. Your shipping options will be restricted accordingly.

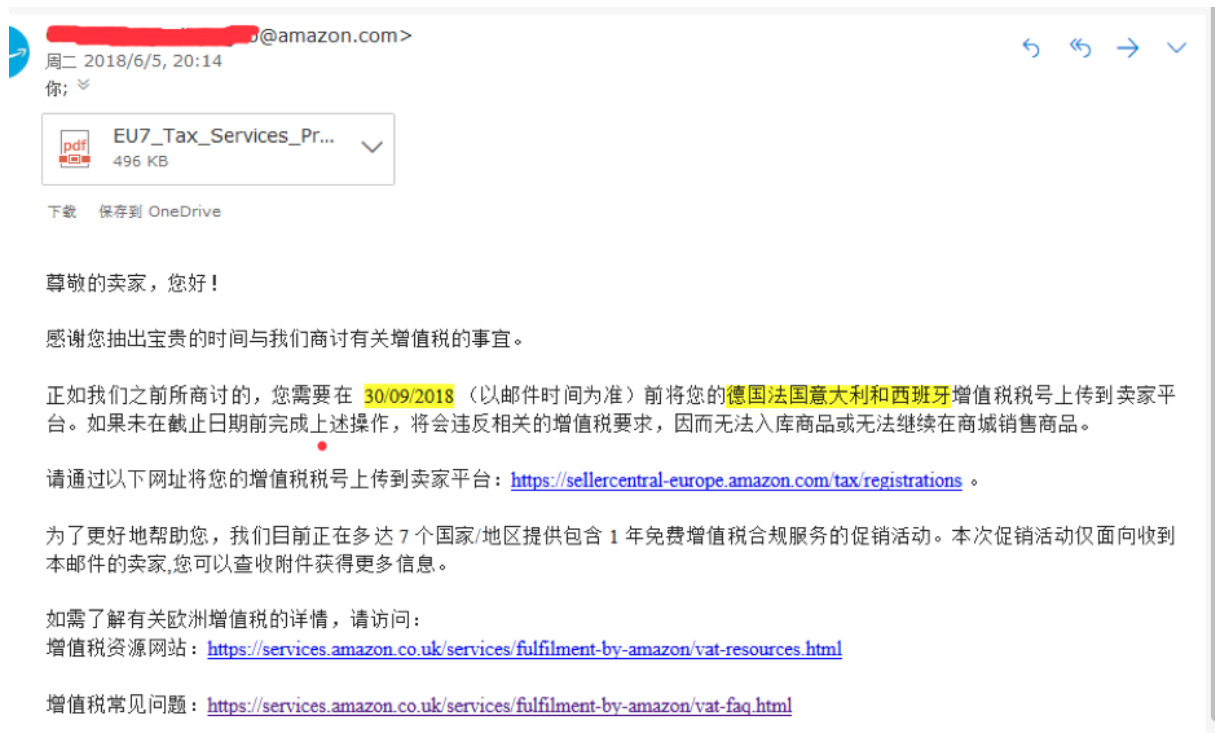
Please contact the German Tax Authorities at [...] to resolve your VAT status. Your Reference number is AB div. [...] and you should quote this reference number in all correspondence with the German Tax Authorities. The German Tax Authorities require that the person contacting them in response to the notice must be the company's legal representative (as registered with respect to the specific Amazon account in question) and must also be in a position to prove his/her status as legal representative by means of the presentation of an excerpt from the relevant commercial register.

Once the German Tax Authorities issue a notification exemption certificate, or certificate of good standing, we may allow you to sell on Amazon.de again.

For information on tax advisory firms with discounted rates for Amazon sellers, visit our VAT Resources help page https://services.amazon.de/programme/umsatzsteuer-services-bei-amazon.html/ref=DE_footer_VATAMZN

Sincerely,
Amazon Services Europe”

There are other kinds of Amazon notifications that inform sellers in general that they have to provide VAT numbers *in future* without an immediate blocking of accounts:



In this message sellers, who use Fulfillment by Amazon (FBA), are asked to upload a VAT number for Germany, France, Italy and Spain until September 30th 2018. This kind of emails raise the question, if the sellers can avoid the obligation to provide a tax registration to Amazon by removing their goods from Amazon Warehouses in those countries.⁷

The change of Amazon's business policy raised the awareness about VAT questions in China. Before that, a lot of mid-sized sellers had poor knowledge on German/European VAT law and a lot of those sellers thought they had paid the VAT on importation in form of the import VAT according to Section 1 I No. 4 Umsatzsteuergesetz (UStG - German VAT law) already. There are Chinese logistics companies, which give wrong information to sellers about that and offered so called "double clearance", a business aimed at tax evasion.⁸

The German tax authorities press operators of electronic marketplaces to provide detailed information about sellers they suspect to evade VAT, to block those sellers' accounts, to block the respective sellers' goods (when using Amazon and Fulfillment by Amazon - FBA) and to freeze their funds. We refer to a letter to Amazons lawyer⁹ by Finanzamt für Fahndung und Strafsachen Berlin¹⁰ concerning 426 Amazon

⁷ Likely Amazon wants to ensure that sellers have a VAT number in the countries of storing goods *in future* only and that removing goods can be a way to avoid account blockings after the deadline.

⁸ Cf. *Brettschneider*, *Steueroase E-Commerce und ihre Austrocknung*, 3rd. Ed., p. 71-76. The big ecommerce logistic companies from China take compliance seriously and do not insolve in such kind of business.

⁹ Küffner Maunz Langer Zugmaier Rechtsanwaltsgesellschaft mbH, <https://www.kmlz.de/>.

¹⁰ Cf. <https://www.berlin.de/sen/finanzen/steuern/finanzaemter/finanzamt-fuer-fahndung-und-strafsachen/>.

ecommerce sellers.¹¹ The recent development cannot be understood without this kind of measures:

Firstly, the Finanzamt für Fahndung und Strafsachen Berlin asks for detailed information about the sellers and the sellers' businesses:

- “1. The owner/shareholder of the company with the date of birth, address, telephone and fax of the company
2. Information, if the company or responsible persons of the company are active under other accounts (worldwide)
3. Does the seller have a seller-account (or more) at the Amazon Payments Europe S.C.A.? In this case information about the customer number, the provided bank account and information about addresses.
4. Information about further bank accounts and credit card numbers, if available.
5. Did the seller use Amazon FBA before since registration as seller?
6. List of all sales separated by account names since registration. The following information should be included: date of sales, description of article, sales price, turnover per year per shop, if the customers' address is in Germany. If Fulfillment by Amazon (FBA) is used, information about the location of the warehouse is requested. Information about Amazon's payments to the seller is requested too.
7. In which warehouse are the goods of the sellers stored at the moment”.

The tax authorities should be aware that the director(s)/shareholder(s) may be dummies.

The authority pressures Amazon by indicating a *criminal liability* for responsible persons at Amazon and presses Amazon to cooperate on this way:

“On the basis of this request for information your client [Amazon] gets knowledge about the tax evasion of the attached companies.

[...]

The tax authority expects that your client [Amazon] blocks the respective sellers immediately and will not allow them to sell in the future. In our opinion, the blocking follows from your client's standard terms already.

Aiding and abetting of tax evasion

The offering of the marketplace platform for sellers, which are known as tax evaders or are recognizable as tax evaders (for example due to a missing tax number/missing VAT-ID-No. and trade from Germany or other EU member states to Germany) can be punishable as aiding and abetting according to § 27 StGB [German criminal code]. The provision of the platform enables them the respective sellers to evade taxes.

Aiding and abetting after crime [Begünstigung] (§ 257 StGB) [German criminal code]

If payments would be made from Amazon or Amazon Payments Europe S.C.A. to the [...] [Seller] after knowledge about the tax evasion a criminal liability according to § 257 StGB [German criminal code] is possible.

[...]”¹²

¹¹ Translated from German by the author.

In the past Amazon stated the *sole responsibility of sellers* concerning VAT again and again. But nowadays Amazon blocks ecommerce sellers, blocks goods that are stored in Amazon warehouses (Fulfillment by Amazon – FBA) and freezes funds as requested by tax authority *immediately*. The background are legal risks, in particular because of the risk of aiding of tax evasion. This policy of Amazon had a strong impact on non-compliant ecommerce sellers from the P. R. of China.

In this context it has to be mentioned that not all Chinese sellers evade VAT. The big Chinese ecommerce sellers take VAT compliance seriously and comply to VAT laws in Germany and other countries since long time. They follow a “defensive strategy” concerning VAT compliance. That means they want to avoid legal problems from the beginning on. Some big sellers from Shenzhen are even listed on Chinese stock exchanges, so that VAT compliance in China and other countries is essential for them. It has to be noted that Chinese ecommerce sellers sell typically under different account which are operated by different companies. Big and mid-size ecommerce sellers from China use more than 100 accounts/companies.¹³ Costs of VAT compliance are multiplied by using several companies. The directors of these companies and even the shareholders of these companies may be different. But there are some sellers, who have a few accounts/companies only. To have many accounts has organizational reasons on one side and the consequences of accounts blockings should be minimized on the other side. Accounts can be blocked by Amazon for many reasons and not only for VAT non-compliance. Therefore, it is a misunderstanding to think that reason for multiple accounts/companies is VAT evasion. To *generalize* about the VAT evasion of sellers is a common mistake by media, politics, German ecommerce sellers and even German prosecutors with consequences for operators of electronic marketplaces and operators of fulfillment businesses.

B. Summary of the Draft Legislation

There are two main elements in this draft: The proposal demands documentary obligations from the operators of electronic marketplaces concerning in the proposal specified data and enacts a liability rule for operators of electronic marketplaces for evaded tax by sellers under in the proposal defined circumstances.¹⁴ In the following we have a look on the proposed provisions in detail:

¹² See Section 27 I of the German criminal code (Strafgesetzbuch - StGB): https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0153. If the operator of an electronic marketplace (or a fulfillment provider) knows that the professional service is used to commit a tax evasion or if the operator thinks it is most probable that a tax evasion is committed by the customer, the line to an aiding is crossed (cf. *Fischer*, Strafgesetzbuch mit Nebengesetzen, 65th Ed., 2018, § 27 Rn. 17 ff., 18a f.).

¹³ Cf. *Brettschneider*, *Steueroase E-Commerce und ihre Austrocknung*, 3. Ed., p. 42.

¹⁴ Cf. Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, B., S. 1; Artikel 9, Änderung des Umsatzsteuergesetzes, Article 9, p. 17-19, for an explanation of the proposed rules see p. 67 ff. (translation of the title: “Legislative draft of the Federal

I. Definitions

The proposal uses definitions:

The draft uses the term “delivering business” (cf. Section 22f I, Section 25e IV, VIII) without providing a definition of this term. The term “delivering business” means a person, who delivers the goods and is not consumer (cf. Sections 13 f. BGB¹⁵). In the following we will name “delivering businesses” as “sellers” too, no matter if they are consumers or businesses.

The term “electronic marketplaces” is defined in Section 25e V. An electronic marketplace according to the proposal is a website or any other instrument that provides information that enable third parties who are not operator of the marketplaces to create turnovers (Section 25e V). In the following the term platform is used for an electronic marketplace as well. Own websites of sellers are not included in this definition.

The term “operator” is defined in Section 25e VI and means a person who runs an electronic marketplace and enables third parties to create turnovers via this marketplace.¹⁶

II. Documentary Obligations for Platform Operators

According to Section 22f the operator of an electronic marketplace has to store documentation about

- the complete name and the complete address of the delivering business (Section 22f I sentence 1 No. 1),
- the tax number (Steuernummer) and if there is one, the VAT Number (Umsatzsteuer-Identifikationsnummer) of the delivering business¹⁷ (Section 22f I Sentence 1 No. 2),
- the begin and expiry of a certificate according to Section 22f Sentence 2 (Section 22f I sentence 1 No. 3) and
- place of the begin of the transportation shipment and the place of destination (Section 22f I No. 4),

Government, Draft of a law to prevent tax evasion in ecommerce concerning the sale of goods and for changing other tax laws”).

¹⁵ https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0050.

¹⁶ The Amazon marketplace in the EU is run by the Amazon Services Europe S.à.r.l. (Luxemburg).

¹⁷ In Germany we have (unlike in other EU-member states) a tax number (Steuernummer) and a VAT number (Umsatzsteueridentifikationsnummer).

- time and amount of the created turnover (Section 22f I Sentence 1 No. 5).¹⁸

These information are subject to the obligation to preserve documentation according to Section 147 AO¹⁹ for six years.²⁰

III. Certificate of the Competent Tax Authority

The platform operator has to prove the information according to Section 22f I sentence 1 No. 1 to 3 by a at the time of the delivery valid certificate about the tax registration of the respective ecommerce seller provided by the tax authority for the delivering business (Section 22f I sentence 2). The certificate is issued by the for the delivering business competent tax authority on request of the delivering business (Section 22f I Sentence 3). The certificate will be issued by the tax authority for up to three years (Section 22f I Sentence 3). For sellers from China the Finanzamt Neukölln²¹ is competent (Section 21 I Sentence 2 Abgabenordnung (AO – German Fiscal Code), Section 1 II Umsatzsteuerzuständigkeitsverordnung (UStZustV). It is in the discretion of the Finanzamt Neukölln how long it will issue the certificates to sellers from China and the future administrative practice is not foreseeable yet.

The Bundeszentralamt für Steuern (Federal Authority for Taxes)²² will give the operators of electronic marketplaces (see the definition in Section 25e V, VI) information about the stored certificates according to Section 22f I Sentence 2 f. by electronic query on request (Section 22f I Sentence 6). Before this electronic query works the Bundeszentralamt für Steuern gives paper based information to the operators of electronic marketplaces (Section 27 XXV Sentence 1). This rule should enable operators of electronic marketplaces to get the information about sellers' certificates fast and without administrative burden. The platform operators will check the certificates of all their sellers to avoid liability risks after the law is in force and the respective transition period is passed.

The delivering business agrees to provide the information about the certificate to the operators of electronic marketplaces by applying for the certificate (Section 22f I Sentence 7).

¹⁸ Cf. Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 67.

¹⁹ For an English version of this rule see: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p1276.

²⁰ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 67.

²¹ For the website of the Finanzamt Neukölln see: <https://www.berlin.de/sen/finanzen/steuern/finanzaemter/neukoelln/>.

²² For the website of the Bundeszentralamt für Steuern see: http://www.bzst.de/DE/Home/home_node.html.

In case of sellers who do not register as businesses, Section 22 f I sentence 1 No. 1, 4 and 5 applies mutatis mutandis (Section 22 f. II). In this case the seller's date of birth has to be documented by the operators of electronic marketplaces.

These rules apply for domestic sellers as well and is not designed for international sellers only, which would be legally problematic. But it is possible that the validity period of the certificate will be much shorter for sellers from the P. R. China in practice.

IV. Liability Rule for Platform Operators

1) Liability Rule and Certificate

At the starting point there is (as expected²³) a broad liability rule in Section 25e I. The liability rule in Section 25e I is worded as follows:

“The operator of an electronic marketplace is liable for taxes from deliveries of a company that are based on its platform”.

But the liability of the platform operator is excluded according Section 25e II, if the platform operator can provide a certificate according to Section 22f I Sentence 1f. (proving certificate by the seller) or Section 22f I Sentence 6 (electronic query from Bundeszentralamt für Steuern), unless the platform operator had knowledge about tax evasion of a delivering business or should have learnt of it.

Therefore, it is sure *that the platform operators will demand the certificate according to Section 22f I sentence 2 from ecommerce sellers in future.* They will demand not only from international businesses, but from domestic businesses too.

If the seller did not register as business the exclusion of liability applies, if the platform operator complies with Section 22f II (see above), unless the platform operator had knowledge about tax evasion of a delivering business or should have learnt of it (§ 25e III).²⁴

2) Liability after Information

If the delivering business do not comply with the tax obligations in substantial manner, the tax authority is allowed to **inform the platform operator**, if other

²³ Finanzministerkonferenz, 30. November 2017 in Berlin, Punkt 2 TO, Bekämpfung des Umsatzsteuerbetrugs im Zusammenhang mit dem Internet-/Onlinehandel, number 2.

²⁴ For a description see: Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 69.

measures are not promising (Section 25e IV sentence 1).²⁵ **After receiving this notice, the platform operator is liable in case of Section 25e IV sentence 1 for the evaded tax of transactions that were completed after receiving the notice.**

This liability is excluded, if the platform operator blocks the delivering business from offering goods on the platform. Therefore, *operators of electronic marketplaces will shutdown the respective sellers' accounts immediately when they get these information from tax authority* (cf. Section 25e IV Sentence 2: "After receiving the notice the operator is liable ..."). According to the explanatory memorandum the liability will occur after a deadline set by the tax authority.²⁶ This rule applies *mutatis mutandis* in case of Section 25e III concerning sellers who are not businesses.

This kind of liability rule works presently in the context of an announced criminal liability of platform operators by tax authorities already efficiently (see above).

3) Liability Statement

The tax authority, which is competent for the respective seller has competence to issue a liability statement against platform operators (Section 25e VII). The liability statement by the tax authority will be issued in writing.²⁷ The action against the operator of an electronic marketplace is subordinate to the action against the seller in general.²⁸ But if the tax authority cannot take action against the sellers, tax authority can held the operators of electronic marketplaces liable.²⁹ In cases of sellers from third countries, the tax authority does not have to try an enforcement against the seller in derogation of Section 219 Abgabenordnung (AO – German fiscal Code)³⁰, but can enforce the liability against the platform operator immediately (cf. Section 25e VIII).³¹

V. Naming of an Authorized Recipient

²⁵ For a description see: Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 69.

²⁶ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 69.

²⁷ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, p. 70.

²⁸ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, p. 70.

²⁹ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, p. 70

³⁰ For an English version of the provision see: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0946.

³¹ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, p. 70.

Businesses without residence, habitual residence, seat or management in Germany or another member state of the European Union have to name an authorized recipient in Germany according to Section 123 Abgabenordnung (AO – German Fiscal Code)³² at the latest at the time of application for the certificate of the tax authority (Section 22f I Sentence 4). Section 123 Sentence 4 Abgabenordnung does not apply (Section 22f I Sentence 5).³³

VI. Collective Information Requests

Concerning collective requests of information (“Sammelsauskunftersuchen”) from operators of electronic marketplaces Section 93 Ia Sentence 2 Abgabenordnung (AO – German Fiscal Code)³⁴ does not apply according to Section 22f III Sentence 2. According Section 93 Ia Sentence 2 Abgabenordnung (AO – German Fiscal Code) it is condition for collective requests of information (“Sammelsauskunftersuchen”) that there is a sufficient cause for investigations and other reasonable measures for the clarification of the facts are not promising.

VII. Date of Enactment and Transition Period

The proposed law by the German government shall be enacted January 1st 2019. It is planned there will be a transition period concerning the liability of platform operators for tax evading sellers (Section 25e I-IV), depending if sellers from third countries or from EU. Concerning sellers from third countries like the P. R. of China the transition period will be until End of February 2019. For sellers from EU, the transition period will be much longer: until End of September 2019 (Section 27 XXV). This different transition periods raised objections under Chinese sellers already.

C. Evaluation of the Draft

I. Certificate as further administrative Burden

Providing a certificate according to Section 22f Sentence 2 lets to a further administrative burden for sellers, operators of electronic marketplaces and tax authorities. This additional administrative burden applies to German ecommerce sellers as well. The VAT compliance in EU-VAT law is costly already, in particular when storing goods in different member states or/and exceeding delivery thresholds. It should be enough to demand a public display of the tax or VAT numbers and the sellers’ identities on the sellers’ accounts. On this way, tax authority can get all

³² For an English version of the provision see: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0946.

³³ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 68 f.

³⁴ The provision is not available in the English version of the provision unter: https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0946.

relevant information about the ecommerce sellers, including their (in the context of the tax registration) provided account names. Tax authority could check on this basis, whether the tax number or the VAT numbers are correct and whether the VAT declarations are handed in by the respective seller. This kind of rule would not be necessarily limited to ecommerce via electronic marketplaces, but can be applied on ecommerce via own websites of sellers. In this context, the tax authorities must be aware that the director(s)/shareholder(s) may be dummies and not the real seller(s).

II. Possible Delays in Providing the Tax Registration

The speed of the Finanzamt Neukölln with providing the tax numbers and VAT Number is an essential problem for Chinese ecommerce sellers who want to comply to German VAT law. The time is unpredictable and it took several months in the past. In addition, the Finanzamt Neukölln did not inform the author several times about the proceeded tax registration of clients, so that the clients did not know the tax registration and could not prepare their VAT-declarations. Letters to Finanzamt Neukölln concerning applications were answered months later often. In general, it is not possible to call clerks at Finanzamt Neukölln and sometimes, if they are available, the tone is unfriendly. The author wrote to the Finance Senator of Berlin (who is competent for Finanzamt Neukölln) several times concerning the delays in issuing tax numbers and VAT numbers and the resulting problems for sellers. The Finance Senator of Berlin never admitted this problem, but said (as excuse) that the applications were not complete.³⁵ The Finance Senator of Berlin does not admit the long time it takes to get a tax registration in general and states that he ensures the personnel resources at Finanzamt Neukölln.

Even if Chinese sellers want to comply with German VAT law, they are not able to comply quickly with the possible effect that their accounts are blocked meanwhile or the sellers face the risk that their accounts are blocked. In the P. R. China, this situation is well known under ecommerce sellers and lets to uncertainty.

There is a conflict between Amazon's business policy, which was enforced end of 2017, on one side and the possibilities of the ecommerce sellers to prove their VAT compliance quickly. Although the speed of Finanzamt improved recently (they got fresh employees), the situation concerning tax registration is not satisfactory at all: questions are not answered in time, the time needed to get a tax registration remains unpredictable and the time unblocking accounts after repayment depends on luck.³⁶ German government should take steps to ensure that the tax and VAT numbers are provided quickly, if complete applications are handed in. The current questionnaires should be revised under consideration of the important questions and under consideration of ecommerce practice. It should be the goal of the government to make the application process simple and fast as this increases the motivation for

³⁵ Some information that is requested by Finanzamt Neukölln cannot be provided often without a tax/VAT number like a Fulfillment contract.

³⁶ Examples can be given by the author to the Finanzamt Neukölln.

sellers to comply and removes burden on ecommerce. The Finanzamt Neukölln should answer emails and calls within reasonable time. In the cases of repayment accounts should be unblocked quickly and without delays of weeks and endless letters and emails to Finanzamt Neukölln.³⁷ It should not be the goal to build up burdens especially for overseas sellers. It must be feared that the problems at Finanzamt Neukölln are not solved in short term.

The application process should be transparent. It should be clear in the application process, which information the tax authority needs additionally/which information are missing and when the application process will be finished.

Subject to the draft should be measures to ensure a fast and efficient application process for tax registration. It would be helpful to give a clear rule when a tax number and VAT number is granted for an applying seller.

III. Possible Delays in Providing the Certificate

It should be a clear when and under which conditions and in which time the ecommerce seller can get the certificate according to Section 22f Sentence 2. The German government should give clear guideline which steps have to be done by the sellers to avoid the risk to be blocked by the operators of electronic marketplaces at the time when the law is law passed by the legislator.

The draft must ensure that sellers get the certificate in the time the operator of electronic marketplaces need the certificate. A delay in providing the certificate according to Section 22f Sentence 2 would lead to serious problem for the ecommerce sellers. The Chinese sellers fear a delay in issuing the certificates by Finanzamt Neukölln in this context very much. The certificate will be the precondition for selling via online platforms to German customers so far as a VAT obligation in Germany occurs. There is the risk that delays will hinder the businesses of Chinese ecommerce sellers substantially. As the Berlin Finance Senator and the Finanzamt Neukölln never admitted the delays and problems in the application procedure at Finanzamt Neukölln concerning the tax registration, it is possible that politics and Finanzamt Neukölln will not take the responsibility to deliver the certificates in time.

IV. Information of Platform Operators by Tax Authorities

Temporary (partly) non-compliance can have serious consequences on ecommerce sellers. It is not clear what constitutes non-compliance in a *substantial* manner yet. The description does not even mention that a substantial non-compliance is condition.³⁸ The legislator should give specifications what non-compliance in

³⁷ This critique does not apply on the Finanzamt für Fahndung und Strafsachen Berlin.

³⁸ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 69: „bei Vorliegen entsprechender Erkenntnisse“.

substantial manner means. At least the description should discuss this point. The missing information in the description about what is “substantial” raises the impression that the government underestimates the legal relevance of this point. Missing the submission of one Umsatzsteuervoranmeldung (VAT-declaration) should not be sufficient to constitute a non-compliance in substantial manner. There is a legal uncertainty for the sellers on this important question. The government, legislator and financial authorities should consider that the temporary shutdown of accounts create a serious loss for the sellers each day.

In the past, the financial authorities had a limited basis of knowledge about the VAT evasion of sellers. They didn't know, if goods were stored in Germany or that sellers do direct sendings³⁹ from China to customers to Germany only (they just knew the public information of the accounts often) when they informed platform operators to block accounts of sellers. Therefore, unjustified blockings happened with the result of serious financial losses.

In case sellers accounts' are shutdown on this way there must be a way to recover the accounts soon, if VAT compliance is proved. There should be a clear and reliable information on which way and in which time accounts can be recovered after blocking. There must be clear rules, otherwise ecommerce sellers face legal uncertainty and “phoenixing”⁴⁰ (see above) will be more attractive. Today it depends on luck and pressure of the sellers' lawyer or tax advisors when the accounts are recovered after solving a compliance problem with Finanzamt Neukölln. There might be the problem that accounts are blocked for non-compliance which doesn't aim on tax evasion, so that a fast recovery is required by the principle of proportionality. The process of giving information to the operators of electronic marketplaces should be transparent. Otherwise, the sellers' possibilities to object measures of tax authorities are cut back.

A deadline like in the context of the Notice in UK⁴¹ is not proposed by German government. It is likely that German government fears that the sellers will remove their goods from the Warehouse, will transfer the money to China meanwhile until the deadline ends and will change identity later („phoenixing”⁴²). This happens in UK. On the other side, the sellers will not risk their accounts for relatively little sums of VAT due. Only if they didn't pay VAT long time, it is likely that they will abandon their accounts to avoid repayment and change their identities by founding other

³⁹ Cf. *Brettschneider*, *Steueroase E-Commerce und ihre Austrocknung*, 3. Ed., p. 48 ff.

⁴⁰ Vgl. *Burns*, *Online marketplaces now liable for trader VAT fraud*, <https://www.accountingweb.co.uk/tax/business-tax/online-marketplaces-now-liable-for-trader-vat-fraud>; *Stanley-Smith*, *International Tax Review* 6/19/2017, S. 7; National Audit Office, *Investigation into overseas sellers failing to charge VAT on online sales*, 19. April 2017, S. 33 Nr. 3.5.

⁴¹ *Brettschneider*, *Steueroase E-Commerce und ihre Austrocknung*, 3. Ed., p. 168 ff.

⁴² Vgl. *Burns*, *Online marketplaces now liable for trader VAT fraud*, <https://www.accountingweb.co.uk/tax/business-tax/online-marketplaces-now-liable-for-trader-vat-fraud>; *Stanley-Smith*, *International Tax Review* 6/19/2017, S. 7; National Audit Office, *Investigation into overseas sellers failing to charge VAT on online sales*, 19. April 2017, S. 33 Nr. 3.5.

companies. This is a typical reaction in the context of achieving VAT compliance at the first time. Sellers should get a deadline before a blocking of accounts take place in general. The change of warehouse locations of goods could be excluded (selling should not be blocked) and funds could be frozen in the time of the deadline. It can be prevented that the respective seller will remove goods and funds, disappear and change its identity. On this way, the legitimate interests of the tax authority can be safeguarded and on the other side there is no risk that seller accounts on platforms will be suspended too easily.

On basis of the draft there is the impression that the tax authority contacts the operator of the electronic marketplace or does nothing. In general, there should be *direct* communication from tax authority to the sellers as this enables sellers to explain the situation to the tax authority before the tax authority undertakes further measures and tax authority would have a clearer picture. In minor non-compliance, this way is demanded by the principle of proportionality. Nowadays the indirect way (informing Amazon) can leads to serious problems of even unjustified blocked sellers. There are many cases that require a communication with the seller.

V. Transition Period

A transition period for the ecommerce sellers is necessary as it is likely that problems in the practical application/implementation of the law will occur. The different transitory periods have to be criticized. The draft gives no justification for the longer transition period for sellers located in the EU. The possible difficulties at the beginning, especially concerning possible delays in issuing the certificate according to Section 22f I Sentence 2 f., will be the sole burden of overseas sellers. Therefore, the government intends to enact a discriminating regulation against overseas sellers, especially sellers from China. In addition, it is likely that the tax authorities competent for the EU- and German sellers can implement the law faster as they don't have the problem of missing (personnel) resources like the Finanzamt Neukölln has obviously. The Finanzamt Neukölln proved in the past that it is not able to handle all the applications for VAT numbers from Chinese ecommerce sellers. Politics has to guarantee that all sellers who are VAT compliant and take the necessary steps are not blocked from selling on electronic marketplaces, regardless which tax authority is competent for them. Otherwise the government will weaken the ecommerce with disadvantages not only for (overseas) sellers, but for customers as well.

VI. Collective Information Requests

Concerning collective information requests the problem that the Amazon Services Europe S.à.r.l. (Luxemburg), is located in Luxemburg is not solved. In the past information requests were denied by Amazon Services Europe S.à.r.l. (Luxemburg)

with the argument of the Luxemburg Data protection law.⁴³ The eBay Marketplaces GmbH is located in Switzerland.⁴⁴ In addition, it is not possible to request information from a company located abroad.⁴⁵ Therefore, it is unclear how German tax authorities can enforce collective information requests, if operators of electronic marketplaces do not cooperate.

VII. Naming of an Authorized Recipient

The intended mandatory naming of an authorized recipient is welcomed. It is in the interest of all sides that the sellers receive documents from the tax authorities on time as they are relevant for the enforcement of VAT law. It should be clear that the tax authorities have to communicate with the sellers *directly*. It is problematic when the communication runs via the operators of electronic marketplaces like it is today concerning blocking notices. The naming of an authorized recipient should be connected with the obligations of tax authorities to communicate directly with the sellers.

VIII. Draft Aimed at Ecommerce via Electronic Marketplaces

The presented proposal is aimed at ecommerce via electronic marketplaces (cf. Section 25e V) only and not for ecommerce via websites that sellers operate to sell their goods. A possible VAT evasion through selling goods on own websites is not solved by this draft legislation. The consequence is different regulations for shops on own websites and on electronic marketplaces, which is questionable. It should be discussed how to enforce VAT law on sellers, who sell on own websites.

D. Need for further Discussion

The German government sees a need for an urgent legislative action now⁴⁶, but in fact VAT evasion in international/overseas ecommerce exists already since the beginning of ecommerce. The topic was discovered by media⁴⁷ and by German

⁴³ Cf. Niedersächsisches FG, Urteil vom 23.02.2012 – 5 K 397/10 (cf. BFH, Urteil von 16.05.2013, Az. II R 15/12 (Revision); Niedersächsisches FG, Urteil vom 30.06.2015, Az. 9 K 343/14).

⁴⁴ <http://pages.ebay.de/help/policies/legal-imprint.html>.

⁴⁵ Seer, in: Tipke/Kruse (Begründer), Abgabenordnung, Finanzgerichtsordnung Kommentar, § 93, Rn. 10 (TK Lfg. 132 Mai 2013): „Auskunftspflichtig sind deutsche Staatsangehörige im Inland sowie Ausländer und Staatenlose, die sich im Inland aufhalten. Exterritoriale sind nicht auskunftspflichtig. Deutsche FinBeh. dürfen im Ausland auch deutsche Staatsangehörige nicht in Anspruch nehmen, da sie dort keine Staatsgewalt haben [...]. Deshalb kann die FinBeh. auch kein (Sammel-)Auskunftersuchen an einen im Ausland (z. B. in Luxemburg) ansässigen Betreiber einer Internetplattform (z. B. ebay) mit dem Ziel richten, die Identität von gewerblichen Verkäufern zu ermitteln“; Schuster, in: Hübschmann/Hepp/Spitaler, Abgabenordnung/Finanzgerichtsordnung, Kommentar, § 93, Rn. 28 (HHSp Lfg. 176 März 2003): „Ausländer und staatenlose, die sich im Ausland aufhalten und Exterritoriale sind nicht auskunftspflichtig“.

⁴⁶ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, A., p. 1.

⁴⁷ Cf. Kartschall/Pohl, Steuerhinterziehung bei Online-Marktplätzen wie Amazon und Ebay – Bundesregierung verzichtet auf Hunderte Millionen Euro, <http://www.rbb->

sellers not long ago - with resulting pressure on politics. Before that the topic was not in focus at all. It took (considering the stated urgency) relatively long until the Finanzministerkonferenz, conference of the German states' finance ministers, presented a proposal on May 29th 2018.⁴⁸ Previously the Finanzministerkonferenz decided on November 30th 2017 to introduce a liability rule for platform operators without any further ideas:

“The finance ministers of the federal states support the proposal [...] to enact a liability rule. According to that, platform operators can be liable for turnovers that sellers created with the platform under certain conditions. *The scope and the specific form has to be decided under consideration of the tax code (Abgabenordnung), organization and automatization.* The finance ministers ask the federal finance minister to prepare a legislative draft in the first quarter 2018”.⁴⁹

Due to the stated urgency of the legislation, a substantial change of the draft and an intensive fruitful discussion with influence on the legislation is unlikely. It would be necessary for the legislator to hear the position of the ecommerce sellers. This applies to (VAT compliant) Chinese ecommerce sellers in particular. The current problems at Finanzamt Neukölln should be considered.

That a discussion is not possible, is problematic for the ecommerce business and ecommerce customers as the law may weaken ecommerce and may increase costs for sellers and platform operators.

It has to be noted again, that the change of Amazon's policy on sellers, who are suspected by tax authorities to evade VAT, had and has strong and positive impact on the VAT compliance of Chinese sellers, so that there should be enough time for developing a legislation that is suited to the practice.

Shenzhen, Guangdong, P. R. of China, August 2018

[online.de/kontraste/archiv/kontraste-vom-23-02-2017/amazon-bundesregierung-verzichtet-auf-hunderte-millionen-euro.html](https://www.online.de/kontraste/archiv/kontraste-vom-23-02-2017/amazon-bundesregierung-verzichtet-auf-hunderte-millionen-euro.html).; *Bognanni/Votsmeier*, Steueroase Amazon, Händler nutzen die Plattform Marketplace für systematischen Umsatzsteuerbetrug, Handelsblatt vom 6.12.2016, For an early article see: *Windeck/Wölbert*, Maximaler Profit, minimales Risiko, Amazons unfaires China-Business, c't 20/2015, p. 88, <https://www.heise.de/ct/ausgabe/2015-20-Amazons-unfares-China-Business-2794664.html>. Cf. *Brettschneider*, Steueroase E-Commerce und ihre Austrocknung, 3. Ed., p. 35.

⁴⁸ Finanzministerkonferenz, Mitteilung an die Presse, Jahreskonferenz 2018 der Finanzministerinnen und Finanzminister der Länder in Goslar, Bekämpfung des Umsatzsteuerbetrugs im Zusammenhang mit dem Internet-/Onlinehandel, Goslar, 25.05.2018, https://www.google.de/search?source=hp&ei=4h-RW9jdFJPy8AWagougDg&q=Finanzministerkonferenz%2C+Mitteilung+an+die+Presse%2C+Jahreskonferenz+2018+der+Finanzministerinnen+und+Finanzminister+der+L%C3%A4nder+in+Goslar%2C+Bek%C3%A4mpfung+des+Umsatzsteuerbetrugs+im+Zusammenhang+mit+dem+Internet-%2FOnlinehandel%2C&oq=Finanzministerkonferenz%2C+Mitteilung+an+die+Presse%2C+Jahreskonferenz+2018+der+Finanzministerinnen+und+Finanzminister+der+L%C3%A4nder+in+Goslar%2C+Bek%C3%A4mpfung+des+Umsatzsteuerbetrugs+im+Zusammenhang+mit+dem+Internet-%2FOnlinehandel%2C&gs_l=psy-ab.12...2614.2614.0.3973.5.3.0.0.0.0.1.0....0...1.2.64.psy-ab..4.1.346.6..35i39k1.346.lmhlQmQFa3E.

⁴⁹ Finanzministerkonferenz, 30. November 2017 in Berlin, Punkt 2 TO, Bekämpfung des Umsatzsteuerbetrugs im Zusammenhang mit dem Internet-/Onlinehandel, number 2, translated by the author.

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