

WTS VAT Update for the Digital Economy

Austrian Digital Services Tax



Last year the Austrian Ministry of Finance announced a digital tax package including the introduction of:

- (i) a 5% tax on online advertising for large corporations, and;
- (ii) a data forwarding obligation for operators of electronic marketplaces, and;
- (iii) the E-commerce package which shall enter into force on January 1st 2021.

1. Digital (online) advertising tax

An advertising tax is not something new in Austria. Since 2000 "traditional" advertising is facing a tax of 5% on revenues gained from advertising services such as newspaper ads, television commercials or advertisement by direct mail.

At the time online advertising was relatively insignificant and was therefore not included in the list of taxable advertising services.

However, after the unsuccessful attempt on a European level to introduce a digital services tax on revenues gained from the provision of certain digital services, Austria announced in 2019 its own national digital tax on online advertising services (further: "**Digital Tax**"), which already entered into force on January 1st 2020. The key features of the new digital tax are as follows:

- taxable item: online advertising services in Austria;
- taxpayer: online advertising service provider (with significant revenues);
- assessment basis: remuneration received by the online advertising service provider;
- tax rate: 5%.

A tax revenue of EUR 25-30 million per year is expected through the Austrian digital tax. Like the French Digital Services Tax, the Austrian digital advertisement tax should be considered as a temporary solution. This until a comprehensive EU/OECD-approach has been found to tax the digital economy.

Tax Rate and Taxpayer

The Austrian digital tax will apply at a rate of 5% on digital advertising revenues, for companies (online service providers) generating within one business year:

- Global revenues of more than EUR 750 million, and
- Austrian digital advertising revenues of more than EUR 25 million (national).

The assessment base for the digital tax is the remuneration (exclusive VAT) that the online service provider receives from a customer.

Online service providers are business entities that provide online advertising services for consideration or that contribute to other remuneration. This is also the case if the online advertising service provider is not the owner of the digital interface (for example, website or app) and "only" contributes to the online advertising service.

If a company is part of a multinational group of companies within the meaning of the Transfer Pricing Documentation Act, the turnover of the group has to be taken into account. The last published annual or consolidated financial statements are decisive. Since the definition of an online service provider is made on a group-level, from our point of view intra-group advertising turnover would probably be irrelevant and not subject to tax (e.g. digital online self-promotion for the group).

Advertisement

The new digital tax covers digital advertising services in the Austrian market. This means that the Austrian digital tax applies to revenues generated in Austria through sales of online advertising space, such as banner advertising, search engine advertising as well as any other comparable advertising service.

In order to specify any other comparable advertising service and taking into account future technical developments, the Austrian Digital Tax Act 2020 expressly provides the power to enact additional regulations. In any event, the definition of an online advertising service does not, for instance, include the supply of digital content, such as software as a service ('SAAS'), streaming services or e-books (online subscriptions to magazines or newspapers).

One main condition is that the online advertising is displayed on an user's device with an Austrian Internet Protocol ('IP') address and is directed (also) towards domestic ("Austrian") users according to its content and design. "User" means any individual or legal person or legal entity using a device by which they access a digital interface. "Digital interface" means any type of software (including a website or parts thereof, as well as mobile applications) that users can access. Based on a connection to the IP address, there will not, for instance, be an Austrian IP address if one is using Wireless Lan device abroad. If an entirely different technology is used for geo-localization (geo-targeting or geolocation), such technology will be deemed equivalent to the IP address.

An online advertisement is only subject to the Austrian Digital Tax if the online advertisement is directed at domestic ("Austrian") users, including the content and design of the online advertisement. The *traditional advertising tax* foresees in a similar demand for an Austrian connection. If for instance TV advertising is intended to be received in Austria and broadcasted from Germany, it is deemed to have been rendered in Austria for the Austrian advertisement tax purposes.

With regard to online advertising, a distinction has to be made between individualized online advertising and general online advertisement.

Individualized online advertising, which most likely includes personalized banners through *Retargeting* will always be addressed to Austrian users, given them a tailor made character.

For the more general banner advertising services this is different, there has to be a specific connection to the Austrian market. A banner advertisement addressed to the Austrian market is usually addressed to domestic users. In contrast to, for instance on the website of a German online newspaper, a fixed banner advertisement appears for all users/readers, it can be assumed that such fixed banner is aimed at German users, even if the advertised products can also be purchased in Austria. Furthermore, in our opinion online advertisements intended for foreign countries (e.g. online advertisement for holidays in Austria on a website) should not trigger any digital tax liability, even if they can be consumed in Austria.

However, if there is a special banner or offer advertisement for Austrian users then the advertisement will be subject to the Austrian digital services tax. The problem of a territorial delimitation without reference to a (domestic) contracting partner becomes clear here. Further clarifications are therefore likely.

According to a recently published decree of the Federal Minister of Finance in those cases where, in the first full financial year of application of the Digital Tax Act 2020, online service providers are unable for technical reasons to allocate fees for the performance of online advertising services to domestic users, the competent tax office may, upon request, permit another method for determining the tax base of the digital taxpayers if the online service provider substantiates that this method leads to similar results.

Collection of tax and Record-Keeping Duties

The person liable for payment of the tax (tax debtor) is the online service provider, which must calculate the tax itself and pay by the 15th of the second month (due date) following the date on which the liability arises. The liability arises at the end of the month in which the taxable service is rendered. Such payments however are to be seen as installments as the final reporting has to be done on an annual basis.

Hereto, three months after the end of the business year, the tax debtor must submit a digital services tax return for the previous year. (Please note: For business years ending already before 1st July 2020, the annual tax return shall be filed by 30th September 2020 at the latest). This return has to include a record of the types of online advertising services (e.g. search engine advertising, banner advertising, other), the remuneration received for this and the global turnover. In the digital tax procedure, annual tax returns and other declarations must be submitted electronically, by way of data stream transmission (via the portal "*FinanzOnline*") or by means of a web-based service ("*Onlineverfahren-Digitalsteuer*").

A non-Austrian online service provider without a CIT PE in Austria will have to register in Austria for digital tax purposes and ask for a tax identification number. Registration and the application has to be done electronically via a web form, which will be available from the beginning of April 2020, where the company name, address and e-mail address must be provided. An extract from the commercial register or comparable proof of registration in the country of domicile has to be attached. After application the company will get a tax identification number and access to the so-called "*Onlineverfahren-Digitalsteuer*". The communication with the fiscal authority has to be done electronically via the "*Onlineverfahren-Digitalsteuer*".

Fiscal Representation

In contrast to the traditional advertising tax, there is no client liability for the payment of the digital tax, even if a foreign online advertising provider is commissioned.

Online service providers who do not have their registered office, management or place of business in Austria, in a member state of the European Union or in any other state party to the Agreement on the European Economic Area (EEA) are obliged to appoint a fiscal representative at the appropriate time before submitting their first annual tax return. Fiscal representatives can be certified tax advisors, lawyers and notaries with a domicile or registered office in Austria. Online service providers are required to notify the fiscal representative in a timely manner of all circumstances relevant to the collection of the digital tax.

Other tax debtors (online service providers), in particular online advertisers with their registered office, management or permanent establishment in another EU member state or other EEA member state, are also free to appoint a fiscal representative in order to be able to fulfil their obligations in connection with the collection of the digital tax as efficiently as possible.

If a foreign online service provider has appointed a fiscal representative, this representative must have a permission to participate in the *FinanzOnline* procedure. Therefore, if a fiscal representative is appointed, the transmission is made exclusively via *FinanzOnline*.

Further remarks

The Austrian tax authorities already announced that plausibility checks, potentially leading to thorough audits (via recapitulative statement relating to advertising services rendered in Austria for VAT purposes), will follow.

The digital tax act itself does not specify any sanctions for non-compliance or non-payment. Therefore, the general sanctions of the Law on financial crime apply and could lead to severe penalties (the offence of tax evasion might be fulfilled) and late payment fines.

Furthermore, the online service provider is obliged to keep records of the online advertising services, which has to be sent to the Austrian tax authorities upon their request (no periodical additional reporting obligation as in France or in Italy in relation to sales made through an online marketplace).

In principle, information on:

- which type of service carried out;
- the clients, and;
- the basis for calculating the Austrian digital tax

have to be recorded by the taxable person. Also, records of IP addresses must be kept to allow the Austrian Tax Authorities to monitor whether online advertising services have been rendered in Austria (storing any personal data in anonymous form).

According to the Austrian Digital Tax Act 2020 the Federal Minister of Finance shall be authorized to adopt more detailed regulations by decree taking into account the requirements of the special features of online advertising services.

Recommendations WTS Global

Although, many questions with regard to the Austrian Digital Service Tax remain unclear, we expect that some more information from the Federal Ministry of Finance will be published soon. This to provide answers and introduce simplifications. We will of course monitor these closely and inform you accordingly.

Nevertheless, in the meantime we recommend companies that might be subject to the digital tax should already be thinking about the impact of the Austrian DST.

Companies that may be affected by the Austrian DST should assess the required follow-up steps in order to adjust financial systems in order to comply with the administrative obligations under the Austrian DST.

In addition we also recommend companies that may be affected by the Austrian DST to review their Austrian (online) advertisement efforts. More specific whether such (online) advertisement is captured under the Austrian DST. In general the effectiveness of Internet advertising can be measured directly via the click rate, the "conversion rate" or "page impressions". The measurability also has the advantage that billing is done via "Pay per Click": Here, the advertising customer only pays for clicks, i.e. only if the interested party is actually directed to his website. In this way, the payment (and assessment base) for domestic online advertising can be determined relatively easily.

Moreover, this also should allow companies to rethink advertisement strategies, more specific aimed at the Austrian Market and/ or Austrian located consumers. The latter of course to the extent this is feasible from a marketing perspective.

2. Obligations for Electronic Marketplaces from January 2020

Operators of online platforms or electronic marketplaces enabling supplies or other services over it must record detailed information about individual traders using their site and report the information electronically to the Austrian tax authorities when requested. This is only applicable if the online platforms or electronic marketplaces do not owe VAT themselves.

However in case the revenue for which there is a record-keeping obligation exceeds EUR 1.000.000 per calendar year, these records must be reported on an annual basis ultimately on January 31st of the following year. The recorded information must include e.g;

- annual turnover;
- customer names;
- address;
- VAT-ID of the supplier (if available);
- tax identification number of the supplier (if available), and;
- records concerning stocks

These new regulations entered into effect on January 1st 2020.

Online Marketplace Liability

In case of non-compliance of the reporting obligations, the operator of the electronic marketplace or online platform will be held liable for the unpaid VAT by the seller using the platform. However, the operator itself does not become the debtor of the VAT.

When the EU E-commerce package enters into force in 2021, Online Marketplace operators will become the taxable person in relation to the sales made through their online marketplace due to the deemed buy/sell. As a result this temporary Austrian reporting obligation for transactions covered by the new regulation will no longer have an effect.

For transactions, which do not fall under the new E-commerce rules the provisions regarding record keeping and marketplace liability will stay in place.

Recommendations WTS Global

Next to other EU Member States, such as the UK, Germany, and France, Austria thus also introduced Online Marketplace liability rules.

The introduction of these new Online Marketplace liabilities are to some extent remarkable.

Especially because of the formal notification of the European Commission ("EC") to the German Authorities, in which the EC takes the position that the German Online Marketplace liability rules are inefficient and disproportionate, hinder the free access of EU businesses to the German market and thus are in violation of EU law.

But also because of the upcoming 2021 EU VAT changes based on which Online Marketplaces will be (under certain circumstances) deemed to buy-sell the goods that are sold over their online platform. Together these measurements could trigger substantial efforts and thus costs to adjust the (financial) systems in order to comply.

In the meantime we recommend operators of Online Marketplaces to analyze the sales over their platforms into Austria in order to make a first assessment of the changes that are required in their (financial) systems, business model, merchant onboarding process and internal processes in order to comply with these new Austrian rules and thus minimize risk.

3. Other changes

The threshold for the small business exemption in the VAT act was raised from EUR 30,000 to EUR 35,000, applicable 2020. The VAT tax rate for electronic publications was lowered to 10% starting 2020.

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