

Brettschneider, Jörg

Working Paper

Online Platform Operators as Sovereigns over the Ecommerce Sellers Selected by the German Legislator

Suggested Citation: Brettschneider, Jörg (2019) : Online Platform Operators as Sovereigns over the Ecommerce Sellers Selected by the German Legislator, ZBW – Leibniz Information Centre for Economics, Kiel, Hamburg

This Version is available at:

<https://hdl.handle.net/10419/197795>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

Dr. Jörg Brettschneider¹
Rechtsanwalt, Hamburg

Online Platform Operators as Sovereigns over the Ecommerce Sellers Selected by the German Legislator²

Abstract:

The German law to combat VAT fraud and other tax regulations went into force recently. The German legislator aims to enforce German VAT law via a liability of platform operators (like Amazon and eBay). The consequences of this regulatory approach are a) that platform operators enforce the law more strictly in relation to the ecommerce sellers than required by the law, b) that legal uncertainty occurs and c) that the legal protection of ecommerce sellers is not clear. Background of the more strict enforcement is that platform operators want to avoid liability risks. The situation from the ecommerce sellers' perspective is described and discussed.

Keywords: ecommerce, VAT, Umsatzsteuer, VAT compliance, VAT fraud, platform operators, electronic marketplaces, Amazon, ebay, liability rule, legal enforcement, China, Germany

JEL Codes: H 25, H 26, K 34, F 60

¹ The author is German Attorney-at-Law (Rechtsanwalt) and consults ecommerce sellers and other companies from China on German VAT and other fields of law. The author can be contacted via email desk@ecomvat.com and phone: (+49)40/33 39 67 05.

² A previous German version was published on March 23rd 2019 on the German ecommerce blog wortfilter.de: "Amazon als vom Gesetzgeber auserwählter Souverän über die China-Händler", <https://www.wortfilter.de/wp/amazon-als-vom-gesetzgeber-auserwaehlter-souveraen-ueber-die-china-haendler/>.

A. Liability of Platform Operators as Legislative Approach

The German law to combat VAT fraud and other tax regulations (“*Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften*”) went into force on January 1st 2019 subject to a transitory period.³ The law is intended to bridge the time until January 1st 2021 as on that time there will new regulations on EU member state level based on the directive of the EU’s common system of value added tax (VAT)⁴ will come into force.⁵

I. Certificate according to Section 22f I Sentence 2 UStG

According to the German legislation, ecommerce sellers have to provide a certificate according to Section 22f I Sentence 2 UStG⁶ to platform operators (the law does not use the expression “platform”, but “electronic marketplace”⁷) as a factual prerequisite⁸ for continuing selling on ecommerce platforms. The certificate should attest that the

³ Bundesgesetzblatt Teil I Nr. 45 vom 14.12.2018, p. 2338 ff.

([https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//*\[@attr_id=%27bgbl118s2338.pdf%27\]#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl118s2338.pdf%27%5D_1555770378505](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//*[@attr_id=%27bgbl118s2338.pdf%27]#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl118s2338.pdf%27%5D_1555770378505)). For an overview of the legislative process see:

<http://dipbt.bundestag.de/extrakt/ba/WP19/2385/238517.html>. For a description see: *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15-22; *Zugmaier/Matthias Oldiges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373-376. For an overview of other new regulations except VAT: *Christian Korn*, Das Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften im Überblick, DStR 2019, p. 1-15.

⁴ *Ronny Langer/Astrid Breitsameter*, Der Mehrwertsteueraktionsplan der Europäischen Kommission, DStR 2018, p. 97 ff.; *Werner Widmann*, Zu den Vorschlägen der Europäischen Kommission vom 4.10.2017 zu einem einheitlichen europäischen Mehrwertsteuerraum, UR 2018, p. 10 ff.; *Jörg Brettschneider*, Steueroase E-Commerce und ihre Austrocknung, 3rd. Ed., Hamburg 2018, p. 118 ff.

⁵ Cf. 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; *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 24; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 15 f.

⁶ For the text of the UStG in German see: https://www.gesetze-im-internet.de/ustg_1980/.

⁷ In German: „elektronischer Marktplatz“. Cf. Section 25e V UStG; Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9 f.; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 16; *Matthias Luther*, Die neue Haftung für Online-Marktplätze, Der Betrieb 2018, p. 1942, 1942 f.

⁸ Cf. *Matthias Luther*, Die neue Haftung für Online-Marktplätze, Der Betrieb 2018, p. 1942, 1945 f.

respective ecommerce seller has a tax registration in Germany, but says nothing about the VAT compliance of the sellers.⁹ If ecommerce sellers do not provide the certificate to the respective platform operators, the platform operators will be legally liable for tax evasion of the respective ecommerce sellers in Germany (Section 25e UStG).¹⁰ Therefore, sellers, which do not provide the certificate, are suspended by the respective platform operators in general.¹¹

II. Liability in Case of Knowledge and Information

In addition, platform operators are liable, even if a certificate was provided and they had knowledge about non-compliance in tax law of the respective seller or should have known it (Section 25e II Sentence 2 UStG).¹² A liability of the platform operators (operators of electronic marketplaces) applies in cases in which the tax authority, which is competent for the respective seller, informs the platform operator about a substantial non-compliance in tax law (Section 25e IV Sentence 1 UStG) too. In this case platform operator is liable for future tax evasions after a deadline set by the tax authority, if the respective platform operator does not stop the seller from selling on the platform (Section 25e IV Sentence 2 f).¹³ The platform operator is allowed to set a

⁹ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4; *Oliver Zugmaier/Matthias Oldiges*, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 374.

¹⁰ Cf. Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 6 ff.; *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 776, 778 f.; *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, 2018, p. 51 ff. The liability is not limited to VAT (Section § 25e I UStG; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 18 f.; *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 776, 776). The letter of the Federal Ministry of Finance does not clarify on this point, but mentions VAT only (Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610).

¹¹ *Matthias Luther*, Die neue Haftung für Online-Marktplätze, Der Betrieb 2018, p. 1942, 1945 f.; *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 15.

¹² Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 7. Cf. *Oliver Zugmaier/Matthias Oldiges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 375 f.; *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 777, 779 f.

¹³ Cf. *Matthias Luther*, Die neue Haftung für Online-Marktplätze, Der Betrieb 2018, p. 1942, 1945; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 18; *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 53 ff.

deadline of up to two months to the seller according to the letter of the Federal Ministry of Finance dated January 28th 2019.¹⁴ If the platform operator cannot prove the seller was suspended from selling within the deadline, the platform operator is liable for the VAT on turnovers that took place after the receiving the information of the financial authority.¹⁵

III. Transition Period

A transition period was created by the German legislator: The liability rule should apply for sellers from third countries (like China) from March 1st 2019 and for online sellers from EU countries from October 1st 2019 on (Section 27 Abs. 25 Satz 3 UStG).¹⁶ Therefore, the transition period for sellers from the EU is much longer. Background is that Germany wants to combat VAT evasion by sellers from China with Hong Kong.¹⁷

B. Enforcement of the Transition Period

From the beginning on, it was clear that the transition period for ecommerce sellers from from China would be too short as the competent tax authority for online sellers from China, the Tax Authority Neukölln (Finanzamt Neukölln), is overloaded due to lots of tax registrations from Chinese online sellers.¹⁸ This concern was raised in the discussion before the law was passed. This concern was not taken seriously by the German legislator and German government, although the situation at the Finanzamt

¹⁴ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 7; *Oliver Zugmaier/Matthias Oldiges*, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 376.

¹⁵ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9.

¹⁶ *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 76 ff.; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 20.

¹⁷ *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 8 f., 24.

¹⁸ Cf. *Matthias Luther*, Die neue Haftung für Online-Marktplätze, Der Betrieb 2018, p. 1942, 1943. *Jörg Brettschneider*, Draft Legislation of the German Government to Combat VAT Evasion in Ecommerce, Econstor-Working Paper, Kiel/Hamburg 2018, p. 12 f. (<http://hdl.handle.net/10419/181934>); *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 23, 68 ff., 63 ff., 76 ff.

Neukölln is known since early 2018 already.¹⁹ Due to the political pressure, the short transition period was enacted. The government and legislator did not react to VAT evasion of overseas sellers for a longer time before. In fact, there occurred a delay in providing the certificates according to Section 22f I sentence 2 UStG and in providing tax numbers by the Tax Authority Neukölln (Finanzamt Neukölln). The Federal Authority for Taxes (Bundeszentralamt für Steuern), which issues the VAT No. (Umsatzsteuer-Identifikationsnummern), has to be excluded from the critique. The Federal Authority for Taxes (Bundeszentralamt für Steuern) is working very quickly and professional.

Therefore, the Federal Ministry for Finance (Bundesfinanzministerium für Finanzen) has published a legal letter on February 21st 2019 that the liability of platform operators will be excluded until April 15th, if the platform operator can provide the respective seller's application for the certificate according to Section 22f I Sentence 2 UStG that was handed in before February 28th 2019.²⁰

This letter was not suited to the practice as the platform operator has to *prove*, that the application for certificate according to Section 22f I Sentence 2 UStG was handed in before February 28th 2019 at the competent financial authority. Neither the platform operators nor the ecommerce sellers can prove that they handed in the application for the certificate before February 28th 2019. The Finanzamt Neukölln confirmed to the author that it is not possible to issue confirmation or receipts for applications. Politics ignored this weakness of the letter and stated to the author that the deadline was extended in a legally uncertain way.

Amazon stated at first that the letter of the Federal Ministry of Finance (Bundesministerium für Wirtschaft) dated February 21st 2019 was unknown and that there will be no extension of the deadline for providing the certificate. Consequence was pressure on the ecommerce sellers, their consultants and agents. The Berlin Finance Senator (Senatsverwaltung für Finanzen Berlin) did not worry about this situation and

¹⁹ Cf. *Jörg Brettschneider*, Draft Legislation of the German Government to Combat VAT Evasion in Ecommerce, Econstor-Working Paper, Kiel/Hamburg 2018, p. 12 f. (<http://hdl.handle.net/10419/181934>).

²⁰ Bundesministerium für Finanzen, Schreiben vom 21. Februar 2019, III C 5 – S 7420/19/10002 :02, 2019/0134756, (https://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Steuerarten/Umsatzsteuer/2019-02-21-haftung-fuer-umsatzsteuer-beim-handel-mit-waren-im-internet.pdf?__blob=publicationFile&v=1).

said the interests of platform operators and sellers are basically aligned. March 1st 2019 passed without the expected account suspensions by Amazon. As late as March 2nd, Amazon announced an extension of the deadline to the ecommerce sellers. On March 12th 2019 Amazon suspended seller accounts because of missing certificates according to Section 22f I Sentence 2 UStG and froze inventory subject to FBA (Fulfillment by Amazon) too.

In relation to the platform operator, the ecommerce seller could not rely on the letter of the Federal Ministry of Finance dated February 21st 2019. Due to the discussed weaknesses of the letter, the platform operators have good reasons to demand the certificate from the ecommerce sellers from third countries like China immediately. However, it is the Finanzamt Neukölln and the German legislator, who are responsible for the delays in issuing the certificates according to Section 22f I Sentence 2 UStG and the delay in providing tax numbers. The letter of the Federal Ministry of Finance cannot solve the problem of the short transition period for third country online sellers like sellers from China. Germany did not take its responsibility to provide an appropriate legal framework. The Berlin Finance Senator (Senatsverwaltung für Finanzen Berlin) said clearly to the author that the government has no influence on the implementation of the law by platform operators.

C. Enforcement by Informing Platform Operators

Financial authorities can cause account suspensions easily by informing platform operators about the suspicion of VAT evasion by online sellers (Section 25e IV UStG).²¹ The platform operator is set a deadline by the tax authority to suspend the sellers account.²² The platform operator reacts against the background of a feared own liability under Section 25e UStG (and a criminal liability of aiding tax evasion too). The

²¹ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9. Cf. *Matthias Luther*, Die neue Haftung für Online-Marktplätze, *Der Betrieb* 2018, p. 1942, 1945 f.; *Jörg Brettschneider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 32 ff.; *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, *UR* 2018, p. 776, 780 f.; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, *Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers*, *DStR* 2019, p. 15, 21.

²² Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9.

intended result is a ban for the respective online seller to sell on the platform (cf. 25e IV Sentence 3 UStG).²³

It is not clear, if platform operators will set a deadline to the sellers in cases they got knowledge of VAT evasion by the seller.²⁴ Likely, the platform operators suspend the respective account immediately (like Amazon does), so that the platform operator's policy is more strict than the regulation.

The ecommerce seller is not informed by the tax authority about the notification of the platform operator in advance or later.²⁵ The seller gets to know about the account suspension from the platform operator when the account is suspended. There is no hearing of the seller in advance.²⁶ This have to be citized as the sellers' possibilities for a defense are cut down on this way.

Unjustified account suspensions on behalf of the Tax Authority for Investigation Berlin (Finanzamt für Steuern und Fahndung Berlin) happen. The Tax Authority for Investigation Berlin (Finanzamt für Steuern und Fahndung Berlin) compares the amount of VAT and evaluations of buyers (the authority considers an evaluation rate of 4 percent) without knowing the VAT transaction data. That has to be criticized strongly as its impossible to know the VAT due without the VAT transaction data. Therefore, the authority accepts it, that accounts are suspended unjustified. They do not even accept the VAT transaction reports provided by the sellers. Instead they ask Amazon for providing the VAT transaction reports, which takes lot of time while the sellers are suspended. It has to avoided that sellers' accounts are suspended without justification at the inducement of financial authorities.

²³ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9; *Matthias Luther*, Die neue Haftung für Online-Marktplätze, *Der Betrieb* 2018, p. 1942, 1945 f.; *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, *UR* 2018, p. 776, 781; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, *Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers*, *DStR* 2019, p. 15, 21.

²⁴ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 7.

²⁵ *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, *UR* 2018, p. 776, 781; Cf. *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, *Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers*, *DStR* 2019, p. 15, 21.

²⁶ *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, *UR* 2018, p. 776, 782.

The ecommerce seller has the right to object and file a suit against the tax authority which issued the notification to the platform operator.²⁷ As an objection or a legal action does not have suspensory effect,²⁸ applying interlocutory relief is necessary, if the seller wants to recover the account quickly.²⁹ The interlocutory relief is able to suspend the notification to the platform operator³⁰, but does not leads to an re-opening on the account directly. Therefore, it is the platform operator's final decision to re-open the seller's account. There is the question how the platform operator would react.³¹

The lifting of account suspensions after solving the problem or proving that the suspension happened unjustified, is "proposed" by the authority to the platform operator only. That means the platform operators decide on their own discretion about lifting the account suspension. In the case of higher repayments and the consideration, if an repayment makes sense economically, this is a point that is considered by the ecommerce sellers and can avoid the decision to repay VAT. Criminal law can be a blunt swort in overseas ecommerce and that applies especially in the case where the directors and shareholders of companies are just dummies.

The lift of an account suspension after a proposal to lift the suspension by the tax authority takes some time. The German financial authorities (Finanzamt für Steuern und Fahndung Berlin and Finanzamt Neukölln) do not urge the platform operators to lift the suspension quickly. The unjustified suspended ecommerce seller is left alone by the authorities and has to wait for the platform operator's decision.

D. Enforcement concerning Sellers with no VAT Obligations

²⁷ *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 776, 781 f.; *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 21 f.

²⁸ Other opinion: *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 776, 781 f.

²⁹ *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 22.

³⁰ *Oliver Zugmaier/Matthias Oldiges*, Elektronische Marktplätze haften für Umsatzsteuerausfälle, Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers, DStR 2019, p. 15, 22.

³¹ Cf. *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, UR 2018, p. 776, 782.

In the case of turnovers that are not subject to German VAT, a tax registration and providing the certificate according to Section 22f I Sentence 2 UStG is not necessary.³² Even if sellers apply for a tax registration, the registration is denied by authority. The law to combat VAT fraud and other tax regulations didn't exclude such cases, which is a major weakness.³³ This exclusion was done later by a letter of the Federal Ministry of Finance dated January 28th 2019.³⁴

Direct sendings are not subject to German VAT, if not Section 3 VIII UStG applies.³⁵ It is sufficient for the platform operator to demand a proof from the seller by a confirmation from the seller, for example.³⁶

There is no VAT obligation in cases a seller delivers from another EU member state to Germany, but is within the delivery threshold (§ 3c Abs. 3 Satz 2 Nr. 1 UStG).³⁷ In this cases providing a valid VAT No. is sufficient and if the seller doesn't have a VAT No., the seller can prove that his deliveries are not subject to German VAT by providing for example an own confirmation to the platform operator.³⁸

The question is, how platform operators enforce the law as they *cannot verify* that a seller has no VAT obligations.³⁹ The platform operator has to take into account

³² Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4 f. Vgl. *Oliver Zugmaier/Matthias Oliges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 374.

³³ *Jörg Brettscheider*, New German Law to Combat VAT Evasion in Ecommerce, Hamburg 2018, p. 84 f.

³⁴ Cf. Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4 f.

³⁵ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4, 6. Cf. *Jörg Brettscheider*. *Steueroase E-Commerce und ihre Austrocknung*, 3rd. Ed., Hamburg 2018, p. 48 ff.

³⁶ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 5.

³⁷ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4. Vgl. *Oliver Zugmaier/Matthias Oliges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 374.

³⁸ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 4.

³⁹ *Oliver Zugmaier/Matthias Oliges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 375.

turnovers on the its marketplace only.⁴⁰ Even when using Fulfillment by Amazon (FBA), Amazon is not able to verify, if delivery thresholds are exceeded as the seller may use other fulfillment service provider too and Amazon is not able to verify, if a delivery is a direct sending not subject to VAT. Therefore, Amazon's lawyers in German VAT recommend that the seller provides a certificate to the platform operator in any case.⁴¹ Therefore, the policies of the platform operators may be more strict than the law. The attractiveness of direct sendings is questioned.

E. Conclusion

The Federal Republic of Germany seeks to enforce its VAT law based on a liability of platform operators. The platform operators enforce sanctions against sellers and enforce the law in relation the sellers on this way.⁴² The reason is that the ecommerce sellers from third countries like China are hard to catch for German authorities.⁴³ The sellers are located in other jurisdictions and the directors and shareholders are hidden often as dummies are used. There no possibilities of German authorities to enforce the German VAT law effectively. Even if they catch some people with arrest warrants, its likely they catch the wrong ones, the dummies.

The German government and legislator think that the platform operators will transfer the responsibilities under the regulation 1:1 to the ecommerce sellers with the intended effects. From this perspective the way to create a liability for platform operators is plausible. On the other side, when looking how the liability rule works, it becomes clear that platform operators enforce rules stricter. Legal uncertainty is the consequence. There are no rules that provides legal protection to the sellers. It is a big difference that

⁴⁰ Bundesministerium der Finanzen, Schreiben vom 28. Januar 2019, III C 5 – S 7420/19/10002 :002, 2019/0069610, p. 9.

⁴¹ *Oliver Zugmaier/Matthias Oliges*, BMF nimmt zur Haftungsregelung für Betreiber von elektronischen Marktplätzen Stellung, Anmerkungen zum BMF-Schreiben v. 28.1.2019, DStR 2019, p. 373, 375: „For this reason it would be more practical for both, the online seller and the platform operator, that online sellers apply for the certificate and provide it to the platform operator, regardless if the delivery threshold was exceeded or not“ (translated from German by the author).

⁴² *Ulrich Hufeld*, Betreiberhaftung im Internethandel, Gutachten zu §§ 22f, 25e UStG-neu im Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften vom 1. August 2018, August 2018. 8 f.

(https://www.cr-online.de/Gutachten_Internethandel_Hufeld.pdf); *Matthias Luther*, Die neue Haftung für Online-Marktplätze, *Der Betrieb* 2018, p. 1942, 1946.

⁴³ *Sven Härtwig*, Gesetzliche Neuregelung zur Haftung von Handelsplattformen, *UR* 2018, p. 776, 780.

the law is enforced via the platform operators and not by German authorities directly. Therefore, the German government and the German legislator escapes from their responsibility of an appropriate legislation.⁴⁴

In the end, the seller has to comply to the rules set by *two sovereigns*: the private platform operators like Amazon and the Federal Republic of Germany. A negotiation or a confrontation with Amazon is not easy to manage and more difficult than with the German tax authorities. There is no claim about a fair hearing in relation to platform operators unlike in case of administrative acts of state authorities. In addition, the rules set for example by Amazon are not transparent at all. There is no clear communication, how platform operators enforce the law. In addition, Amazon is located in Luxemburg, which makes it even more difficult for sellers to confront with Amazon. If the seller wants to sue Amazon, the seller needs to file a lawsuit in Luxemburg.

The sketched shift of responsibility is not in the interest of ecommerce sellers from China and not in the interest for sellers from the EU as well. Ecommerce sellers know the power of platform operators to enforce the platform operators' own rules very well. A lot of sellers have experienced platform operators' policies and were suspended for several reasons without a clear legal protection. This law leads to even more power of the platform operators. Sellers from the EU can be affected by the described regulatory approach as well. This regulatory approach by the German legislator is in contradiction to the current initiative of the European Commission to protect the rights of sellers in relation to platform operators⁴⁵.

Submitted June 11th 2019

⁴⁴ In the literature the proportionality of the liability rule is questioned from perspective of platform operators (*Ulrich Hufeld*, *Betreiberhaftung im Internethandel*, Gutachten zu §§ 22f, 25e UStG-neu im Entwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften vom 1. August 2018, August 2018. 29 ff., https://www.cr-online.de/Gutachten_Internethandel_Hufeld.pdf); *Roland Ismer*, *Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht*, Rechtswissenschaftliches Gutachten im Auftrag der Amazon Services Europe S.à.r.l.m, September 2018, p. 14 ff. (<https://www.bitkom.org/sites/default/files/file/import/20180924-Reform-Umsatzsteuer-Ismer-Studie.pdf>); *Oliver Zugmaier/Matthias Oldiges*, *Elektronische Marktplätze haften für Umsatzsteuerausfälle*, *Rechtliche Beurteilung der Neuregelung und Rechtsschutz des Onlinehändlers*, DStR 2019, p. 15, 19, 22.

⁴⁵ Cf. European Commission, Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.