

Global VAT Newsletter

Members of the MGI Worldwide Global VAT Group set out some of the recent changes to VAT in their respective countries.

Italy: Implementation of EU Directive 2020/284 to combat VAT fraud

Legislative Decree 153/2023, implementing EU Directive 2020/284 on the obligations of payment service providers (PSPs), has been published in the Italian Official Journal. This normative update leads to the introduction of Arts. 40-bis to 40-sexies in Presidential Decree no. 633/72, which shall come into effect as from 1 January 2024.

The rules shall provide for new record-keeping and reporting obligations on information regarding cross-border payment transactions, i.e., qualifying transactions in which the payer is in a Member State of the European Union and the payee is located in another Member State, third territory or third Country. The data flows into a Central Electronic System of Payment (“CESOP”).

PSPs resident in Italy will have to report sufficiently detailed records of payees and of payments in relation to the payment services they provide for each calendar quarter to enable the competent authorities of the Member States to carry out controls of the supplies of goods and services which are deemed to take place in a Member State, in order to achieve the objective of combating VAT fraud. Subsequently the Italian Tax Authorities, in turn, will be required to forward the data using the CESOP.

The technical rules for sending the data were approved by the Italian Tax Authorities in Ordinance no. 406675 on 20 November 2023.

Obligations of data storing and transmission for payment service providers

With four FAQs dated 17 January 2024, the Italian Tax Authorities provided clarification on the obligations for payment service providers (PSPs) to store and transmit data on “cross-border payments”.

In particular:

- the information must be sent to the Italian Tax Authorities within the last day of the month following the relevant quarter. On their turn, the Italian Tax Authorities must send such information to CESOP (Central electronic system of payment information) by the tenth day of the second month following the relevant quarter;
- the outcome of processing activity carried out by the national system is generally received within five days on the Data Interchange System;
- to the extent that the other requirements of the regulation are met (number of cross-border transactions above the threshold, location of the payee’s PSP, etc.), foreign transfers that a PSP makes for the payment of a supplier’s invoices are also in-scope.



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Germany: Place of the economic activity overrules the statutory seat for VAT purposes

The German Federal Fiscal Court dated 18 October 2023 (XI R 22/20), recently published and under discussion in practice, issued a decision on the place of economic activity and its potential VAT impact.

The essence of the decision is that a statutory seat or a postal address of a (letterbox) company is not necessarily equal to the place of its economic activity for VAT purposes.

In the underlying case, a German supplier rendered programming services to a company based on the Seychelles. The court was asked to decide on the question whether the recipient of services is a resident abroad as its registered (statutory) office was on the Seychelles.

The German supplier intended to treat its services as outside the scope of German VAT (B2B rule, Art. 44 RVD) due to the customer's registered office being on the Seychelles. The German tax authorities, however, took the view that the place of supply is in Germany as the business was managed out of Germany and assessed German VAT for the supplier.

In its ruling, the German court ruled in favor of the tax authority due to the circumstance that the customer's business was managed out of Germany (being the place of its economic activity = place of establishment for VAT purposes).

According to the decision, several crucial factors must be carefully considered to determine the place of the economic activity:

- Statutory seat
- Location of the central administration
- Place where the executives meet
- Place where the general company policy is determined

Other elements must also be taken into consideration, such as the place of residence of executive persons, where meetings are held and operations (e.g. administration and finance) are conducted.

This decision should further be compared to the EU perspective which makes reference to the place of the economic activity being of major importance (Art. 10 of the EU Directive 282/2011). EU case law provides further details on how this should be interpreted in an EU conform approach (e.g. "Planzer Luxembourg Sarl", C-73/06).

In practice, we sometimes experience that the place of establishment for VAT purposes is only connected to the statutory seat. This can lead to severe VAT risks in the form of additional VAT liabilities or restrictions on the input VAT side (including VAT refund claims). Especially against the background of the place of supply rules or whether an entity is regarded as domestic or abroad.



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Poland: Implementation of Real Time Invoicing postponed, yet still planned (2025?)

The implementation of the obligatory Real Time Invoicing system, commonly known in Poland as "KSeF" (abbreviation for "Krajowy System e-Faktur" (National System of e-Invoices) was initially planned for 1 July 2024, but will most likely apply from 2025. The main reason is that the new Polish government has identified some flaws in the concept and wants to perform extensive audits/tests before launching it.

The KSeF is a centralised IT system operated by the Polish Ministry of Finance for issuing, receiving and archiving electronic invoices.

The idea of such digital invoicing is nothing new to European taxation systems. For example, a similar concept has been in place for several years in Italy. The implementation of comparable solutions is also more or less advanced in other EU countries.

The aim of this change is to provide the Polish tax authorities with ongoing insight into the content of individual invoices. Currently, the Polish tax authorities have "only" an overview of the purchase and sales registers (so-called Standard Audit File-Tax, known in Poland under the abbreviation "JPK").

After implementation of KSeF, as a rule, the only permissible form of a Polish VAT invoice will be a structured XML file, which will be registered in KSeF and maintained through it. In other words, it will be mandatory to issue and receive invoices linked to the Polish VAT ID via KSeF. An invoice without the ID issued by KSeF will have no legal or tax validity. However, some exceptions apply, for example, to non-Polish companies.

In practice, every company based in Poland and registered for Polish VAT will be subject to KSeF. Foreign companies, on the other hand, will be obligated to use KSeF only with regard to invoices related to their "fixed establishment" in Poland (e.g. branch). This exception results directly from the future article 106ga of the Polish VAT Act. So, in case a non-Polish company (like your Client) does not have any FE in Poland, it will be able to issue and receive Polish invoices as usual (e.g. per e-mail) even after the introduction of KSeF.

However, these exceptional cases are also controversial, as the EU has only agreed to the implementation of the KSeF in relation to companies having their registered seat in Poland (thus: the additional criterion of "fixed establishment" is therefore violating the EU law). It is possible that the planned amendments to the concept will eliminate these controversies.

Nonetheless, non-Polish companies should be allowed to use the KSeF on an optional basis. This could de facto be necessary if e.g. a bigger Polish buyer insisted on being able to download all purchase invoices (including invoices from foreign companies) via KSeF at all time, without having to introduce parallel systems (incoming invoices from Polish companies via KSeF and incoming invoices from foreign companies via e-mail).

Therefore, it may turn out that some of your Clients conducting domestic transactions with Polish companies might be interested in using KSeF, even without formal obligation.



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United Kingdom: What future for Tour Operator's Margin Scheme (TOMS)?

TOMS was set up to enable businesses to offer travel and accommodation services in other EU Member States without having to register for VAT in those member States where the travel/accommodation takes place by changing the place of supply to where the supplier is established.

In Great Britain TOMS got a reputation for being very complex (the public notice at one point had 23 pages of how to calculate the margin).

However, it was very useful for EU Member States (which then included the UK) where the place that the supplier was not established sold a lot of holidays in other Member States. Like other margin schemes there are issues for businesses buying in such supplies for their own consumption as the VAT is not a known entity so VAT invoices cannot be issued; but generally, it was seen as a workable solution where the other option was an administrative and financial problem.

Despite being an EU wide scheme it seems that many EU Member States have different interpretations of when TOMS applies. Some member states require the seller to be registered as a travel agency or have travel being their main income. One of the reasons for writing this piece is to get contributors to set out what criteria suppliers in their Member State have to meet to be able to use TOMS.

Then Brexit happened. Great Britain was no longer a member of the EU, so zero-rated TOMS supplies went from third country destinations to anywhere outside Great Britain.

This coincided with the Covid pandemic so most people were not allowed to holiday overseas which may have also resulted in the true impact of Brexit not being felt in the EU until 2022/23.

In addition, the way in which travel is bought has been changing substantially in the 21st century with businesses selling individual parts of a holiday package rather than the whole package as was traditional.

An EU case a couple of years ago ruled that the supply of a single service (a ski chalet in Austria) fell under TOMS and a VAT case in Great Britain last year ruled the same, this time for an Uber like taxi company – as the transport of passengers was “clearly a supply within TOMS”.

I understand that both Germany and Croatia are looking to compel suppliers of holiday services in those countries to register and account for VAT in either Germany or Croatia.. Again, do you know of any similar plans in your Member State to diverge from the TOMS scheme?

In summary, are we seeing the start of the end of TOMS? What rules do you have for businesses to use TOMS? Are there plans for your Member State to require overseas businesses to register locally for supplies of holidays there? Is TOMS being used to reduce VAT costs beyond what was initially contemplated (that taxi case is definitely going to be challenged). Please let us know what your news is on the above so we can build a picture of how TOMS is being implemented and what future it may have.



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