# Value Added Tax and the Digital Economy

## The 2015 EU Rules and Broader Issues

Edited by

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CHAPTER 5

# VAT Fraud and the Digital Economy within the European Union: Risks and Opportunities

*Edoardo Traversa & Emanuele Ceci*[*]

## 5.1 INTRODUCTION

Since the adoption of VAT, EU and Members States' policy-makers and administrations have been confronted with fraud and avoidance (abuse), often on a (very) large scale. Despite all the efforts made in order to improve the fight against this phenomenon, VAT fraud numbers remain worrying. According to the latest VAT Gap study, published by the Commission in 2014, EUR 177 billion in VAT revenues were lost due to non-compliance or non-collection of VAT in 2012.[1] VAT fraud not only negatively affects the financial interests of the Member States, but it also constitutes a serious issue for business, because VAT malpractices distort the normal conditions of fair competition in which compliant businesses operate.[2]

The transformation of business models through information and communication technologies paves the way for new forms of VAT fraud, particularly in an EU cross-border context. This is in part due to the inadequacy of the design of the present VAT system. As the Commission pointed out, the common system is not entirely '*well-fitted for today's society*'[3] and '*inconsistent with the idea of a Single*

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1. European Commission (2014): 'Taxation: Study confirms billions lost in VAT Gap', 23 October 2014, http://europa.eu/rapid/press-release_IP-14-1187_en.htm; European Commission (2013): '2012 Update Report to the Study to quantify and analyse the VAT Gap in the EU-27 Member States', TAXUD/2013/DE/321, p. 7, ec.europa.eu.
2. European Commission (2011): 'Questions and Answers: Value Added Tax (VAT)', 6 Dec. 2011, p. 7, http://europa.eu/rapid/press-release_MEMO-11-874_en.htm?locale = en.
3. *Ibid.*, p. 2.

*Market'*.[4] Adopted more than forty years ago, it also suffers from the institutional rigidity of the unanimity rule and barely takes into account recent developments, in particular the digitalization of the economy.

Digital commerce follows its own specific pattern, and one could wonder how traditional tax rules '*would interact with the new technologies that enabled global electronic commerce*'.[5] Action 1 of the OECD BEPS Report is related to the tax challenges of the digital economy and recognizes that the present tax rules, also in the area of income taxation, are not adapted to the new business environment.[6] Even if this situation does not necessarily imply that specific VAT regimes have to be set up for digital transactions,[7] it certainly forces all concerned to rethink the manner in which VAT rules are applied and in which the fight against VAT fraud is conducted.

## 5.2 THE FIGHT AGAINST FRAUD AS A FOCAL POINT OF EU DIGITAL VAT POLICY

Tackling VAT fraud has always been a main concern for EU Members States, especially since the implementation of the so-called transitional VAT system, which has been considered as particularly exposed to VAT fraud schemes.[8] Despite the existence of a common harmonized EU system, VAT fraud remains primarily an issue for the Member States, since it affects their ability to raise revenue and hence their capacity to fund public policies or to alleviate the burden caused by other forms of taxation.[9] As a

4. CFE (2009): 'Opinion Statement of the CFE Fiscal Committee on the European Commission's Proposal for a Directive and Action Plan to Better Combat VAT Fraud', Paper submitted by the Confédération Fiscale Européenne to the European Institutions in February 2009, European Taxation of May 2009 at p. 284.
5. A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International, 2013 at 3 and 4. See also J. Li (2003): 'International Taxation in the Age of Electronic Commerce: A Comparative Study', Canadian Tax Foundation, 2003 at 1–28.
6. N. Gaoua (2014): 'Taxation of the Digital Economy: French Reflections', 54 European Taxation 1 Jan. 2014 at 10.
7. The Expert Group on Taxation of the Digital Economy shares the same opinion and considers that '*it is not necessary to create a special tax regime for digital economy because the goal is achievable just adapting the existing rules* …'. See P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 785. See also B. Westberg (2014): 'Taxation of the Digital Economy: An EU Perspective', 54 European Taxation 12 of Dec. 2014 at 541.
8. The development of carrousel fraud is the perfect example of that situation. See among others A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International, 2013 at 278 and 279; C. Amand and K. Boucquez (2011): 'A New Defence for Victims of EU Missing-Trader Fraud?', 22 International VAT Monitor of July/August 2011 at 234.

   Some authors even believe that the only way to eradicate VAT fraud will be to '*fundamentally change the current VAT system*'. See M. Griffioen, L. van der Hel (2014): 'New European Approach to Combat VAT Fraud?', 42 Intertax 5 of 2014 at 298.
9. Many EU Member States have recently increased VAT rates in order to lower, or at least to avoid rising, direct taxes, in particular on labour. See European Commission (2014): 'Taxation trends in the European Union', 2014 at 25–27, http://ec.europa.eu (ISSN 1831-8789).

consequence, the right for EU Member States to adopt specific measures to fight fraud is recognized by the EU VAT directive.[10]

Due to the threat it represents to the credibility of EU tax harmonization, fraud has also become a major priority for the EU institutions. The European Commission published several documents on the topic. In December 2008, in the context of the 'Anti-Fraud Strategy' started in 2006,[11] the Commission presented a short-term action plan with a certain number of measures such as the creation of Eurofisc and the improvement of the exchange of information between Member States.[12] The Commission adopted a revised Anti-Fraud Strategy (CAFS) in 2011 with the objective:

> to improve prevention, detection and the conditions for investigations of fraud and to achieve adequate reparation and deterrence, with proportionate and dissuasive sanctions, and respecting the due process, especially by introducing anti-fraud strategies at Commission Service level respecting and clarifying the different responsibilities of the various stakeholders.[13]

According to MS tax administrations, it is essential to opt for a preventive approach instead of just reacting to the development of fraudulent schemes.[14] Since then, many priority actions established in the 2011 CAFS have been implemented.[15]

This Strategy also vowed a longer term reflection on ways in which to fight VAT fraud,[16] which resulted in the 2012 Action Plan to strengthen the fight against tax fraud and tax evasion.[17] The European Commission has been very active on the legislative side, by issuing proposals, most of which have been adopted by the Council. Notable legislative changes are the adoption of Council Regulation (EC) no. 1798/2003 of

10. See Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. The preamble mentions some references in that respect (see points 27, 42, 55 and 59), as well as some specific parties (see Title XII, Chapter 4, section 4; Title XIII, Cha. 2, section 1).
11. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee concerning the need to develop a coordinated strategy to improve the fight against fiscal fraud, 31 May 2006, COM (2006) 254 final, http://eur-lex.europa.eu. The main goal of this Communication was to enhance the need to provide a clear anti-fraud Strategy and to present some means to explore. This Communication represents for some authors '*the first of the EU's tangible initiatives on countering fiscal fraud*'. See P. Kavelaars (2013): 'EU and OECD: Fighting against Tax Avoidance', 41 Intertax 10 of 2013 at 507.
12. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee on a coordinated strategy to improve the fight against VAT fraud in the European Union, 1 Dec. 2008, COM (2008) 807 final, http://eur-lex.europa.eu.
13. Commission Staff Working Document (2014): 'Implementation of the Commission Anti-Fraud Strategy (CAFS)', Brussels SWD(2014) 248 final of 17 Jul. 2014 at http://eur-lex.europa.eu, p. 5.
14. See M. Griffioen, L. van der Hel (2014): 'New European Approach to Combat VAT Fraud?', 42 Intertax 5 of 2014 at 300 and 301.
15. For more information, see Commission Staff Working Document (2014): 'Implementation of the Commission Anti-Fraud Strategy (CAFS)', Brussels SWD (2014) 248 final of 17 Jul. 2014 at http://eur-lex.europa.eu.
16. European Commission (2011): 'Questions and Answers: Value Added Tax (VAT)', of 6 Dec. 2011 at p. 7, http://europa.eu/rapid/press-release_MEMO-11-874_en.htm?locale = en.
17. Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, 6 Dec. 2012, COM(2012) 722 final, http://eur-lex.europa.eu. See also P. Kavelaars (2013): 'EU and OECD: Fighting against Tax Avoidance', 41 Intertax 10 of 2013 at 508–510.

7 October 2003 on administrative cooperation in the field of value added tax,[18] recast by Regulation 904/2010 of 7 October 2010,[19] and, more recently, two directives establishing a Quick Reaction Mechanism against VAT fraud and an optional application of the VAT reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud.[20] Those instruments mainly aim at better organizing the cooperation between MS tax administrations, by providing clear and binding rules that improve the quality and timing of exchange of information (better procedures, form requirements, better timing to provide the information …), facilitate cross-border VAT investigations and allow the quick adoption of specific anti-fraud measures.

Besides these specific measures, the Commission also considers that better fraud prevention should include a thorough revision of the EU VAT system. In its 2010 Green Paper on the future of VAT,[21] the Commission considered that a reform towards '*a comprehensive VAT system that can adapt to changes in the economic and technological environment and is solid enough to resist attacks of fraud* (...)' could play a crucial role in the implementation of the Europe 2020 strategy and the return to growth within the EU. This viewpoint was confirmed in the 2011 Commission Communication on the future of VAT,[22] and, more recently, in a 2014 EU VAT expert group opinion on the definitive VAT system[23] and a 2014 Commission working document on the implementation of the definitive VAT regime for intra-EU trade,[24] in which the Commission again pointed out that the present system is '*out of step with the new economic, digital and international environment*'. Those documents clearly state that resistance to fraud has to be one of the guidelines for any future reform of the EU VAT system, along with simplicity and legal certainty, neutrality and proportionality,

18. This Regulation repealed the former Council Regulation (EEC) no. 218/92 of 27 Jan. 1992 on administrative cooperation in the field of indirect taxation, which was not fit for purpose anymore considering the evolution of the internal market. See also Commission implementing Regulation (EC) no. 1925/2004 of 29 Oct. 2004.
19. For more information, See Report from the Commission to the Council and the European Parliament on the application of Council Regulation (EU) No. 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax, 12 Feb. 2014, COM (2014) 71 final, http://eur-lex.europa.eu.
20. Directive 2013/42/EU of 22 Jul. 2013, amending Directive 2006/112/EC on the common system of value added tax, as regards a Quick Reaction Mechanism against VAT fraud, O.J., L 201/1, 26 Jul. 2013 and Directive 2013/43/EU of 22 Jul. 2013, amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud,, O.J., L 201/4, 26 Jul. 2013. See also the Council Directive 2010/23/EU of 16 March 2010 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain services susceptible to fraud, O.J., L 72, 20 Mar. 2010, p. 1.
21. See Green Paper on the future of VAT. Towards a simpler, more robust and efficient VAT system, 1 Dec.r 2010, http://ec.europa.eu. See also H. Kogels (2011): 'The European Commission's Green Paper on VAT', 22 International VAT Monitor of 2011 at 141–143.
22. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, Brussels, 6 Dec. 2011, http://ec.europa.eu.
23. Opinion of the VAT Expert Group on the Definitive VAT Regime, 12 Jun. 2014, p. 2, http://ec.europa.eu.
24. Commission Staff Working Document on the implementation of the definitive VAT regime for intra-EU trade, 29 Oct. 2014, http://ec.europa.eu.

efficiency and cooperation between Member States. The fight against fraud is therefore not only seen as an important objective in itself, it is also one of the main drivers of EU VAT harmonization as a whole.

There seems to be a consensus among experts, EU institutions and Member States that the current VAT system is not sufficiently equipped to prevent fraudulent behaviour and that it needs to be adapted with simple rules and efficient tools. There are, however, divergences on how to achieve this objective because Member States tend to be reluctant towards solutions that imply a further harmonization of the VAT taxable base and rates, and they fear the budgetary consequences of any modification of the current system, especially as regards location rules. Sometimes, Member States even seem to be reluctant to develop a broader administrative cooperation between them. Moreover, some anti-fraud measures are quite effective in ensuring the collection of tax by the tax administration on a case-by-case basis, but do not offer structural solutions to eradicate (or at least decrease) the development of tax fraud schemes.[25]

The growing importance of the digital economy reinforces the inevitable need for a discussion on the necessary evolution of the VAT system. E-commerce is indeed quite different from the classic way of doing business, mainly because of the intangible nature of electronic products or services and the fact that business transactions are carried out in a way that makes '*distance and time differences virtually meaningless*'.[26] Moreover, digital commerce very often, if not always, has a cross-border dimension, which inevitably raises issues linked to the boundaries of the tax sovereignty of the States and the limits to international administrative cooperation in the field of taxation.[27]

Therefore, the primary question to be asked in order to efficiently prevent VAT fraud is how the present VAT rules could be applied to digital transactions. Several well-known reports have recently been published on this issue: the report of the Commission expert group on taxation of the digital economy,[28] the OECD International VAT/GST Guidelines, in particular on the location of taxable supplies[29] and the OECD Report on Addressing the Tax Challenges of the Digital economy in the framework of the BEPS Action Plan.[30] These reports build on the experience gained by the OECD and

25. See C. Amand and K. Boucquez (2011): 'A New Defence for Victims of EU Missing-Trader Fraud?', 22 International VAT Monitor of July/August 2011 at 237 and 238.
26. J. Li (2003): 'International Taxation in the Age of Electronic Commerce: A Comparative Study', Canadian Tax Foundation, 2003 at pp. 1–28.
27. See among others A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International, 2013 at 552; S. Basu (2007): 'Global Perspectives on E-Commerce Taxation Law', Ashgate Publishing, 2007; R. L. Doernberg and L. Hinnekens (1999): 'Electronic Commerce and International Taxation', Kluwer Law International, 1999; L. Hinnekens (1998): 'The Challenges of Applying VAT and Income Tax Territoriality Concepts and Rules to International Electronic Commerce', 26 Intertax of 1998 at 52–70.
28. European Commission, Report of the Expert Group on Taxation of the digital economy, 28 May 2014, pp. 31–40, http://ec.europa.eu.
29. International VAT/GST Guidelines, April 2014, http://www.oecd.org; International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, http://www.oecd.org.
30. OECD, BEPS Action 1: Address the tax challenges of the digital economy, 16 Sep. 2014. See also the Discussion Draft released on 24 Mar. 2014.

the EU and their respective Member States since the 1990s in addressing the issues raised by e-commerce and by the digitalization of the economy.[31] In this respect, it is worth recalling the principles laid down in the Ottawa Taxation Framework which at the time were considered applicable to both traditional and e-commerce,[32] and still are:[33]

- *Neutrality*: Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.
- *Efficiency*: Compliance costs for taxpayers and administrative costs for the tax authorities should be minimized as far as possible.
- *Certainty and Simplicity*: The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.
- *Effectiveness and Fairness*: Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimized while keeping counteracting measures proportionate to the risks involved.
- *Flexibility*: The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.

However, those general principles have to be reconciled with the diversity of the issues to be addressed when trying to apply VAT rules to digital commerce,[34] such as the qualification of the concept of '*transactions in the digital economy*', the identification of the recipient and the location and effective taxation of the transactions. The

31. See OECD (1998): 'Ottawa Ministerial Conference on Electronic Commerce' and OECD Committee on Fiscal Affairs (1998): 'Electronic Commerce: Taxation Framework Conditions'; Commission of the European Community, 'E-Commerce and Indirect Taxation', Communication to the Council of Ministers, the European Parliament and to the Economic and Social Committee, COM (98) 374; Commission of the European Community 'VAT on E-Commerce – Why the Rule Need To Be Changed, The Key', Taxation and Customs Union DG of the Commission, October, 2000. For a comment, see A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International 2013 at 193–233.
32. See P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', IBFD Amsterdam, Doctoral Series, 2009, Vol. 18 at 68.
33. See OECD Committee on Fiscal Affairs (1998):'Electronic Commerce: Taxation Framework Conditions', 1998; OECD (2001): 'Taxation and Electronic Commerce – Implementing the Ottawa taxation framework conditions', 2001 at p. 10, www.oecd.org. For more details, see P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', Amsterdam, IBFD, Doctoral Series, 2009, Vol. 18 at 67–122.
34. See P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', Amsterdam, IBFD, Doctoral Series, 2009, Vol. 18 at 123; pp. 179–326; A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 343–349.

design of these rules, and their implementation, will undeniably have an impact on the extent of VAT fraud and on the choice of the tools to combat it.

## 5.3 IDENTIFYING AND LOCATING DIGITAL SUPPLIES IN ORDER TO MINIMIZE VAT FRAUD: THE DESTINATION PRINCIPLE AS A PANACEA?

The best way to limit VAT fraud is preventing it, by the adoption of rules that are not easily circumvented. Within the EU single market, and more generally from a cross-border perspective, fraud-proof location rules are key to the implementation of a robust VAT system. It is therefore necessary to discuss whether the idea according to which VAT should be collected at destination, if implemented thoroughly and coherently, could be one (if not the) solution to make the EU common system more robust as regards the taxation of digital supplies.

### 5.3.1 An Internationally Recognized and Implemented Principle

There seems to be a growing international consensus on the fact that VAT on digital supplies[35] should be collected according to the destination principle,[36] i.e., in the country where the consumer is established. The use of the destination principle was also recommended by the Ottawa Taxation Framework conditions.[37] An origin-based taxation distorts consumption decisions in favour of suppliers located in jurisdictions applying a low rate of VAT and creates an incentive for VAT suppliers to get established, even fraudulently, in such jurisdictions.[38] This is even more true for digital supplies, and it was confirmed in the report of the EU Commission Expert Group on Taxation of the Digital Economy, that the destination principle should ensure economic efficiency and neutrality.[39] The OECD International VAT/GST Guidelines also recognize that '*VAT neutrality in international trade is generally achieved through the*

35. P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', IBFD Amsterdam, Doctoral Series, 2009, Vol. 18 at p. 123; p. 181.
36. See among others, A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International, 2013 at 200; P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', Amsterdam IBFD, Doctoral Series, 2009, Vol. 18 at 275 and 276; M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 1; P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 785 and 786; B. Westberg (2014): 'Taxation of the Digital Economy: An EU Perspective', 54 European Taxation of December 2014 at 542 and 543.
37. A. Cockfield, W. Hellerstein, R. Millar, C. Warzeggers (2013): 'Taxing Global Digital Commerce', Kluwer Law International, 2013 at 200.
38. See M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', p. 3, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer); P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 786.
39. Report of the Commission Expert Group on Taxation of the digital economy, 28 May 2014, p. 31 http://ec.europa.eu.

*implementation of the "destination principle"*',[40] facilitating the ultimate objective of VAT, which is to tax final consumption. Therefore, '*internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption*'. This solution should also be positive in terms of 'distributional equity', as every Member State will collect VAT on supplies effectively consumed on its territory '*sharing the cost of taxation amongst individuals*'.[41]

The traditional proxies used for implementing the destination principle are the customer's principal place of business for B2B supplies, and the customer's place of residence for B2C supplies. This is in line with the recently implemented EU VAT rules for supplies of telecommunications, broadcasting, and electronically supplied services to a final consumer which locate the place of supply in the country of the customer.[42]

Alternative proxies, such as the place of actual performance, could also be applied in specific situations.[43] However, unlike most non-digital transactions, the place of establishment of the supplier or the place of performance should not be taken as a general proxy. According to OECD International VAT/GST Guidelines: '*(…) the application of a proxy based on the supplier's location or place of performance to determine the place of taxation is unlikely to lead to an appropriate result* […]'.[44] This 'place of supplier' criterion is indeed usually not relevant to determine the place of consumption of e-services or e-products, as they '*can be supplied remotely to customers who may be located anywhere in the world when consuming* [the service or product concerned]'.[45] Moreover, this criterion most likely increases the risk of fraud or avoidance, because taxable persons could be tempted to fictitiously locate their place of business in a low- or no-tax jurisdiction. Therefore, locating VAT taxable transactions at the customer's location, appears to be the best option, also considering the fact that it is likely that the customer will effectively use and enjoy the service or product in the country where he or she resides.

### 5.3.2 Obstacles to Implementing the Destination Principle in a Borderless Economy

The OECD International VAT/GST Guidelines however underlined that the application of the destination principle is more difficult in the case of e-commerce, because

40. International VAT/GST Guidelines, April 2014, http://www.oecd.org; International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, http://www.oecd.org, p. 3.
41. P. P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 786.
42. Directive 2006/112/EC, Article 44 (for B2B) and Article 58, applicable as for 1 Jan.2015 (for B2C).
43. See International VAT/GST Guidelines, April 2014, http://www.oecd.org; International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, http://www.oecd.org.
44. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, p. 6 http://www.oecd.org.
45. *Ibid*.

electronically supplied products and services cannot be subject to border controls in the same way as goods.[46] This situation can also lead to some issues regarding VAT fraud, because it will be more difficult to track the e-transactions and therefore to ensure the correct application of the VAT rules and the assessment and collection of the VAT due. This phenomenon is reinforced by tax planning strategies developed by multinational companies in order to channel the supply of digital services through favourable tax jurisdictions. Paraphrasing Edward Kleinbard, digitalization, together with globalization, may contribute to create 'stateless transactions'.[47]

#### *5.3.2.1 Excessive Compliance Costs for Tax Administrations and Taxable Persons*

Even if this choice of locating the supply in the country of the recipient stems from the application of general VAT principles, its application to e-commerce is not self-evident, as some authors already pointed out.[48] It requires the correct determination of the VAT status of the customers and their location.[49] However, in standard e-commerce transactions, the parties involved do not meet and have a minimal level of interaction, and suppliers often deal with anonymous customers (who may, for example, use a pseudo or route their transaction through an unidentifiable or borrowed IP address).[50] Moreover, e-supplies take place at any time of the day and activities often involve a high volume of transactions with relatively small margins. The high volume of e-supplies also means that customers may be located in a potentially high number of Member States. Business to consumer situations are even more problematic because there is usually no established relationship between the parties.

Therefore, identifying and locating taxable and non-taxable persons is far from being an easy task for both tax administrations and suppliers, because digitalization makes it difficult '*to obtain reliable information on [the] e-customers in the short time frame in which the transaction will be completed and in which tax assessment must thus be performed*'.[51]

Tax administrations could be faced with difficulties when they try to establish whether a taxable transaction has taken place within their jurisdiction, let alone when they try to effectively assess and collect the corresponding VAT. However, due to the

46. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, p. 3, http://www.oecd.org.
47. E. Kleinbard (2011): 'Stateless Income', 11 Florida Tax Review of 2011 at 699.
48. M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT' at 4 and 5 (to be published); A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 343–349.
49. M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 4.
50. M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', at 4 and 5, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer).
51. M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', at 4, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer).

fact that VAT is collected by economic operators (usually the suppliers), it is on them that the primary burden falls to identify their customer and to apply the correct VAT treatment.

As the case law of the European Court of Justice on the application of the exemption of intra-community supply of goods has shown,[52] it is sometimes difficult for the supplier to clearly determine his/her customer's location for non-digital transactions. It could prove to be a mission impossible for digital supplies, considering their above-mentioned particularities. This situation creates legal uncertainty for the e-suppliers, and more generally for all the parties involved in digital transactions. It also represents an important issue regarding the fight against VAT fraud.

#### *5.3.2.2 Excessive Burden of Proof for Suppliers*

Heavy compliance requirements may represent an excessive burden of proof for suppliers.[53] Since the destination principle requires that taxation takes place at the customer's location, the supplier needs to ascertain the status and location of his customers, which is problematic as mentioned above. Furthermore, in the absence of a reverse charge mechanism, which is usually the case for supplies to non-taxable persons, the supplier will have to assess the VAT due in accordance with the rules that apply in the jurisdiction of consumption, for each single transaction.

These compliance obligations could be so burdensome that e-suppliers could even prefer to take the risk of being convicted of fraud instead of implementing the necessary internal processes to ensure compliance. Due to those compliance difficulties, e-suppliers could contemplate fraud as a sort of second-best solution and voluntarily decide to take the risk not to apply the cumbersome requirements laid down by the applicable legislation.[54] For some authors, e-suppliers could for instance decide to just charge VAT based on the indication by the customer of its VAT number (if any) and its location,[55] without any certainty of the veracity of this information. According to ECJ case law, a party involved in a transaction has to take every reasonable step to avoid a participation in a tax fraud scheme.[56] The ECJ also regularly refers to the well-known 'knowledge test', under which Member States are

52. See CJEU Case C-409/04 *Teleos of 27 September 2007*; CJEU Case C-146/05 *Collée of 27 September 2007*; CJEU Case *Twoh of 27 September 2007*, C-184/05.
53. P. Rendahl (2009): 'Cross-Border Consumption Taxation of Digital Supplies', Amsterdam IBFD, Doctoral Series, 2009, Vol. 18 at 179.
54. See M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', at 4, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer).
55. A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 347.
56. See among others CJEU Case C-409/04 *Teleos of 27 September 2007*. For more information, see among others E. Traversa (2014): 'Prevention of Evasion, Avoidance and Abuse in EU VAT Law', in M. Lang, P. Pistone, J. Schuch, C. Staringer, D. Raponi (eds) (2014): 'ECJ – Recent Developments in Value Added Tax: The Evolution of European VAT Jurisprudence and its Role in the EU Common VAT System', Viena, Linde Verlag, at 48–53.

allowed, or even obliged, to sanction a VAT taxable person if it is established that he or she knew or should have known that he or she was involved in VAT fraud.[57] But how could a supplier be certain that he is or will not be involved in VAT fraud when dealing with e-commerce if he has no legal certainty regarding the identification and location of his customers and thus the applicable VAT regime? It will put him in a critical position.

From the perspective of correctly carrying out e-commerce transactions and of fighting VAT fraud, it is therefore crucial for all parties concerned to dispose of clear and effective criteria which will allow the correct identification of the key elements of every e-transaction. These elements will have to take into account '*the automation and the dematerialization of the activity*'.[58]

### 5.3.3 The Limits of the Proposed Solutions

Unfortunately, the solutions proposed to better implement the destination principle in the area of digital transactions do not appear satisfactory, especially in the light of their concrete implementation.

#### *5.3.3.1 The Presumptions regarding the Place of Supply of E-Services in Regulation 1042/2013/EU*

At the European level, Regulation 1042/2013/EU of 7 October 2013 amended Implementing Regulation 282/2011/EU as regards the place of supply of services of telecommunications, broadcasting and electronic services. Explanatory Notes have also been published on 4 April 2014,[59] with the objective to provide more information regarding the new rules and to '*solve any doubt that could arise from the wording of legislative acts*'.[60] These documents (see Appendices III, IV and V) provide some rebuttable presumptions that can be used by the supplier in order to determine how to correctly apply VAT rules.[61]

Concerning the determination of the status of the recipient, Regulation 282/2011/EU provides that the supplier may regard a customer as a VAT taxable person

57. See among others E. Traversa *supra* at 50–53; M. Alvarez Suso (2014): 'The boundaries of Abusive Practices: the Grey Zone', in M. Lang, P. Pistone, J. Schuch, C. Staringer, D. Raponi (eds) (2014): 'ECJ – Recent Developments in Value Added Tax: The Evolution of European VAT Jurisprudence and its Role in the EU Common VAT System', Viena, Linde Verlag, at 64; C. Amand and K. Boucquez (2011): 'A New Defence for Victims of EU Missing-Trader Fraud?', 22 International VAT Monitor of July/August 2011 at 235.
58. P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 786.
59. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, http://eur-lex.europa.eu (see Appendix V).
60. P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 786.
61. See A. Bal (2015): 'Taxing Virtual Currency: Challenges and Solutions', 43 Intertax 5 of 2015 at 387.

'*where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name and address* [...]'.[62] If the customer does not have a VAT number yet, the presumption is applicable if the latter demonstrates that he is in the process of registering and if the supplier '*carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks*'.[63]

This solution is however not optimal. As mentioned, electronic business involves minimum contacts and it will thus be difficult for the supplier to obtain this information from his e-client, especially once that the transaction has taken place.[64] The EU presumptions also imply that a party (the supplier) depends on the reliability of the information submitted by the client, although liability for VAT rests on him.[65] Finally, the compliance burden imposed on the supplier in terms of the '*reasonable level of verification*' when the client is in the process of obtaining a VAT number, is unclear and does not provide the required legal certainty. The Regulation tries to solve some of the issues regarding the application of VAT rules by indicating that if the recipient does not provide any VAT number, the supplier may consider the recipient as a non-taxable person '*irrespective of information to the contrary*',[66] but this is not satisfactory, because it could lead to a wrong application of VAT location rules and possibly to double taxation.

Regulation 282/2011/EU also provides some rebuttable presumptions regarding the determination of the location of the customer (Article 24a-c), to assist suppliers in that respect.[67] For instance, the recipient can be presumed to be established: at the place of installation of his fixed landline, based on the country code of his SIM card, but also '*on the basis of two items of non-contradictory evidence as listed in Article 24f* [...]'. These items include: the billing address of the customer; the bank details (location of the bank account or billing address held by the bank); '*other commercially relevant information*', and, as indicated by the Explanatory Notes, this is a non-exhaustive list.[68]

These presumptions can be rebutted[69] by the supplier '*on the basis of three items of non-contradictory evidence indicating that the customer is established, has his*

62. Article 18, 1, a) of the Implementing Regulation 282/2011/EU of 15 Mar. 2011.
63. Article 18, 1, b) of the Implementing Regulation 282/2011/EU of 15 Mar. 2011.
64. A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 345; A. Bal (2015): 'Taxing Virtual Currency: Challenges and Solutions', 43 Intertax 5 of 2015 at 388.
65. A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 345; See A. Bal (2015): 'Taxing Virtual Currency: Challenges and Solutions', 43 Intertax 5 of 2015 at 387 and 388.
66. New Article 18, 2 of the Implementing Regulation 282/2011/EU of 15 Mar. 2011.
67. For more explanations, see A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 346.
68. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 53, http://eur-lex.europa.eu.
69. See A. Bal (2014): 'The Myth of Taxing Cloud Computing under EU VAT', 25 International VAT Monitor of November/December 2014 at 346.

*permanent address or usually resides elsewhere*',[70] and by the tax authorities '*where there are indications of misuse or abuse by the supplier*'.[71]

Once again, although interesting, these clarifications offer no legal certainty to the e-supplier who remains dependent on his clients' bona fide cooperation, because in many cases the information will not be accessible otherwise. Moreover, the absence of a clear compliance procedure is also problematic. The perfect example is the listing of: '*items of non-contradictory evidence*'. First of all, no hierarchy is foreseen. What should the supplier therefore do in case of equality between contradictory and non-contradictory evidence? The Regulation stays silent. The Explanatory Notes, which should bring some clarification, mention that: '*It will be for the supplier to decide which two items of non-contradictory evidence he considers most reliable in determining the place where his customer belongs*'.[72] In terms of legal certainty and reliability, this is clearly not satisfactory.

Second, some items are redundant (for instance, if the Mobile Country Code is available, the presumption based on the SIM card country code should be applied) or can be easily falsified (for instance, the IP address).

Finally, some elements are unclear. What is, for instance, covered by the term: '*other commercially relevant information*'? The Explanatory Notes give some examples: the use by the client of a specific payment mechanism from a Member State; the client's trading history; a gift card point of sale; country-locked gift cards; documentation of third-party payment to service providers; customer self-certification.[73] Again, some elements might be difficult to track, and some of them look too specific to be applicable to common e-situations. Moreover, the compliance burden on the supplier remains important: the Explanatory Notes indeed mention that: '*the supplier should also be able to justify why this information is relevant to him*'[74] and that: '*a pro-active verification should take place on a regular basis*'.[75]

Some interesting proposals where thus made, but these remain insufficient to provide all the essential guarantees needed to reach an optimal level of legal certainty, to ensure a correct application of VAT rules and to minimize risks of fraud.[76]

70. New Article 24d, 1 of the Implementing Regulation 282/2011/EU of 15 Mar. 2011.
71. New Article 24d, 2 of the Implementing Regulation 282/2011/EU of 15 Mar. 2011.
72. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 60, http://eur-lex.europa.eu.
73. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 69 and 70, http://eur-lex.europa.eu.
74. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 69, http://eur-lex.europa.eu.
75. Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 71, http://eur-lex.europa.eu.
76. It also seems that the vision of how e-commerce is taking place stays blurred. A perfect example is provided by the Explanatory Notes: when they analysed how the supplier should verify information on the recipient, they mentioned that 'in many cases, the customer will have a regular relationship with the supplier'. This is far from the reality of the digital economy, where we already mentioned the limits of interaction between parties. The options offered to deal with

#### *5.3.3.2 The OECD Guidelines*

The OECD has also offered guidance. The OECD International VAT/GST Guidelines (in their April 2014 version)[77] recommended, for instance, to allow the supplier to ascertain the identity and location of his customers and to proceed to verifications on a transaction basis, based on information available among others in the business agreement concluded by the parties. However, the same remarks, as those made above on the EU proposals, can be made. In the digital economy, it could be extremely difficult to follow this 'transaction by transaction' compliance procedure. Moreover, the suggestion to look at the business agreement cannot be seen as a reasonable solution because e-commerce is usually a 'one shot transaction' (especially in a B2C context) that takes place in the absence of a business agreement between the parties concerned, and the OECD International VAT/GST Guidelines stay silent on the way to act in the absence of an existing business relationship and a detailed business agreement.[78] This solution could be optimal neither regarding the fight against VAT fraud.

As in the case of the EU, the OECD International VAT/GST Guidelines also suggest to refer to the VAT registration number as a way of identification of e-customers. This solution might be interesting, also from a VAT fraud perspective, if it were possible to quickly verify the official VAT registration numbers on a real time basis and with an accurate result. However, the way in which the actual system works does not permit to achieve the desired result: there is indeed no worldwide VAT registration numbers database. It could be argued that this is not totally true: indeed, at the EU level, the VIES system in principle allows verifying the validity of a VAT number issued by any Member State. However, this system is not totally reliable and not always up-to-date. This situation might evolve, as mentioned by the European Commission in a report published on 12 February 2014 regarding administrative cooperation and fight against VAT fraud.[79] The Commission recalled that '*the provisions relating to the VIES database were amended in order to increase the amount and quality of information stored and exchanged*'. A large number of Member States is satisfied with this evolution, which increases the rapidity of the updates and therefore implies a better exchange of information. The situation is however not totally optimal: the European Commission indeed underlined that, despite the amendments, '*there are still discrepancies and retroactive corrections continue to be made to VIES data*'. This

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e-commerce would remain insufficient if the perception of what this sector represents stays incorrect. See Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 Apr. 2014, at 71, http://eur-lex.europa.eu.

77. International VAT/GST Guidelines, April 2014, http://www.oecd.org.
78. M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', at 5, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer).
79. Report from the Commission to the Council and the European Parliament on the application of Council Regulation (EU) No. 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax, pp. 8 et 9, http://ec.europa.eu.

could still remain an issue in terms of reliability of the VIES database. Therefore the Commission recommended that '*all Member States introduce measures to keep the VIES database up-to-date*'. This should lead to a reliable and updated VIES system, which will be positive in terms of determining essential elements of e-transactions.[80]

The most recent version of the OECD International VAT/GST Guidelines, i.e., the Discussion Draft Guidelines, offers interesting insights regarding 'identification' solutions.[81] These Draft Guidelines seek to complement the first chapters of the existing Guidelines focusing on B2C supplies, among others to correctly determine the place of taxation for B2C supplies of services and intangibles in accordance with the destination principle. The Draft Guidelines were opened to public comments, which were centralized in a report published on 25 February 2015.[82]

The Draft Guidelines start by encouraging jurisdictions to provide '*clear practical guidance on how suppliers could establish the status of their customer (business or non-business)*'.[83] However, this recommendation is at the moment only made for jurisdictions that implement specific approaches for determining the place of taxation and/or provide for different collection mechanisms. This limitation has no sense considering the abovementioned issues related to the determination of the status of e-customers. This was clearly underlined in the public comments Report, which pleads for advising the jurisdictions to provide practical guidance on how suppliers can establish the status of their customers in all circumstances.[84]

The Draft Guidelines continue by recommending:

> a requirement for suppliers to provide a customer's VAT registration number or tax identification number, or other such indicia (e.g., information available in commercial registers) to establish their customer's status. Where a supplier, acting in good faith and having made reasonable efforts, is not able to obtain the appropriate documentation to establish the status of its customer, this could lead to a presumption that this is a non-business customer and that therefore the rules for business-to-consumer supplies apply. To facilitate suppliers' identification and verification of their customers' status, jurisdictions are encouraged to consider implementing an easy-to-use process that would allow suppliers to verify the validity of their customers' VAT registration or tax identification numbers.[85]

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80. C. Amand and K. Boucquez (2011): 'A New Defence for Victims of EU Missing-Trader Fraud?', 22 International VAT Monitor of July/August 2011 at 239 and 240.
81. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, http://www.oecd.org.
82. Comments received on public discussion drafts – International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, 25 Feb. 2015, http://www.oecd.org.
83. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, p. 4, http://www.oecd.org.
84. Comments received on public discussion drafts – International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, 25 Feb. 2015, at 212, http://www.oecd.org.
85. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, at 4 and 5, http://www.oecd.org.

This recommendation encourages solutions in order to clearly identify the status of the customers, using existing data.[86] It also takes into account the fact that the supplier should face a reasonable burden when determining the status of his customer. Finally, it pleads for having an efficient and reliable system to verify the validity of the VAT number, which is in line with the amendment of the VIES database (compare *supra*). This recommendation could also be more generally used in terms of combating VAT fraud. The determination of the different elements of every e-transaction could be facilitated by using existing data (which should be recorded somewhere – compare *infra*). Moreover, the limitation of the burden of proof should also be considered whenever anti-abuse provisions would apply to non-fraudulent participants in a fraud scheme.

Regarding the '*easy-to-use process*' mentioned in the Draft Guidelines, it is recommended to modify the actual Guidelines:

> to advise the jurisdictions to make a freely available official online tool for real-time verification of the tax status of the customers, where such checks are expected either by the legislation or by the tax practice of the jurisdiction's tax authorities. Especially in the case of the digital economy it is important to have an access to an official tool which enables a real-time verification of the tax status of new customers. E-commerce businesses need to process the transaction immediately and automatically without undue delays. They do not have the luxury of traditional businesses to verify the tax status of their customer manually before deciding whether or not consumption tax should be charged. Any delay increases the risk that the customer will abort the transaction before the sale is made.

This suggestion could be of great help in improving the fight against VAT e-fraud: having an easily accessible online tool which could be used by the VAT parties to check the relevant information will give them some certainty regarding the transaction and each other's status. Obviously, in order to have an efficient tool, it will require from Member States that they ensure the timely updating of this instrument, which might be an issue, as the experience with the VIES system has demonstrated.

The Draft Guidelines also state that due to the specific characteristics of e-commerce (high volume, minimal communication and interaction between parties, …): '*suppliers might not be able to rely on one single source of information, such as a contract, to reliably determine the place of usual residence of the customer*'.[87] It is therefore recommended that the suppliers are allowed to rely on information that they: '*routinely collect from their customers in the course of their normal business activity, as long as such information provides reasonably reliable evidence of the place of usual residence of their customers*'.[88] In particular, the Draft Guidelines emphasize that

86. The proposed solution of using information available in commercial registers is however not sufficient regarding digital economy, as already pointed out, considering the lack of permanent business connexion between involved parties.
87. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, at 8, http://www.oecd.org.
88. *Ibid*.

information provided by the customer generally may be considered as important evidence regarding his usual residence. Different examples are mentioned, similar to those provided in the EU implementing Regulation: ordering process, address, bank details, credit card information, IP address, device used to download digital content etc. These are interesting elements, but, as mentioned above, they are clearly not fraud-proof (possible manipulation of some information, dependence on the e-client, …). Also, as pointed out in the public comments report,[89] this could have a negative impact on the business, since the proposed language used in the Draft Guidelines:

> suggests that suppliers may be required by jurisdictions to obtain additional information supporting the consumer's place of usual residence. This approach is not feasible in the context of high-volume, low-value transactions *[i.e., in e-commerce area]*. The more information a supplier requires a consumer to provide in order to complete a transaction, the more likely it becomes that the consumer will abandon the transaction prior to completion.

It is therefore not in the best interest of the further development of e-activities to provide that a party has to rely on the good will of the other party. Some solutions need to be found in that respect (for instance the use of a third party – compare *infra*).

The draft also encourages an improved international cooperation between Member States, in particular regarding exchange of information and assistance in recovery.[90] It represents the best way to ensure an efficient identification of the parties concerned, the monitoring of the volume of transactions and the proper collection of VAT. Discussion on the options to be favoured is still ongoing: representatives from OECD countries and territories will decide whether to ratify the orientations proposed in the draft guidelines during the third meeting of the OECD Global Forum on VAT that will take place in November 2015.[91]

## 5.4 FIGHTING VAT FRAUD IN THE AREA OF DIGITAL SUPPLIES: THE NEED FOR COMPREHENSIVE AND INNOVATIVE SOLUTIONS

Despite the clear impact of the above-mentioned issues on the fight against VAT fraud, it is quite surprising that the recent official documents/reports do not contain specific recommendations about how to fight VAT fraud in the digital economy. It is true that Chapter 4 of the OECD Draft Guidelines deals with issues regarding evasion and avoidance. The only goal of this chapter, however, is to describe the main existing

89. Comments received on public discussion drafts – International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, 25 Feb. 2015, at 182, http://www.oecd.org.
90. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, at 9 and 10, http://www.oecd.org.
91. The third meeting of the OECD Global Forum on VAT has been planned at the occasion of the second meeting of that same forum in Tokyo on 17–18 Apr. 2014, see 'Statement of Outcomes on the OECD International VAT/GST Guidelines', see http://www.oecd.org/tax/consumption/vat-global-forum.htm.

instruments for exchange of information and mutual assistance that facilitate the fight against VAT fraud (multilateral cooperation, OECD Model Tax Convention etc.). The OECD International VAT/GST Guidelines encourage the use of these existing mechanisms for mutual cooperation, information exchange and mutual assistance, but there is no specific mention of the question whether the existing instruments are fit for the purpose of combating VAT e-fraud.

Considering this situation, the question remains open as to which solutions could be found in order to efficiently combat VAT fraud in e-commerce.

### 5.4.1 Using Information Technology to Better Trace and Identify VAT Taxable Persons and Transactions

As already mentioned, it will be important for the parties concerned to dispose of clear elements which will allow them to identify the e-transaction and the different parties involved (IP address, ordering process, address, bank details, ...), without being in a 'dependence situation' (see *supra*). It will therefore be important to develop specific e-tools to help collect this information and keep it up to date and at the disposal of e-commerce suppliers. The OECD International VAT/GST Guidelines encourage the use of electronic record keeping systems, which will enable the tax administration: '*to ensure that the tax has been charged and accounted for correctly*'.[92] In that respect, the Guidelines recommend to limit the data to be recorded to what is required to satisfy the jurisdictions and to what could be made available on request within a reasonable delay. The use of electronic identification devices is also an interesting path to follow,[93] as it could provide reliable information, instantaneously. Having the opportunity to access relevant information almost instantly should significantly deter the development of fraudulent schemes.

The involvement of a third party, like financial institutions, in the VAT assessment and collection process also appears promising.[94] These institutions are indeed increasingly required to verify, collect, store and update information concerning their customers. As this information already is or will be available, it could be used also in the fight against VAT fraud. In that respect, the RTvat[95] initiative can be mentioned. It aims at combatting VAT fraud by organizing the collection of VAT at the level of banks. This could have a positive effect as it would remove the VAT collection burden from suppliers.[96]

92. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, at 17, http://www.oecd.org.
93. M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 17–19.
94. M. Lamensch (2014): 'The Treatment of "Digital products" and other "E-Services" under VAT', at 4, in M. Lang and I. Lejeune (eds): 'VAT/GST in a Global Digital Economy', to be published (Kluwer); M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 14–17.
95. http://rtvat.net.
96. For more information, see M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 15 and 16.

### 5.4.2 Enhancing Administrative Cooperation and Developing Simple Mechanisms for the Assessment and Collection of VAT on Cross-Border Transactions

It will also be crucial to continue developing cooperation and exchange of information between Member States.[97] In a Single, integrated market, the only way to ensure an efficient fraud-proof VAT system is by increasing the efficiency of the cooperation between Member States. This conclusion was recently drawn by the European Commission in its February 2014 report concerning the fight against VAT fraud and the development of administrative cooperation.[98] The aim of the report was to serve as: '*a basis for a permanent and structured dialogue between the Commission, the European Parliament, the Council and the Member States in order to improve the efficiency of administrative cooperation in the field of VAT with the specific objective of fighting VAT fraud more effectively*'. It presented an overview of how the different mechanisms of administrative cooperation have been used by the Member States in fighting VAT fraud.

The conclusion stressed, however, that the current situation is far from being optimal. The European Commission stated that there are numerous unresolved issues mainly due to the behaviour of Member States (lack of replies, delays, etc.).[99] Some initiatives were already taken: for instance, regarding the exchange of information upon request, new e-forms have been drawn up in order to help Member States to quickly handle the treatment of the requests.[100] Moreover, the European Commission is willing to extend administrative cooperation beyond EU borders, by directly negotiating with third countries on behalf of the twenty-eight Member States.[101]

In this context, it will be essential, as recommended in the OECD International VAT/GST Guidelines Discussion Draft, to develop a common standard for the exchange of information that is simple, minimizes the costs for tax administrations and businesses by limiting the amount of data that is exchanged, and which can be implemented in a short timeframe. It will also be crucial to properly improve the use of the feedback mechanism by the Member States. This system should normally lead to a steady improvement in the volume and quality of the information exchanged between the Member States, which the Commission considers unsatisfactory at the moment.[102]

97. M. Griffioen, L. van der Hel (2014): 'New European Approach to Combat VAT Fraud?', 42 Intertax 5 of 2014 at 299.
98. Report from the Commission to the Council and the European Parliament on the application of Council Regulation (EU) No. 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax, 12 Feb. 2014, http://ec.europa.eu.
99. Some authors share the same view. See M. Griffioen, L. van der Hel (2014): 'New European Approach to Combat VAT Fraud?', 42 Intertax 5 of 2014 at 299.
100. Report from the Commission to the Council and the European Parliament on the application of Council Regulation (EU) No. 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax, 12 Feb. 2014, http://ec.europa.eu.
101. Communication from the Commission to the European Parliament and the Council, An Action Plan to strengthen the fight against tax fraud and tax evasion, 6 Dec. 2012, COM(2012) 722 final, at 11.
102. *Ibid*.

Administrative cooperation should also go beyond the mere exchange of information and extend to collaboration in the assessment and collection process. Especially within the EU, Member States' tax administrations should act more as decentralized authorities of one single European tax administration than as independent, water-edged bodies whose responsibilities are limited to the territory of one single Member State.

The compliance burden imposed on the supplier should also be eased by simplification mechanisms. For instance, because the taxable transaction is located in the country of the customer, the correct assessment, collection and remittance of VAT entails (significant) additional costs, generally borne by the supplier, and triggered by the registration in the jurisdictions where the VAT is due. In order to settle that issue, the OECD International VAT/GST Guidelines recommend the implementation of a '*simplified registration and compliance regime*'.[103]

Within the EU, a destination based solution applies since 1 January 2015 to supplies of telecommunications-, broadcasting-, and electronic services to a final consumer, which locates the place of supply in the country of the customer. It has indeed been decided to implement an optional mini One Stop Shop (MOSS). Actually, this represents an extension of an already existing system, the One Stop Shop, which simplifies VAT obligations for non-EU suppliers of electronic services to EU customers. As mentioned by the European Commission,[104] the implementation of the above-mentioned new rule: '*makes it necessary to broaden the current scope of the existing One Stop Shop system*'. This system can be used by digital suppliers to account for their VAT liability online in their Member State of registration rather than obliging them to register in each Member State of consumption. The suppliers may therefore register, declare and pay the VAT due in other Member States: '*via a single web portal in one single Member State, the Member State of identification*'.[105]

The Commission has issued guidelines regarding the concrete functioning of the MOSS.[106] It represents an important progress towards the simplification of all the VAT obligations within the EU, in line with all the above-mentioned proposals made in order to dispose of a better and fraud proof VAT system.

It will be interesting to see how the MOSS will work, also from a VAT fraud perspective. The MOSS could indeed become the proposed, easily accessible, online platform (compare *supra*) that could be used by the VAT parties to quickly dispose of

103. International VAT/GST Guidelines on place of taxation for business-to-consumer supplies of services and intangibles, Discussion Draft for Public consultation, 18 Dec. 2014–20 Feb. 2015, p. 8, http://www.oecd.org.
104. European Commission, 'Taxation: Developing the One Stop Shop for cross border VAT compliance', 13 Jan. 2012, http://europa.eu/rapid/press-release_IP-12-17_en.htm.
105. Report from the Commission to the Council and the European Parliament on the application of Council Regulation (EU) No. 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax, 12 Feb. 2014, at 15, http://ec.europa.eu.
106. These guidelines were issued in October 2013 and June 2014. For more information, see P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 786; M. Lamensch (2012): 'Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?', 1 WJOVL 1 of 2012 at 6–9.

all the relevant needed information in order to ensure the correct application of location criteria and therefore the absence of fraudulent behaviour.[107] The success of the MOSS will have an impact beyond the digital economy: indeed, in a 2014 Communication, the European Commission has indicated that this system should be extended to supplies of services and goods other than the e-transactions. Some authors are also in favour of such an extension.[108]

New technologies and new business models create some difficulties for the application of the traditional VAT rules. But this could also be the opportunity to use this new e-environment to rethink the EU common tax system[109] and, among others, to adapt the way in which VAT fraud is fought. Beyond the specific reforms presented in this article (use of electronic devices, online tools, etc.), one could wonder whether an efficient VAT anti-fraud strategy would not necessarily require setting up a common EU digital VAT administration, which would provide for the traditional functions of a tax administration (information, assessment, collection and control) but completely on-line. More than ever, the fragmentation resulting from the existence of twenty-eight different bodies presents many inconveniences and very little, if no, advantages. As the MOSS has shown, digital supplies are the laboratory in which solutions will be elaborated towards a single, unified EU VAT e-administration, which is undoubtedly the most efficient tool against fraud.

Finally, and most importantly from a legal point of view, new anti-fraud rules and mechanisms will have to be designed in accordance with superior norms, in particular human rights.[110] Indeed, the most remarkable developments that have recently occurred in the VAT case law of the European Court of Justice as well as the European Court of Human Rights, concern the application of individual rights and freedoms contained in the Charter of Fundamental Rights of the European Union and in the European Convention of Human Rights and Fundamental Freedoms.[111]

Considering the peculiarities of the matter, one should pay particular attention to the respect of the *ne bis in idem* principle in the area of VAT, not only because of the coexistence in many Member States of administrative and criminal sanctions, but also due to the hybrid nature of the 'sanction' consisting in the refusal to grant the right to deduction in cross-border transactions whenever the supplier has not fully complied either with administrative requirements or with a still rather undetermined duty of

107. P. Centore and M. T. Sutich (2014): 'Taxation and Digital Economy: Europe is Ready', 42 Intertax 12 of 2014 at 787.
108. See B. Westberg (2014): 'Taxation of the Digital Economy: An EU Perspective', 54 European Taxation of December 2014 at 543.
109. J. Li (2003): 'International Taxation in the Age of Electronic Commerce: A Comparative Study', Canadian Tax Foundation, 2003 at p. 2.
110. On human rights and taxation, see P. Pistone, Ph. Baker (2015): 'General report – Subject 2: Practical protection of taxpayers' fundamental rights', IFA Cahiers de droit fiscal international, Volume 100B, Sdu at 21–74: G. Kofler, M. Poiares Maduro, P. Pistone (éd.) (2011): 'Human rights and taxation in Europe and the world', Amsterdam, IBFD Publications, 2011.
111. See on the *ne bis in idem* principle (Article 50 of the Charter), CJEU Case C-617/10 *Akerberg Fransson of 26 February 2013*, as well as ECtHR, 10 February 2009, *Zolotukhin v. Russia* (application No. 14939/03) and 27 November 2014, *Lucky Dev v. Sweden* (application no. 7356/10).

diligence. Moreover, in the digital world, privacy becomes a matter of utmost concern: the constitution of mega-databases containing all sorts of information on taxable persons, taxable transactions and customers would have to be realized in compliance with the data protection standards laid down by international courts.[112]

112. On confidentiality and privacy in tax matters, see E. Kristoffersson, M. Lang, P. Pistone, J. Schuch, C. Staringer, and A. Storck (eds)(2013): 'Tax secrecy and tax transparency: the relevance of confidentiality in tax matters', Peter Lang, Frankfurt, 2013; Ph. Malherbe, E.Traversa (2014): 'Du secret en droit fiscal' in V. Cassiers/ S. Gilson (coord.) (2014): 'L'entreprise et le secret', Larcier, 2014, p. 265–302; E. Traversa and G. D'Angelo (2010): 'Diritto tributario e privacy: un binomio critico' in L. Bolognini, D. Fulco, P. Paganini (eds) (2010) 'Next privacy: Il futuro dei nostri dati nell'era digitale', RCS ETAS of 2010 at 230–249.