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VAT treatment of E-commerce intermediaries

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Abstract

The massive growth of E-commerce is challenging the EU VAT system from different points of view. The Author explores the VAT treatment of E-commerce intermediaries involved in supplies of goods, services and digital services. Notwithstanding the EU Commission attempts to modernize the EU VAT system, there are still numerous issues that have not been dealt with. The Author concludes that the VAT rules for online transactions in which intermediaries are involved, are not entirely suited to meet the challenges brought by the development of the digital economy.

Abbreviation list

AG	Advocate General
B2C	Base Erosion Profit Shifting
BEPS	Business to Consumer
C2C	Consumer to consumer
CJEU	Court of Justice of the European Union
E-commerce	Electronic commerce
EU	European Union
HMRC	Her Majesty's Revenue and Customs
ITC	Information and communication technology
MS	Member States
OECD	Organization for Economic Cooperation Development
UK	United Kingdom
VAT	Value Added Tax
VOIP	Voice Over Internet Protocol

1 INTRODUCTION

1.1 Background

1.1.1 E-commerce

The digital economy¹ has revolutionized many aspects of our lives and it is increasingly becoming the economy itself.² One of the key components of the digital economy is the electronic commerce (E-commerce) which is defined as “*the sale or purchase of goods and services conducted over computer networks by methods specifically for the purpose of receiving or placing of orders*”³.

In the last years the business-to-consumer (B2C) E-commerce has had an unrestrained growth.⁴ Thanks to the developments in information and communication technology (ICT), it is now easier, safer and faster to buy and sell goods and services online. Due to the spread of the internet and digital payments, the number of digital buyers is progressively growing and it was expected to increase to over 1 billion people by the end of 2013, almost one-seventh of the world’s population.⁵

E-commerce enables companies to establish their presence on the market at national level and also to extend their business across borders. Besides, E-commerce has the potential to reshape the European Market for enterprises and private consumers by allowing price and products comparisons in a free market context. Global B2C E-commerce sales reached USD 1.4 trillion in 2014.⁶

¹Digital economy is defined as “*an economy which functions primarily by means of digital technology, esp. electronic transactions made using the Internet*”, The Oxford English Dictionary.

² OECD, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), p. 11.

³ OECD, *OECD Guide to Measuring the Information Society 2011*, OECD Publishing (26 July 2011), p. 71-73.

⁴ 'E-Commerce Statistics For Individuals - Statistics Explained' (*Ec.europa.eu*, 2017) <http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals> accessed 22 May 2017; 'E-Commerce Statistics - Statistics Explained' (*Ec.europa.eu*, 2017) <http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics> accessed 22 May 2017.

⁵'B2C E-Commerce|Statista' (*Statista*, 2017) <<https://www.statista.com/markets/413/topic/457/b2c-e-commerce>> accessed 22 May 2017.

⁶ OECD (n.2) p.56.

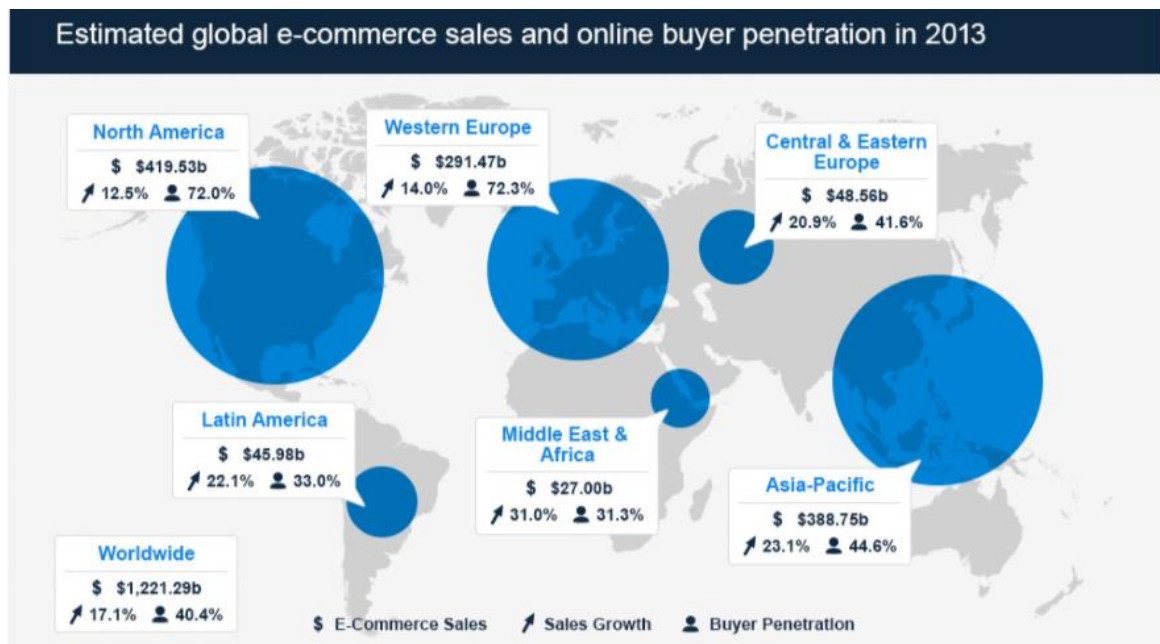


Figure 1: This chart shows estimates for global e-commerce sales and online buyer penetration in 2013, broken down by region. (< <https://www.statista.com/chart/1223/global-e-commerce-sales-2013/> > accessed 22 May 2017)

The average Internet penetration⁷ in Europe increased to 75.3% in 2015 and the rate is slightly higher in the countries in the European Union in the same year (81.5%). European E-commerce turnover has been growing steadily over the years, with an annual growth of around 12-13%. It is expected that this growth will continue in the years to come, resulting in European E-commerce sales of EUR 598 billion in 2017 and EUR 660 billion in 2018.⁸

1.1.2 VAT Issues

The development of digital economy has raised numerous issues from a tax perspective. In particular, the increased businesses and consumers mobility, the development of new business models, the reliance of data, which are some of the characteristics of the digital economy, are challenging traditional tax systems.

Action 1 of the base erosion and profit shifting (BEPS) project launched by the Organization for Economic Cooperation and Development (OECD) is aimed at addressing these challenges. According to the OECD the growth of online B2C cross-border trade of goods and services is challenging the traditional VAT systems. In particular, the OECD identified the imports of low valued goods which are generally exempt from VAT and the supply of Electronic services (E-services) as the main VAT challenges brought by the development of E-commerce⁹.

⁸ Ecommerce Foundation, European B2C E-commerce Report 2016, (2016).

⁹ OECD (n.2) p. 120.

Since the beginning of the development of E-commerce, the EU Commission recognized its potential and also the VAT issues related to it. What was clear since the beginning for the EU Commission was that online transactions had to be subject to VAT in the same way as conventional supplies.¹⁰ This is perfectly in accordance with the nature of VAT as a general tax on consumption, which means that all supplies of goods or services made by taxable persons for consideration should be subject to it.¹¹ The EU identified the different VAT issues arising with the development of the E-commerce and undertook an active role in addressing them. Among the EU initiative, it is worth mentioning the introduction of specific provisions for E-services in 2002¹² and the changes of the place of supply rules for telecommunications, broadcasting and E-services which entered into force in 2015.¹³

In addition, future developments are expected, since the creation of a Digital Single Market for Europe is considered as one of the Commission top priorities.¹⁴ According to the Commission the complexity of VAT obligations represents one of the key obstacles for the development of EU cross-border E-commerce, for this reason, after the May 2015 communication “*A Digital Single Market Strategy for Europe*”, the Commission submitted in December 2016 a package of proposals for modernizing the VAT on cross-border B2C E-commerce.¹⁵

1.1.3 Specific VAT challenges related to intermediaries

According to some Authors, the development of E-commerce meant the elimination of intermediaries from digital value chains.¹⁶ The reasoning

¹⁰ European Commission, *An European Initiative in Electronic Commerce*, COM(97) 157 (1997), p 19.

¹¹ Article 1 Recast VAT Directive 2006/112/EC.

¹² Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services.

¹³ Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services.

¹⁴ Digital Single Market' (*Digital Single Market*, 2017) <<https://ec.europa.eu/digital-single-market/en/digital-single-market>> accessed 22 May 2017.

¹⁵ European Commission, *Proposal for a Council Directive 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*, COM(2016) 757 final (2016); European Commission, *Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax*, COM(2016) 756 final (2016); European Commission, *Proposal for a Council Regulation amending Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax*, COM(2016) 755 (2016).

¹⁶ E. Fridensköld, 'VAT And The Internet: The Application Of Consumption Taxes To E-Commerce Transactions' (2004) 13 *Information & Communications Technology Law.*; D Tapscott, *The Digital Economy* (1st edn, McGraw-Hill 1996).

behind this assumption was that, thanks to the advance of technology, businesses could sell directly to their customers without the involvement of intermediaries.¹⁷ This prevision proved to be wrong, in fact nowadays a large share of the E-commerce trade is made on online marketplaces such as Amazon, eBay, Alibaba, App Store, etc. The business models of these online intermediaries are different, however generally they facilitate transaction by allowing third parties to sell, either directly or through auction, goods and services on their online marketplaces/platforms.

From a VAT perspective the involvement of intermediaries in a supply can have different consequences depending on the contractual arrangements between the parties and the functions fulfilled by the intermediaries. E-commerce supplies, especially E-services ones, often involve several transactions and stretch across different countries, therefore it could be particularly complex to determine the party liable for VAT in the transaction to the final consumer.¹⁸ For example, in the case of apps, the app creator may enter into an agreement with an app store from which the end consumer purchase the app.¹⁹ In such a scenario it could be difficult for the app creator to collect information relating to the customer location and status, and thus to account for VAT on his supply.

The Commission is well-aware of these problems, as demonstrated by the introduction of specific rules concerning intermediaries involved in E-services supplies in the VAT Implementing Regulation²⁰ and the proposed amendments to the intermediaries provisions in the VAT Directive.²¹

1.2 Purpose

The purpose of this thesis is to determine whether the EU VAT provisions related to intermediaries and the proposed amendments are suited to meet the challenges brought by the development of the Digital Economy.

¹⁷ P. Anderson & E. Anderson, *The New E-Commerce Intermediaries*, (2002) Sloan Management Review.

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*, (2014) (Council Implementing Regulation (EU) No 1042/2013), p.22.

¹⁹ Ibid.

²⁰ VAT Implementing Regulation: Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for the VAT Directive 2006/112/EC amended by Regulation (EU) No. 1042/2013 of 10 October 2013.

²¹ European Commission, *Proposal for a Council Directive 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*, (2016) COM(2016) 757 final.

1.3 Method and material

In order to answer the legal question raised in the thesis, the traditional legal method will be used. Given the complexity of the topic, it is necessary to begin from the analysis of the law as it stands. For this purpose the Author will start his inquiry from the VAT Directive, the Implementing Regulations and the case-law of the Court of Justice of the European Union (CJEU). In addition, given the scarce number of EU case-law on the topic, account will be taken of EU Commission proposals and related documents such as explanatory notes and working documents, VAT committee guidelines, OECD publications, academic journal articles, Member States' case-law and other online resources. Even if these latter sources do not form part of EU law, it is useful to take them into consideration in order to have a clearer picture of the current system and its issues.

Since the research for this thesis was completed the 22nd of May 2017 only publications and Judgments issued before that date have been taken into consideration.

1.4 Delimitation

The main focus of this thesis is the VAT treatment of sales of goods and services for monetary consideration done through online marketplaces or platforms. In particular the Author will analyse the VAT implication of Business to Consumer (B2C) and Consumer to Consumer (C2C) E-commerce intermediaries, such as Amazon, eBay, AirBnb or Uber.

The analysis will be carried out in the context of the EU VAT system, thus citations of Member States case-law and legislation are made just for illustration purposes and do not imply an in-depth analysis of domestic legal systems.

1.5 Outline

Following the introduction, Chapter 2 will describe the general VAT rules that apply for disclosed and undisclosed agents. In particular, the definitions, the purpose and the VAT treatment will be presented. In Chapter 3, after a brief introduction of the new rules for digital services entered into force in 2015, the presumption in Article 9a of VAT Implementing Regulation for online intermediaries that take part in a supply of E-services will be analyzed in depth. In Chapter 4 the package of proposals for modernizing the VAT on cross-border B2C E-commerce will be presented, with a particular focus on the proposed amendments of Articles 14(2)(c) and 28 VAT Directive. In Chapter 5 the VAT challenges related with the development of sharing economy will be assessed. Finally, the Author's conclusions will be presented.

2 THE VAT TREATMENT OF INTERMEDIARIES

2.1 Introduction

VAT is a general tax on consumption which means that, in principle all supplies of goods or services made by taxable persons for consideration are subject to it.²² The tax must be charged at each stage in the production and distribution chain and generally the vendor is responsible for the correct calculation, collection and remission of the VAT on his supplies (Vendor collection model).²³

There are different exceptions to this rule, one of this is the legal fiction provided in the case in which an undisclosed agent takes part in a supply of goods or services. In this Chapter the Author will describe the purpose of these provisions, the circumstances in which the legal fiction applies and those in which does not. In the second part, the different VAT consequences for intermediaries involved in a supply will be analyzed.

2.2 Disclosed vs Undisclosed agents

2.2.1 Definition

The level of involvement of an intermediary in a supply of goods and services can vary. The intermediary may have a minor role in the transaction, for example simply introducing the seller to potential customers, or, he may have a more active one, for example making the delivery or receiving the payment on behalf of the seller. For simplicity sake it is possible to distinguish, for VAT purpose, two types of intermediaries: disclosed and undisclosed agents (or commissionaires).

2.2.2 Undisclosed agents

The first difficulties arise with the definition of undisclosed agent, since there are major differences within the EU regarding the characterization of contracts relating to intermediaries. For example the Civil Law concept of *commission contract* does not have an exact counterpart in Common Law.²⁴ However, in order to avoid divergences in the application of the VAT from one Member State to another, the concepts expressed in national laws have to be interpreted in conformity with EU law.²⁵

²² Article 1 Recast VAT Directive 2006/112/EC.

²³ Article 193 Recast VAT Directive 2006/112/EC.

²⁴ J.F. Avery Jones, *What is a "Contract under which Commission is Payable"?*, in H. Van Arendonk, S. Jansen, R. Van der Paardt, *VAT in an EU and International Perspective: Essays in honour of Han Kogels*, (IBFD 2011).

²⁵ See Case C-455/05 *Velvet & Steel*, para. 15 regarding the interpretation of VAT exemptions.

Unfortunately, the EU Legislator has not been consistent in the use of the terminology throughout the VAT Directive which creates additional uncertainty and confusion.²⁶

In order to define the concept of undisclosed agent or commissionaire is appropriate to start from the relevant provision in the VAT Directive. The first one is Article 14(2)(c) VAT Directive which reads:

... *each of the following shall be regarded as a supply of goods:*

*c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale*²⁷.

The text of the provision is far from obvious, especially is not clear what a *contract under which commission is payable* is.²⁸ In order to clarify the meaning of this provision, it is useful to analyse Article 28 VAT Directive which is the equivalent provision to Article 14(2)(c), but relating to services instead of goods. Article 28 reads as follows:

Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

It is not clear why the EU legislator used a different terminology for these two provisions, which are supposed to pursue the same purpose.²⁹ In particular, as pointed out by J.F. Avery Jones the translation of *contrat de commission* used in the French text of the VAT Directive (Article 14(2)(c)) as a *contract under which commission is payable* is misleading.³⁰ One could even doubt that these provisions have the same meaning. Luckily, the CJEU in its case-law clarified that a *contract under which commission is payable* constitutes an agreement by which an intermediary undertakes to carry out in his own name, but on behalf of someone else one or more legal transactions³¹. It is therefore confirmed that, despite the different terminology used, Articles 14(2)(c) and 28 VAT Directive are subject to the same requirements and pursue the same objective.³²

In the Author's opinion it would have been much more logical, as suggested by B.J. Terra and J. Kajus, if article 14(2)(c) of the VAT Directive would have been written as follows: *where a taxable person acting in his own*

²⁶ Article 14(2)(c) and 28 Recast VAT Directive 2006/112/EC.

²⁷ The French text of the VAT Directive refers to: *la transmission d'un bien effectuée en vertu d'un contrat de commission à l'achat ou à la vente.*

²⁸ J.F. Avery Jones (n.24).

²⁹ Ibid.

³⁰ Ibid.

³¹ Case C-526/13 *UAB Fast Bunkering Klaipėda v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* [2015] ECLI:EU:C:536, para.33.

³² C-274/15 *Commission v Luxembourg* [2017] ECLI:EU:C:333, para. 84-89.

*name but on behalf of another takes part in a supply of goods, he must be considered to have received and supplied those goods*³³.

To recap an undisclosed agent or commissionaire is an intermediary who: (i) takes part in a supply, (ii) acts in his own name, but (iii) on behalf of someone else.

2.2.2.1 Practical Implementation

The case-law of the CJEU gives us additional guidance on how to assess the fulfillment of the requirements for undisclosed agents set in Articles 14(2)(c) and 28 VAT Directive.

First of all, in order to determine if the intermediary is acting as an undisclosed agent, it is necessary to take into account all the details of the case, in particular the contractual relationship which stipulates the responsibilities between the principal and the intermediary.³⁴ This could be particularly problematic in the case of intermediaries, because, as mentioned before, the contract of agency in Common and Civil Law are based on different concepts.³⁵ Even if national law should be interpreted in conformity with EU law, differences in the national contract law may affect the interpretation of the VAT Directive. In cases in which the parties in the transaction are established in different Member States the differences in national contract law could result in double taxation.

In addition, the CJEU provided a list of circumstances that national Courts have to consider to determine whether an agent is *acting in his own name*³⁶:

- the exercise of the agent activity requires the authorization by the public authorities;
- the customer's receipts mention the principal's name;
- the customers agree to the terms & conditions set by the principal;
- the business run by the agents carries the sign of the principal.

The fact that the final customer does or not know the identity of the principal is not a key criteria to determine whether the intermediary is a disclosed or undisclosed agent. However, in the case of undisclosed agents,

³³ B. J. M. Terra and J. Kajus, *Introduction to European VAT (Recast)*, (IBFD latest reviewed 1 January 2017), Ch. 10.2.1.4 - accessed 22 May 2017.

³⁴ Case C-464/10 *État belge contre Pierre Henfling et autres* [2011] ECLI:EU:C:489, par. 40.

³⁵ 'VAT Notice 700: The VAT Guide - GOV.UK' (*Gov.uk*, 2017) <<https://www.gov.uk/government/publications/vat-notice-700-the-vat-guide/vat-notice-700-the-vat-guide#eu-and-international-supplies-involving-uk-undisclosed-agents>> accessed 22 May 2017.

³⁶ Case C-464/10 *Henfling*, para. 42-43.

the end customer is not supposed to know who the principal is, since he does not receive any invoices or receipts directly from the principal.³⁷

2.2.3 Disclosed agent

A disclosed agent is an intermediary who is involved in a supply in the name and on behalf of someone else.³⁸ The VAT treatment of disclosed agents is much more straightforward than the one that applies for undisclosed agent, since there are not deemed supplies for VAT purpose.

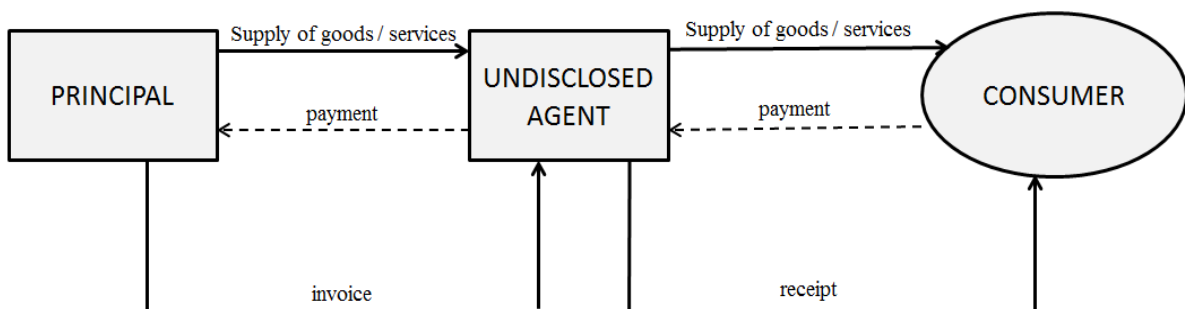
2.3 VAT consequences

In this section the VAT treatment for both disclosed and undisclosed agents will be described.

2.3.1 Undisclosed agent

When a taxable person takes part in a supply of goods or services in his own name, but on behalf of someone else (the principal), he is deemed to have received and supplied further those goods or services himself.³⁹

Table 1



In the above scenario (Articles 14(2)(c) or 28 VAT Directive apply), two supplies of the same goods/services are deemed to take place: the first between the principal and the undisclosed agent and the second between the undisclosed agent and the consumer. This means that the undisclosed agent is deemed to purchase the goods/services from the principal and then supply them further to the consumer. It follows that the principal has to issue a

³⁷ C. Amand, *EU Value Added Tax: The Directive on Vouchers in the Light of the General Value Added Tax Rules* (2017) 45 *Intertax*, Issue 2, pp. 150–168.

³⁸ S. Claessens, T. Corbett, *Intermediated Delivery and Third-Party Billing: Implication for the Operation of VAT Systems around the World*, in M. Lang, I. Lejeun, *VAT/GST in a Global Digital Economy*, EUCOTAX Series on European Taxation; Volume 43 (Wolters Kluwer Law & Business 2015) p.65.

³⁹ Article 14(2)(c) and 28 Recast VAT Directive 2006/112/EC.

VAT invoice (with VAT or exempt depending on the underlying transaction) to the undisclosed agent, which in turn, has to issue a receipt/bill to the consumer.

For VAT purpose the undisclosed agent does not make a separate supply of intermediation services to the principal, the commission retained by the undisclosed agent is included as a mark-up in the price of the onward supply.⁴⁰

The full selling price of the goods/service supplied will form part of the VAT turnover of the undisclosed agent which is also responsible for VAT calculation, collection and remission on the supply to the consumer. It follows that the administrative burden on the agent can be quite substantial, in fact, in order to apply the correct VAT rate on his supply, he needs to determine the consumer location which can be quite complex especially for digital supplies. In addition, when the goods or services are sold to a consumer established in another Member State, the agent may be liable for registration in that Member State.

The fiction created by these provisions coincides with the money flow, which makes it easier from an accounting and invoicing perspective.⁴¹ On the other hand, the fiction created for VAT purposes may not be in line with the contractual agreement and the liability of the parties in the transaction. The major difficulty in this scenario is that there is a fictitious supply for VAT purposes only. For VAT purposes the customer has a relationship only with the undisclosed agent, while from a contractual perspective there may be a legal relation between the principal and the customer.⁴²

2.3.1.1 Case C-464/10 Henfling

In the *Case C-464/10 Henfling* the CJEU discussed the interpretation of Article 28 VAT Directive in relation to gambling services. Tiercé Franco-Belge SA (TFB), is a betting company registered for VAT in Belgium. The TFB's business model is based on a network of agents called "*buralistes*", who on the basis of a "*commission contract*" carry on their activity in their own name, but on behalf of TFB. The "*buralistes*" record bets and pay winning bets on behalf of TFB. The "*buralistes*" are remunerated on commission as a percentage of the registered bets in a given period.

The Belgian tax authorities found out that the commission made by the "*buralistes*" between 1997 and 2000 had not been subject to VAT.

⁴⁰ 'VAT Notice 700: The VAT Guide - GOV.UK' (*Gov.uk*, 2017) <<https://www.gov.uk/government/publications/vat-notice-700-the-vat-guide/vat-notice-700-the-vat-guide#eu-and-international-supplies-involving-uk-undisclosed-agents>> accessed 22 May 2017.

⁴¹ S. Claessens, T. Corbett, (n.38) p. 67.

⁴² C. Amand, (n. 37) pp. 159–161.

Therefore, taking the view that the commission had to be subject to VAT, the authorities claimed a repayment of the VAT from TFB.⁴³ On the other hand TFB claimed that VAT was not payable on the commission, because the “*buralistes*” had to be considered to be commission agents taking part in a supply of services exempt from VAT.

Taking the view that the outcome of the proceedings was dependent on the interpretation of EU law the *cour d’appel of Mons* decided to refer a question to the CJEU. The question referred concerns the interpretation of Articles 6(4) and 13(B)(f), of the Sixth Directive (now Articles 28 and 135(1)(i) VAT Directive), in particular the referring Court asked to the CJEU whether the supplies of gambling services made by the “*buralistes*” as undisclosed agent are exempt from VAT.

In its judgment the CJEU, as a preliminary point, recalled that the exemption from VAT of betting transactions in Article 13(B)(f) Sixth Directive (now Article 135(1)(i) VAT Directive) is based on practical considerations (gambling transactions are not easy to tax) and not on public interest ones.⁴⁴

Then the Court highlighted that the “*buralistes*” have a high degree of independence in the transactions, in fact they may refuse to place a bet without being obliged to provide justification and they are responsible for the payment of winning bets to betters. According to the facts at hand, the Court considered that the “*buralistes*” were acting in their own name, but on behalf of TBT, consequently article 6(4) of the Sixth Directive (now Article 28 VAT Directive) was applicable. As already mentioned, this provision creates the legal fiction of two consecutive supply of the same services, which means that the intermediary is considered to have received and supplied those services himself.⁴⁵

According to the Court, the fiction created by Article 6(4) of the Sixth Directive concerns also the application of VAT exemptions. This means that, if the supply of services in which the intermediary is involved is exempt from VAT, the exemption applies also to the services supply between the principal and the intermediary.⁴⁶

From this judgment, it follows that if the transaction is exempt from VAT, both the supply to and by the intermediary are exempt as well. However, the CJEU specified also that this reasoning does not apply to all the VAT

⁴³ The Belgian tax authorities claimed a repayment from TFB and not from the *buralistes*. The reason is that the Belgian tax authorities thought that the *buralistes* were working in the name and on behalf of TFB. Case C-464/10 *État belge contre Pierre Henfling*, para. 22.

⁴⁴ Case C-464/10 *Henfling*, para. 29.

⁴⁵ *Ibid* para. 32.

⁴⁶ *Ibid* para. 36.

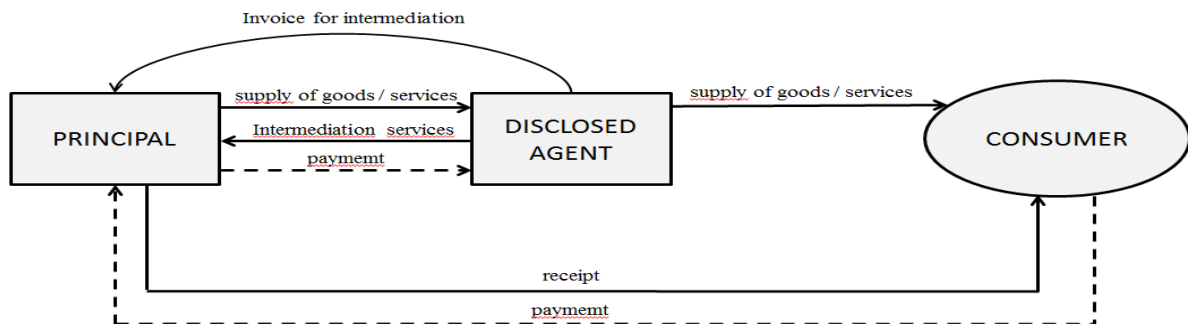
exemptions. According to the CJEU, there are VAT exemptions which have specific features that could justify a limitation of the scope of Article 6(4).⁴⁷ The VAT exemptions in which the subjective element is fundamental for their application could fall among the latter group. An example could be the exemption provided in Article 132(1)(c) VAT Directive regarding medical care services, which according to the CJEU is subject to two conditions: (i) medical services must be involved and (ii) they must be supplied by persons who possess the necessary professional qualifications.⁴⁸ In such a case, the supply of medical services made by an undisclosed agent which does not possess the professional qualification required cannot be exempt from VAT.

In cases in which the exemption applies for both the supplies to and by the intermediary, as for gambling services, the undisclosed agent will not be able to deduct the input VAT linked with those supplies. In such a case, no output VAT is charged on the undisclosed agent supplies and, consequently, no input VAT linked with those supplies can be deducted.⁴⁹ This means that for the goods and services used to carry out both taxed and exempt supplies the undisclosed will be able to deduct only the input VAT linked, either directly or indirectly, with his taxed supplies.⁵⁰

2.3.2 Disclosed agent

The chart below describe a supply flow in which the intermediary act as a disclosed agent, which means that he is acting in the name and on behalf of the principal.

Table 2



In this case, there are two supplies: the supply of goods/services between the principal and the consumer and the supply of intermediation services

⁴⁷ Ibid para. 37.

⁴⁸ Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin*, [2002]ECLI:EU:C:473 para. 27.

⁴⁹ Article 168 Recast VAT Directive 2006/112/EC.

⁵⁰ Article 173 Recast VAT Directive 2006/112/EC.

between the disclosed agent and the principal.⁵¹ The principal is responsible for VAT calculation and collection on his supply to the consumer, while the intermediary is responsible for its supply of intermediation services to the principal. The level of involvement of the intermediary in the transaction is limited and this is reflected on his VAT obligations.

2.4 Purpose

The fictitious supply to and by the undisclosed agent has been introduced by Article 5(2)(c) of the Second VAT Directive, but for goods only.⁵²

An undisclosed agent, as the name suggests, may act without disclosing the identity of his principal. Without this provision an intermediary who acts in his own name, but on someone else behalf would always be required to communicate the identity of his principal for correct VAT invoicing procedure.⁵³ In practice, the principal who may not have any contractual relationship with the customer, would be required to invoice the final customer on the supply of goods.

⁵¹ It could also be possible to have a supply of intermediation services between the disclosed agent and the consumer.

⁵² C. Amand, (n. 37) pp. 159–161.

⁵³ B. J. M. Terra and J. Kajus, (n.33) Ch. 10.2.1.4.

3 INTERMEDIARIES IN DIGITAL SUPPLIES

Specific rules apply in the case of intermediaries involved in E-services supplies.⁵⁴ The introduction of the specific rule regarding the VAT treatment of these supplies was due to the fact that E-services are extremely difficult to tax. The reason for this is that E-service supplies do not rely on traditional forms of distribution: they take place without regard to location and time constraints and with no or minimal necessity of human intervention.⁵⁵ From a VAT point of view, the main difficulties relate with the identification of the place in which the supplies of digital services take place.

Before analyzing the new rules introduced in the VAT Implementing Regulation for online intermediaries of E-services⁵⁶, which is the main objective of this Chapter, the Author will briefly describe the other changes in the VAT Directive entered into force from the 1st of January 2015 regarding the VAT treatment of digital services in B2C transactions.

3.1 The VAT treatment of digital supplies

First of all, to better contextualize the new rules it is necessary to clarify what E-services are. The definition can be found in Article 7 of the VAT Implementing Regulation and covers : “*services that are delivered over the internet or an electronic network and the nature of which render their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology*”. Article 7 includes both examples of services that qualify as E-services and services that do not. In addition, further guidance is given by the list of E-services included in Annex II of VAT Directive. For instance all the following services fall into the category of E-services: music and video supplied online, all kind of apps, games of chance and gambling games played online, software downloaded from the internet etc.

The place of supply rules for E-services have been changed in accordance with the destination principle. From the 1st of January 2015 all supplies of electronic, broadcasting and telecommunication services to non-taxable persons are taxable at the place where the consumer is established, has his

⁵⁴ For digital or E-services supplies we refer to supplies of services fully delivered or performed via the internet. For example: e-books, music, movies, IT services etc..

⁵⁵ M. Lamensch, *European Value Added Tax in the Digital Era: A critical Analysis and Proposals for Reform*, (IBFD Doctoral Series Vol. 36 2015) pp. 39-51.

⁵⁶ The new rules for intermediary apply also for Internet telephone services supplied through a telecommunication network an interface or a portal, see article 9a(2) VAT Implementing Regulation.

permanent address or usually resides.⁵⁷ According to the previous legislation, the place of supply for E-services followed the general rule for B2C services provided in Article 45 VAT Directive i.e. where the supplier has established his business.⁵⁸ These rules gave VAT planning opportunities: digital services suppliers had an incentive to establish in the Member State with the lowest VAT rate in order to have a tax advantage over suppliers established in Member States with higher VAT rate or outside the EU.⁵⁹ To give a practical example in Luxemburg the VAT rate on e-books was 3%⁶⁰, while in Germany it was 19%, therefore according to the place of supply rules in force before 2015, e-books suppliers established in Luxemburg had a clear advantage in terms of competition in comparison with those established in Germany.⁶¹

In addition, in order to avoid the need for suppliers to register in all the Member States to account for VAT on B2C digital services, the mini one-stop-shop (MOSS) scheme was extended to EU providers.⁶² The MOSS represents a simplification measure for digital providers, in fact it allows them to declare, in a single return, and in a single Member State all B2C supplies made in a given period.⁶³ In practice the Member State of identification has to collect and redistribute the tax to the Member State of consumption. The EU was the first to introduce a simplified registration scheme (2003)⁶⁴ which has now been adopted in many other countries.⁶⁵ Such simplified registration scheme is also recommended in the VAT/GST Guidelines issued by the OECD.⁶⁶

⁵⁷ Article 58 VAT Directive which in some circumstances can be override by Article 59a VAT Directive “*effective use and enjoyment*” provision.

⁵⁸ In the case in which the services is supplied from a fixed establishment the place of supply is the place where that fixed establishment is locates.

⁵⁹ M. Weidmann, *The New EU VAT Rules on the Place of Supply B2C E-Services*, (2015) EC Tax Review 2015-2, pp.108-110.

⁶⁰ It is important to highlight that the electronic services cannot be subject to reduced rates (Article 98(2) VAT Directive), for this reason Luxemburg, as a result of the infringement procedure initiated by the Commission (Case C-502/13 Commission v. Luxemburg), amended the VAT rate on e-books. However, with the previous rules, it would have still be advantageous to establish in the Member State with the lower standard VAT rate considering that the difference can be quite substantial.

⁶¹ M. Weidmann, (n.59) pp.108-110.

⁶² Council Directive 2008/8/EC, in addition Council Regulation 282/2011 and Council Regulation 967/2012 provide for implementing provisions.

⁶³ European Commission, *Guide to the VAT mini one stop shop*, (2013); A.M. Bal, *EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, (2014) 54 Eur. Taxn. 7 Journals IBFD, p. 302.

⁶⁴ Council Directive 2002/38/EC amending Directive 77/388/EEC.

⁶⁵ Switzerland (2010), Norway (2011), Iceland (2011), South Africa (2014), Korea (2015) and Japan (October 2015), See M. Lamensch, *Is There Any Future for the Vendor Collection Model in the 21st Century Economy?*, (2016) 27 Intl. VAT Monitor 3 Journals IBFD, pp. 184-185.

⁶⁶ OECD, *International VAT/GST Guidelines*, (12 April 2017) pp. 72-76.

3.2 E-services supplied via intermediaries

A whole range of digital services can be delivered to the end consumer through an intermediary. The number of parties involved in the distribution chain of these services can vary. The services can be supplied directly from the provider to the final customer, for example when a consumer download an Anti-virus software directly from the website of the developer. However, usually multiple intermediaries are involved in the supply of digital service for example the developer of an app may, in order to increase sales, enter into a contract with an app store which in turn may enter into a contract with a payment processor to handle the purchase by the consumer.⁶⁷

The involvement of intermediaries is common in the case of digital services and the supply chain can be long and stretch across different countries.⁶⁸ In such cases, it can be complicated to determine who, in the chain, is responsible for VAT. For this reason, the Commission decided to introduce legal presumptions for intermediaries involved in digital supplies with the aim to achieve a threefold objective: (i) simplify compliance by providing legal certainty for all the parties involved in the supply, (ii) eliminate double taxation by preventing Member States' Tax Authorities to take differing views on the applicability of Article 28⁶⁹ and (iii) ensure VAT collection.⁷⁰

As already discussed, according to Article 28 VAT Directive the taxable person that takes part in a supply of services on his own name but on behalf of another person is considered to have received and supplied those services himself. The Regulation (EU) No. 1042/2013 has introduced a specific presumption in the VAT Implementing Regulation for the application of Article 28 VAT Directive in the case of E-services and internet telephone services⁷¹ supplied through a telecommunication network, an interface or a portal.

3.2.1 Article 9a VAT Implementing Regulation

Article 9a VAT Implementing Regulation establishes the legal presumption that a taxable person who takes part in a supply of E-services or telephone services, including voice over internet Protocol (VoIP), through the internet is considered to be acting in his own name, but on behalf of the E-services provider. This means that each intermediary is deemed to have received and

⁶⁷ European Commission, (n.18) p.22.

⁶⁸ Ibid.

⁶⁹ See for example case SW: Administrative Court of Appeal Sundsvall, 20 Mar. 2012, *Resolution Interactive (RI) v. the Swedish Tax Authority*, Case No. 2741–2743–10 in R.M. Millar et al., *VAT on B2C Supplies by Non-Resident Sellers*, (2014) 68 Bull. Intl. Taxn. 10 Journals IBFD, pp. 553-554.

⁷⁰ R.M. Millar et al., *VAT on B2C Supplies by Non-Resident Sellers*, (2014) 68 Bull. Intl. Taxn. 10 Journals IBFD, pp. 553-554.

⁷¹ Voice over Internet Protocol (VoIP) is included in the category of Internet telephone services.

supplied further (to the consumer or to another intermediary in the chain) the services.

The presumption can be rebutted only when the following cumulative conditions are met: (i) the service provider is explicitly indicated as the supplier and (ii) that is reflected in the contractual agreements between the parties. The first condition is fulfilled when both the invoices and the customer's receipt issued or made available by the taxable persons involved in the chain identify the service provider as the supplier of the E-service. Each taxable person in the digital supply chain has to meet these requirements in order to avoid being considered as the B2C supplier.

In addition, even if the two above mentioned conditions are met, the presumption cannot be rebutted where a taxable person taking part in the supply of E-services authorizes the charge or the delivery of the services to the customer, or sets the general terms and condition of the supply. It is sufficient for the taxable person taking part in the digital supply to meet one of these conditions to be irrevocably caught by the presumption.

Finally, the last paragraph of Article 9a VAT Implementing Regulation establishes that the presumption does not apply to taxable persons whose only involvement in the supply of E-services is limited to the processing of the payment.

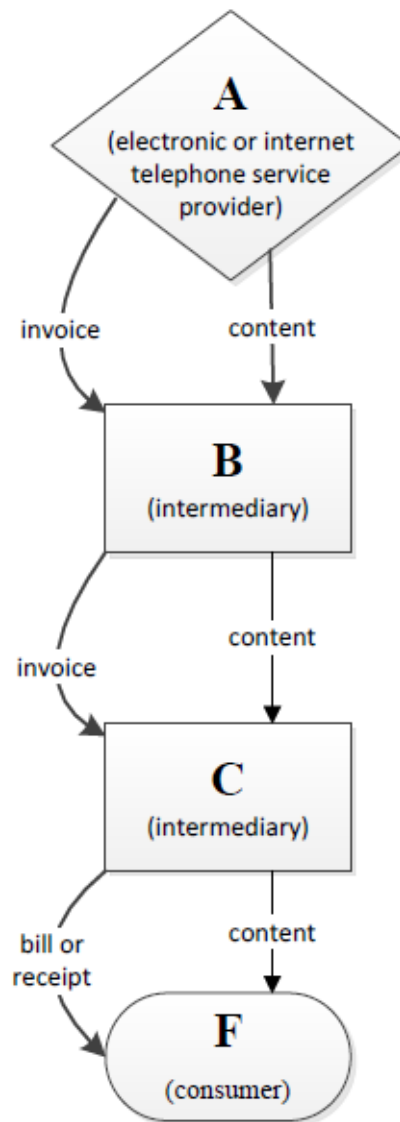
The purpose of this provision is to tax as close as possible to the end consumer, which means that generally the last intermediary in the chain will be caught by the presumption. However, this is not always true, in particular in cases in which there is a sufficient level of information which allows to identify the E-services supplier at an earlier point in the chain.⁷²

In order to better understand how the presumption in Article 9a VAT Implementing Regulation works, it can be useful to provide some examples.

Scenario 1⁷³

⁷² European Commission, (n.18) p.35.

⁷³ Ibid, p.24.



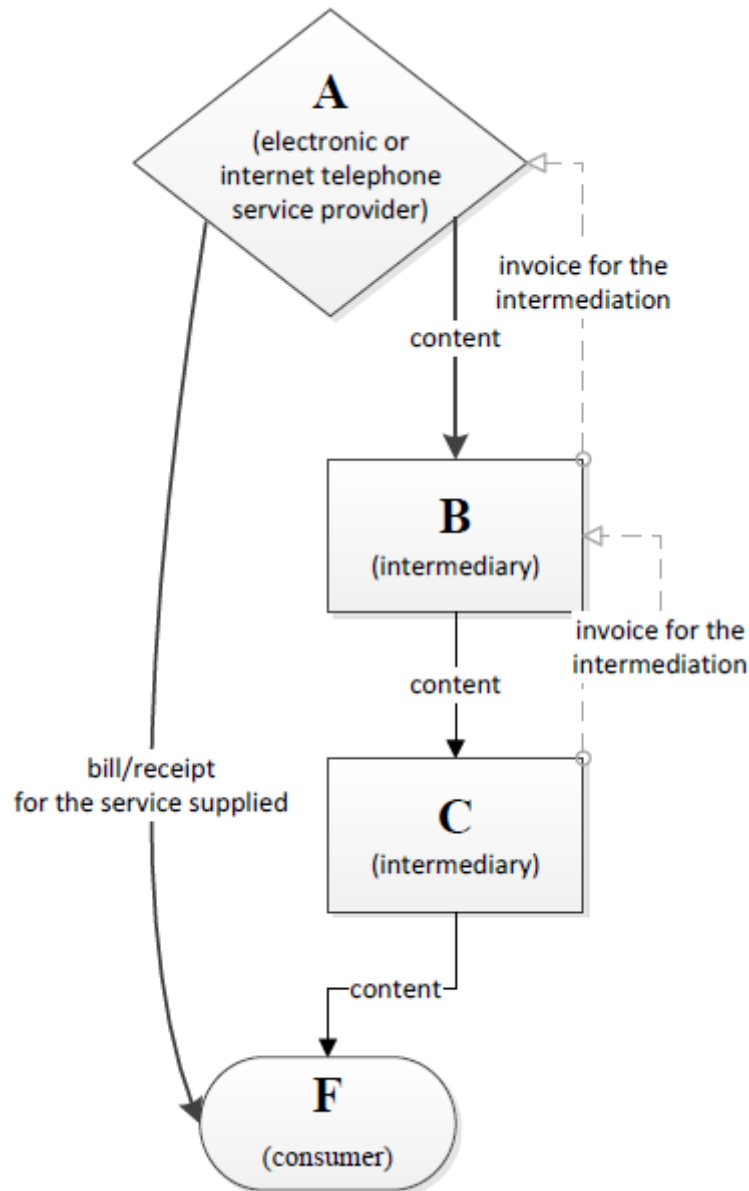
The chart above shows the case where all the intermediaries are caught by the presumption of Article 9a VAT Implementing Regulation, consequently Article 28 VAT Directive applies. Intermediary B is deemed to receive the service from the service provider A and supply it further to intermediary C, which in turn is deemed to receive the service from B and supply it to the end consumer as if he was the provider.⁷⁴ It does not matter for the application of the presumption that, from a civil law perspective, the end consumer F purchases the digital service directly from A. The intermediary C is the one responsible for VAT in the supply to the consumer.

In the case in which the consumer F and the intermediary C are established in different Member States, the intermediary, in order to account for VAT on its supply, needs to either register in the Member State of the consumer

⁷⁴ Ibid.

or to use the simplified MOSS scheme. In addition, in accordance with the destination principle, the intermediary C has to determine the location of the consumer and store the information collected, which is a substantial compliance burden.⁷⁵

Scenario 2⁷⁶:



The chart above shows the situation where the intermediaries B and C rebutted the presumption. In this scenario the service provider is responsible for the VAT collection and calculation on the digital service supply to the

⁷⁵ For an analysis of the issues related to the determination of the location of the consumer in digital supplies see: M. Lamensch, *Are 'reverse charging' and the 'one-stop-scheme' efficient ways to collect VAT on digital supplies?*, (2012) World Journal of VAT/GST Law.

⁷⁶ European Commission, (n.18) p.26.

end consumer.⁷⁷ This means that the service provider needs to determine the location of the consumer which could be particularly complex in this case. In fact, when numerous intermediaries are involved in the chain, the original service provider could lose track of its supply and consequently he will not be able to collect reliable information about the location of the end consumer.

In this case the intermediaries are responsible for VAT only on the invoice issued for the intermediation services. It is also important to remember that the conditions for the rebuttal of the presumption must be fulfilled by both the intermediaries in the chain.

3.2.2 Assessment

Given the absence of EU case-law regarding the presumption introduced by Article 9a VAT Implementing Regulation, the analysis will be based mainly on the general principles of the VAT Directive and the Commission Explanatory Notes. It is important to keep in mind that the Explanatory Notes do not form part of EU law, which means that they are not legally binding for Member States and taxable persons.

3.2.2.1 When an intermediary takes part in the supply?

The presumption of Article 9a applies only when a taxable person “*takes part*” in the supply of an electronic or internet telephone service. In such a case, the taxable person is considered to act in his own name, but on behalf of the service provider.

According to the Explanatory Notes in order to determine whether the intermediary took part in the supply, all the relevant circumstances of the case must be taken into account. In particular, both the facts and the contractual relations must be analyzed. Moreover, in accordance with the principle of substance over form, in case of contradiction between economic reality and contractual arrangements, the former prevails.⁷⁸

The Explanatory Notes also hold that the expression in Article 9a VAT Implementing Regulation *taking part in the supply* should have the same meaning as in Article 28 VAT Directive. In any case, the interpretation of both articles has to be based on EU law and not on national law, which are, as highlighted in the previous Chapter, very different on the point.⁷⁹

In addition, the Explanatory Notes provide a non-exhaustive list of indicators that suggest that a taxable person is *taking part in the supply*⁸⁰:

⁷⁷ Ibid, p.26.

⁷⁸ Ibid, p.27.

⁷⁹ Ibid, p.27.

⁸⁰ Ibid, p.29.

- a) owning or managing the technical platform over which the services are delivered;
- b) being responsible for the actual delivery;
- c) being responsible for collecting payment, unless the only involvement of the taxable person is the processing of payment;
- d) controlling or exerting influence over the pricing;
- e) being the one legally required to issue a VAT invoice, receipt or bill to the end user in respect of the supply;
- f) providing customer care or support in relation to queries about or problems with the service itself;
- g) exerting control or influence over the presentation and format of the virtual market place (such as app stores or websites) such that the brand and identity of the taxable person are significantly more prominent than those of other persons involved in the supply;
- h) having legal obligations or liabilities in relation to the service provided;
- i) owning the customer data related to the supply in question;
- j) being in a position to credit a sale without the supplier's permission or prior approval in cases where the supply was not properly received.

The list is useful to determine if a taxable person takes part in the supply, however it does not mean that the taxable person is automatically caught by the presumption. In fact, the taxable person would still have the possibility to rebut the presumption, provided that the strict requirements for the rebuttal are met.⁸¹

It is evident, on the basis of the above-mentioned list, that the scope of the presumption, as interpreted by the Commission, is very broad and potentially covers not only large companies, but also many small and medium-sized enterprises.⁸² Moreover, it is important to stress that the list is just the result of the Commission interpretation for which there is no explicit support in the wording of Article 9a VAT Implementing Regulation. This means that the CJEU could reject the Commission's extensive interpretation in the Explanatory Notes.⁸³

⁸¹ Only in case where the taxable person taking part in the supply of e-services authorizes the charge or the delivery of the services to the customer, or set the general terms and condition of the supply, the presumption is not rebuttable.

⁸² M. Weidmann, (n.59) pp.108-110.

⁸³ M. Lamensch, (n.55), p. 162-163.

3.2.2.2 *In which circumstances the presumption is rebuttable?*

When a taxable person takes part in a supply of electronic or internet telephone services the presumption provided in Article 9a VAT Implementing Regulation generally applies. The presumption is rebuttable only when all the following conditions are met⁸⁴:

(1) the provider of the service is explicitly indicated as the supplier by this taxable person which means that:

(a) the invoice issued or made available by each taxable person taking part in the supply identifies the service in question and its supplier; and

(b) the customer's bill or receipt identifies the service in question and its supplier; and

(c) the taxable person taking part in the supply does not authorize the charge to the customer⁸⁵; and

(d) the taxable person taking part in the supply does not authorize delivery⁸⁶; and

(e) the taxable person taking part in the supply does not set the general terms and conditions of the supply⁸⁷;

AND

(2) this is reflected in the contractual arrangements.

It is clear, especially in the light of the broad interpretation of points (c), (d) and (e) given in the Explanatory Notes, that the presumption is very difficult to rebut for taxable persons taking part in the supply. On one hand, this has the effect of increasing legal certainty, since the last intermediary in the chain will, in most cases, be the one responsible for VAT on the B2C supply. On the other hand, with regards to cases in which the presumption is not rebuttable, Article 9a VAT Implementing Regulation could be considered incompatible with Article 28 VAT Directive which is an higher

⁸⁴ European Commission, (n.18) p.25.

⁸⁵ According to the Explanatory Notes authorizing the charge refers to the situation in which the taxable person can influence whether, at what time, or under which preconditions the customer pays.

⁸⁶ According to the Explanatory Notes authorizing the delivery is a broader concept than making the delivery. It refers to the situation where the taxable person can influence whether, at what time, or under which preconditions the delivery is made.

⁸⁷ According to the Explanatory Notes the expression *general terms and conditions of the supply* covers any general terms and conditions that are set by a taxable person taking part in the supply and with which a final customer has to agree before purchasing the service. For example it includes the terms and conditions set by market places and similar platforms requiring users to agree to general terms and conditions for using that website or platform

ranking norm.⁸⁸ In order to be caught by the legal fiction of Article 28 VAT Directive, a taxable person needs to: (i) take part in the supply, (ii) act in his own name, but (iii) on behalf of another. With regard to the fulfillment of point (ii) the CJEU in its case-law held that all the details of the case have to be taken into account and, in particular, that the contractual relationship between the parties involved in the transaction is decisive.⁸⁹ It follows that, in cases in which from the agreements between the parties emerges clearly that the taxable person taking part in the supply is not acting in his own name (and this reflects economic reality), the presumption in Article 9a could in all cases be disregarded by the CJEU.⁹⁰

3.3 Interim conclusion

Credit must be given to EU Legislator for being the first to recognize the challenges created by the digital economy and for introducing specific provisions in the VAT Directive to address them. The implementation for E-services of the destination principle for B2C supplies contributed to the reduction of the distortions of competition for business established in different Member States. Also, the extension of the MOSS for EU E-services provider, although improvable, leads to the reduction of the compliance burden for businesses involved in E-services cross-border supplies.⁹¹ In general, the rules for E-services represent, in the Author's view, a step in the right direction.

When an E-service provider relies on different intermediaries it can be difficult for him to know exactly when the e-service is supplied, at what price and, above all, in which location the end consumer is established. The result is that the E-service provider would not be able to correctly collect the VAT on the B2C supply. The presumption in Article 9a VAT Implementing Regulation attempts to improve legal certainty and to secure VAT collection in these situations by making the intermediary, which is presumably closer to the end consumer⁹², responsible for VAT. Again, credit must be given to the EU Legislator for identifying the problem and trying to solve it. However, in the Author's opinion, the new rules concerning intermediaries,

⁸⁸ An implementing regulation cannot go beyond the scope of the legal act which it implements.

⁸⁹ Case C-464/10 *Henfling*, para. 39-42.

⁹⁰ M. Weidmann, (n.59) pp.108-110.

⁹¹ See M. Lamensch, *Are 'reverse charging' and the 'one-stop-scheme' efficient ways to collect VAT on digital supplies?*, (2012) *World Journal of VAT/GST Law* (2012).

⁹² There are also doubts regarding this assumption, in fact it may be easier for the intermediary to have access to information regarding the end consumer's location, however the intermediary may be unaware of which digital services are supplied. This mean that the intermediary can have difficulties to determine if the services supplied are, for example exempt from VAT.

and their interpretation in the Explanatory Notes, raise numerous issues and practical difficulties.

First, as already mentioned in section 3.2.2.2, the presumption in Article 9a VAT Implementing Regulation and, especially its extensive interpretation in the Explanatory Notes, could be considered not compatible with Article 28 VAT Directive and the CJEU case-law.

Second, it could be argued that the presumption is not in line with the original purpose of Article 28 VAT Directive. Both Articles 14(2)(c) and 28 VAT Directive introduce the fictitious supply, allowing in this way the intermediary not to reveal to his customer the identity of original supplier.⁹³ On the contrary, the purpose of Article 9a VAT Implementing Regulation is to make liable for VAT the taxable person who is *closer* to end customer.

Third, notwithstanding the Explanatory Notes, great uncertainty remains on the application of the presumption, in particular it is difficult to determine with certainty in which cases the intermediary *takes part* in the supply. In the Author's opinion, the Commission's interpretation in the Explanatory Notes is too broad and covers cases in which the taxable person intervention in the supply is minimal.

In conclusion, it is evident that the presumption in Article 9a VAT Implementing Regulation is very hard to rebut for intermediaries that take part in the supply. It appears that, at least for digital supplies, the presumption leads to a shift from the vendor collection model⁹⁴, which constitutes the basis of the EU VAT system, towards an intermediary collection model. This latter does not represent a problem *per se*, on the contrary it could constitute a more effective way to ensure the collection of VAT in a digital environment, especially in cases in which the service provider is not established in the EU.⁹⁵ However, implementing the intermediary collection model constitutes a major change in the VAT system that would require further amendments of the VAT Directive. Widening the scope of Article 28 VAT Directive, which serves a different purpose, only leads to additional uncertainty.

⁹³ B. J. M. Terra and J. Kajus, (n.33) Ch. 10.2.1.4.

⁹⁴ The vendor collection model requires sellers to assess and collect the tax due on their supplies and to register with the tax administration for the purpose of remitting it.

⁹⁵ In the intermediary collection model the liability to remit the VAT lies on particular intermediaries in the supply chain. The BEPS action 1, suggest this model for the import of low value goods.

4 INTERMEDIARIES IN DISTANCE SALES

4.1 Introduction

As mentioned in Chapter 2, Article 14(2)(c) VAT Directive introduces, for intermediaries that take part in a supply of goods in their own name and on someone else behalf, the legal fiction of two consecutive supplies of the same goods: the first between the principal and the intermediary and the second between the intermediary and the customer. Unlike the case of E-service, there are no special rules or presumption for the application of Article 14(2)(c) VAT Directive in an online scenario. Therefore the analysis carried out in Chapter 2 validly describe the rules applicable for intermediary involved in B2C supplies of goods.

However, the EU Commission issued in December 2016 a package of proposals for the amendment of the VAT Directive and VAT Implementing Regulation aimed at modernizing the B2C E-commerce trade. In particular, the Commission proposed a modification of the text of both Articles 14(2)(c) and 28 VAT Directive. For this reason, in this Chapter the Author will focus on the analysis of the proposals.

4.2 The proposal

4.2.1 Background

The amendments of the VAT Directive proposed by the EU Commission are based on three main reasons:

a) The complexity of VAT obligation

The EU VAT system is based on the destination principle for B2C cross-border supply of goods. According to Article 33 VAT Directive the place of supply of goods dispatched or transported on behalf of the supplier⁹⁶ is deemed to be the place where the dispatch or transport to the customer ends. It follows that, above a certain threshold⁹⁷, businesses, in order to account for VAT, are required to register in the Member State of destination. The cost of complying with VAT obligations has been estimated on average EUR 8,000 *per* year for each Member State in which a business supplies to, which represent a substantial cost for a business that carry out supplies in all the 27 Member States. For this reason many businesses, in particular SMEs, do not engage in cross-border trade.⁹⁸

b) The current system is not neutral

⁹⁶ According to the VAT Committee Guidelines, 104th Meeting 4-5 June 2015, Article 33 applies also when the supplier has intervened *indirectly* in the transport or dispatch of the goods.

⁹⁷ The threshold can be either EUR 100.000 or 35.000 depending on the Member State.

⁹⁸ European Commission, (n.21) p.2.

EU businesses are in a disadvantageous position compared to non-EU ones which, through high levels of non-compliance, are able to make VAT-free supplies into the EU.⁹⁹ This is due to the fact that Member States cannot enforce properly the registration requirements over non-EU taxable persons.

c) The exemption for the importation of small consignments

This exemption apply for importation of goods below a certain value, because the cost of collecting VAT on such imports is expected to be higher than the revenue generated. However, due to an high level of abuse the loss of tax revenue related to this exemption is estimated to be EUR 5 billion per year.¹⁰⁰

4.2.2 Overview

The proposal covers E-commerce in wide sense: E-services, distance sales and imports of low-value goods.¹⁰¹

4.2.2.1 E-services

With regard to E-services the Commission proposed the introduction of two thresholds with effect from 2018. The first threshold of EUR 10,000 introduces a derogation from the destination principle for B2C E-service supplies. The supplies made by taxable person with a total annual value of intra-community B2C E-services supplies below the EUR 10,000 threshold will be taxed at origin.¹⁰²

Taxable persons with a total annual value of B2C intra-community E-services supplies below EUR 100,000 will have a more favorable treatment for the identification of consumers location (just one piece of evidence instead of two).¹⁰³

Finally, also with effect from 2018, the Commission proposed the application of the rules for invoicing and record-keeping of the Member State of identification. In practice, the Member States of consumption will have to accept the invoices drawn up on the basis of the rules that apply in the Member State of identification of the taxable person.¹⁰⁴

⁹⁹ Ibid, p.2.

¹⁰⁰ Ibid, p.2

¹⁰¹ For a more detailed analysis of the proposal see M. Lamensch, *European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, (2017) 28 Intl. VAT Monitor 2 Journals IBFD.

¹⁰² The application of the origin taxation will be optional.

¹⁰³ European Commission, (n.21) p.6.

¹⁰⁴ Ibid, p.6.

4.2.2.2 Distance sales

With effect from 2021, the Commission proposed the application of the MOSS also to distance sales. In addition, the same EUR 10,000 threshold discussed above for E-services will apply to distance supplier.¹⁰⁵

4.2.3 Imports of low-value goods

The Commission proposed the elimination of the exemption for importation of goods below a certain amount (from EUR 10 up to EUR 22). With the growth of E-commerce the imports of such low-value consignments has increased massively. The increase of such imports is also due to undervaluation frauds which cause a loss of revenue for Member States that is estimated to be EUR 5 billion *per year*.

The elimination of the exemption is connected with the extension of the MOSS to cover the imports of low-value consignments. In addition, since the Commission is not expecting that all the non-EU sellers will comply with the MOSS registration requirements, the Commission proposed, in case of failure to register, that the person presenting the goods to custom in the Community¹⁰⁶ will have to report and pay import VAT due on these goods electronically.¹⁰⁷

4.2.4 Proposed amendments to Articles 14(2)(c) and 28 VAT Directive

The Commission proposed a change in the text of both Articles 14(2)(c) and 28 VAT Directive. The amendment consists in adding to the text of these provisions the following words: “*including cases where a telecommunications network, an interface or a portal is used for that purpose*”.¹⁰⁸ The scope of these amendments is to clarify, if that was still needed, that both Articles 14(2)(c) and 28 VAT Directive applies where service or goods are provided through an intermediary who is acting in his own name, but on behalf of another person and who is using an electronic interface to make the supply.¹⁰⁹

Surprisingly the changes are not supposed to enter into force at the same time. The new version of Article 28 VAT Directive will enter into force from 2018, while the clarification for Article 14(2)(c) from 2021.¹¹⁰

Even if it is already clear with the current text that Articles 14(2)(c) and 28 VAT Directive apply also in case in which an undisclosed agent is using an interface, a telecommunications network or a portal to make the supply, the

¹⁰⁵ Ibid, p.8.

¹⁰⁶ Such as postal operator or express couriers.

¹⁰⁷ M. Lamensch, *European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, (2017) 28 Intl. VAT Monitor 2 Journals IBFD, section 4.

¹⁰⁸ European Commission, (n.21) pp. 15, 17.

¹⁰⁹ Ibid., pp. 7,9.

¹¹⁰ Ibid., pp. 7,9.

clarification would make it even more explicit and thus it will increase legal certainty.

4.3 Joint and several liability for online marketplaces – the UK example

4.3.1 How the fraud works

The Her Majesty's Revenue and Customs (HMRC) has estimated that, in 2015-2016, UK online VAT fraud and error committed by non-EU sellers costed approximately GBP 1.5 billion in lost tax revenue.¹¹¹ According to the HMRC the fraud is carried out by sellers non-established in the EU which import (before sale) goods in the UK without paying the correct amount of import VAT. After being imported those goods are then stored in fulfilment centres¹¹². The seller will then sell those goods, without charging VAT, to UK customers through an online marketplace (typically Amazon or eBay).¹¹³

This fraud is possible because non-EU sellers can easily import goods into UK fulfilment centres without paying the correct amount of import VAT. The HMRC identified various way used by non-EU sellers to do so: undervaluation of the goods to qualify for the exemption for importation of low-value consignments, Onward Supply Relief, reliefs for gifts and samples and relief for use of private imports.¹¹⁴ In addition, fulfillment centres do not own the goods they store and for non-EU sellers the importation is made before the end customer is known. The result is that no proper checks are carried out in order to guarantee that the correct VAT has been paid on the stored goods.¹¹⁵

Online marketplaces such as Amazon and eBay explicitly state in their Terms and Conditions that the seller has the legal responsibility for the collection and payment of VAT on the sales of his goods.¹¹⁶ As a result, non-EU sellers can easily carry out supplies of goods to UK customers without charging VAT or without remit it to the HRCM. The UK and the others Member States do not have enforcement jurisdiction beyond their

¹¹¹ National Audit Office, *Investigation into overseas sellers failing to charge VAT on online sales*, (19 April 2017), p. 19.

¹¹² Fulfillment centres are warehouses where goods can be stored before delivery to the customer.

¹¹³ National Audit Office (n.111), p.10.

¹¹⁴ Ibid. p.14.

¹¹⁵ Ibid. p.14.

¹¹⁶ Amazon's Participation Agreement states that all the sellers on Amazon.com marketplace agree that it is their responsibility to determine and declare any VAT charges that arise from the sale of goods and services by the seller to the buyer. Similarly, eBay's policy pages state: "If you are required to charge VAT on your items, you are responsible for paying that VAT to the relevant tax office in accordance with the appropriate laws and regulations."

borders, which means that they cannot verify and enforce properly the EU VAT obligation on non-EU taxable persons.¹¹⁷

4.3.2 The HMRC's solution

In order to tackle this type of fraud, the HMRC has introduced in September 2016 the online marketplace liability. In practice, the marketplace can be held liable in the case in which the online seller fails to fulfill his VAT obligation. The joint and several liability notice issued by the HMRC can be withdrawn (i) if the non-EU seller has fully met his VAT obligations or (ii) if the non-EU seller is removed from the online marketplace. The online marketplace will not be held liable for the payment of VAT if the non-EU seller is removed from the online marketplace within the time specified in the joint and several liability notice.¹¹⁸

4.3.3 Assessment

The online marketplace liability is based on Article 205 VAT Directive, according to which a person other than the one responsible for VAT on the supply can be held jointly and severally liable for payment of VAT. Since a large share of E-commerce is carried out on online marketplaces, in the Author's view, the online marketplace liability can effectively tackle the above described type of VAT fraud because it will enhance cooperation between online marketplaces and tax authorities and it will solve the problem of enforcement with non-EU sellers. However, doubts can arise regarding the compatibility of the online marketplace liability with the principle of proportionality.¹¹⁹

¹¹⁷ M. Lamensch, *Is There Any Future for the Vendor Collection Model in the 21st Century Economy?*, (2016) 27 Intl. VAT Monitor 3 Journals IBFD, p. 182.

¹¹⁸ 'VAT: Overseas Business Using Online Marketplace To Sell Goods In The UK - GOV.UK' (*Gov.uk*, 2017) <<https://www.gov.uk/guidance/vat-overseas-businesses-using-an-online-marketplace-to-sell-goods-in-the-uk#JSL>> accessed 22 May 2017.

¹¹⁹ See for example Case C-384/04 *Commissioners of Customs & Excise and Attorney General v Federation of Technological Industries and Others*, [2006] ECLI:EU:C:309.

5 INTERMEDIARIES IN SHARING ECONOMY

5.1 Introduction

Sharing economy platforms such as Uber, Airbnb, BlaBlaCar have grown rapidly in recent years.¹²⁰ These platforms represent a shift from the traditional business models based on ownership towards new ones based on access. Thanks to the development of ITC, these platforms allow private individuals to generate income out of their idle resources for example by renting out their apartment or by offering a ride.¹²¹

The impressive growth of these platforms raises different issues from a tax perspective. In particular, the current EU VAT rules do not seem to properly address the tax challenges brought by these new business models.

5.2 The VAT treatment of sharing economy

The way in which online sharing platforms are organized can vary from a platform to another. However, generally the exchange of goods and services between individuals (or so-called peers) is carried out on an online marketplace or an app. There are different types of transaction that take place on these marketplaces¹²², since it would be impossible to cover all the existing business models, the following analysis will be focused only on supply of goods and services by individuals for monetary consideration.

According to the EU Commission, the VAT assessment of sharing economy transactions should be based on a separate analysis of the supplies of goods and services by individuals on the sharing platform with other peers and the supplies of services by the sharing platform to its users.¹²³ The Commission did not refer to the scenario in which the sharing platform involved in the transaction is acting in its own name, but on the individual behalf.

5.2.1 Services provided by sharing platforms

Generally, the online sharing platforms provide intermediation services to their users. In fact, through the platforms, users can communicate and interact with each other in order to carry out supplies. It is clear, that such intermediation services if provided for monetary consideration are subject to VAT. The online sharing platform are generally treated for VAT purposes as disclosed agents.¹²⁴

¹²⁰ Value Added Tax Committee, *Working Paper No. 878*, (2015) taxud.c.1(2015)4370160 VAT Treatment of Sharing Economy, p.2.

¹²¹ I. Grlica, *How the Sharing Economy Is Challenging the EU VAT System*, (2017) 28 Intl. VAT Monitor 2 Journals IBFD, section 1.

¹²² Value Added Tax Committee (n.120), p. 3-4.

¹²³ Ibid, p.4.

¹²⁴ I. Grlica (n.121), section 5.

5.2.2 Goods and services provided by individuals for consideration

Much more complicated is the treatment of the supplies of goods and services carried out by the users of sharing platforms. In principle, all the supplies of goods and services made by a taxable person (acting as such) for consideration are subject to VAT.¹²⁵ It is therefore fundamental to determine if an individual who supplies goods or services on an online sharing platform can be considered a taxable person within the meaning of Article 9(1) VAT Directive.

In order to do so it is necessary to determine if the sharing platform's user is carrying out an economic activity and whether such activity is carried out independently. According to the Commission both requirements need to be assessed on a case by case basis. However, the Commission also argues that an individual that joins an online platform in order to sell his goods and services should be considered as carrying out an economic activity irrespective of whether such activity is performed with continuity or on occasional basis.¹²⁶

5.3 Interim conclusion

Online sharing platforms have enabled individuals to exploit their own resources in order to generate income. These sharing platforms are growing rapidly and are challenging traditional business models.

The fact that the transactions on these platforms are carried out by private individuals who, due to the lack of regulations, do not have to comply with administrative and tax obligations, places them in a competitive advantage in comparison with traditional businesses.¹²⁷

The taxation of the intermediation services rendered by sharing platforms does not create particular problems from a VAT Perspective. However, the treatment of the supplies carried out by the user of sharing platform is much more complicated. If, as the Commission submitted, the users that carry out supplies on sharing platforms have to be considered taxable persons, this would result in an increase of the number of taxable persons, which could be difficult to handle by the Member States' tax authorities. In addition, many of the sharing platforms' users would probably benefit from the exemption for small enterprises with the consequence that no VAT is charged on their transactions.¹²⁸

The EU VAT system is not suited to address the challenges brought by these new business models. It remains to be seen if, the growth of transactions

¹²⁵ Article 1 and 2 Recast VAT Directive 2006/112/EC.

¹²⁶ Value Added Tax Committee (n.120), p. 6.

¹²⁷ I. Grlica (n.121), section 3.

¹²⁸ Articles 281-294 VAT Directive 2006/112/EC.

between users of sharing platforms and the resulting loss of revenue for Member States, together with the competition distortions created by these business models will lead to new legislative initiative at EU level.

6 CONCLUSIONS

The EU VAT system, which was adopted more than 40 years ago is not , as admitted by the EU Commission, “*well-fitted for today’s society*”¹²⁹. Notwithstanding the recent legislative developments there are still numerous issue regarding the VAT Treatment of E-commerce intermediaries.

E-services

The introduction of Article 9a VAT Implementing Regulation has surely improved legal certainty for intermediaries involved in E-services supplies. However, there are doubts regarding the compatibility of Article 9a VAT Implementing Regulation with Article 28 VAT Directive. In addition, since the Commission interpretation of the presumption is very broad and the rebuttal is subject to strict requirements also intermediaries with a minimal involvement in the supply could be caught by it. As a result, it could be difficult for such intermediaries to be able to collect and store reliable information regarding the location of the end consumers and thus account for VAT.

Distance sales

The new package of Proposals on E-Commerce with the introduction of the MOSS also for distance sales will reduce, if approved, the compliance burden for businesses that engage in cross-border trade. Also the elimination of the exemption for low-value consignments represents a positive development. With regard to intermediaries, the amendments of both Articles 14(2)(c) and 28 VAT Directive are just a clarification of the meaning of these provision and do not constitute a major progress. However, as shown in the UK example, the level of fraud related to distance sales is currently very high and the elimination of the exemption for low-value consignments is supposed to enter into force, if approved, only in 2021. The marketplace liability adopted by the UK appears to be a convincing short-term solution for combating fraud.

Sharing Economy

Taxing the sharing economy represent one of the challenges which has not been properly addressed by the EU legislator. In the case of sharing economy the treatment of the sharing platforms does not raise particular issues, what is more problematic is the treatment of transactions between peers. In particular, the VAT rules do not adapt easily to transactions between users of sharing platforms, as a result many of these transactions

¹²⁹ European Commission, *Questions and Answers: Value Added Tax (VAT)*, (6 Dec. 2011), < [http://europa.eu/rapid/press-release MEMO-11-874_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-874_en.htm?locale=en) > accessed 22 may 2017.

are not subject to VAT.¹³⁰ The growth of economic relevance of the sharing economy, the resulting loss of VAT revenue for Member States and the distortions of competition caused by these business models will probably require the introduction of new rules or at least the adaptation of the current ones to address effectively the VAT challenges brought by sharing economy.

¹³⁰ Either because the users are not considered taxable persons or because they fall under the exemption for small enterprise.

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