

# **Obstacles To Global B2C eCommerce From China And The USA Depending On Local Fiscal and Customs Regulations**

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**Abstract.** In an ideal global market, the customer choice of ordering tangible or non-tangible commodities anywhere in the world should not be limited by administrative restrictions affecting the original commercial decision making process. For B2B (business to business) trade, interacting companies are experienced in handling international transactions from the perspective of customs and tax obligations, INCO (International Chamber of Commerce) terms regarding logistics requirements, payment methods, warranty obligations and rights of return. In the actual customs and administrative environment, B2C (business to customer) eCommerce trade is affected by national or regional legislation specifying commonly much more detailed requirements. Customers are usually not prepared to handle administrative customs or logistics requirements or take risks for relatively small orders. Consequently, intercontinental B2C eCommerce between large commercial zones like China, the USA and EU is affected by these obstacles to international trade. Whereas sellers from the USA are mainly exporting non-tangible goods in the form of digital content to European customers by eCommerce, sellers from China are increasing their direct sales of tangible lower price goods underrunning legal thresholds via eCommerce platforms like Amazon, eBay or Alibaba. In both cases, disturbances of fiscal and tax regulations are significantly affected.

**Keywords:** eCommerce, global trade, B2C, obstacles, EU, China, USA

## **1. Introduction**

With an Internet user penetration of about 90% of the European population <sup>[1]</sup>, approximately 70% of the European population is using eCommerce for purchase activities on a regular basis <sup>[2]</sup>. The informed buyer can therefore not only choose to purchase from national eCommerce stores but also from international trading platforms. Among others, Amazon, eBay or Alibaba give their customer base the possibility to acquire products from international sellers (in case of Amazon called market place sellers) or directly from other international selling platforms belonging to these companies <sup>[3]</sup>. A special issue to highlight is Amazon; on its market place platform, external sellers can either stock themselves their products or they can use Amazon's FBA (fulfilment by Amazon) service to store and ship the products nationally to the customer. In such an FBA case, at the time of sales the product has already entered the EU and therefore it can be shipped by Amazon on behalf of the market place seller to the end customer directly without further customs or tax obligations. Approximately 2 million external sellers use the platform of Amazon, whereas sellers from Hong Kong and China have been growing 65% per year. Overall 40% of the total business of Amazon is done by market place sellers <sup>[4]</sup>. The following research will focus on the international purchase of tangible and non-tangible goods by B2C customers and the affected legislations. Tangible goods are defined as products needing a shipping process passing through customs clearance internationally. Non-tangible products in this context are digital products like mobile phone apps or other software, eBooks or digital music downloads which do not pass through the customs clearance since the digital commerce is not monitored by the customs agencies so far.

This paper focuses on of legal obligations of sellers in the context of global B2C eCommerce and existing loopholes. Additionally, warranty and rights of return obligations will be discussed. As the main

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outcome it will be investigated in which way eCommerce portals might be made responsible for facilitating tax fraud and maintaining information errors under current European legislation.

## **2. Legal Framework**

To consider the purchase process completely several aspects of legal regulations have to be studied which can be different either relating to tangible or non-tangible products. Legal frameworks affecting the sales process are normally found in the legislative environment of the customer. Therefore, mainly legislation of the European Union, and administrative regulations of the national customs and tax offices are highlighted to understand these obligations of sellers and customers.

### **2.1. EU Directives affecting the collection of VAT from B2C customers**

Based on the EU directive 1042/2013, from 1st January 2015 onwards all purchases of electronic services, telecommunications and broadcasting are taxed at the place of the billing address of the B2C customer. The change of approach arose from the fact that VAT for this kind of electronic services was charged beforehand at the country of the seller. Up to the introduction of the new directive, the former approach caused a competition between countries with low levels of VAT for electronic services, telecommunications and broadcasting and an elimination of VAT for the consumption of digital electronic in the country of the customers.

Due to the new directive, companies wanting to supply electronic services to and within the EU have to register in each Member State of the EU for VAT declaration purposes. Or, if they choose to do so, as introduced to ease the administrative process for companies without national branches in each Member State, a Mini One Stop Shop (MOSS) allows a merchant to identify one specific tax authority in the EU as its Member State of Identification (MSI). For EU merchants the MSI will typically be their own national tax authority. A non-EU merchant is free to choose any national tax authority as their MSI. The process is compulsory for all merchants that sell digital services to B2C customers in the EU. There is no threshold limit, so no matter what size a merchant's turnover is, they must comply with the directive. This means that many merchants that are currently not registered for VAT are affected after 1st January 2015. If they have B2C sales of broadcasting, telecommunications and/or electronic services in the EU then the VAT directive covers their business. Once an MSI has been selected then all VAT collected on sales in the EU is declared via a web portal with the MSI. In turn, the MSI distributes the correct VAT to each EU member state in which the merchant concluded B2C digital service sales [5].

Regarding tangible products, the original EU directive 112/2006 ensured already that VAT had to be raised in the country of the billing & shipping address of the B2C customer. Therefore, companies selling tangible products were already applying this approach nationally for a decade.

### **2.2. EU Regulation affecting the contractual fulfillment of location and consumer rights**

European Regulation 1215/2012 specifically defines in Article 17 that B2C customers can exercise their legal rights in their country of residence [6]. This is insofar important as when it comes to infringements regarding warranty (as defined in the European Directive 44/1999) or rights-of-return (as defined in the European Directive 83/2011 and translated into national law). The challenge is nevertheless when the seller does not have a local branch within the European Union although the seller is executing B2C business with private customers. Conflicting legal situations can occur when the seller resides outside the EU but is affected by the EU legal framework with certain obligations anyway.

In the case of China it is necessary to highlight Article 42 of the Conflict Law Governing Foreign-Related Civil Relations. It states that the law at the habitual residence of the buyer shall be the governing law in case of B2C consumer contracts with the only exception when business operators have no relevant business operations at the habitual residence of the consumer. Since Amazon market place sellers are not using their own eCommerce platform but Amazon's European platforms, the seller therefore consciously decides to accept European legislation by offering on the European Market. The European Court of Justice has decided in C 585/08, C 144/09 and others that when an international offer on a commercial platform by a

seller exists, then the consumer can assume this as an offer in his own country and the relevant national legislation applies locally.

### 2.3. EU Directive on the common system of value added tax as regards to the rules on invoicing

Directive 45/2010 allows for the creation and usage of digital invoices within the European environment. Before the introduction of the directive, each commercial transaction had to be accompanied by a paper invoice. This was an additional cost factor in cases where products were shipped by logistics companies from their own warehouses and hence a paper invoice had to be posted separately by the seller. Now an electronic invoice (e.g. in format pdf posted by eMail) is enough if the minimum content of a valid invoice is covered according to the directive. According to § 14a.5 Umsatzsteuergesetz (Law on VAT) in Germany, this explicitly includes the VAT identification number. This goes hand in hand with the requirements set out by Amazon for market place sellers in the participation rules Article B3: all prices shown have to include VAT and/or customs duties which might occur even after the shipment of the product.

## 3. Application and Loopholes

The main challenge of international B2C (e)commerce arises from the fact that different legislations might collide having their origin either from the sellers or buyers country or region. Also depending on the kind of product purchased different importing processes, administrative institutions and customer/seller obligations are involved. This will be shown by using examples where either tangible products are purchased via Amazon from a market place seller China or digital content from Amazon in the USA.

### 3.1. Example: Tangible products from China via Amazon



Fig. 1. Commodity Export Route

Amazon is not publishing concrete figures for Chinese market place traders in Amazon Europe platforms. Only the growth rate of 65% per year in the aforementioned press release gives some indication. Other publications and non-representative reviews of the European show an above 50% presence of Chinese market place traders for low-price products that are easier to pass through the customs processes [7].

#### 3.1.1 Applicable customs legislation

For tangible products, specific legislations apply to charge customs duties (if applicable) and VAT during the sales process. Due to making customs handling easier regarding low-value shippings, member states of the EU have introduced minimum limits where international shippings are exempt from customs or importation VAT when the value falls below the threshold. Article 23 of the European regulation 1186/2009 in charge of setting up a Community system of reliefs from customs duty declares that customs duty is not charged for shippings with a value less than €150 from third countries. Additionally each member state establishes rules for the exception of importation VAT in that regard.

Exemplarily in Germany, article 1a of the law on exemptions on importation VAT (Einfuhrumsatzsteuer-Befreiungsverordnung) exempts all shippings with declared values of €22 or less including postage from importation VAT. In the UK, Notice 143 of HM Revenue & Customs exempts all regular shippings with a value of less than £15 or in case of declared gifts £36 of importation VAT. The shipper or seller himself

defines the value of the shipping by declaring it on an internationally standardized customs declaration CN22 added to the outside of the shipping.

Using a prescribed evaluation by the customs office, the value can be determined by the following methods and in that priority: specific sales price for that order (although the shipping does not have to be accompanied by a commercial invoice); price for identical other products; price for similar products.

The customs administration is permitted to open international shippings for (value) inspections to determine if the value declaration is correctly assigned. If this were not the case then the customs administration can withhold the shipping and demand either from the sender or receiver further documentation for clarification.

### **3.1.2 Amazon Payment System**

In all cases, when customers purchase via Amazon portals, money is transferred via the Amazon Payment System (APS). When a market place seller registers at Amazon he is not obliged to provide a VAT-identification number [8]. By law it is not required but from the absence of it, it can be deducted that the seller is not declaring VAT to European tax offices because for that purpose a valid VAT identification number is compulsory. Consequently, it can be questioned in how far Amazon is negligently supporting tax fraud by not making a VAT identification number compulsory for all payments. For the commission part of the sale which Amazon receives, it deducts VAT due to the new tax legislation regarding digital services and pays it directly to the tax office. It is not clear why Amazon should not do this for the complete part of the sale (also as a service to the seller) as Google, Apple and Microsoft do this already for apps sold on their platforms.

It can only be assumed that Amazon wants to push its own payment services because e.g. eBay, who is clearly a intermediary between customer and seller, permits all kind of payment types besides eBay and PayPal and fees are charged afterwards directly to the seller.

### **3.1.3 FBA (Fulfillment by Amazon)**

Amazon offers market place sellers the possibility to store their products in Amazon warehouses for a storage, handling and shipping charge and when customers purchase from the market place seller, then Amazon ships the products directly to the customer labelled with the PRIME-service. From an import perspective, the market place seller is the owner of the product until a customer concludes a purchase, pays and receives the shipment. In no case, ownership is transferred to Amazon. Amazon is only acting as a warehouse and logistics service provider towards the market place seller and therefore the market place seller has to take care of the complete importing process and customs and VAT obligations.

Regarding the value of the goods imported, it is important to note that the monetary value can be set much lower when the FBA process is used. The reason is that the products are still considered wholesale instead of retail merchandise. Hence, at the time of import, the value can be set at a fraction of the sales price and therefore customs duty and VAT is much lower as well. In theory, the rest of the VAT has to be declared by the market place seller once he sells at a specific price to an end customer and Amazon ships the product to the customer. But in order to declare this, a VAT-identification number is required which is not requested by Amazon.

### **3.1.4 Step-by-Step Sales Process**

When a customer orders on one of the European Amazon platforms from a Chinese market place seller, the platform indicates this by showing the user name instead of Amazon as the contractual partner. By clicking on the username of the seller, the customer is shown the company and location of the seller. The customer enters a legally binding buying/selling contract with the foreign seller according to the T&Cs of Amazon.

Payment as the only option is done via the Amazon payment system and forwarded to the seller after deduction of the Amazon fees. The transfer method for the payment to the market place seller is accumulative. According to the status of the seller, payment by Amazon is done in intervals ranging from 24h to 14 days.

Once the order is booked, two possibilities regarding the shipping method exist. If the seller is using Amazon's FBA service, Amazon is initiating the packing and sending of the product. The seller is obliged to

issue an invoice which according to EU directive 112/2006 has to contain VAT at the rate of the country of destination. The market place seller can issue an invoice according to the standards of his own country but the VAT of the country of destination has to be shown and transferred to the tax office of the country of destination. VAT paid during the importation process can be deducted accordingly. The buyer receives a digital invoice from the seller and the shipping from Amazon.

Table 1. Shipping Cost from Hong Kong to EU (exchange rate €/ \$ 8,23 – 2015/11/23)

Letter	Air-Mail (5-6 days)	Surface (30-45 days)
20 gr.	€0,45	€0,43
50 gr.	€1,15	€0,74
100 gr.	€2,05	€0,98
250 gr.	€4,75	€1,94
500 gr.	€9,25	€3,68

Source Hong Kong Post 2015/11/23

If the market place seller is shipping from his own premises, then he needs to prepare an international shipping by parcel or envelope declaring the value of the contents. If the value falls below the administrative limits of customs duty and VAT, then the buyer receives the shipping and the market place seller has to declare the VAT to the tax office of the country of the buyer or via MOSS, if he has chosen to do so. If the value is above the administrative limits, the shipping is stopped by customs and either the buyer has to pick up the shipping at the customs office paying duty and VAT or the shipping company does this as a service (at additional cost for the buyer). In both cases the invoice from the seller has to show VAT to be declared in order to be compliant with EU directive 112/2006. According to § 3 Abs. 8 Umsatzsteuergesetz, due to the prices being shown including VAT, the seller automatically becomes responsible for declaring VAT in the country of the seller [9].

### 3.2. Example: Non-Tangible products from the USA via download



Fig. 2. Digital Goods Export Route

In this context, the most likely non-tangible products purchased in a B2C environment are media entertainment (videos & music), ebooks and mobile apps or PC software. Although media entertainment [10][11] and ebooks [12] are at €10 billion each and growing, mobile apps have passed the €50 billion threshold already and are continuing to grow strongly [13]. The supply take can please via electronic shipment, download or streaming. The German customs office declared based on an information request that neither at German nor at European level statistics are available on digital cross-border sales [14].

#### 3.2.1 Applicable customs legislation

The German customs office declared based on an information request that it is neither in charge nor responsible for the vigilance or administrative process of importing digital goods regarding customs duty or VAT. It is the responsibility of each seller or respectively customer to adhere to the relevant legislation and declare taxes accordingly [15].

#### 3.2.2 Step-by-Step Sales Process

Depending on the sales portal used and the legal representation, either the portal owner or a seller behind the portal is the contractual partner of the buyer. Presently, apps bought from Google Play, Apple iTunes or Windows App Store are purchased from them directly based on their business model. Before the introduction of EU directive 1042/2013, the developer publishing an app in these stores was in charge of declaring VAT to the tax office. After the introduction of the directive beginning of 2015, Google, Apple and Microsoft are

collecting the VAT now for the full value of the app and not only for their commission part and are declaring it to the tax office according to the location of the customer. If non-tangible products are bought on reselling platforms with direct market place sellers or company own platforms, then the seller has to declare VAT in the EU himself even when his location is outside the EU.

## 4. Results and Discussion

Article 71 as defined in the Directive 112/2006 on the Common System of Value Added Tax states that even when shippings pass through customs without duty and/or VAT obligations due to e.g. minor value exemptions, at the moment of reaching the end customer VAT has to be applied. Therefore there is only a temporary exemption of VAT, not a permanent one. The only approach that changes is that higher value goods are stopped by customs whereas lower value goods remain under the personal obligation of the seller to declare VAT.

Table 2. Intermediary Status of different Platforms

	Amazon	Ebay	Alibaba
3 <sup>rd</sup> -party invoice.	On request	Yes	Yes
VAT shown	Yes	Yes	Yes
Payment	Via Amazon	Direct to seller	Direct to Seller
Applicable legislation.	European	European	China
Fee Deducted	From sales price	From seller	From Seller
Report Suspicious Activity directly possible	No	Yes	Yes

The principal question to be investigated is if Amazon, eBay or similar platforms can be made responsible for the lacking declaration of customs duty and VAT by their market place sellers. Principally, Amazon is offering them three services, which are platform representation, payment processing and optionally fulfillment. When Amazon obliges customers to accept the Amazon T&Cs for buyers and additionally the sellers to accept the Amazon T&Cs of market place sellers then Amazon has great leeway to define the regulatory framework between these two parties. As an example it might serve that Amazon obliges the market place sellers to offer a right-of-return although no international legal basis exists for this. Amazon is acting therefore in a ‘double role’. Regarding taxes and contractual relationships it denies any responsibility by claiming that it acts only as a intermediary. This can be doubted insofar as a market place seller has to process the whole sales transaction including the payment through Amazon. However, at the same time, if one of the parties is acting in contrary to its interests, Amazon has the full power to exclude the seller or customer and/or regulate the issue at hand without the consent of the seller [16].

## 5. Limitations

European legislation presently aims clearly at the big market players to assure that taxes, VAT and duties are paid according to where they have branches in Europe. Sellers for products or downloads of digital goods that have their business residences outside the European Union need to comply with this regulations but due to missing international mutual agreements, are presently not pursued. Nevertheless, this does not eliminate the risk for these companies in case of future changes or if company owners travel to the EU and might be held liable for their accumulated tax debts.

### 5.1. Purchase on Alibaba instead of Amazon Europe

If a European Customer were to purchase on the Chinese Alibaba platform, in what way would this influence the applicable legislation? Even in that case, if Chinese sellers were acting regularly as a commercial seller towards Europe then Article 42 of the Conflict Law Governing Foreign-Related Civil Relations would apply in case of conflicting elements of legislation. If this were the case for a Chinese platform, it would be much more the case for a European platform like Amazon.

### 5.2. Amazon Status as an Intermediary instead of Reseller

The question arises additionally, if Amazon can actually be considered as intermediary regarding the market place sales activities or - due to overstepping the entrepreneurial liberties and its monopolistic status - itself it has to show certain responsibilities towards customers and state agencies. The obvious question is how much Amazon can regulate market place sellers up to an extent that they cannot be considered

independent sellers anymore but vicarious agents. It is in fact a similar discussion to the topic when freelancers are dependent and exploited to such an extent that courts consider them rather full employees with all relevant rights.

Up to 2013 Amazon dictated market place sellers to offer their products nowhere as cheaply as on Amazon. This best-price obligation forming part of the T&Cs of Amazon was heavily criticized by the German anti-trust office. At the end of 2013 Amazon relented during the investigation process and before further legal actions were necessary, removed any such obligations from its T&Cs [17].

A seller has to use always the Amazon Payment System to receive money from the customer. No alternative direct payment methods from the customer to the seller are permitted. This also includes the right of Amazon to decide unilaterally to withhold and return money for purchases executed by customers e.g. in case the Amazon A to Z warranty applies. Amazon (as well as eBay and Alibaba) protect their customers with voluntary warranties in case third-market sellers fail to comply. In any case, Amazon reserves the right to decide unilaterally at the expense of the seller if a customer has the right to make use of the Amazon warranty [18].

In the participation conditions for market place sellers, Amazon principally dictates the T&Cs between buyer and seller. Sellers are able to add personal T&Cs in their market place description, which might be conflicting with Amazon's T&Cs and then only have limited legal effect. The main question remains whose T&Cs are in force in such conflicting events.

It is doubtful that under such conditions sellers can still be considered as free enterprises in such a tight framework of non-governmental regulations.

### **5.3. Forum Liability**

In the USA, Section 230 Communications Decency Act of 1996 states that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Similarly, the European Union Directive 31/2000 protects portal providers in Article 14 by defining that providers are not responsible for the content they host as long as they are not informed of its illegal character, and they act promptly to withdraw access to the material when informed of it. The obligation to react (in Germany within 24h) has been confirmed in a multitude of court cases [19]. Therefore, although portals like Amazon, eBay and Alibaba are not responsible for the content created on their websites, they are responsible for the displayed information over time.

Since Amazon is assumingly aware of VAT regulations in Europe and the contradicting situation that prices are shown including VAT on Amazon from market place sellers without VAT identification numbers it is already under obligation to remedy this situation. Either Amazon removes the VAT-included tag that cannot be removed by the market place seller himself or Amazon excludes all market place sellers without a VAT identification number from its portals. Or else, Amazon could be held responsible for forwarding the VAT proportion of the sales price to market place sellers outside the EU.

## **6. Conclusions**

Europe is clearly moving towards a centralization of the legal and administrative framework that handles both tax interests of the Member States as well as consumer rights. Loopholes can be assumed to be closed over time as it happened similarly with the loophole of VAT regarding electronic services, etc. when it became too big to be ignored overtime.

The major challenges are covering several areas. In the tax area, the importation market from China for tangible goods that still falls under the low-value shipping usually executed by mail might be growing enough to become interesting for the tax offices. Here one solution could be that Amazon will be obliged to withhold VAT directly from the sales price similarly as it is done in the non-tangible goods sector [20].

The legal obligation of Amazon regarding the VAT issue of non-European market place sellers is difficult to assess. Due to customer complaints, Amazon must be aware of the issue. The question remains if Amazon has a personal interest in attracting international market place sellers without proper VAT

identification or if this is happening negligently or without purpose. Whatever the role of Amazon and if this is a grey area of tax avoidance or not, it has to be clarified by the national tax offices and/or courts.

But what seems to be already clear is that the grossly negligent tolerance of contradictory data with missing VAT identification numbers and pricing including VAT cannot be longer ignored by Amazon. A continuous violation of European Union Directive 31/2000 is punishable by court order. If it can be proven that this was done purposefully within an internal strategic planning, Amazon might even be found responsible for repaying VAT debts of his international market place sellers. In the UK, the government has introduced new regulations for the tax office establishing that Amazon is liable for VAT if a foreign seller acting on the UK Amazon market-place does not declare and pay VAT within a 30-day timeframe [21]. It can be expected that this taxation approach will spread all over Europe.

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