jurisdiction is always the destination jurisdiction, businesses do not directly assume tax burdens as they can be shifted to final consumers, and the existing multilateral treaty on mutual administrative assistance in tax matters is applied to VAT too. However, as the book shows, there are still substantial challenges experienced. The wild differences in the design and implementation of the destination principle on cross-border digital supplies have not been effectively coordinated by any international framework, and the risks of double taxation, revenue losses due to non-taxation, and increased compliance burdens are significant. There is a need to reflect on the lessons and prospects of VAT at this critical juncture in the development of the tax in the digital age.

This book comprises two major parts. It starts with current practices, with details of national and common market rules on the application of VAT to cross-border digital supplies. This includes analyses of VAT rules in both developed and developing jurisdictions as well as traditional and modern VATs in terms of legal design. The experiences of these jurisdictions illustrate the development of options for international coordination or harmonization of VAT systems.

The second part of the book focuses on lessons and prospects of VAT in its further development in the continuing digitalization of the economy. It examines the impact of non-binding OECD guidance on VAT development with regard to taxation of cross-border supplies of services and intangibles, conceptual and administrative challenges posed by a rapidly evolving international economy, and how lessons can be applied to improve the consistency in the application of taxation across borders. This part also considers the broader international tax law and institutional aspects of a multilateral response to VAT cross-border issues.

The book aims to provide the first systematic research on international VAT harmonization, focusing on the most challenging issues facing VATs in the contemporary global economy. It seeks to provide timely insights for tax policy development in the world's most important consumption tax, the VAT.

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Digital Supplies in a Cross-Border Context

The EU Perspective on VAT Coordination

Edoardo Traversa, Marie Lamensch, and Elena Masseglia

I. Introduction

Ensuring the correct collection of value-added tax (VAT) on digital sales has become a major issue for governments around the world. One of the main difficulties is that it is challenging, if not impossible (both legally and practically), for a state to compel and control businesses established outside their jurisdiction to collect VAT on their behalf. The level of VAT compliance on cross-border transactions (representing a large proportion of online sales) is therefore largely dependent on the 'goodwill' of foreign businesses. This lack of control over foreign businesses has an impact not only on the revenue collected but also on domestic businesses, which are subject to real controls and suffer from unfair competition from foreign businesses which do not charge VAT correctly on their sales without being concerned.

Many states are considering how best to proceed, notably under the auspices of the Organisation for Economic Co-operation and Development (OECD).[1] Recently, there has been a clear trend towards involving platforms in the process of collecting VAT on online purchases.[2] Since VAT is a tax on economic transactions which was designed in the mid-20th century, at a time when intermediation existed but remained the exception, the emergence of *digital* supplies and their different business models is a clearly disruptive element. The tax burden may, indeed, vary according to the business model chosen by digital businesses to operate their activities. Elements to be taken into account include the nature and structure of the activities, the role played by intermediaries (usually digital platforms), and their

[1] OECD, *International VAT/GST Guidelines* (OECD 2017). The World Customs Organization has also set up an e-commerce working group to map out possible policy responses that could be proposed. In June 2018, it published *Framework of Standards on Cross-Border E-Commerce*, which addresses, among other things, the issue of VAT/goods and services tax (GST) collection and customs duties on imports: World Customs Organization, *Framework of Standards on Cross-Border E-Commerce* (World Customs Organization 2018).

[2] See eg European Economic and Social Committee, 'Taxation of the Collaborative Economy—Analysis of Possible Tax Policies Faced with the Growth of the Collaborative Economy' (2017), ECO/434–EESC-2017-02946-00-00-AC-TRA (IT) paras 6.3–6.7; Arthur Cockfield, Walter Hellerstein, and Marie Lamensch, *Taxing Global Digital Commerce* (Kluwer 2020) § 5.02.

relationship with the suppliers and the consumers and the nature of the supplies performed by the initial suppliers ('underlying supply') as well as the places where suppliers, platform, and consumers are located.

Against this background, this chapter aims to highlight basic VAT conceptual issues that arise with respect to digital supplies (section II). Section III discusses recent EU legislative developments imposing new VAT collection and reporting obligations on digital platforms and identifies a number of grey zones or questions that currently remain unanswered. Final comments and conclusions are offered in section IV.

II. Key Concepts of VAT in the EU Regarding Digital Supplies

A. The Notion of Digital Supply in EU Law

The notion of digital supply in the everyday language may refer to two types of transactions. In a narrow sense, it may refer to digital services, that is, supplies taking place exclusively digitally and not involving any physical goods. The European Union (EU)-harmonized VAT system[3] has its own definition of 'electronically supplied services' and covers transactions such as website maintenance, software creation and sale, streaming services, and distance teaching.[4] Such supplies are considered taxable when they are carried out by a taxable person, that is, in the course of an economic activity and with a view to generating income with a certain degree of permanence.[5] Electronically supplied services, together with telecommunications and media services, benefit from a specific regime as regards localization rules (in particular in a business-to-consumer (B2C) context) and collection mechanism (see section III).

In a broader sense, it may refer to supplies of (physical) goods and services that are being sold or exchanged via a digital intermediary. Those transactions are, in principle, subject to VAT, provided that the supplier qualifies as a taxable person acting as such and provided they are made for consideration. Consumer-to-consumer (C2C) supplies, such as those taking place on eBay between two non-taxable persons, however, remain outside the scope of VAT.

It is important to clarify that under EU law, VAT may also be due on supplies made in the context of a non-profit activity. It may, indeed, happen that the suppliers

[3] The harmonized EU VAT system is mainly regulated by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1 (hereafter VAT Directive). See also Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, [2011] OJ L 77/1 (hereafter VAT Implementing Regulation).

[4] VAT Directive (n 3) Annex III; VAT Implementing Regulation (n 3) Art 7 and Annex I.

[5] See VAT Directive (n 3) Art 2 (and the case law of the Court of Justice of the European Union

do not act within a business activity for commercial law or income tax reasons. For example, a platform serves a non-profit objective such as community building, or goods and services on the platform are exchanged without consideration or as a peer-to-peer transaction.[6] Nevertheless, for VAT purposes, transactions that are made for consideration generally fall within the scope of VAT, independently of the goal pursued by their supplier (if, of course, the supplier can be characterized as a taxable person). In other words, even supplies made in the framework of a non-profit activity—whether intended or not—may be subject to VAT.[7]

Another important clarification is that many EU Member States apply a threshold below which activities of a taxable persons may not be subject to VAT (the so-called 'SME [small and medium-sized enterprises] exemption'[8]), which, as a result, tends to exclude those non-profit transactions from actual VAT collection. However, it should be kept in mind that this exemption is not granted on account of the goal pursued by the supplier but by reason of the amount of the consideration received for those supplies. Moreover, Member States usually only grant this turnover-based exemption to established taxable persons, which will change as of 2025, but for the time being, it means that small undertakings not established in the concerned Member State have no access to such a special scheme.[9]

In any case, even if the suppliers of the initial service or good are not considered to carry out an economic activity for VAT purposes or have a turnover below the exemption threshold, this does not mean that the digital intermediary will be exempt from VAT if, in its relationship with their suppliers or end users, it carries out taxable transactions under EU VAT law (supplies of intermediation services). As soon as the intermediation service is made for consideration, VAT is likely to apply.

Depending on the involvement of the digital platform in the underlying transactions, it can be regarded as a mere intermediary, whose role is limited to putting a buyer and a seller in contact or, more broadly, as a provider of the underlying service or good. The legal characterization as an intermediary (from an EU VAT perspective) or as an initial supplier has important consequences both on the place of taxation and on the amount of VAT due. As a matter of fact, the characterization of the transaction will affect the taxable event (time and place where the VAT liability arises), the taxable amount, and the level of the VAT rate, which vary across

[6] On peer-to-peer and VAT, see Cristina Trenta, *Rethinking EU VAT for P2P Distribution* (Kluwer 2015).

[7] Ole Gjems Onstad and Peter Melz, 'NPOs (Charities) and VAT' in Frans Vanistendael (ed), *Taxation of Charities* (International Bureau of Fiscal Documentation (IBFD) Publications 2015).

[8] VAT Directive (n 3) Art 284.

[9] Council Directive (EU) No 2020/285 of 18 February 2020 amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises and Regulation (EU) No 904/2010 as regards the administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises, OJ L 62/1313, Art 3.

the Member States but also within each Member State, depending on the type of services or goods which can benefit from a reduced rate.

B. Place of Supply of Digital Supplies under EU Law

The EU common VAT system provides for location nexuses which vary according to the legal characterization of the transaction as well as the parties involved in the transactions.

If the transaction can be characterized as a supply of goods (tangible property), it is taxable in the Member State where the goods are located at the time of the supply. If the goods are transported, VAT is due in the Member State of arrival of the goods (except if the client is an end user and the supplier's annual turnover with respect to online sales to end users is below EUR 10,000, in which case, the supply will, in principle, be taxed in the Member State of departure of the goods).[10]

If the transaction qualifies as a supply of services (ie any transaction that does not involve a tangible good), VAT will normally be collected in the country of the supplier if the client is a final customer (Article 45 of the VAT Directive) or in the country of the client if the client is a taxable person (Article 44 of the VAT Directive). There are many exceptions to this latter rule, however. For example, certain services which performance can be clearly identified with one territory (such as hotel and restaurant services, services relating to immovable property, or cultural or educational services) are located in the country where they are performed. Another exception concerns electronically supplied services which are always taxable in the country of the customer, even if that person is an end user (Article 58 of the VAT Directive).[11] In practice, the multiplicity of these alternative criteria for B2C services and the uncertain status of digital platforms for VAT purposes generates doubts as to the place where VAT has to be charged and paid. For example, digital platforms dealing with intermediation for hotel reservation services (such as booking.com) could be subject to VAT in different jurisdictions.[12] If those services are characterized as services relating to immovable property or services ancillary to such services, they will be taxable in the jurisdictions where the immovable

[10] VAT Directive (n 3) Arts 33 and 34. If the client is a taxable person, the supply will also be subject to VAT in the Member State of arrival, as an 'intra-community acquisition'. Specific rules apply for certain categories of taxable persons such as small enterprises, agricultural undertakings, or public bodies.

[11] On digital supplies, see Marie Lamensch, *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform* (IBFD Publications 2015).

[12] On intermediation services in the hotel sector, see European Commission, 'Value Added Tax Committee, Guidelines Resulting from the 89th Meeting of 30 September 2009, Document A—taxud.d.1(2009)405067–639' in 'Guidelines Resulting from Meetings of the Vat Committee Up until 28 April 2022' <https://taxation-customs.ec.europa.eu/system/files/2023-05/guidelines-vat-commit

property is located. In contrast, if they are seen as services falling within the general rule, VAT will be applied in the jurisdiction where the digital intermediary is located if the client is a non-taxable person or in the jurisdiction of the client, if that person is a taxable person. Finally, some Member States prefer to treat the services provided by digital intermediaries to their users as electronically supplied services, to which different rules apply (as discussed above).

This example illustrates the importance of identifying the relevant transaction for VAT purposes. Depending on how contracts are drafted, and assuming that there is no abuse under EU VAT law, it can be the relationship between the digital intermediary and the end customer or between the platform and the initial supplier. Usually, the fact that the commission paid to the digital intermediary is paid by the final customer or by the supplier will determine where the transaction takes place. But a recharacterization by another domestic tax authority cannot be excluded, which could lead to double VAT liability unless the different tax authorities manage to reach an agreement (which is unlikely because of the lack of incentive) or the Court of Justice of the European Union (CJEU) intervenes.[13]

III. EU Legislative Developments Involving Collection of VAT on Digital Supplies

There have been two major reforms at the EU level as regards the VAT treatment of digital supplies involving services and goods.

A. The Regime Applicable to the Supplies of Electronic Services since 2015

Since 2015, within the EU, platforms through which electronic services[14] are supplied to consumers residing in one of the Member States must take responsibility for collecting and remitting the VAT due on these services.[15] A one-stop-shop

[13] On 8 December 2022 the European Commission released a proposal to harmonize the VAT treatment of the facilitation services offered by platforms, comprising amendments to the VAT Directive (n 3), VAT Implementing Regulation (n 3), and European Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268/1 (the proposal is to always tax the intermediation services in the Member State where the underlying transaction is taxed). Unanimity among the Member States is required to have this proposal adopted. See European Commission, 'Taxation: Embracing the Digital Transition to Help Fight VAT Fraud and Support EU Businesses' (Press Release 8 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7514> accessed 27 July 2023.

[14] For example, the provision of software, music, or films for download and other applications whose provision is fully automated.

[15] In order to simplify collection, a one-stop shop (OSS) system has been introduced. In practice, platforms register in a single Member State and remit the VAT due on services provided to all Member

(OSS) system is available to them for the periodic payment of VAT in a single Member State (of their choice). If they do not register at the OSS, they must register in each Member State where VAT is due.

EU Council Implementing Regulation 1042/2013 has rendered platforms liable for the collection of VAT in electronic supplies made through them in specific circumstances.[16] Based on the legal fiction laid down in Article 28 of the VAT Directive, the EU rules have been amended to make it clear that any taxable person who takes part in the supply of electronically supplied services is deemed to be acting in their own name, albeit on behalf of the initial provider of these services.[17] In this case, a B2B supply is deemed to take place between the initial supplier and the platforms and a deemed B2B or B2C supply is taking place between the platform and the customer. To remit VAT in B2C situations, the platform is invited to register via a simplified procedure to remit the VAT that they are liable to collect: the so-called mini one-stop-shop system (MOSS). In practice, platforms may register in one Member State (Member State of identification) and declare and remit all the VAT due on the supplies to which they take part in single periodical (quarterly) returns.

A key question is the scope of application of Article 9a of the VAT Implementing Regulation regarding digital platforms. The European Commission has issued 'explanatory notes' to guide digital platforms in determining whether or not they are liable to collect the VAT on supplies of electronic services made through them.[18] In principle, the presumption of liability that it entails does not apply (ie can be rebutted) when the initial service provider is explicitly indicated as the supplier by the taxable person taking part in the supply, and this is reflected in the contractual arrangements with the customer because the initial supplier is either identified on the invoice issued by each person taking part in the B2B supply or in the customer's bill of receipt in the case of a B2C supply. When these (cumulative) conditions are met, the initial provider of the electronically supplied service will remain the person liable for assessing and collecting the tax.

[16] Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services, [2013] OJ L 284/1.
[17] VAT Implementing Regulation (n 3) Art 9a, as amended by Council Implementing Regulation (EU) No 1042/2013 (n 16).
[18] European Commission, '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 April 2014) <https://vat-one-stop-shop.ec.europa.eu/system/files/2021-07/explanatory_notes_2015_en_0.pdf. The Explanatory Notes, 48, confirm that Art 18(2) is optional for suppliers as long as the customer has not communicated their VAT number.

B. The New Regime Applicable to Intra-EU Distance Sales (as of July 2021)

In 2017, EU Member States adopted an 'e-commerce VAT package'.[19] The new rules, applicable since 2021, impose new obligations on taxable persons who 'facilitate, through the use of an electronic interface such as a marketplace, platform, portal or similar means', certain sales involving non-EU businesses, namely, domestic or intra-EU sale of goods by a taxable person established outside the EU ('distance selling') or an import of goods ('distance selling from a third country'). Those digital intermediaries, on the one hand, have to collect and keep details of the underlying transactions that they facilitate (for ten years) and, on the other, are 'deemed to have received and delivered the goods themselves' so as to be directly liable to VAT on those transactions.

The VAT Implementing Regulation (as amended)[20] defines the term 'facilitates' very broadly. It covers all cases where an electronic interface enables a buyer and a supplier to come into contact, resulting in a delivery of goods to that buyer.[21]

Under new Article 14a(2) of the VAT Directive, these platforms are therefore deemed to receive the goods from the seller (deemed B2B supply) and are then deemed to supply the goods onward to the final consumer (deemed B2C supply). Importantly, while the deeming provision applies in the case of sales facilitated by platforms but made by non-EU suppliers, it applies in the case of both intra-EU and domestic sales; that is, the goods are already located in the Member State of the customer at the time of the sale due to, for example, storage in a fulfilment house. Importantly also, the deeming provision applies irrespective of whether the platform is established within or outside the EU and whether it is registered for the OSS or not (the MOSS for electronic services was extended to distance supplies of goods and platforms in 2021 and has become the OSS). This deeming provision is most probably inspired from the European Parliament legislative resolution of

[19] The package consisted of one directive (Council Directive 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ L 348/7 (hereafter 2017 Amending Directive)) and two regulations (Council Implementing Regulation (EU) No 2017/2459 of 5 December 2017 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, [2017] OJ L 348/32 (hereafter 2017 Implementing Regulation) and Council Regulation (EU) No 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax, [2017] OJ L 348/1 (hereafter Amending VAT Administrative Cooperation Regulation)).
[20] Council Implementing Regulation (EU) No 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods, [2019] OJ L 313/14.
[21] VAT Implementing Regulation (n 3) Art 5b.

30 November 2017 (proposed amendment 7).[22] However, the rapid adoption of this provision means that practical issues were not discussed by the Member States.

A first and crucial question is to determine who (ie which digital intermediary) is caught by the deeming provision. Under the very broad definition of 'facilitates' noted above, only digital intermediaries that do not perform any of the following tasks are excluded by the VAT Implementing Regulation from this 'own responsibility' system:

(1) laying down, either directly or indirectly, the general conditions under which the delivery of goods is made;
(2) participating, either directly or indirectly, in the collection of payment from the customer;
(3) participating, either directly or indirectly, in the ordering or delivery of goods.

According to the VAT Implementing Regulation, a digital intermediary is also outside the scope of this 'own responsibility' system if it is only responsible for one of the following activities:

(1) processing of payments in connection with the delivery of goods;
(2) the placement of advertisements for, or the promotion of, goods;
(3) redirecting or transferring purchasers to other electronic interfaces where goods are offered for sale, without further intervention in the delivery.

Common sense would perhaps suggest that a platform could only be required to collect VAT in the case where it handles the payment and is able to withhold the VAT. However, it seems that the European Commission and EU Member States are willing to seek a much broader scope of application. In this case, it remains unclear how digital intermediaries are supposed to collect the VAT from the business they host and to what extent they can be held liable for its payment at a later stage. (What happens if the business does not pay or goes bankrupt in the meantime?) As new Article 66a of the VAT Directive provides that 'in respect of supplies of goods for which VAT is payable by the person facilitating the supply pursuant to Article 14a, the chargeable event shall occur and VAT shall become chargeable at the time when the payment has been accepted', it may even result in the obligation for them to pre-finance the VAT.

A second question is how digital intermediaries should handle reimbursement of VAT pursuant to returns of goods. In the case where the platforms collect the

[22] European Parliament, Legislative resolution of 30 November 2017 on the proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added

VAT, it indeed seems logical to require them to reimburse it if necessary. The question is what kind of evidence will be required by the tax authorities and how much it will cost them. The issue was not addressed in the impact assessment since this part of the directive was not part of the Commission's proposal.

A third question is a more technical one. The deeming provision indeed creates the fiction of two subsequent supplies with transport. In VAT, however, in a chain transaction there can be only one supply with transport. In this case, the transport is to be linked to the deemed B2C supply (from the digital intermediary to the consumer), which means that the first supply (from the initial supplier to the digital intermediary) is considered a local supply, taxable where the goods are located at the moment of the supply. In order to avoid the incurring by that digital intermediary of VAT in the country where the transport of the goods starts, a specific exemption has been introduced which means that no VAT needs to be charged on this first supply. However, an invoice must be issued in each case (and this obligation cannot be waived by the Member States).

Digital intermediaries will also have to keep records of all the supplies that they facilitate in sufficient detail to enable the tax authorities of the Member States to maintain control. They will have to keep these records for a period of ten years after the end of the year during which the transaction was carried out and will have to make these records available electronically on request. Once again, the financial impact due to extra compliance costs has not been assessed and the issue of enforcement on non-EU digital intermediaries arises.[23]

C. The New Regime Applicable to B2C Imports from Outside the EU

Another objective of the 'e-commerce VAT package' adopted in 2017 was to restore a level playing field between EU and non-EU suppliers of goods. Since the 1980s, a VAT exemption has applied on imports below a certain value (from EUR 10 to EUR 22) because the cost of collecting VAT on these imports would exceed the expected revenue.[24]

With the development of e-commerce, however, imports have multiplied and this results in not only an increasing loss of VAT revenue for the Member States (due to mislabelling or undervaluing higher-value goods to take advantage of such

[23] For a qualitative analysis of the impact of these new rules, see: Marie Lamensch and others, 'New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment' (2021) 13(3) World Tax Journal 441.

[24] See former Council Directive 83/181/EEC of 28 March 1983 determining the scope of Article 14(1)(d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation

VAT exemption)[25] but also a competitive disadvantage for EU suppliers who do not benefit from the exemption and have to charge VAT (at a rate of up to 27 per cent) on their supplies of low-value goods to EU consumers. Such a mismatch has led to the setting up of tax-saving schemes by economic operators.[26] A related issue is that non-EU suppliers routinely undervalue their supplies in order to fraudulently benefit from the exemption.[27]

The exemption for imports of negligible value previously provided for in Article 23 of Council Directive 2009/132/EC of 19 October 2009[28] has therefore been removed in order to avoid distortion of competition between suppliers inside and outside the EU and to mitigate losses of tax revenue.[29] Since 1 July 2021, all goods bought online by EU consumers from non-EU retailers are thus subject to VAT regardless of their value.

To facilitate compliance and 'to compensate for the increase in volume of inbound transactions on which VAT will be due',[30] Council Directive 2017/2455, included in the 'e-commerce VAT package',[31] has introduced special schemes to simplify the collection of import VAT on low-value consignments (less than EUR 150) in case of B2C distance sales: (i) the Import One-Stop Shop (IOSS) and (ii) special arrangements when the IOSS is not used.[32] It can be noted that excise goods are excluded from these special schemes.[33]

The new concept 'distance sales of goods imported from third countries or third territories' defined in the VAT Directive refers to the supplies of goods dispatched

[25] European Commission, 'Modernising VAT for Cross-Border B2C E-Commerce', COM(2016) 757 final, 1 December 2016, 2; Ernst & Young, *Assessment of the Application and Impact of the VAT Exemption for Importation of Small Consignments: Executive Summary* (European Commission 2015) <https://op.europa.eu/en/publication-detail/-/publication/cf58afdb-e2f7-4591-b4d7-59f00bf92dd2/language-en> accessed 27 July 2023; Marta Agnieszka Papis-Almansa, 'VAT and Electronic Commerce: The New Rules as a Means for Simplification, Combatting Fraud and a More Level Playing Field' [2019] (20) European Research Area Forum 211–12; Marie Lamensch, 'Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One' (2018) 27(4) European Community Tax Review 192.

[26] On the specific UK situation (and the Channel Islands), see Antony Seely, 'VAT on Postal Packages' (House of Commons Library Briefing Paper 4155, 9 June 2017).

[27] See United Kingdom Parliament, House of Commons, Committee of Public Accounts, 'Tackling Online VAT Fraud and Error' (HC 312, 18 November 2017). See also Cockfield, Hellerstein, and Lamensch (n 2).

[28] Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods, OJ L 292/5.

[29] See 2017 Amending Directive (n 19) recital 10; European Commission, 'Modernising VAT' (n 25) 4.

[30] Papis-Almansa (n 25) 212.

[31] 2017 Amending Directive (n 19). See also 2017 Implementing Regulation (n 19); European Council, Directive (EU) No 2019/1995 of 21 November 2019 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods, OJ L 310/1.

[32] VAT Directive (n 3) Title XII, ch 7.

[33] ibid Art 369l. According to Art 2(3) of the VAT Directive, 'products subject to excise duty' are energy products, alcohol and alcoholic beverages, and manufactured tobacco, as defined by EU legislation, but not gas supplied through a natural gas system situated within the territory of the EU or any

or transported from a third country or third territory by, or on behalf of, the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, to a customer in a Member State (whether a taxable person, or a non-taxable legal person whose intra-Community acquisitions of goods are not subject to VAT, or any other non-taxable person).[34] New means of transport and goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier, are excluded from its scope of application.[35]

The European Commission clarifies that 'the goods must be physically dispatched from a third country or third territory to be considered as distance sales of imported goods'.[36] Thus, if they are placed in a customs warehouse in an EU Member State from which subsequently goods are supplied to customers in the EU, such supplies are not covered by the concept of distance sales of imported goods.[37] It is worth noting that the IOSS can also be used by EU operators carrying out distance sales of goods imported from third territories or third countries to EU customers.[38]

With respect to the identification of the transaction, as Marta Papis-Almansa specifies, a transaction can be identified both as an 'importation of goods' and a 'distance sale of goods imported from third territories and third countries',[39] but it will be classified under only one of the two categories (and it will be taxed accordingly), depending on whether the IOSS applies or not.

Moreover, as already mentioned, a specific value has to be taken into account. IOSS scheme and special arrangements apply to goods of an *intrinsic value* not exceeding EUR 150. This threshold follows the threshold of the customs duty exemption for consignments of negligible value under the Duty Relief Regulation[40] (DRR) which are defined as 'goods the intrinsic value of which does not exceed a total of EUR 150 per consignment'.[41] Article 1, point (48) of the Commission Delegated Regulation (EU) No 2015/2446 of 28 July 2015[42] supplementing the Union Customs Code (UCC)[43] states that 'intrinsic value' means

[34] ibid Art 14(4)(2); VAT Implementing Regulation (n 3) Art 5a.

[35] VAT Directive (n 3) Art 14(4)(2)(b).

[36] European Commission, 'Explanatory Notes on VAT E-Commerce Rules' (September 2020) 52 <https://taxation-customs.ec.europa.eu/system/files/2020-09/vatecommerceexplanatory_notes_30092020.pdf> accessed 27 July 2025 (hereafter European Commission, '2020 Explanatory Notes').

[37] ibid.

[38] VAT Directive (n 3) Art 369m.

[39] Papis-Almansa (n 25) 212.

[40] European Council, Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, OJ L 324/23, Arts 23–24 (hereafter Duty Relief Regulation).

[41] Products subject to excise duties (alcoholic products, perfumes, toilet waters, tobacco and tobacco products) are out of the scope of the customs duty relief.

[42] Commission Delegated Regulation (EU) No 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, [2015] OJ L 343/1 (Delegated Act to the Union Customs Code; hereafter DAUCC).

[43] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013

a) for commercial goods: the price of the goods themselves when sold for export to the customs territory of the Union, excluding transport and insurance costs, unless they are included in the price and not separately indicated on the invoice, and any other taxes and charges as ascertainable by the customs authorities from any relevant document(s);
b) for goods of a non-commercial nature: the price which would have been paid for the goods themselves if they were sold for export to the customs territory of the Union.

Transport and insurance costs are thus excluded from calculation of the intrinsic value, together with any other costs 'that do not reflect the value of the goods in themselves',[44] when they are separately and clearly indicated in the invoice. 'Other tax or charges' means 'any tax or charge levied on the basis of the value of the goods or on top of a tax or charge applied to such goods'.[45] The European Commission has clarified that the same exclusion of costs, taxes, and charges mentioned in the provision at stake with respect to commercial goods applies also to goods of a non-commercial nature.[46]

It should be noted that the intrinsic value is referenced for the application of the DRR customs duty relief and the use of IOSS scheme. VAT is, however, charged on the total value calculated according to Article 85 and subsequent Articles of the VAT Directive; transport and insurance costs are thus still included in the import VAT taxable amount when it is collected.[47]

As regards the application of the concept of 'consignment', to be considered as one single consignment, goods must be dispatched simultaneously by the same consignor to the same consignee and covered by the same transport contract. In the event that goods are dispatched or shipped separately, they should be considered as separate consignments, even if ordered by the same person.[48]

The IOSS is still optional: the IOSS procedure is not mandatory for consignments below EUR 150. Special arrangements for distance sales of imported goods in consignments not exceeding EUR 150 may be used instead, or the online sellers can choose to have import VAT collected by the customs declarant (eg courier) from the final customer. Under the special arrangements, the customer pays the

[44] As tooling costs and licence fees; see European Commission, 'Importation and Exportation of Low Value Consignments—VAT E-Commerce Package, Guidance for Member States and Trade' (Revision 1, Final, Taxud/A2, 4 May 2021) 10–11 <https://vat-one-stop-shop.ec.europa.eu/system/files/2022-01/guidance_on_import_and_export_of_low_value_consignments_en.pdf> accessed 27 July 2023; European Commission, '2020 Explanatory Notes' (n 36) 54–55, 68ff.
[45] European Commission, '2020 Explanatory Notes' (n 36) 54--55, 68ff.
[46] ibid.
[47] There is no longer a VAT exemption for imported goods based on value. See Thomas Bieber, 'Customs Valuation and Import VAT' (2019) 14(2) Global Trade and Customs Journal 73, 75.
[48] European Commission, 'Importation and Exportation of Low Value Consignments' (n 44) 11;

VAT to the person presenting the goods to customs[49] (as a postal operator, express carrier, or a customs agent), who effects the payment of such VAT.[50] VAT collected under this special arrangement must be reported electronically in a monthly declaration and it must be paid by the deadline applicable to the payment of import duty in accordance with the UCC.[51]

In order to use the IOSS, the supplier or the electronic interface (or their intermediaries) needs to register in the IOSS through the relevant electronic portal[52] of one EU Member State (the 'Member State of identification').[53] Upon registration, the tax authorities of the Member State of identification issue an IOSS VAT identification number to the supplier or their intermediaries.[54] Non-EU sellers from countries without a mutual assistance agreement with the EU on VAT[55] need to appoint a fiscal representative acting as intermediary, which receives a separate IOSS VAT identification number for each taxable person they represent.[56] This identification number may be used for all the distance sales of imported goods to EU customers under the IOSS.[57] The IOSS VAT identification number must then be indicated on all packages sent to the EU customers under the scheme in question to show to customs authorities that VAT has being properly paid. Customs clearance thus becomes quicker.

Indeed, when a good is ordered and the seller has chosen to apply the IOSS procedure, the chargeable event of the supply of goods occurs and VAT becomes chargeable at the time when the payment has been accepted (eg when the customer receives the payment confirmation),[58] which is considered the time of supply.[59]

[49] The VAT Implementing Regulation (n 3) Art 63d clarifies that the condition 'presenting the goods to customs on behalf of the person for whom the goods are destined' is fulfilled if the person presenting the goods to customs declares their intention to make use of the special arrangements and to collect the VAT from the person for whom the goods are destined.
[50] VAT Directive (n 3) Arts 369y–369za.
[51] ibid, Art 369zb. The monthly payment of import VAT in this case may be subject to the conditions applicable for the deferment of payment of customs duty under the UCC, pursuant to VAT Implementing Regulation (n 3) Art 63d. See European Commission, 'The Union Customs Code (UCC)—Introduction' <https://taxation-customs.ec.europa.eu/union-customs-code-ucc-introduction_en> accessed 28 July 2023.
[52] Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, [2010] OJ L 268/1 (hereafter VAT Administrative Cooperation Regulation) Art 47c.
[53] To establish the Member State of identification, consideration shall be made to whether or not the seller is established or has a fixed establishment in the EU and whether or not the seller has designated an intermediary which has established his or her business in the EU or not (VAT Directive (n 3) Art 369n(2)(3)). For the information to be given to the EU Member State of identification, VAT Directive (n 3) Art 369p.
[54] ibid Art 369q; VAT Implementing Regulation (n 3) Art 57e.
[55] See Commission Implementing Decision (EU) No 2021/942 of 10 June 2021 laying down rules for the application of Council Directive 2006/112/EC as regards the establishment of the list of third countries with which the Union has concluded an agreement on mutual assistance similar in scope to Council Directive 2010/24/EU and Council Regulation (EU) No 904/2010, [2021] OJ L 205/80.
[56] VAT Directive (n 3) Art 369q(3).
[57] ibid Art 369q(4).
[58] Regardless of when the actual payment of money is made; see VAT Implementing Regulation (n 3) Arts 41a and 61b.

VAT is paid as part of the purchase price by the customer and is collected by the supplier or the digital intermediary (if deemed supplier). With the IOSS, the total price of the transaction is known by the customer at the moment of purchase. At the time of the importation, if the intrinsic value of the consignment does not exceed the threshold of EUR 150 and the IOSS number is valid,[60] the release for free circulation is thus exempted from VAT[61] to avoid double taxation;[62] it has already been levied. If the supplier or the digital intermediary does not use the IOSS, VAT is paid upon importation into the EU, pursuant to Articles 70 and 71 of the VAT Directive.

VAT is charged and collected at the rate applicable to the goods concerned in the EU Member State where the supply takes place. If the IOSS is used, the place of supply of distance sales of goods imported from third territories or third countries is the EU Member State in which dispatch or transport of the goods to the customer ends.[63] As specified by the Commission in its Explanatory Notes, in practice, 'this is the Member State where the customer indicates that the goods are to be delivered'.[64] It is the 'Member Sate of consumption'.[65] If the special scheme in question is not applied, the place of *supply* of distance sales of goods would be the third country or territory (where the transport begins)[66] and, thus, outside VAT Directive territorial scope of application; the transaction will be taxed as an *importation*.

Suppliers and platforms using the special scheme in question (or their respective intermediaries) must submit a VAT return for each month, by electronic means, to the tax authorities of the Member State of identification in the IOSS, whether or not distance sales of imported goods have been carried out. The VAT return shall be submitted by the end of the month following the end of the tax period covered by the return.[67] By the same deadline, online sellers must pay the VAT, referring to the relevant VAT return.[68] It is then up to the Member State of identification to transmit the relevant information[69] and allocate the VAT to the corresponding Member States of consumption.[70] For all the transactions covered by this special scheme, records must be kept.[71]

60 An electronic verification of the validity of the individual VAT identification number is carried out, see VAT Administrative Cooperation Regulation (n 52) Art 47h.

61 VAT Directive (n 3) Art 143(ca).

62 2017 Amending Directive (n 19) recital 10.

63 VAT Directive (n 3) Arts 33(b) and (c).

64 European Commission, '2020 Explanatory Notes' (n 36) 59.

65 VAT Directive (n 3) Art 369n(2)(4).

66 ibid Art 32; Papis-Almansa (n 25) 213.

67 VAT Direction (n 3) Art 369s. For the content of the VAT return and the amendments, see Art 369t of the VAT Directive (n 3) and, for currencies, Art 369u of the VAT Directive.

68 ibid Art 369v.

69 VAT Administrative Cooperation Regulation (n 52) Arts 47d(2), 47e, and 47i.

70 The VAT Administrative Cooperation Regulation has been amended consequently; Arts 47f and 47g of the Amending VAT Administrative Cooperation Regulation (n 19 in fine).

Customs authorities prepare a monthly listing concerning the total value of imports of low-value goods for each IOSS VAT identification number and make them available to the relevant tax authorities in the EU. The value provided can thus be matched with the one declared in the VAT return.[72]

With the introduction of the IOSS, the customs rules were also modified and adjusted to the new VAT provisions. In particular, it has been seen that when the IOSS is used, the importation of low-value goods into the EU is exempt from VAT. Those goods can be released for free circulation into a Member State other than the Member State of final destination of the goods. Conversely, if they are not covered by the scheme in question and they arrive in a Member State other than the one of final destination, they are placed under the transit procedure[73] to reach the latter, and then they are released for free circulation in the Member State where the dispatch or the transport of the goods ends, as also now specified in the new Article 221(4) of the Implementing Act of the UCC.[74]

According to the European Commission, over EUR 2 billion in VAT revenues has been collected on imports of low-value consignments by Member States and, among them, more than half—approximately EUR 1.1 billion—was collected via the IOSS during its first six months of operation, that is, in the second half of 2021.[75] It has been calculated that EUR 700 million represented new VAT revenue

72 VAT Administrative Cooperation Regulation (n 52) Art 47e; European Commission, '2020 Explanatory Notes' (n 36) 60, 77; European Commission, 'Importation and Exportation of Low Value Consignments' (n 44) 8–9, 40.

73 Under the external transit procedure, non-Union goods may be moved from one point to another within the customs territory of the Union without being subject to any charges, as import duties and VAT (UCC (n 43) Art 226).

74 Commission Implementing Regulation (EU) No 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, [2015] OJ L 343/558 (Implementing Act of the Union Customs Code). In addition, to keep track of them, a customs declaration for release for free circulation must be lodged upon importation, even for these consignments of an intrinsic value not exceeding EUR 150 which benefit from relief from import duty and on which customs do not collect VAT upon importation when the IOSS is used. The possibility of declaring those goods by simply presenting them to customs authorities has been removed and a customs declaration is thus required: Art 143a and column H7 of Annex B to DAUCC (n 42). In addition, transitional measures have been established for the application of the customs declaration of low-value consignments until the upgrade of the National Import Systems referred to in the Annex to European Commission, Implementing Decision (EU) No 2019/2151 of 13 December 2019 establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code, OJ L 325/168. For a more detailed overview of import formalities for low-value consignments, see European Commission, 'Importation and Exportation of Low Value Consignments' (n 44) 13–33; European Commission, 'Importation and Exportation of Low Value Consignments—VAT E-Commerce Package, Guidance for Member States and Trade' (Revision 2, Draft 15 September 2022) <https://taxation-customs.ec.europa.eu/system/files/2022-11/Customs%20Guidance%20doc%20on%20LVC-Clean-20220915.pdf> accessed 28 July 2023.

75 European Commission, 'New EU VAT Rules for E-Commerce: Updated Revenue Figures Point to a Successful Implementation' (news announcement 23 May 2022) <https://taxation-customs.ec.europa.eu/news/new-eu-vat-rules-e-commerce-updated-revenue-figures-point-successful-implementation-2022-05-23_en> accessed 28 July 2023; European Commission, Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age, COM/2022/701 final, 8

(which corresponds to EUR 1.4 billion annually) generated by the abolition of the VAT exemption that previously applied to imports of low-value goods not exceeding EUR 22; moreover, an estimated additional EUR 270 million in VAT has been collected 'as a direct result of the import OSS's capacity to counter fraud and VAT losses due to undervaluation'.[76]

In light of the above, consideration is being given to expanding the use of the IOSS. Moreover, the possibility is under evaluation of making use of the IOSS mandatory (initially, for digital intermediaries facilitating distance sales of imported goods) and the removal of the EUR 150 threshold for its application.[77]

In addition to this major change (VAT collection by non-EU suppliers or transporters rather than by customs authorities), a deeming provision was also inserted in the case of B2C imports up to EUR 150 facilitated by platforms (new Article 14a(1) of the VAT Directive, applicable as of 1 January 2015). In the event that a taxable person facilitates,[78] through the use of an electronic interface such as a marketplace, platform, portal, or similar means, the distance sales of imported goods at stake, that taxable person is again *deemed* to have received and supplied those goods themselves ('deemed supplier').[79] The seller is deemed to supply its goods to the digital intermediary and then the latter to make a supply to the customer, considered a non-taxable person by the digital intermediary.[80] The same comments as above can be made regarding the scope of application of this deeming provision.

An additional issue concerns the major risk of misuse of digital intermediaries' IOSS numbers. As a matter of fact, taxable persons 'facilitating' an import will be liable to pay the VAT on a periodical basis and, as explained above, the import as such should then be exempt. This means that a supplier whose supply has been facilitated through an electronic platform will have to include the IOSS registration number of the digital intermediary in the import declaration in order to benefit from the exemption. The question is then how the same supplier is prevented from using that IOSS registration number when shipping a parcel that was sold directly to an EU customer (without passing through the electronic interface). More generally, how can we prevent anyone from using that number? And what exactly will the liability of the platform be if its IOSS registration number is being misused? As a valid IOSS number means a green light for an exempt import into the EU, the European Commission will quickly have to propose measures in order to avoid any abuse. It is worth recalling that the deeming provision for digital intermediaries

[76] European Commission, 'New EU VAT Rules for E-Commerce: Updated Revenue Figures Point to a Successful Implementation' (n 75).

[77] Council of the European Union, Council Conclusions on the Implementation of the VAT E-Commerce Package, 7104/22, 15 March 2022, point 9; European Commission, Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age (n 75), 10–13.

[78] For the definition of 'facilitates', see the VAT Implementing Regulation (n 3) Art 5b.

[79] VAT Directive (n 3) Art 14a.

was not part of the Commission's initial proposal, and therefore it is logical that accompanying (anti-abuse) measures were not part of their proposal either. What is perhaps more questionable is the adoption of the deeming provision by the Member States without much concern for this major issue.

As noted in earlier in this section, Member States are also committed to issuing monthly listings of imports for each IOSS registered taxable person, including value declarations. The objective is to compare import figures with the IOSS returns data and thereby obtain a rough estimate of compliance. One problem is that comparing what is being declared at import with what is being declared via the IOSS is only useful to the extent that the accuracy of the data declared at import is being checked (otherwise, a foreign vendor from a particular country declaring a value of EUR 3 and paying EUR 3 via the IOSS will look like a match even if the imported good was, in fact, worth EUR 50). With the additional obligations imposed on customs authorities for verifying the validity of IOSS numbers, the further question arises as to whether there will be any time left for them to verify import value declarations. This is not a minor point of detail in view of the massive frauds based on undervaluations that currently take place, as referred to above. It has also to be considered that undervaluation can be used to take advantage of the duty exemption goods of negligible value[81] under the DRR and, taking into account that the import VAT taxable amount is based on the customs value of goods added up with (*inter alia*, the amount of customs duties themselves), this would affect import VAT as well. The amount of import VAT collected would thus be reduced and competition distorted.[82] A second problem is that the comparison may not be relevant from a temporal perspective as the import may take place during a different month from the corresponding IOSS declaration. A third problem is that it does not take into consideration the case of returned goods that do not leave the EU but are sent to outlet centres or even destroyed in the EU. In the end, therefore, while making monthly listing will constitute a cost for the Member States, the question is whether it will serve any purpose.

Also from a business perspective, even if a fraud could be eventually spotted, the question remains whether a digital intermediary whose IOSS number has been misused would be liable for the payment of the VAT.

[81] Goods the intrinsic value of which does not exceed a total of Euro 150 per consignment.

[82] Sergio Messina, 'VAT E-Commerce Package: Customs Bugs in the System?: Analysis of the Issues Undermining the New Import VAT Platform Collecting Model' (2021) 13(1) World Tax Journal 136. That is also why the removal of this customs duty exemption threshold for e-commerce is under evaluation; see Wise Persons Group on Challenges Facing the Customs Union (2022), 'Putting More Union in the European Customs. Ten Proposals to Make the EU Customs Union Fit for a Geopolitical Europe' (Report by the Wise Persons Group on the Reform of the EU Customs Union March 2022) <https://taxation-customs.ec.europa.eu/system/files/2022-03/TAX-20-002-Future%20customs-REPORT_BIS v5%20%28WEB%29.pdf> accessed 28 July 2023

IV. Final Remarks and Conclusions

In conclusion, as the development of the platform economy has completely transformed both domestic and international trade, it appears inevitable that the current VAT framework has to be adapted. The purpose of the 'own responsibility' approach for digital intermediaries described in this chapter is to ensure a higher degree of compliance. Those taxable persons are, indeed, more likely to comply with VAT legislation than the thousands of sellers they host. However, it should be borne in mind that the issue of under-declaration/under-assessment remains unresolved as such (although it is estimated that over 60 per cent of imports were under-declared at importation before the reform).[83] Indeed, Member States can only hope that intermediaries will remit correct VAT amounts/declare correct amounts, without having any real possibility of controlling them.

In any event, this legislative change at the EU level in 2021 has had a significant impact on the platform economy (in organizational terms and in terms of costs). It could even, in the long run, favour larger players, which will be the only ones able to meet the new obligations that will be imposed on them (and therefore the phenomenon of *concentration* will be reinforced).[84]

Moreover, the transition towards a digital platform economy characterized by a multiplicity of actors, whose role in the production/consumption of goods and services is not easy to determine and who can also be located anywhere in the world, requires much more than legislative changes at the level of the EU and its Member States. Indeed, those changes will be ineffective if nothing is done to ensure their implementation outside EU borders. And this implies a need for the EU to negotiate arrangements, whether on a bilateral basis or through international organizations, with its main trading partners. The development of an EU external policy would certainly represent a major evolution in the European tax harmonization process. But it is a necessary step, without which European states will not be able to reap the fruits of globalization and allow their social systems to remain financially sustainable.

[83] Bruno Basalisco, Julia Wahl, and Henrik Okholm, 'E-Commerce Imports into Europe: VAT and Customs Treatment' (Copenhagen Economics 4 May 2016) <www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/8/348/1462798608/e-commerce-imports-into-europe_vat-and-customs-treatment.pdf> accessed 28 July 2023.

[84] See Marie Lamensch and Rebecca Millar, 'The Role of Marketplaces in Taxing B2C Supplies' in Michael Lang and others (eds), *CJEU: Recent Developments in Value Added Tax 2018* (Linde Verlag 2019).