



# NAVIGATING THE GIVEN EXTERNAL CONSIDERATIONS INCREASING REGULATORY ENFORCEMENT OF EU CROSS-BORDER E-COMMERCE

by Yves Melin, Philippe Heeren & Emma McGrory

## *Takeaways*

- Currently, regulatory compliance of products sold through cross-border e-commerce is honored in the breach and enforcement of customs duties and VAT is patchy
- Customs authorities and regulators in the EU and UK are determined to ensure enforcement and restore the competitiveness of domestic businesses
- Increasingly, customs authorities are looking at carriers when it comes to enforcement at the border and liability for non-compliance
- Increasingly, carriers are required to know what products they are transporting



**T**he rise of cross-border e-commerce is increasingly coming up against legal and societal concerns, chiefly the protection of consumers and restoration of competitiveness for domestic producers and retailers. This manifests in two areas in particular:

1. More aggressive enforcement of customs and VAT collection, including against transport companies when other debtors are not within reach, which is regularly the case in cross-border e-commerce; and
2. A new focus on trying to overcome the difficulties inherent in enforcing regulatory compliance of imported e-commerce goods. Logistics service providers are increasingly the target of these enforcement actions, in the expectation that they know, or should know, what they are transporting.

### **Cross-border e-commerce poses unique enforcement challenges**

E-commerce continues to grow at a dizzying pace. Already representing almost \$3 trillion, e-commerce sales are expected to increase by another 47 percent by 2025 according to the World Economic Forum and Statista. Cross-border e-commerce, whereby goods sold online cross a customs border, represents an important share of these sales. A high-risk share.

Unlike other e-commerce sales, cross-border e-commerce involves importing goods and placing them on a foreign market for the first time. Enforcement authorities expect that every item sold online should be fully compliant. This applies both to items shipped in bulk, and wholesale, before being retailed in the EU from fulfilment centers (B2B2C) and to items shipped directly to consumers from another customs territory (B2C). The importer, or declarant in EU parlance, is required by law to know what is in each box and to be able to demonstrate compliance, at the time of importation and for at least three years afterwards. However, compliance levels are very low. Up to 75 percent of items online could be breaching product safety rules. Additionally, not enough is being done to ensure that the right customs duty and VAT are paid.



## **Latest legal developments in cross-border e-commerce**

Lawmakers around the globe are tooling up. Here, we look in particular at the situation in the EU and United Kingdom.

### *The European Union*

With effect from July 1, 2021, the EU thoroughly reworked the legal framework for the taxation of cross-border e-commerce shipments. The traditional VAT exemption for low-value goods was abolished and replaced by a system whereby VAT on any shipment, no matter how small the value, becomes due and payable at the time of the online order. The subsequent import of the goods is then exempt from VAT. Only direct shipments from a country outside of the EU can qualify for this (as yet) optional Import One-Stop Shop (IOSS) system. Online marketplaces play an important role under IOSS, as they qualify as a deemed supplier. The alternative Special Arrangement system allows VAT to be collected by the person presenting the goods to customs, which is particularly relevant for postal operators. By allowing the declaration of low-value goods with a so-called “super reduced data set”, the EU has limited the burden associated with customs formalities for these two optional systems applicable to low-value consignments. Yet, these simplified formalities still create a greater burden compared to the oral declarations that were possible before July 1, 2021.

The Market Surveillance Regulation entered into force on July 1, 2021 to streamline and coordinate EU-wide product compliance and surveillance procedures for imported products, with rules specifically making fulfilment service providers liable for compliance. EU legislators aim to close an enforcement gap, as the importer is now often a final consumer (the party the product regulations aim to protect) and not a distributor or an importing business.



The EU is increasingly focusing on how products are manufactured outside of its borders. A rapidly growing number of mandatory supply chain due diligence schemes are being adopted, or discussed, by the EU, requiring manufacturers and traders to be able to demonstrate that the products they import were made without breaching minimum labor laws, human rights and environmental standards. There are already a number of laws for specific products such as conflict minerals and timber. This set of rules, based on a standard set by the OECD, is being expanded to include other products, including raw materials for batteries, soft commodities, etc.

Cross-border e-commerce is changing rapidly. Shipments from Chinese warehouses straight to EU doorsteps are growing. Since the UK left the EU's customs union on January 1, 2021, all online sales from Great Britain became cross-border e-commerce. This pressure is causing the EU to look for further reforms. The optional VAT tax system is likely to become mandatory. The exemption from import duties for shipments under €150 is also being discussed, and could disappear. More generally, the European Commission is starting consultations with stakeholders on adapting the Union Customs Code to capture new trade flows, with e-commerce being the main priority. Further changes are expected.

### *The United Kingdom*

The UK also recently reworked its VAT legislation. The changes to the cross-border e-commerce rules for Great Britain are broadly similar to those introduced in the EU. However, the changes came into effect on January 1, 2021 (six months prior to the corresponding EU changes) and are mandatory rather than optional, unlike in the EU. In light of these changes, non-UK sellers and online marketplaces should keep an eye on whether they are required to register for UK VAT going forward.

For now, we wait to see if the UK will follow the EU in adopting other changes.

### **Enforcement trends: Know what is in the box**

As a market participant, it is quite a task to monitor all these changes and ensure their proper application, but if goods are not brought into the market correctly this can lead to serious trouble. Customs and other supervisory checks can lead to disruption to the flow of goods. Additional taxes may be due on import if a misdeclaration is found. Also, due to an investigation, goods may not be released, resulting in mandatory modifications, or even destruction, along with possible non-compliance sanctions.

Who is responsible? Naturally, the importer is looked at first. After all, the importer should know the goods in question, or at least have direct access to the relevant information. In practice, however, we find that importers are not always prepared and aware of the applicable regulations, and sometimes they are not established in the EU.

Enforcement authorities often look at other persons in the supply chain, alongside the importer. The Market Surveillance Regulation designates fulfilment service providers as responsible for compliance with product regulations. Customs regulations go a lot further.

The person declaring the goods on entry is responsible for accuracy and completeness. This includes the entry summary declaration, which is the carrier's responsibility. Where the declaration is incorrect or incomplete, the person in question will be liable for the consequences. In Belgium, especially in a maritime smuggling context, the customs authorities are looking at the carrier when it comes to tax liability. When goods are smuggled, the carrier has not submitted a correct or complete entry declaration. To escape liability, the carrier must demonstrate that it could not have known about the non-compliance. This, in turn, requires demonstrating that adequate compliance procedures were in place, so that the fraud or non-compliance could not reasonably have been detected. We see a similar trend in other EU member states to look at the carrier as the liable party.

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