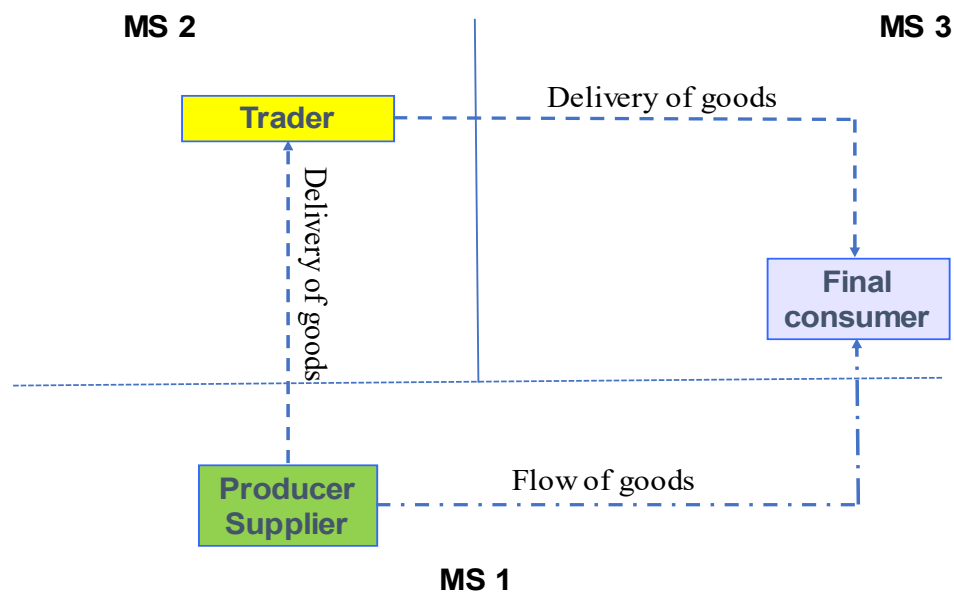


NEW E-COMMERCE RULES (NO. IX)

The Achilles heel of the special OSS regime?

Although this is a very common business model, which is often used by e-commerce traders, it seems that OSS is not ready for such model and it will not be possible to use this business model quite easily. This may result in obligatory VAT registration of these traders in all Member States where they supply goods to final consumers. This is the following business model:



For example, a French consumer (MS 3) orders goods on the website of a German e-shop (MS 2). The German e-shop (not registered for VAT in the Czech Republic) will order goods from a Czech manufacturer (MS 1). The Czech manufacturer ensures the transport of goods on the basis of instructions from the German e-shop directly to the French consumer.

The stumbling block lies in the text of Article 36a of Directive 2006/112/EC (hereinafter "the Directive"). As follows from that provision, where the same goods are supplied successively and those goods are dispatched or transported from one Member State to another Member State directly from the first supplier to the last customer in the chain, the dispatch or transport shall be ascribed only to one supply, namely to the supply made to the intermediary operator, respectively for supply realized by the intermediary operator. At the same time, the Explanatory Notes to the Quick fixes confirm that if the transport is arranged by the first supplier, the transport must be assigned to the delivery made by that first supplier.

The only exception to this rule is where the goods are delivered to the final consumer via an electronic platform which is considered to be a deemed supplier within the meaning of Article 14a of the Directive.

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*More than 15 years
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At the same time, the findings of the Court of Justice of the EU in respect of chain transactions according to which, inter alia, other supplies in the chain constitute the supplies without transport and each subsequent supply in the chain is not started until the previous supply has ended, should continue to apply.

On the one hand, for the trader, the definition of “*intra-Community distance sales of goods*” will be met, but on the other hand, Article 36a of the Directive should likely (also considering that it explicitly mentions as an exception the situation covered by Article 14a of the Directive) also apply to this type of chain transaction and the findings of the Court of Justice of the EU should be followed.

And if we proceed according to Article 36a of the Directive, resp. according to the Quick Fixes Explanatory Notes, we must conclude that a transaction between the Czech producer and the German trader should be considered as intra-Community delivery of goods with transport. The subsequent transaction between the German trader and the French consumer should then be considered as a local supply of goods without transport in France.

As the supply of goods from the German trader to the French consumer constitutes only a local supply in France, this means that the definition of “*intra-Community distance sales of goods*” is no longer met. Therefore, the German trader cannot use OSS in Germany and should be registered in France for VAT in order to declare the French VAT.

This interpretation is also confirmed in the OSS Guide issued by the Commission. One of the examples in this Guide applies to the same situation. A trader established in Member State 1 sells goods to a customer in Member State 2. This trader does not have the goods in stock and buys them from a manufacturer in Member State 3 (where this trader is not established or registered for VAT) and asks the manufacturer to send the goods directly to a customer in a Member State 2. As stated in the Guide, in this case, the supply of goods by the supplier to the final consumer constitutes a supply of goods without transport and cannot, therefore, be considered as the intra-Community distance sales of goods.

In respect of the above, this frequently used business model does not seem to fit into the OSS concept. The solution is the standard registration of the trader in the Member State from which the goods are delivered to him. This is also confirmed in the example above. However, even mere registration in the country of manufacturer (which will be mandatory in many countries) may not be sufficient. The supplier must set the contractual conditions with the manufacturer so that the person arranging the transport is considered to be this supplier and not the manufacturer (otherwise it would still be necessary in the spirit of the Explanatory Notes to assign transport to delivery made by this manufacturer with negative effects described above).

*Next time we will focus on **new notification obligations for electronic platforms**. If you have any questions, please contact us at tomicsek@stanek-tomicsek.com*

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