Collecting Value-added tax in the platform economy: overview of the fundamental issues and recent EU 2018 developments

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Pre-print

Published in LAMENSCH, MARIE ; TRAVERSA, EDOARDO. "Collecting Value-added tax in the platform economy: overview of the fundamental issues and recent EU 2018 developments". In: Bram Devolder (ed.), *The Platform Economy*, Intersentia 2019, p. 363-376

Abstract

Variations in the VAT treatment of the transactions performed by and through digital platforms may significantly impact the profits generated by intermediation between a supplier and a customer. Accordingly, VAT plays an important role in the design of digital platforms strategies as regards the structuring of the relations with both clients and providers. AT the international level, VAT design and interpretation may further affect the allocation of VAT revenues between states. Unfortunately however, there is considerable uncertainty about the application of VAT rules to "digital platforms business models"[1]. This is particularly the case within the European Union where the VAT Directives and related case-law offer insufficient guidance to guarantee a coherent and comprehensive VAT treatment of transactions involving platform across the Member States. Recently also the EU VAT legislator imposed new collection and reporting obligations on platforms, whose scope of application is not yet clear so that they may likewise result in legal uncertainty, together with a substantial additional compliance burden for the concerned platforms.

1. Introduction

There are essentially two historical reasons for the emergence and spread of VAT, first in Europe and then throughout the world. First, VAT aims at neutrality between economic actors, by taxing the added value resulting from a supply chain independently of the number of transactions intervening in the production and commercialization process. Second, VAT also aims at achieving neutrality between domestic and cross-border supplies by ensuring that both types of transactions are taxed equally, on the same basis and at the same rate[2]. Those two objectives have to be duly kept in mind when addressing the VAT treatment of digital platforms.

[1] See for example European Economic and Social Committee, Report :Taxation and the sharing economy, 2017, ECO/434 – EESC-2017-02946-00-00-AC-TRA (IT), paras 6.3 to 6.7.

[2] On the objectives of VAT, in the European Union and beyond, see R. van Brederode, Systems of general sales taxation : theory, policy and practice, Kluwer, 2009 ; R. de la Feria; VAT and the EC Internal market : the shortcomings of the harmonisation, Oxford centre for business taxation working papers series, WP 09/29, http://eureka.sbs.ox.ac.uk/3279/1/WP0929.pdf.

Within the EU, a common harmonized system defines the notions of "taxable person", "economic activity", "taxable transactions" and "taxable base" in a way that leaves very little leeway to the Member states. [3] The Member States, however, remain responsible for the implementation of the harmonised VAT rules and the collection on their territory. To avoid multiple taxation of the same transaction, and to a lesser extent situation of non-taxation, the criteria used to localize a transaction in a particular Member State are also harmonized.

Since VAT is a tax on economic transactions that was designed in the mid-20th century, at a time when intermediation existed but remained the exception, the emergence of *digital* platforms and their different business models is a clearly disruptive element. The tax burden may indeed vary according to the business model chosen by the *digital* platform to operate its activities. Elements to be taken into account include the nature and structure of the activities of the platform, its relationship with the suppliers and with the consumers, 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 contribution aims to highlight basic VAT conceptual issues that arise with respect to the activities of digital platforms and underlying supplies (Section 2). Section 3 will discuss recent legislative developments imposing new VAT collection and reporting obligations on digital platforms and identify a couple of grey zones or questions that currently remain unanswered. Final comments and conclusions will be offered in Section 4.

2. Selected basic VAT conceptual issues

2.1. VAT liability of platforms activities and underlying supplies

A first question is to what extent platforms activities are subject to VAT.

Within the European Union, all supplies of goods and services performed against consideration by a taxable person in the context of an economic activity are, in principle, subject to VAT. The consideration received must moreover be in direct link with the supply received. In the absence of consideration, the activity of the platform will therefore be considered as out of scope.

It is important to stress that the analysis of the economic consideration of digital platform goes beyond the fact that the platform directly receives money for its services. Consideration may indeed take different forms, such as payments made to third parties or non-monetary forms such as barter. In this respect, a very controversial issue is whether the fact that digital platforms collect data from their users in exchange of "free" services (such as the free access to a networking platform like LinkedIn or a tool like Googledoc) is sufficient to consider that they undertake an economic activity. A main argument in favour of this interpretation is that data collection is essential to the viability of the business models of those platforms. The data

[3] See in particular Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1–118.

collected is indeed afterwards monetized in the form of advertisement services which form an important part of the profits generated by some of these platforms.[4] Arguments against the economic character of the collection of data include the fact that the nature of the link between the service supplied to the consumer and transfer of the data may be considered insufficient from a legal perspective to justify a connection between both. Another issue is that it is not possible to determine the value of the data provided by each user and this casts doubt as to the feasibility of defining a taxable amount for each supply. Finally, there are also technical implementation issues, including for example the fact that it may be difficult to determine when the taxable event is taking place.[5] In 2017, the chair of the social democratic party of Austria proposed to consider data collection by large digital services providers (such as Google, Facebook and Twitter) as bartering for VAT purposes, and therefore subject to VAT. However, this proposal was not followed by any concrete measure, neither at the Austrian nor that European level. This is not surprising as the proposal was heavily criticized for being unpractical and distortive, especially if implemented in only one member state[6]. In our opinion, even if we agree with the underlying assumption that data collection plays a central role in value creation for those companies, we doubt that VAT is the best instrument to regulate that phenomenon. The legal appraisal of protection and sharing of data collected by those Internet Giants indeed raises fundamental issues which go way beyond VAT and which should be solved before or at least together with the tax implications of it. In particular, it should be decided to what extent the data collected on personal preferences of users can be freely used by platform for commercial reasons and whether obligations to share the collected (anonymised) data with competitors shouldn't be imposed on those companies.[7]

The situation is much more straightforward when the digital platform receives a commission for its intermediation services, whether paid by the initial supplier or by the consumer: the intermediation services is in this case subject to VAT.

As regards the supplies of goods and services that are being sold or exchanged on the platform (underlying supply), they are also in principle subject to VAT, provided the supplier qualifies as a taxable person acting as such (C2C supplies such as those taking place on Ebay between two non-taxable persons, for example, remain outside of the VAT scope) and provided they are made against consideration. It is important to clarify here that VAT may also be due on supplies made in the context of a non-profit activity. It may indeed happen that the suppliers do not act within a business activity for commercial law or income tax reasons, for example because the platform serves a non-profit objective such as community building or because goods and services on the platform are exchanged without consideration or as a peer to peer[8]. Nevertheless,

[4] See S. Pfeiffer, European Union –VAT on "Free" Electronic Services?; International VAT Monitor, vol. 27, n°3, 2016, p. 158ss.

[5] In that sense, see M. Lamensch, "The Scope of the EU VAT System: Traditional & Digital Economy Related Questions", in "Recent VAT case law of the CJEU 2017", M. Lang et al. eds, Linde Verlag 2018 (to be published).

[6] W. Hoke, EU VAT Experts divided in Austrian proposal to Tax web activity as bartering, Tax analysts, 5 May 2017, www.taxanalysts.com

[7] In the same sense, see M. Lamensch : "The Scope of the EU VAT System: Traditional & Digital Economy Related Questions", in "Recent VAT case law of the CJEU 2017", M. Lang et al. eds, Linde Verlag 2018 (to be published).

[8] On peer-to-peer and VAT, see C. Trenta, Rethinking VAT for P2P distribution, Kluwer, 2015, 360p.

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 he or she 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[9]. Another important clarification is that many Member States apply a threshold under which activities of a taxable persons will not be subject to VAT (so-called "SME exemption"), which as a result tends to exclude those non-profit transaction from actual VAT collection. However, one should keep 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. Nevertheless, even if the suppliers of the initial service or good are not considered to carry out an economic activity for VAT purpose/or have a turnover below the exemption threshold, this does not mean that platform will be exempt from VAT if, in its relationship with their suppliers or end users, it meets the criteria set out by the VAT directive. As soon as the intermediation service is made for consideration, VAT is likely to apply.

2.2. Extent and location of VAT liability of platforms

2.2.1. Extent of VAT liability

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 in contact a buyer and a seller, or more broadly as a provider of the underlying service or good. The legal characterization as an intermediary or as an initial supplier has important consequences both on the place of taxation and/or 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) and the extent of the taxable amount and the level of the VAT rate, which vary across the Member States but also within each Member State depending on the type of services or goods which can benefit from a reduced rate.

In practice, three models exist: platforms can be treated as fully transparent for VAT purposes, as intermediaries or as commissionaires. Under the first model platforms are considered as not taking part in any way to the transaction made between the supplier and the customer using the platform, there will be no VAT incidence. This however implies that the platform does not receive any consideration for its role, whether direct or hidden.

Under the second model the platform is considered as an intermediary paid by the parties for its intermediation, through a commission which would be subject to VAT.

Under the third model the platform is considered as a supplier of goods and services and therefore subject to full VAT liability. In some cases, the same result is reached by applying a

[9] O. Gjems-Onstad/P.Melz, "NPOs (Charities) and VAT", in F. Vanistendael (ed.), Taxation of charities, IBFD, 2015, p. 75-85.

fiction according to which intermediaries are deemed to have received and supplied themselves the underlying goods or services (deemed suppliers).

A careful analysis of the contract relationship between the parties involved is essential. One should also keep in mind that it will not only depend on the contractual terms defined by the parties as, in VAT matters, the principle of prohibition of abuse has been recognized by the CJEU. This may lead to disregard the legal relations arising from the contracts between the involved parties, when they do not correspond to the economic reality. For example, as decided by the CJEU in the *Newey and Ocean Finance*[10] case, concerning a UK loan-broker who had incorporated a company in Jersey, Alabaster, in order to provide the services to UK customers from a "non-EU VAT territory":

"Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction (…) have to be identified. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions".[11]

In fact, the CJEU has held on various occasions that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive and that « *the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (…)* ».[12]

The CJEU traditionally leaves it to the domestic courts to determine whether the contractual terms do not genuinely reflect economic reality (as this is a factual assessment). However, in the *Newey and Ocean Finance* case, the CJEU suggested that, « *taking into account the economic reality of the business relationships (…) it is conceivable that the effective use and enjoyment of the services at issue in the main proceedings took place in the United Kingdom and that Mr Newey profited therefrom* ». In the cases where the national court indeed considers that the contractual terms do not reflect economic reality, the contractual terms have to be « *redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice* ».[13]

Summing up, the Newey and Ocean Finance decision establishes that contractual terms, even though they may be taken into consideration, are not decisive in order to identify the parties to

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[22] See CJEU, Case C-653/11, *Newey and Ocean Finance*. On abuse of rights and VAT, see also E. Traversa, Prevention of Evasion, Avoidance and Abuse in EU VAT Law, in M. Lang, D. Raponi et alii (ed.), ECJ- Recent developments in Value added tax, Linde Verlag, 2014, p. 35-54 and the literature quoted.

[11] Court decision para 47 and 48.
[12] (see Halifax and Others, paragraph 71 and the case-law cited).
[13] Court decision, para 50, with reference to (see, to that effect, Halifax and Others, paragraph 98).

a transaction for VAT purposes and that the situation can be recharacterised by the national tax administrations. Such a conclusion is of particular relevance for digital platforms, which could be in that regard considered as parties to the underlying transactions, and not mere intermediaries or facilitators.

2.2.2. Location of VAT liability

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

If the transaction can be characterized as a supply of good (tangible property), it will be taxable in the Member State where the good is located. If the good is transported, VAT will be charged in the Member State of departure or arrival depending on the supplier's turnover if the client is an end user[14] or in the country of arrival if the client is a taxable person registered for VAT purposes.[15]

If the transaction qualifies as a supply of services (i.e. any transaction that does not involve a tangible good), VAT will normally be collected in the country of the supplier if the client is an final customer (article 45 EU VAT Directive) or in the country of the client if the client is a taxable person (article 44 EU 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 concern electronic services which are always taxable in the country of the customer, even if he or she is an end user (article 58 EU VAT directive)[16]. In practice, the multiplicity of these alternative criteria for B2C services and the uncertain status of digital platform 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 countries[17]. If those services are characterized as services relating to immovable property or services ancillary to such services, they will be taxable in the countries where the immovable property is located. In contrast, if they are seen as services falling within the general rule, VAT will be applied in the country where the platform is located if the client is a non-taxable person, or in the country of the client is he or she is a taxable person. 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 platform and the end-customer or between the platform and the initial supplier. Usually, the fact that the commission paid to the platform is paid by the final customer of by the supplier will determine

[14] Articles 33 and 34 of the VAT Directive.
[15] In this case they will be taxable as intra-CE acquisitions. Specific rules apply for certain categories of taxable persons such as small enterprises, agricultural undertakings or public bodies.
[16] On digital supplies, M. Lamensch, European Value Added Tax in the Digital Era, A Critical Analysis and Proposals for Reform, IBGD Doctoral series, Volume 36, 2015.
[17] On intermediation services in the hotel sector, see VAT Committee, Lignes directrices découlant de la 89ème réunion du 30 septembre 2009, Document A – taxud.d.1(2009)405067 – 639, available on ec.europa.eu/taxation_customs.

where the transaction takes place. But one cannot exclude a recharacterisation by another domestic as tax administration, which could lead to double VAT liability, unless the different tax administrations manage to reach an agreement (which is unlikely because of the lack of incentive) or the CJEU intervenes.

3. Recent EU legislative developments involving platforms

3.1. Digital platforms liable to collect VAT on underlying supplies of electronic services since 2015

Applicable since 1 January 2015, Council Regulation 1042/2013 has rendered platforms liable for the collection of VAT in electronic supplies made through them in specific circumstances. Building on the legal fiction laid down in Article 28 of the VAT Directive, Article 9a in Council Regulation 282/2011 (as amended by Council Regulation 1042/2013) foresees that any taxable person who "takes part" in the supply of electronically supplied services is deemed to be acting in his own name albeit on behalf of the initial provider of these services. 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. In practice they may register in one Member State (Member State of identification) and declare and remit all the VAT due on the supplies that they take part in single periodical (quarterly) returns.

A key question is the scope of application of Article 9a. 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 (i.e. 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, either because the initial supplier is identified on the invoice issued by each person taking part in the B2B supply, or in the customer's bill or 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 one liable for assessing and collecting the tax.

A taxable person taking part in the supply by authorising payment or delivery or setting the terms and conditions of the supply will, however, have no possibility to escape from the application of the presumption, even if he or she fulfils these conditions (one of the three event is enough to exclude the rebuttal of the presumption). In contrast, a taxable person only processing the payment will not be covered by the presumption.

[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, Published on 3 April 2014, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf ("EC explanatory notes"). The EC explanatory notes confirm that Article 18(2) is optional for suppliers, as long as the customer has not communicated his VAT number (EC explanatory notes p. 48).

According to the explanatory notes, if at any stage an intermediary is covered by the presumption (either because one or two above conditions are not met or if he or she authorises the payment or delivery or sets the terms conditions), it will not be possible for intermediaries further down the chain to indicate the original supplier as the supplier of the service. In that case, it will only be possible to go back up to the first intermediary covered by the presumption.

The explanatory notes also give several examples (with illustrative charts) of situations in which a taxable person is, in the European Commission's opinion, "taking part" in the supply for the purpose of Article 9a of the Implementing Regulation. This includes the case in which the taxable person owns or manages the technical platform over which supplies are provided, controls or exerts influence on the pricing, issues a VAT invoice, receipts or bills to the customer, provides customer support in relation to the service supplied, owns the customer data, or exerts influence over the presentation and format of the virtual market place "so that the brand and identity of the taxable person are significantly more prominent than those of the other persons involved in the supply" (and here the explanatory notes explicitly refer to app stores).

The explanatory notes also stress that the assessment of the chain supply should start at the level of the final consumer and move upstream in the chain. In other words, in case several intermediaries could be covered by the presumption, it is the intermediary covered by the presumption under 9a of the Implementing Regulation that is the closest to the customer that will be the taxable person. The explanatory notes further hold that a taxable person should normally be deemed to be taking part in the supply if contractual or legal arrangements stipulate clearly that this person is acting in his own name but on behalf of the initial provider and this reflects reality, but that if the contractual or legal arrangements may be not sufficiently clear on that question, all the factual features of the transaction need be taken into account. The notes also clarify that it is not sufficient to insert a clause in the contract that would exclude a taxable person from the chain of transaction if this does not reflect economic reality. Because a taxable person only processing the payment will not be covered by the presumption, the EC explanatory notes analyse more concrete situations where the Internet provider or mobile operator facilitate the flow of cash and/or content. In short, the question in these cases is whether the participation of these intermediaries is sufficiently predominant.

Shifting the tax liability to the successive intermediaries taking part in such chain supplies seems a logical and desirable improvement that increases legal certainty. As a matter of fact, when an initial supplier relies on a marketplace for applications to market his products, he or she will in many cases not have any contact whatsoever with final customers. In these circumstances, he or she cannot reasonably be expected to correctly assess and collect VAT on final supplies. In contrast, intermediaries will in many cases have easier access to relevant and reliable information regarding customers, obtained in the context of more established relationships (e.g. Apple store when all the devices of the customer are connected to an Apple account).

This having been said, because of the complexity of some transaction chains, and the high number of intermediaries possibly involved in an online supply, implementing Article 9a of the Implementing Regulation 282/2011 may not always be so easy and the explanatory notes are in this case extremely useful, provided the interpretations given therein are fully endorsed by the

Member States and would be confirmed by the CJEU. In the authors' view, however, the EC explanatory notes offer a rather disputable interpretation of this provision. As a matter of fact, even though Article 9a of the Implementing Regulation provides that an intermediary, who authorises the charge to the customer or the delivery of the services or sets the general terms and conditions of the supply, cannot indicate another person as the supplier of those services (and therefore is automatically to be considered as the taxable person in the supply), it does not say anything that can be interpreted as including intermediaries who, for example, provide customer support in relation to the service supplied, exert influence over the presentation and format of a marketplace or own customers data.

Some cases will also remain more difficult to handle, for example when, at the end of the chain, two intermediaries "taking part" in the supply can be considered as equally close to the final customer, or when the different intermediaries are not aware of the others' "interventions", and therefore cannot assess how close they are to the final consumer. However, it can be assumed that in the great majority of the cases, intermediaries "taking part" to a supply will know who else is involved in the supply and how "close" they are to the customers. Moreover, even if Article 9a of the Implementing Regulation 282/2011 may be complex to implement, the complexity in fact mostly comes from the transactional scenario chosen by the taxable persons involved.

3.2. Digital platforms might become deemed suppliers in intra-EU distance sales (as of 2021)

The recently adopted VAT e-commerce package (adopted on 5 December 2018 and applicable as of 1 January 2021 for what concerns the deeming provision) also renders digital platforms liable when they "facilitate" intra-EU distance sales of goods made by a non-EU business. To be noted that this new tax liability for platforms was not part of the proposal made by the Commission and that, therefore, the Impact assessment accompanying the Proposal does not evaluate the impact on the sector.

Under a new Article 14a(2) of the VAT Directive, these platforms will be deemed to receive the goods from the seller (deemed B2B supply) and then deemed to supply the goods onward to the final consumer (deemed B2C supply). Importantly, while the deeming provision will only apply in the case of sales facilitated by platforms but made by non EU suppliers, it will apply in both intra-EU and domestic sales (i.e. if the goods are already located in the Member State of the customer at the time of the sales, for example because they are stored in a fulfilment house). Importantly also, the deeming provision will apply irrespective of whether the platform is established in the EU or not and whether it is registered in the MOSS or not (the MOSS for electronic services will indeed be made available to distance suppliers or goods and platforms as of 2021 and will become the "OSS"). This deeming provision is most probably inspired from the European Parliament legislative resolution of 30 November 2017 (proposed amendment 7)[19]. However, the rapid adoption of this provision means that practical issues were not

[19] 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 VAT obligations for suppliers of services and distance sales of goods, 2016/0370, Doc. A8-0307/2017

discussed by the Member States. Implementing measures will be needed and the work and negotiations are only starting now. At this stage, many questions remain unanswered.

A first and crucial question is to determine who (ie. which platform) will be caught by the deeming provision. What seems clear is that the scope of this deeming provision is wider than the scope of the deeming provision for electronically supplied services ("facilitates" being broader than "takes part"). 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 like the Commission and the Member States are willing to go for a much broader scope of application. In this case it remains unclear how the platform 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?). Since the new Art. 66a VAT Directive will provide 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 platforms to prefinance the VAT.

A second question is how should platform handle reimbursement of VAT pursuant to returns of goods. In the case where the platforms collects the VAT, it indeed seems logical to require from them that they reimburse it if necessary. The question is what kind of evidence will be required by the tax administrations and how much it will cost to the platforms. 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 provisions indeed creates the fiction of two subsequent supplies with transport. In VAT, however, one knows that in a chain transaction there can be only one supply with a transport. The question then arises in which leg of the transaction the transport is deemed to take place? If the transport were to be linked to the deemed B2C supply (from the platform to the consumer), then the platform will incur VAT in the country where the transport of the goods start. If the platform is established in another country than the Member State where the goods are located when the transport begins, it will have to ask for a refund (under the 2008/9 Directive if the platform is located in another Member State and under the 13th Directive if it is residing outside of the EU[20]). The European Commission will hopefully propose a simplifying measure to avoid what would admittedly be unbearable compliance costs.

Digital platforms will also have to keep records of all the supplies that they facilitate in sufficient details as to enable the tax authorities of the Member States to make controls. They will have to keep these records for a period of 10 years after the end of the year during which the transaction was carried out and will have to make these records available electronically on

[20] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ L 44, 20.2.2008, p. 23–28); Thirteenth Council Directive 86/560/EEC of 17 November 1986 - Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ L 326, 21.11.1986, p. 40–41)

request. Once again the financial impact on platforms has not been assessed and the issue of enforcement on non-EU platforms arises.

3.3. Platforms may become deemed suppliers in B2C Imports

One of the main objectives of the e-commerce VAT package is to restore a level playing field between EU and non EU suppliers of goods. Since the 1980s, a VAT exemption is indeed 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. With the development of e-commerce, however, imports have multiplied and this not only results in an increasing loss of VAT revenue for the Member States but also in a competitive disadvantage for EU suppliers who do not benefit from the exemption and have to charge (up to 27% of VAT) 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, considered as abusive[21]. A related issue is that non-EU suppliers routinely undervalue their supplies in order to fraudulently benefit from the exemption. [22].[23]

The EU response to that situation is the planned (as of 2021) removal of the exemption threshold for low value imports and the requirement from either the non-EU supplier or the transporter to collect the VAT due on imports (at the moment, import VAT is being collected by customs authorities that would not be able to collect the VAT on each and every import once the exemption threshold is removed). In practice, non-EU suppliers are invited to register to a broadened version of the MOSS system initially set up for electronic services and also to be made available for intra-EU distance sales (see above; the MOSS will then become the OSS). If they do register, their supplies will be exempt at import because VAT declaration and payment is expected to take place via the periodical OSS returns (monthly and not quarterly as is the case for electronic services or intra-EU distance sales). If they do not register, the transporter will be liable to collect the VAT upon import.

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 150 EUR facilitated by platforms (New Article 14a(2) of the VAT Directive, applicable as of 1 January 2015). 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 platforms' OSS numbers. As a matter of fact, platforms "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 by a platform will have to include the OSS registration number of the platform in the import declaration in order to benefit from the exemption. The

[21] On the specific UK situation (and the Channel Islands), see Antony Seely, VAT on postal packages, House of commons Library Briefing paper, Number 4155, 9 June 2017.
[22] See United Kingdom Parliament, Tackling online VAT fraud and error inquiry (report), 18 November 2017, https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/312/31202.htm.
[23] A. COCKFIELD, W. HELLERSTEIN, R. MILLAR & C. WAERZEGGERS, Taxing global digital commerce (2013).

question is then how do we prevent the same supplier to also use that OSS registration number when shipping a parcel that was sold directly to an EU customer (without passing through the platform)? More generally, how can we prevent anyone from using that number? And what exactly will be the liability of the platform if its OSS registration number is being misused? As a valid OSS 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 worth recalling here that the deeming provision for platforms was not part of the Commission initial proposal and therefore that 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.

It should be added that, as part of the e-commerce package, the Member States committed to issue monthly listings of imports, per OSS registered taxable person, including value declarations. The objective is to compare import figures with the OSS returns data and thereby obtain a rough estimate of compliance. A first problem is that comparing what is being declared at import with what is being declared via the MOSS is only a good idea to the extent the accuracy of the data declared at import is being checked (otherwise, a Chinese vendor declaring a value of 3 EUR and paying 3 EUR via the MOSS 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 OSS numbers, the question then arises whether there will be any time left for them to verify import value declaration. This is not a minor point of details in view of the massive frauds based on undervaluations that currently take place (see above). 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 than the corresponding OSS 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 centers 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?

From a business perspective also, even if a fraud could be eventually be spotted, the questions remains whether a platform whose OSS number has been misused would liable for the payment of the VAT in the meantime?

3.4. Record keeping

Digital platforms will also have to keep records of all the supplies that they "facilitate" in sufficient details as to enable the tax authorities of the Member States to make controls. They will have to keep these records for a period of 10 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.[24] The financial impact on platforms has not been assessed as this obligation was again not part of the proposal made by the Commission. Moreover the issue of enforcement on non-EU platforms once again arises.

[24] Article 242a of the 2006/112 VAT directive, as amended.

4. Final remarks and conclusions

In conclusion, as the development of platform economy has completely transformed both domestic and international trade, it appears inevitable that the current VAT framework has to be adapted. However, the transition towards a platform economy characterized by a multiplicity of actors, not only whose role in the production/consumption of goods and services is not easy to determine but also which can be located anywhere in the world requires much more than legislative changes at the level of the European Union and its member States. Indeed, those changes will be ineffective if nothing is done in order to ensure their implementation outside EU borders. And this will imply for the EU to negotiate whether on a bilateral basis or through international organizations arrangements with the main trading partners. The development of a EU external policy would certainly represent a major evolution in the European tax harmonisation 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.