

# VALUE ADDED TRAVEL

## Quarterly VAT news for the travel and events sectors

March 2021



There is much to cover in this edition including developments on the potential need of UK travel businesses to pay VAT in the EU – both Germany and Croatia have announced changes in this area. And the prospect of reform of the EU TOMS is gathering pace. Despite Brexit, the likely changes will still affect us.

Please do get in touch if you would like to discuss any of the issues.

### The new UK TOMS

But I'll start with a couple of points on the new UK rules.

In the December 2020 edition, I mentioned that HMRC might introduce a means to apportion the margin between services taxed at different rates so that the benefit of the reduced and zero rates applicable to some services would be available to those accounting for VAT on the margin (relevant of course only for UK travel). I was hopeful that this would have been confirmed by now but there is still no news.

Similarly, it has been suggested that a B2B TOMS opt-out (similar to that available before 2010) might be introduced, but there is also still no news on this.

### The status of UK (and other non-EU) travel businesses selling EU destinations

There is an ambiguity at the heart of the EU TOMS: how does it apply to tour operators and other travel suppliers located outside the EU? This question has remained unanswered for many years but, in practice, no matter how the law might be interpreted, it has been rare for third country businesses to pay EU VAT. However, Brexit has focused more attention on this issue. What is the status of UK businesses under the EU TOMS and what obligations might they have under EU VAT law

when selling holidays and other forms of travel enjoyed in the EU? These are not straightforward to answer.

A broad interpretation of the EU TOMS would see suppliers with no EU place of business as having no obligations to pay EU VAT (to the extent their supplies meet the conditions for the application of TOMS). A narrow application, however, would see a supplier with no EU place of business fall outside the scheme with the result that “normal” EU VAT principles apply. Typically, these require VAT to be paid on a holiday and many other forms of travel in the member state in which they are enjoyed.

The broad interpretation may give third country travel suppliers a competitive advantage in certain circumstances, and we know from the Brexit negotiations how important a level playing field is to the EU. Furthermore, recent VAT technical papers from the European Commission stress the importance of fair competition. A large majority of respondents to last year's TOMS consultation reported that the non-taxation of third country suppliers (whether it is caused by the law itself or by the non-application of the law) is a source of unfair competition. The current status of third country travel businesses needs to be viewed against this background.

The Brexit transitional period came to an end without any clarification of the potential obligations of UK tour operators etc to pay EU VAT. However, Germany and Croatia have since both announced that they expect UK and other third country tour operators and similar to pay local VAT on travel in their countries. It has been reported that Austria agrees but I have seen no official confirmation of this.

There are some comments specific to Germany and Croatia below. However, let's not forget, given the

ambiguity of EU law in this area, that it is possible to argue that the German/Croatian positions (and that of Austria too if the reports are to be believed) are incorrect. But let's assume they are correct: what are the implications of the announcements?

## Germany

On 29 January the German tax authorities published guidance to the effect that, from the start of this year, they consider third country travel suppliers to fall outside TOMS. That was the full extent of the guidance but the practical consequences are significant. It strongly suggests that Germany now considers third country suppliers to be subject to the normal rules, so that holidays etc in Germany are subject to German VAT.

The announcement in January stated that the new policy was to be backdated to take effect from 1 January this year. However, on 29 March it was announced that the new policy will not take effect until the end of 2021. This gives those affected some time to consider the practical implications but there is no suggestion at this stage that Germany will drop its new policy altogether.

Despite the delay, it is still appropriate to look at the effects of the German position now. Set out below is my understanding of the complex German rules but please do take advice on the application of these rules to your circumstances.

We need to consider how the VAT due should be calculated and paid. VAT would be due on the full selling price of the services at the rate(s) stipulated in Germany (i.e. 19%, 7% or 0%). For a package, it is expected that the price should be split to allocate a value to each of the components and VAT paid as appropriate on the individual parts. Furthermore, where a holiday etc is enjoyed only partly in Germany, the selling price will need to be split fairly between the German and non-German parts.

German VAT charged by suppliers could be recovered and offset against the VAT payable but please note that many travel suppliers do not charge VAT either because they are within TOMS or they are not VAT-registered in Germany so an offset of input VAT will often not be possible, increasing the VAT cost considerably. This is not a margin-based calculation.

The means by which the VAT is paid may well differ between B2B and B2C supplies:

- For B2B supplies, depending on the nature of the service the German reverse charge rules will apply. This means that the supplier is not obliged to register and pay VAT but the obligation to register and pay the VAT rests with the business client – even if that client is not German. Broadly speaking, the reverse charge applies compulsorily to, for example, accommodation and river cruises but cannot be used for passenger transport by road or rail (and B2B suppliers of such land transport therefore will need to register in Germany). The treatment of B2B supplies is complex.

- For B2C supplies, there is no reverse charge and the supplier should declare the VAT due. That would require a registration for German VAT or the use of the One Stop Shop (“OSS”) - see below.

It can be expected that more detail will become available as we approach the revised implementation date.

## Croatia

Unlike Germany, Croatia has actually introduced a change in its law to clarify the status of third country travel suppliers. As a result, from 5 January 2021, third country suppliers are not treated as being within TOMS, with the result – as in Germany – that local VAT needs to be declared.

I understand that practical detail is thin on the ground but it seems reasonable to think that Croatia now expects UK and other third country tour operators etc selling Croatian services to pay local VAT. I will circulate further detail if and when it becomes available.

## But it's not all bad news ...

As discussed on many occasions, the CJEU has decided that TOMS must be used for B2B supplies. EU based TMCs, wholesalers and MICE agencies must, therefore, often account within TOMS. This can be detrimental. However, as per the German and Croatian policies, TOMS cannot apply to a third country supplier and therefore a non-EU supplier of B2B travel would apply normal VAT, creating a possible VAT advantage when compared to similar businesses in the EU.

## The One Stop Shop (“OSS”)

The OSS is a means by which VAT due in multiple member states can be declared and paid in one member state. However, it cannot currently be used for travel services.

An enlarged OSS will be introduced on 1 July 2021 and will be available for other services. This will allow the declaration of all EU VAT due on services to be declared in a single member state (although a separate total must be given for each member state). A third country supplier could opt to use the OSS and would choose the member state of OSS declaration. Those with multiple registration requirements may find the OSS helpful, but there are two major qualifications: first, it can only be used for B2C supplies and, second, it has no facility to recover input VAT. A claim for input VAT would be made using the bureaucratic 13<sup>th</sup> Directive refund scheme and there would be a potentially long delay in receiving a refund of the input VAT. On the plus side, however, use of the OSS would avoid the need to appoint a fiscal representative (which is otherwise a requirement in some states).

## The situation elsewhere

As far as I am aware, no other member state has yet made a comparable announcement. It remains to be

seen whether other member states will follow suit but, in my view, this is likely. Should this happen, VAT would be due in the other member state(s) involved (again subject to the proviso that the position might be challenged) in broadly the same way. The broad principles would be very similar but the detail would differ. For example, other member states do not apply the reverse charge in the same way as Germany.

## Reform of TOMS

I've been writing about the potential reform of the EU TOMS rules now for 20 years! In that time, precisely no changes have been made (although there have been numerous CJEU cases which have clarified the effect of many aspects of the current law). It does now feel, however, that there is some real momentum behind a push for change.

The turning point might have been last year's consultation on the effects of the current TOMS rules. The general theme of the large number of submissions was that a margin-based scheme should be retained but that change is needed to better accommodate the needs of the sector. As mentioned above, a large majority of respondents believed the status of third country competitors to be a problem.

Numerous changes to the scheme are under consideration but what matters most for the UK is what happens to the rules for third countries. The new German and Croatian policies are these countries' interpretations of the current law. There is a danger of member states doing their own thing so that potentially numerous varying approaches and great uncertainty are created.

Therefore, it is important to find a means to achieve future equality of treatment within a system which is as easy as possible to adopt (in contrast to the arrangements introduced under the current rules as illustrated above!) This might be achieved by changing the TOMS place of supply to the place of residence of the customer: the margin would then only be taxable when the sale is made to a person resident in the EU. This would apply to EU and non-EU suppliers alike.

Most recently, there was a meeting of the VAT Expert Group to discuss the way forward. The Commission has committed to further consultations – and is keen to hear from interested parties – before producing an impact assessment of possible changes.

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