

VAT – Compliance, reporting and accounting obligations - Liability for tax - Supplies of goods and services – Several liability to the payment of VAT for online platform operators

[The below outlines a free translation of official guidelines published by the French tax authorities on March 23rd 2020. These comments are open to public consultation for the period March 23 up to 31 May 2020. Any operator / interested party can issue questions/comments in the frame of this consultation]

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With a starting effect on 1st of January, 2020, Article 283(4a) of the General Tax Code (CGI) have been ruling a several liability mechanism between the taxable persons / users of the platform and the online platform's operators, through which these taxable persons carry out a business activity..

The several liability is destined to be sought in situations where the tax authorities flag to the platform operator on the existence of factual items disclosing a possible failure of the platforms users with regard to the correct achievement of their own tax obligations.

I. Scope of application

A-Taxable persons that may be flagged

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Entities liable to the payment of VAT by virtue of VAT legal provisions are those who, whether established in France or not, are suspected by the French tax authorities to fail to meet their VAT compliance obligations in France.

In addition those entities must be in one of the situation below:

- Either carrying out deliveries of goods or supplies of services, through the intermediary of the platform, to the benefit of non-business clients (end-consumers or end-users), where the said taxable transactions are located in France from a VAT territorial standpoint.
- Or carrying out business activities through the intermediary of the platform, and being liable to account for VAT on imports of goods in France.

B-Platforms operators covered by the several liability of payment

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The online platform operators, referred to in Article 283a of the General Tax Code and Article 293 A ter of the General Tax Code connect persons online, by electronic means, for the purpose of facilitating the sale of a good, the provision of a service or the exchange or sharing of a good or service. II § 40 of the BOI-BIC-DECLA-30-70-40-10 sets out a non-exhaustive list of these platform operators concerned

[Below is a free translation of the list provided by the French tax authorities:

- Sale or resale of goods of any kind: real estate; equipment of the house or persons; cultural goods; tickets for shows, sporting events or trains; vehicles, spare parts; tools; raw or processed food products, with or without delivery
- Renting of real estate or their accessories: furnished tourist accommodation; renting or sharing of bare or furnished real estate; renting of swimming pools, sports grounds, terraces, gardens or natural areas
- Rental of movable property: land vehicle, boat or plane; miscellaneous tools; household appliances or household equipment; equipment of the person
- Transport of persons or objects: taxi; passenger car with driver (VTC); transport of goods
- Pool consumption: carpooling; organisation of meals (co-cooking); sea boat pooling
- Provision of a service or benefit: maintenance of the person's home or equipment goods; gardening work; personal assistance; childcare; school support; sports lessons at home or outside; various advice; pet sitting; etc. ;
- Crowdfunding]

C-Operations covered by the several liability

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The several liability to the VAT payment mechanism provided for in Article 283 bis of the CGI and Article 293 A ter of the CGI concerns transactions, carried out by a taxable person through an online platform operator, whose place of taxation for VAT purposes is in France.

The several liability may be activated as from 1 January 2020, including in view of VAT obligations in respect of periods prior to that date.

Thus, an alert may be flagged by the tax authorities as of 1 January 2020 if there are presumptions that a taxable person (user of the platform) has failed to meet his obligations with respect to the declaration or payment of VAT, including in cases where these obligations relate to periods whose last day is prior to 1 January 2020, subject to the applicable prescription rules (BOI-CF-PGR-10-30).

II. Conditions for the application of the joint and several payment procedure

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The several liability payment mechanism provided for in Article 283 bis of the General Tax Code and Article 293 A ter of the General Tax Code provides for several stages described in Article 190 of Annex IV to the General Tax Code, Article 191 of Annex IV to the General Tax Code, Article 192 of Annex IV to the General Tax Code and Article 192 bis of Annex IV to the General Tax Code:

- the tax authorities shall inform the online platform operator of the taxable person for whom there are presumptions of failure to meet the obligations to declare or pay VAT ;
- following the flag alert, the online platform operator takes all measures to enable the taxable person to regularize his situation, and notifies the tax authorities of the measures taken;
- if, (i) at the end of a period of one month following the notification made by the operator of the online platform there would remain factual items revealing to the tax authorities that the taxable person (user of the platform) has still failed to meet its VAT obligations; or, (ii) in case of failure of the platform operator to respond to the tax authorities, at the end of a period of one month following the flag by the tax authorities, then the tax authorities shall give the operator of the online platform formal notice to take additional measures or to exclude the taxable person from its platform;
- following the formal notice, the online platform operator shall take the additional measures or exclude the taxable person, and shall notify the tax authorities of the measures implemented or the exclusion ;
- where no additional measures are implemented by the platform operator, or where the taxable person is not excluded from the platform at the end of a period of one month following the notification made by the online platform operator or, failing such notification, within a period of one month following the formal notice, the VAT for which the taxable person is liable shall be payable jointly and severally by the online platform operator.

A. Flag of the taxable person by the tax authorities to the platform

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The flag is made by the tax authorities, in application of II of Article 283 bis of the CGI or II of Article 293 A ter of the CGI, to the online platform operator, by sending a registered letter with acknowledgement of receipt, or by any other means in agreement with the online platform operator, in particular by electronic message attesting to the certain date of receipt under conditions equivalent to a registered letter with acknowledgement of receipt. In the latter case, the platform operator must first send the tax authorities a valid electronic contact address and accept the acknowledgement of receipt requested by the tax authorities when sending.

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The information contained in the flag letter is defined in Article 190 of Annex IV to the IMC. There is no breach of professional secrecy as the transmission of the information results from the law.

1. Elements of identification of the taxable person

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The identification of the taxable person shall include, if known to the tax authorities :

- his business name;

- his trade name or user name as communicated on the online platform. This may correspond, for example, to the taxable person's pseudonym or the name of his "shop" on the online platform;
- his identifier provided by the operator of the online platform. That identifier may correspond, for example, to the reference, internal to the platform, attributed to the taxable person and/or to the e-mail address of the taxable person's presentation page on the site of the online platform;
- his place of establishment as at the date of the flag;
- his intra-community VAT number or, if he does not have one, his identity numbers defined in Article R. 123-221 of the French Commercial Code or, for a non-resident company, his registration number with the tax authorities of his country of residence.

2. Description of the tax obligations and periods for which the taxable person is presumed to be in default.

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The flag letter shall indicate, in particular by reference to the relevant texts, the tax, reporting or payment obligations in respect of which the taxable person is presumed to be in default and the periods concerned by that default.

3. Information on the consequences of joint and several liability

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The flag letter will indicate:

- the obligation for the operator of the online platform to notify the tax authorities, within one month of receipt of the alert, of the measures taken as a result of the alert ;
- the possibility for the tax authorities, in the event of persistence of the presumption of failure of the taxable person at the end of a period of one month from receipt of the notification made by the platform operator or, in the absence of such notification, at the end of a period of one month from receipt of the alert by the online platform operator, to send a formal notice to the said operator to enjoin it to take additional measures or to exclude the taxable person from the platform.

4. Measures to be implemented by the online platform operator regarding the taxable person concerned

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Following the flag letter sent by the tax authorities, the online platform operator shall implement measures requested by the tax authorities, which shall include:

- a reminder to the taxable person of his tax and social obligations as provided for in 1° of article 242 bis of the CGI ;

- in the event of a presumed payment default, a request to the taxpayer to contact the tax authorities in order to regularize his tax situation. To this end, the contact details of the tax authorities office to be contacted by the taxpayer will be specified in the flag letter;

- in the event of a presumed failure to declare VAT, a request to the taxable person to provide his intra-Community VAT number; where appropriate, a verification, via the VIES website, of the validity of the intra-Community VAT number and of his correspondence with the taxable person ;

- in the absence of an intra-community VAT number or in the event of invalidity of this number, a request to the taxable person to regularize his tax situation; where applicable, a request to the taxable person to appoint a tax representative in France pursuant to Article 289 A of the French General Tax Code (BOI-TVA-DECLA-20-30-40-10).

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In addition to the above measures, the operator of the online platform may take any other measures it considers useful in the context of the flag letter.

B. Response letter by the platform operator to the tax authorities' flag letter

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From the date of receipt of the flag letter made by the tax authorities pursuant to II of Article 283 bis of the General Tax Code or II of Article 293 A ter of the General Tax Code, the online platform operator has a period of one month to respond to the tax authorities and inform them of the measures implemented following the flag letter.

This response letter may be sent to the tax authorities by any means that makes it possible to certify its receipt.

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In accordance with Article 191 of Annex IV to the General Tax Code, the response letter shall include the following information:

- the elements of identification of the taxable person, provided for in II of Article 190 of Annex IV to the General Tax Code, which are not known from the tax authorities and which are known by the platform operator, in order to enable the tax authorities to effectively verify the compliance of this taxable person with its tax obligations in terms of declaration and payment;

- the nature of the measures implemented;

- the date on which these measures were implemented;

- any element making it possible to demonstrate that the measures have actually been implemented by the operator of the online platform: copy of the mails or electronic messages sent to the taxable person, copy of the result of the examination of the validity of the intra-Community VAT number, etc.

- where appropriate, any information available to the online platform operator that may enable the tax authorities to check that the taxable person has regularized his situation. However, the online platform is not expected to monitor the taxable person's situation with regard to his tax obligations.

C. Formal notice issued by the tax authorities to the platform operator

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Pursuant to III of Article 283 bis of the CGI or III of Article 293 A ter of the CGI, if there is still a presumption of default by the taxable person at the end of a period of one month following receipt of the response letter from the online platform operator or, in the absence of such response letter, at the end of a period of one month following receipt of the alert, the tax authorities may give formal notice to the operator of the online platform to take additional measures or to exclude the taxable person from its platform.

Such formal notice shall be given by the tax authorities to the operator of the online platform, by sending a registered letter with acknowledgement of receipt or by any other means in agreement with the operator of the online platform, in particular by e-mail. In the latter case, the procedures are specified in II-A § 50.

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In addition to the date and reference of the flag described in II-A § 50 to 210, the formal notice contains the information defined in Article 192 of Annex IV to the CGI.

1. Description of the reasons why the presumption persists

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The formal notice indicates the findings made by the tax authorities that allowed it to detect a possible failure of the taxable person (user of the platform).

2. Information on the consequences of joint and several liability

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In accordance with I of Article 192 of Annex IV to the General Tax Code, the formal notice indicates the information mentioned in II-A-3 § 90.

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In addition, in accordance with 1° of II of Article 1740 D of the French General Tax Code (CGI), resulting from Article 149 of the Finance Act for 2020 No. 2019-1479 of December 28, 2019, the formal notice

expressly mentions that the platform operator may be registered on the list of non-cooperative platform operators if it meets the conditions set out in this same article.

3. Additional measures or exclusion of the taxable person

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In accordance with II of Article 192 of Annex IV to the General Tax Code, the additional measures to be implemented by the online platform operator following the tax authorities's formal notice include :

- all measures described in II-A-4 § 100 to 120;
- measures allowing the suspension of the activity of the taxable person concerned in connection with transactions subject to VAT in France.

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The exclusion of the taxable person concerned by the operator of the online platform may take the form of a suspension of his user account, the shops and/or trade names attached to that user on the online platform, if that suspension has the effect of preventing any activity carried out by the taxable person via that platform.

D. Notification made by the operator of the online platform following the formal notice

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From the date of receipt of the formal notice issued by the tax authorities pursuant to Article 283a III of the General Tax Code or Article 293 A ter of the General Tax Code, the operator of the online platform has a period of one month in which to notify the tax authorities of the implementation of the additional measures or the exclusion of the taxable person concerned following that formal notice.

Such notification may be sent to the tax authorities by any means that provides proof of its receipt.

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In accordance with Article 192a of Annex IV to the General Tax Code, this notification shall include the following information:

- the nature of the additional measures implemented ;
- the date on which these additional measures were implemented or the date on which the exclusion of the taxable person is effective ;
- the elements which make it possible to demonstrate that the additional measures or the exclusion of the taxable person have actually been implemented: copy of the exchanges with the taxable person, copy of the act of deregistration or suspension of the taxable person's account, etc.
- where appropriate, any information available to the operator of the online platform which may enable the tax authorities to check that the taxable person has regularized his situation. The procedure

does not, however, imply that the platform operator monitors the taxable person's situation with regard to his tax obligations.

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If the taxable person regularizes his situation after having been excluded from an online platform, the tax authorities may inform the platform operator electronically, provided that a contact address has been communicated to him beforehand by the platform operator.

E. Failure to implement the requested measures or to exclude the taxable person

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If the tax authorities finds within one month of receipt of the notification made by the platform operator, or failing this notification, within one month of receipt of the formal notice by the said operator, that the measures described in II-A-4 § 100 et seq. and II-C-3 § 190 et seq. have not been implemented, then it may implement the joint and several liability of the online platform operator for the payment of the VAT due by the taxable person referred to in the notification.

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If the platform operator fails to send the notification provided for in II-B § 120 et seq. within one month of receipt of the formal notice, the tax authorities may assume that the additional measures or the exclusion of the taxable person have not been implemented.

F. Notification of VAT assessments and settlement procedure

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The implementation of the joint and several payment provided for in Article 283 bis of the CGI and Article 293 A ter of the CGI requires the authentication of the VAT liabilities due by the taxpayer. To this end, the tax authorities issue a writ of payment in the name of the taxable person.

Where the VAT liability at the level of the taxable person has not already been established by the tax authorities, it is necessary to carry on a tax audit (on the basis of documents or on the spot) and to notify the taxable person the VAT assessments for the period covered by the flag letter. At the end of the tax audit, the several liability of the online platform is exercised made by the Public State accounting officers in charge of recovering the VAT liabilities due by the taxable person.

III. Implementation of joint and several payments

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Since the law has not provided for any principle of subsidiarity that would require the person legally liable for the debt to be sued in the first instance, the debt may be recovered from either the taxable person or the online platform.

A. Scope of joint and several liability

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The several liability of payment of the online platform operator, provided for in Article 283 bis of the CGI and Article 293 A ter of the CGI, is limited to the amount of VAT due on transactions carried out by the taxable person through the intermediary of the said online platform.

B. Exercise of the several liability at the level of the online platform operator

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The claim for joint and several payments at the level of the operator of the online platform, through which the taxable person concerned makes supplies of goods or services or carries out an activity covered by the several liability mechanism, is carried out in accordance with the general principles for calling into question joint and several debtors described in the BOI-VAT-DECLA-10-10-30-10 § 70 to 140.