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Presumptions on the place of supply for digital B2C services

by

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HARN60 Master Thesis

Master's Programme in European and International Tax Law

2019/2020

31st May 2020

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Contents

Summary

According to Art. 58 VAT Directive digital services are to be taxed at the place where the customer resides. The Implementing Regulation provides certain presumptions for suppliers to determine that place. These presumptions are analysed in this thesis regarding their actual compliance effort for companies, as well as the implementation of the destination principle.

But before, the conditions and recognition of the destination principle for cross-border digital supplies on a European and international level are assessed.

This thesis shows, that some presumptions are impossible to determine for suppliers, while others may not sufficiently represent the destination principle. Moreover, it discusses legal problems with the Implementing Regulation, as it is elaborated that it actually changes the general rule as set out by Art. 58 VAT Directive. The additional guidance for companies given by the Explanatory Notes are used for the interpretation of the presumptions. However, the author concludes, that a coordinated interpretation among the Member States should be provided for the suppliers.

Lastly, the thesis discusses an alternative system for the taxation of digital services similar to a split-payment scheme, which would relief the supplier from the burdensome compliance. This is followed by a brief look at the rules for the determination of the place of supply in other jurisdictions.

The author concludes, that changes to the system should balance the compliance effort and the destination principle. However, the rules have to be designed to allow for an automated determination. Technology should be a key feature for an alternative system.

Preface

This thesis marks the end of the Master's Programme in European and International Tax Law at Lund University. A year of so many great guest lectures and discussions. I want to express my gratitude by thanking especially Marta Papis-Almansa, Cécile Brokelind, and Sigrid Hemels, who made this programme so unique and fun. Same applies to my classmates. I also want to thank my supervisor, Eleonor Kristoffersson, for her feedback and guidance during the writing process.

I am also grateful for Lund University and the staff at LUSEM for the great welcome and organisation during my year in Lund.

Finally, I want to express my thanks towards my parents, making this Sweden experience possible, the rest of my family, and my friends.

Abbreviation list

B2B	Business to business
B2C	Business to consumer
CJEU	Court of Justice of the European Union
e.g.	For example
EU	European Union
GST	Goods and Services Tax
OECD	Organisation for Economic Co-operation and Development
SME	Small and medium enterprises
TBE	Telecommunication, broadcasting and electronic services
VAT	Value added tax

1 Introduction

1.1 Background

Digitalization as probably one of the biggest projects of our generation has a huge impact on almost every aspect of life. More and more opportunities for inter alia simplification, increase of efficiency and whole new business models can be observed.

This change in economy also has an impact on taxation. The taxation of the digital economy is one of the major challenges for jurisdictions all around the world.[1] Besides the impacts on direct taxation, it also raises problems for VAT systems.[2] One of them is the taxation of digital services. More and more services are consumed online via computer or phones. Especially now, when the world is facing the COVID-19 crisis, the usage of digital services is growing rapidly. People forced to stay at home, start to stream much more videos and participating in video conferences in their home office. In recent years the turnover of digital services has increased, making it a subject of special interest for the different jurisdictions regarding VAT.

A challenge, when it comes to the supply of digital services, is the determination of the place of supply. It defines the jurisdiction, which actually has the right to tax the digital service. Already in 2015 changes were made to the VAT Directive[3] concerning those place of supply rules.[4] Since then supplies to final consumers are to be taxed at the place the consumer resides. This was a measure to avoid a distortion of competition. Before, companies were able to settle in a low tax jurisdiction to be able to apply a low VAT rate for their services. The Implementing Regulation[5] provides for certain presumptions for companies to determine, where the consumer resides. However, this resulted in increased compliance requirements for the companies. The costs for VAT compliance are estimated to be 11% higher for intra-EU transactions, than for domestic transactions (both for services and goods).[6]

By 2019 changes in those rules entered into force, mainly aiming to facilitate the application for smaller businesses under a certain threshold. Those enterprises are now allowed to apply the VAT rate at the place they are established. The change indicates that the application of the

[1] Martijn Veltrop, *Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 264.
[2] For example, the taxation in the shared economy or the liability for online marketplaces.
[3] Consolidated version of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347/1 as amended by Council Directive 2018/2057 of 20 December 2018 OJ L 329/3.
[4] Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ L 348 17/7; Council Implementing Regulation of 5 December 2017 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC in the common system of value added tax, OJ L 17/32.
[5] Consolidated version of the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax OJ L 77/1 as amended by Council Implementing Regulation (EU) 2018/1912 of 4 December 2018 OJ L 311/10.
[6] Madeleine Merkx/ John Gruson/ Naomie Verbaan/ Bart van der Doef, *Definitive VAT Regime: Stairway to Heaven or Highway to Hell?*, ec Tax Review 2018-2, p. 75.

destination principle required too burdensome compliance and there has been a need to relief smaller companies of it.[7]

1.2 Aim

The aim of this thesis is to analyse and examine the presumption rules as set out in the Implementing Regulation for determining the place of supply for VAT on digital B2C cross-border services. To reach this aim, the following research questions are answered: What is the compliance burden for companies? Moreover, do they actually lead to a destination-based taxation?

1.3 Method and material

To reach this aim a legal-dogmatic analysis is applied by assessing "the law as it positively stands"[8]. Following this method, the main sources of information (legislation, legal doctrine) are used to "understand the positive law"[9] and provide the answers to the research questions and possible improvements for the current law.[10] The interpretation of the presumptions is based on the Explanatory Notes and the proposals by the European Commission, as well as legal doctrine in the form of articles and books. Additionally, the OECD guidelines on VAT are used as a source for arguments and interpretation of these rules. However, no judgement by the European Court of Justice (CJEU) regarding these presumption rules was given by now. Therefore, the research will focus on the guidelines and legal doctrine. The same legal-dogmatic method is used to measure the compliance burden for the suppliers. The presumption rules, the guidelines, and legal doctrine considering practical problems and difficulties during the determination process are presented. Lastly, the comparative method is used for comparing the rules for the supply of digital services in other jurisdictions with the ones in the European VAT system. The research is limited to sources available in English or German.

1.4 Delimitation

The determination of the place of supply for digital services to taxable persons may also be faced with difficulties and compliance effort for the supplier. For example, when it comes to the determination of the status of the customer and whether the services are used for private or business purposes.[11] Nevertheless, the requirements and challenges for the determination of the place of supply between B2B and B2C supplies differ and due to limited space, this paper therefore focuses only on B2C supplies to non-taxable natural persons.

The problems on how to actually define digital services, especially if supplied as bundled services is also not covered by the following. The rules for intermediary services, like App

[7] Marta Papis-Almansa, *VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?*, ERA Forum (2019) 20, p. 206.
[8] Sjoerd Douma, *Legal research in international and EU tax law*, Kluwer, 2014, p. 17.
[9] Philip Langbroek/ Kees van den Bos/ Marc Simon Thomas/ Michael Milo/ Wibo van Rossum, *Methodology of Legal Research: Challenges and Opportunities*, Utrecht Law Review, Volume 12, Issue 3, 2017, p. 2.
[10] ibid.
[11] Martijn Veltrop, International VAT Monitor, September/October 2014, p. 268.

Stores, from Art. 9 (a) Implementing Regulation, to determine who actually is the supplier shall be out of the scope of the thesis, since it is limited only to the determination of the place of supply. Thus, the MOSS (mini one stop shop) for the collection of VAT on digital supplies is also not discussed in this thesis.

1.5 Outline

At first, chapter 2 gives the legal context of the taxation of digital services under the VAT Directive. Afterwards, the destination principle is defined further. Additionally, the recognition of this principle and implications for such a taxation by the OECD guidelines on VAT and the Definitive VAT system as proposed by the Commission are discussed. In chapter 4 the presumption rules are interpreted and assessed, whether they result in a destination-based taxation and their compliance burden for the suppliers. Before a conclusion is given, possible alternatives for taxation of digital services are discussed in chapter 5.

2 Taxation of digital services under the VAT Directive

The general rule for the supplies of services to a non-taxable person, which can either be a natural person or a non-taxable legal person, is set out by Art. 45 VAT Directive. Therefore, the services are to be taxed at the place the supplier has established his business. As this is just a general rule, there are several exceptions in the Directive for particular services.

Art. 58 VAT Directive includes the special rule for the supply of telecommunication, broadcasting and electronic services (TBE services, in the following also referred to as digital services). Those supplies are taxed at the place, where the non-taxable person is established, has his permanent address, or usually resides. Before 2015 a destination-based taxation of digital services was only applied for services supplied by non-EU suppliers.[12] The application of the same rules for EU and non-EU suppliers can be seen as a prevention of distortion of competition between these two, as well as a simplification for the VAT system.[13]

There is an exception to this exception in Art. 58 (2) VAT Directive, changing the place of supply to the place of establishment of the supplier, so the general rule in Art. 45 VAT Directive. This only applies to suppliers only resident in one Member State, with customers in another Member State and total value of the supplies of Art. 58 VAT Directive under 10,000€ per year.

Applying a destination-based taxation for digital services however, "raises substantial practical difficulties from a tax assessment and compliance perspective"[14]. Therefore, the Implementing Regulation provides further details on how to determine the place of supply referred to in Art. 58 VAT Directive through several presumptions. These presumptions have been introduced to assume, where final consumption in specific situations is likely to happen.[15] For further guidance on the application of the presumptions the European Commission has published non-binding Explanatory Notes.[16]

Nonetheless, suppliers shall only rely on these presumptions, when the determination of the place of residence is "extremely difficult, if not practically impossible"[17] for them following the interpretation by the Explanatory Notes. So, suppliers cannot directly apply the

[12] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 349.
[13] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 106.
[14] Marie Lamensch*, Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 40.
[15] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 108.
[16] Explanatory Notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 by the European Commission, 3 April 2014, https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf (last access: 13 May 2020) (Explanatory Notes in the following); Marta Papis-Almansa, *VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?*, ERA Forum (2019) 20, p. 204.
[17] Explanatory Notes, p. 55.

presumptions, but it is not clear to which extend they need to demonstrate their effort regarding the failed determination to tax authorities.[18] There is however, "nothing in the VAT legislation in support of [this interpretation]"[19].

As Art. 23 (2) Implementing Regulation points out, suppliers shall base their determination on factual information, which is provided by the customers. It should be verified by normal commercial security measures, such as those related to identity or payment checks.

Furthermore, Member States may deviate from these rules by opting for the effective-use-and-enjoyment principle stated in Art. 59a VAT Directive.[20] Services would then be taxed, where they are actually enjoyed. However, the determination, where, for example a downloaded movie, is actually enjoyed seems rather impossible for the suppliers.

[18] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 12.
Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 266.
[20] Cristina Trenta, *European VAT and the digital economy: recent developments*, eJournal of Tax Research (2019), vol. 17, no. 1, p. 121.

3 Destination principle

3.1 Introduction

Before taking a closer look at the presumptions this chapter elaborates the features and recognition of a destination-based taxation, both on an international level by analysing the OECD guidelines, and on a European level by assessing the definitive VAT system as proposed by the Commission. First, some general remarks about function and reasons for the application of the destination principle to digital supplies are given.

3.2 Features of the destination principle and its requirement for digital services

While the determination of the place of supply is of no significant importance for national transactions, it becomes essential for cross-border supplies.[21] If two jurisdictions are involved, the allocation of taxing rights is central to avoid double (non)taxation.[22] This is one of the main purposes of a harmonized VAT system.[23] Due to the increase of cross-border trade, mostly accelerated by digital services, double taxation becomes more and more a problem for VAT systems.[24] Two possibilities for the allocation of taxing rights for cross-border transactions can be distinguished.

First the taxing right can be allocated to the state where the supplier is established, origin principle. Each jurisdiction will tax the amount of value added within its territory.[25] Following this principle, exports are taxed, while imports will be exempt from VAT.[26]

Another possible way is to allocate the taxing right to the state, where the recipient is established, destination principle. Leading to a taxation at the state where the final consumption takes place.[27] As a result the tax, which was paid, will be refunded if the goods are exported.[28] The benefit of the destination principle lies in the fact that "all products bear the same tax burden when finally sold to the consumer"[29]. Contrary, there is a need for border corrections regarding the refunding of VAT already paid.[30]

Because we see an increasing number of cross-border services (inter alia online services), it seems preferable to apply the destination principle. Otherwise companies could choose a low-

[21] Ben Terra, *The Place of Supply in European VAT*, Kluwer Law International, 1998, p. 1
[22] ibid.
[23] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 106.
[24] Thomas Ecker, *A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation*, IBFD 2013, 2.1.
[25] Aleksandra Bal, European Taxation July 2014, p. 300.
[26] Ben Terra, *The Place of Supply in European VAT*, Kluwer Law International, 1998, p. 4.
[27] Ben Terra/ Julie Kajus, *Introduction to European VAT* [online] (Amsterdam IBFD) (last access: 13 May 2020), p. 126.
[28] Ben Terra, *The Place of Supply in European VAT*, Kluwer Law International, 1998, p. 4; Rebecca Millar, *Jurisdictional Reach of VAT*, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 08/64, July 2008, p. 177.
[29] Ben Terra, *The Place of Supply in European VAT*, Kluwer Law International, 1998, p. 5.
[30] ibid.

tax rate jurisdiction to establish their business ("improper VAT rate shopping within EU"[31]), and therefore, encourage a distortion of competition between different tax jurisdictions.[32] Since final consumers are in general less mobile than companies, the destination principle promises a solution to avoid such distortion.[33] Another benefit is that jurisdictions "can introduce [a destination-based tax system] unilaterally"[34], a global agreement is therefore not necessarily needed. However, it is needed to avoid double taxation. Whenever jurisdictions apply the origin-based taxation or apply different, sometimes contradicting rules there is a risk for such double (non)taxation.[35] Additionally, the destination principle reflects better that VAT is a tax on consumption.[36] This is a fundamental principle that lies within "the logic and nature of VAT"[37]. Ideally, it would be levied only in the country of consumption, which would also solve problems of double taxation.[38]

However, a flaw of the destination principle is that in order to determine the place of consumption it has to use certain proxies.[39] One of them is that final consumption takes place where the recipient resides. This does not necessarily reflect reality. *Millar* underlines that it would be "a perfectly designed set of jurisdictional rules, [when] place of taxation [equals] place of consumption"[40]. The problems of taxation with the destination principle are not caused by the principle itself, "but [are] instead a proxy problem concerning the indicators to be used for determining the destination"[41].

VAT is in itself a tax build up on presumptions. While income tax is collected after a defined tax period, where it is possible to objectively determine all necessary circumstances, VAT is collected at the moment of transaction.[42] At this stage it can only be presumed whether final consumption takes place or not, because it actually occurs after the transaction is made and the VAT is levied.[43] Suppliers should be able to rely on the result of the presumption, even if

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[31] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 349.
[32] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 300; Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 106.
[33] Martijn L. Schippers/ Contantijn E. Verhaeren, *Taxation in a Digitizing World: Solutions for Corporate Income Tax and Value Added Tax*, ec Tax Review 2018-1, p. 62.
[34] ibid.
[35] Rebecca Millar, *Jurisdictional Reach of VAT*, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 08/64, July 2008, p. 178.
[36] Opinion of AG Kokott of 3 October 2019, *Herst*, C-401/18, EU:C:2019:834, p. 23; Thomas Ecker, *A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation*, IBFD 2013, 2.1.
[37] Charlène Adline Herbain, *Value Added Tax 3.0* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 32.
[38] ibid.
[39] Rebecca Millar, *Jurisdictional Reach of VAT*, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 08/64, July 2008, p. 177.
[40] ibid, p. 178.
[41] Martijn L. Schippers/ Contantijn E. Verhaeren, *Taxation in a Digitizing World: Solutions for Corporate Income Tax and Value Added Tax*, ec Tax Review 2018-1, p. 66.
[42] ibid.
[43] ibid.

it turned out to be wrong.[44] In the majority of transactions "the supplier will simply have no idea where actual consumption took place"[45].

The place of supply rules within the different jurisdictions therefore are presumptions to determine the place of final consumption. These proxies shall ensure a taxation at the place that reflects the place of consumption most accurate.

3.3 OECD guidelines

It is useful for the interpretation of the European presumptions and to assess the importance and recognition of the destination principle on an international level to take a closer look at the recommendations from the OECD.

The members identified double taxation in the area of VAT as a problem for international taxation, mainly as a consequence of increasing supplies of cross-border services.[46] They recognized the need for an internationally approach, at least regarding services and intangibles.[47] Starting in 2006, the OECD has released guidelines on recommendations for VAT/GST systems regarding digital services in B2C situations.[48]

The current OECD guidelines[49] from 2017 constitute as the "overreaching purpose of VAT"[50] the taxation of final consumption. The destination principle is seen as the way for reaching this purpose and to achieve "neutrality in international trade".[51] Consequently a taxation applying the origin principle would contradict the so called "core features of VAT"[52]. These were already recognized at the Ottawa Conference in 1998.[53] Thus, the guidelines "strongly endorse"[54] a destination-based taxation.

At the same time the guidelines also recognize that, while it is relatively easy to apply the destination principle for the supply of goods, this is of more difficulty regarding the supply of services.[55] The underlying reason is that services cannot be subject to border controls, such as goods, because they are intangible.[56] The guidelines therefore give recommendations for the

[44] ibid, p. 179.
[45] ibid.
[46] Thomas Ecker, *A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation*, IBFD 2013, 2.1.
[47] ibid.
[48] Fabiola Annacondia, *Cross-Border B2C Digital Services: A New Way to Collect VAT?*, International VAT Monitor September/October 2018, p. 177.
[49] International VAT/GST Guidelines by OECD, 2017, http://dx.doi.org/10.1787/9789264271401-en (last access: 13 May 2020)(OECD guidelines in the following).
[50] ibid, 1.8.
[51] ibid, 1.9.
[52] ibid, 1.10.
[53] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 348.
[54] Francesco Cannas/ Calogero Vecchio/ Davide Pellegrini, *A New Legal Framework Towards a Definitive EU VAT System: Online Hosting Platforms and E-Books Reveal Unsolved Problems on the Horizon*, Intertax Volume 46, Issue 8 & 9p. 693.
[55] OECD guidelines, 1.14.
[56] ibid.

determination of place of supply for cross-border services, which should be briefly analysed in the following.[57]

The tax system that the jurisdictions apply for the determination shall inter alia guarantee that "compliance by businesses […] is kept as simple as possible"[58], "clarity and certainty are provided"[59], and compliance costs "are minimal"[60]. As the guidelines underline that these rules should serve to find out what is the actual place of consumption, they notice that it does not usually happen in most jurisdictions.[61] Because of practical problems and the design of VAT (it is charged before the actual consumption takes place), those rules mainly rely on proxies for the determination of the place of final consumption.[62]

While the most commonly used presumption for the place of consumption for services was the place, where the supplier had established his business, it is now "unlikely to lead to an appropriate result"[63]. Since, as was already mentioned above, the services can now be supplied from all over the world via internet, the recipient does not necessarily have to be physically present at the establishment of the supplier.[64] Thus, the presumption that the supplier's place equals the place of consumption is simply not valid anymore for the majority of services. Nevertheless, it is still valid for services that actually require a physical presence of the customer.[65]

Following this development, the guidelines recommend a twofold design for the place of supply rules.[66] Keeping the presumptions for "on-the-spot supplies"[67] and apply for all other services the presumption that the service will be consumed at the place where the customer resides.[68]

Nevertheless, the determination for the place of residence, might still be difficult, especially in e-commerce, due to the huge quantity and the amount of low value transactions.[69] Additionally, those transactions include a "minimal interaction and communication"[70] between the involved parties, making it even harder for the supplier to sufficiently determine the right place of supply. Hence, the guidelines recommend jurisdictions to "provide clear and realistic guidance for suppliers"[71] for the requirements of the determination.[72]

While this may be a very vague recommendation, the guidelines concretize a bit more to give some advice for the jurisdictions. Accordingly, the rules should allow companies to use their

[57] ibid.
[58] ibid, 3.3
[59] ibid.
[60] ibid.
[61] ibid, 3.6.
[62] ibid.
[63] ibid, 3.112.
[64] ibid.
[65] ibid, 3.113.
[66] Fabiola Annacondia, *Cross-Border B2C Digital Services: A New Way to Collect VAT?*, International VAT Monitor September/October 2018, p. 177.
[67] OECD guidelines 3.114.
[68] ibid.
[69] ibid, 3.125.
[70] ibid.
[71] ibid.
[72] ibid,

usual commercial information regarding the customers residence.[73] Furthermore, it suggests to introduce rules that tax authorities would only be allowed to reject the assessment if there should be misuse or abuse.[74] Special attention should be drawn to "the protection of personal privacy"[75] regarding the stored information.

Regarding the kind of information suppliers could use, the guidelines elaborate on possible indicators for the place of residence. So, the information given by the customer (e.g. used bank account, address, credit card), IP address or even "the customer's trading history"[76] may serve as a ground for the determination.[77]

The introduction of the destination-based taxation for all supplies of digital services within the EU aimed to implement these OECD recommendations.[78]

3.4 Definitive VAT system

The destination principle as the underlying principle for a taxation of services has also been recognized by the EU. Due to the changing economy there has been an "awareness that the EU VAT system was simply not equipped"[79] to cope with the digitalization.[80] The European Commission published its "Action Plan on VAT: Towards a single EU VAT area"[81] in 2016.[82] The intention was to adopt the VAT system to the "global, digital and mobile economy"[83]. One reason for the suggested change in the VAT system was the simplification for companies by lowering the compliance burden in cross-border transactions.[84] As stated in the introduction, companies are faced with significant higher compliance costs for cross-border supplies, than for domestic ones.[85] Therefore, the Commission suggested the introduction of a definitive system based on the destination principle.[86] However, the Action Plan just refers to the taxation of the supply of goods.

Further details on how to achieve the definitive system were published by the Commission in the Follow-Up to the Action Plan[87] in 2017, which also considered services. The core element

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[73] ibid, 3.126.
[74] ibid.
[75] ibid.
[76] ibid, 3.127.
[77] ibid.
[78] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 106.
[79] Rita de la Feria, *The Definitive VAT System: Breaking with Transition*, ec Tax Review, 2018-3, p. 123.
[80] Rita de la Feria, *The Definitive VAT System: Breaking with Transition*, ec Tax Review, 2018-3, p. 123.
[81] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT – Towards a single EU VAT area – Time to decide, 7 April 2016, COM(2016) 148 (Action Plan in the following).
[82] Rita de la Feria, *The Definitive VAT System: Breaking with Transition*, ec Tax Review, 2018-3, p. 123.
[83] Action Plan, p. 2.
[84] Action Plan, p. 2.
[85] Madeleine Merkx/ John Gruson/ Naomie Verbaan/ Bart van der Doef, *Definitive VAT Regime: Stairway to Heaven or Highway to Hell?*, ec Tax Review 2018-2, p. 75.
[86] Aleksandra Bal, *The Changing Landscape of the EU VAT: Digital VAT Package and Definitive VAT System*, European Taxation February/March 2019, p. 80.
[87] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the follow-up to the Action Plan on VAT Towards a single EU VAT area – Time to act, 4 October 2017, COM(2017) 566 (Follow-Up in the following).

of this Follow-Up is "the endorsement of the destination principle"[88]. One part of the plan was the e-commerce VAT package, which is to be assed below (4.7).

The Commission proposed a two-step change. In the first step the transitional arrangements for cross-border supplies should be replaced by definitive ones ensuring destination-based taxation for goods.[89] More interestingly the second step would consist in applying the new VAT treatment to all cross-border supplies, therefore including services as well.[90] This shows that the Commission is aiming for a tax system based on the destination principle. This second step will be proposed by the commission five years after the changes from the first step have entered into force and were evaluated for the first time.[91]

However, in the long run the destination principle is recognized by the Commission as the underlying principle for the definitive VAT system for both, the supply of goods and services. This actually goes beyond the proposals by the OECD guidelines, since they clearly distinguish between on-spot services to which an origin-based taxation shall apply, and other services, which shall be taxed at destination.[92]

[88] Francesco Cannas/ Calogero Vecchio/ Davide Pellegrini, *A New Legal Framework Towards a Definitive EU VAT System: Online Hosting Platforms and E-Books Reveal Unsolved Problems on the Horizon*, Intertax Volume 46, Issue 8 & 9, p. 692.
[89] Follow-Up p. 6.
[90] Follow-Up p. 7.
[91] Follow-Up, p. 7.
[92] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 350.

4 Presumptions in the Implementing Regulation

4.1 Introduction

After it was shown that the destination principle is endorsed by the OECD and the EU, this chapter interprets each presumption rule in the Implementing Regulation regarding the application of this principle, as well as the compliance burden for companies by applying the presumptions. Afterwards, the new thresholds to the VAT Directive and the Implementing Regulation for smaller companies will be discussed, followed by the analysis of legal concerns and problems regarding the Implementing Regulation and the Explanatory Notes.

4.2 On the spot services Art. 24 a Implementing Regulation

Art. 24 a (1) of the Implementing Regulation defines that for certain TBE services, which are supplied at a specific location like "a telephone box, a telephone kiosk, a wi-fi hot spot, an internet café, a restaurant or a hotel lobby" (Art. 24 (1) Implementing Regulation), the customer presumably resides or has his permanent address at this location, whenever his physical presence is needed for the supply of the service.

Following this, there are actually two different presumptions. First, it is presumed that the customer resides at that location. The other presumption is that the services are "effectively used and enjoyed" at this location. Thus, the rule wants to achieve taxation at the actual place of consumption, which is the general aim of the VAT as a tax on consumption. It shifts the taxation from the actual place of residence to the place of actual consumption.[93] Although the result is welcomed it seems to be a rather artificial way for the determination of the place of supply to presume that the consumer is resident at the specific location. The presumption that the services are enjoyed at the place of residence is not needed in these scenarios, since the actual place of consumption can be easily determined. In the end this rule "tends to be a real consumption test"[94]. However, it is actually changing the general rule (taxation at place of residence) to the place of consumption.

Art. 24 a (1) Implementing Regulation itself does not give any clarification for which services this rule shall apply. It remains unclear if, for example the download of a movie provided by the supplier of a wi-fi hotspot would also allow to apply this presumption. But an implication can be found in the Explanatory Notes[95], as they mention that so called "on-top services" are not covered by the rule as set out by Article 24 a (1) Implementing Regulation. Only those services which actually require the physical presence of the customer should fall into the scope. This seems stringent considering the underlying presumption that the service is consumed at the location, where the service is carried out, only applies if the customer is

[93] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 355.
[94] Marie Lamensch*, Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 55.
[95] Explanatory Notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 by the European Commission, 3 April 2014, https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf (last access: 13 May 2020)(Explanatory Notes in the following).

actually physical present at this place. Therefore, this presumption seems to be applied mainly to telecommunication and broadcasting services and just rarely for electronic services.[96]

This rule is in line with the OECD guidelines, which recommend, as mentioned above, a taxation at the place of the performance of the services, for "on-spot services". Moreover, the application of the presumption for the suppliers is not heavily burdensome, because they can charge VAT according to their domestic rules and therefore causing a lower compliance effort.[97]

As an exception to the former described rule Art. 24 a (2) Implementing Regulation clarifies if the location mentioned in paragraph 1 should be "on board a ship, aircraft or train" (Art. 24 a (2) Implementing Regulation) the place of supply shall be the country of departure. In other words, the general rule for services supplied on board of those vehicles (Art. 57 VAT Directive) will be applied to digital services as well. In fact, this means that the services, like the supply of wi-fi on board of a ferry, will not be taxed at the place, where they are actually carried out, but in the country of the departure. It is doubtful, if this rule is in line with the OECD guidelines, because the country of departure does not necessarily has to be identical to the country of residence of the customer.

An example from the Explanatory Notes to illustrate this: A cruise starts in Spain, with stops in Portugal and France and finishes in UK (which is still to be regarded as a Member State for this example).[98] According to the Explanatory Notes, the supply of TBE services as mentioned in Art. 24 a (1) Implementing Regulation will therefore be taxed with Spanish VAT (country of departure). The location where the service is carried out and that allows for the presumption to tax at the place of the location, however, is not Spain for a big part of the journey. Moreover, the way back to Spain would then have to be taxed in UK. Therefore, the place of supply "differs and is never in accordance with the usual residence of the customer"[99]. According to this presumption, neither the place of residence, nor the place of consumption is decisive for these supplies.[100] *Veltrop* refers to this presumption as "the most absurd"[101]. Even if suppliers could determine the current location of the customer in the moment of supply, it will be impossible for them to determine if they are on board a ship, train or maybe just onboard a bus or car.[102]

The rule aims to simplify the determination for the taxable persons, so that they do not have to assess in which territory the customer was in the moment of purchase. But on the other hand, it is very unlikely to result in a taxation that reflects the actual place of consumption or residence.

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[96] ibid, p. 50.
[97] ibid, p. 54.
[98] ibid, p. 57.
[99] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 110.
[100] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 355.
[101] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, 267.
[102] ibid.

4.3 General presumptions in Art. 24 b Implementing Regulation

4.3.1 Fixed land line, Art. 24 b (a) Implementing Regulation

According to Article 24 b (a) Implementing Regulation the customer is presumed to have his permanent address or usually resides at the place the fixed land line is installed if services are supplied through it. Since that place usually equals the place the service is consumed, the presumption seems accurate.[103] The Explanatory Notes underline that the service needs to be supplied through the fixed land line of the consumer, demanding a relation between the fixed land line and the recipient of the services supplied through it.[104]

The presumption that the customer is established at the address of the fixed land line may only be true if the customer equals the contracting partner for the fixed land line. Therefore, at least a service supplied through a fixed land line of a business facility cannot be in the scope of this presumption.[105] Hence, it only applies to residential landlines.[106] It is not clear from the interpretation given by the Explanatory Notes if the connection shall just exclude business landlines or if it shall also just apply, when the recipient of the service equals the subscriber of the landline. Only the latter would ensure a taxation at the place of consumption.

Applying this latter interpretation (only applicable, when subscriber and recipient are equal) it would be almost impossible for suppliers to verify this relation between their customers and the subscribers of the landline. But even with a broader interpretation, it is also challenging or even impossible for suppliers to determine whether the fixed landline, the customer purchased the service through, is a residential, because they do not have the right to access the details of the landline subscription.[107] In both situations the supplier would always need more information to assess. Especially, if the supplier of the digital service is not identical to the supplier of the fixed land line it is very hard to determine. Regardless of this difficulty the Explanatory Notes nevertheless explicitly state that it does not matter for the application of the presumption if the fixed land line belongs to the supplier or to a third party.[108]

From a more legal point of view the limitation to only residential landlines may also be "a disputable interpretation of the text of the [Implementing Regulation]"[109], since a limitation to residential fixed land lines is not indicated by its wording.[110]

But applying the broader interpretation, the presumption may also have the "bizarre effect"[111] that the customer is presumed to be resident at the place even though he might use the landline of a friend or where he is just temporarily staying.[112]

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[103] See Explanatory Notes, p. 58.
[104] ibid.
[105] ibid.
[106] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 13.
[107] ibid, p. 14.
[108] Explanatory Notes, p. 58.
[109] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[110] ibid.
[111] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 267.

In the end, this presumption would mean that the service provider needed to access the customer information of the operator of the fixed land line. Therefore, involving a third party in the tax compliance for VAT liabilities between customer and digital service supplier.

Only the narrow interpretation would ensure a taxation at the actual place of consumption in line with the destination principle. However, the determination for both interpretations renders heavily burdensome or impossible for the suppliers. The practical scope of this presumption may therefore be limited to cases, where the owners of fixed landlines supply services to their customers. But it is questionable if they even need to rely on a presumption in this case, because they already know where the customer resides.

4.3.2 SIM card, Art. 24 b (b) Implementing Regulation

If the service is supplied through mobile networks, the place of residence shall be the country according to the country code of the used SIM card (Art. 24 b (b) Implementing Regulation). The ground for the presumption is the assumption that the SIM card is most likely to be used in the country, where it was issued.[113] While it is possible that customers buy foreign SIM cards to benefit, for example from lower telecommunication prices, it is still probably only a small amount among all users. The overall presumption may therefore be reasonable. The Explanatory Notes point out that this SIM card presumption may be helpful especially for pre-paid credits.[114] The seller of prepaid credits cannot know in advance for which service they will be used, because it is also possible to buy movies, music etc. using your prepaid credit.[115] Therefore, it is a simplification to determine the place of supply in the moment the service is actually received by considering the SIM card country code in that moment.

The Explanatory Notes interpret this presumption as only applying to supplies for which the SIM card is used.[116] Thus, excluding supplies through mobile internet networks and limit it just to "traditional telecommunication networks"[117]. This cannot be taken from the wording of the Implementing Regulation and may also not be a satisfying result for the tax administrations, since the inclusion of mobile internet networks would allow them to collect VAT on supplies to their residents.[118] However, even though it would be interpreted as including supplies through mobile internet networks it would be impossible for the suppliers to determine both, that the supply was made using a mobile phone and to be able to gain the information which country code the SIM card had.[119]

Moreover, some territories within the EU share the same country code, for example Spain and the Canary Islands, but the latter do not fall in the scope of VAT.[120] A supplier, applying this

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[112]ibid.
[113] Explanatory Notes, p. 59.
[114] ibid.
[115] ibid.
[116] ibid.
[117] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[118]Marie Lamensch*, Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 58.
[119] ibid.
[120] ibid.

presumption, could therefore wrongly charge Spanish VAT based on a SIM card issued on the Canary Islands.[121]

Another bizarre effect may occur, when this presumption collides with the one for supplies on board a ship. When the passenger uses his mobile network, he will be charged VAT according to the SIM card country code of his SIM card. If he enjoys the same services, but uses the wi-fi onboard, the VAT will be charged according to the country of departure. If the cruise does not fall into the scope of the presumption (Art. 24 a (2) Implementing Regulation), it would then be the location of the wi-fi hotspot according to Art. 24 a (1) Implementing Regulation at the moment the service is used, which may be hard to determine for a boat.[122] The applicable VAT rate just changes because of the customer's decision to choose one internet connection over the other.[123]

4.3.3 Decoder or viewing card, Art. 24 b (c) Implementing Regulation

As far as a decoder, a similar device, or a viewing card is used for the supply of a service which is not provided through a fixed land line it can be presumed that the customer resides in the state where the decoder is located, or the viewing card was sent to (Art. 24 b (c) Implementing Regulation). This presumption mainly aims to cover supplies of traditional broadcasting networks.[124]

Regarding the viewing card the presumption of the supply of goods is reflected to the later supply of services through this card. Because goods have to be delivered to the customer the final consumption is regarded to take place at the place the goods are send to. Basically, the place of taxation for the supply of the card is deemed to be the place for the supply of services as well. It would be hard for a third party, supplying services through a viewing card, to get the information, where the card was actually sent to when sold. But for viewing cards it is not as common as for SIM cards to offer on-top services by third parties.

It is likely that the services are actually enjoyed where the decoder is located. Therefore, this presumption provides for taxation at destination. But on the other hand, it is again challenging for the supplier to actually determine where the decoder is located. Therefore, the presumption shall not apply if the supplier does not know and cannot know about the location.[125] The scope of this presumption may therefore be very narrow. Only when the supplier can be sure about the location of the decoder or the viewing card the place of residence of the customer can be determined applying this rule. Probably the most common situation for this sufficient knowledge would be the combination of the decoder and a fixed land line. The location of the decoder would be equal to the fixed land line in this case. But the Explanatory Notes point out that whenever a fixed land line is involved at the supply of the service through a decoder, or a similar device the presumption of Art. 24 b (a)

[121] ibid.
[122] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 356.
[123] ibid.
[124] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 13.
[125] Explanatory Notes, p. 59.

Implementing Regulation is applicable instead of Art. 24 b (c) Implementing Regulation.[126] Meaning that the most likely case in which a supplier would be able to sufficiently fulfill the conditions set out for Art. 24 b (c) Implementing Regulation would not fall into the scope of it. So, it might be questionable if the special rule for decoder and similar devices is actually needed or the application of either the rule for fixed land lines or the general rule in Art. 24 b (d) Implementing Regulation would be enough to cover the few situations the supplier is actually able to determine the location of the decoder without a fixed land line.

4.4 Evidence rule Art. 24 b (d), 24 f Implementing Regulation

4.4.1 Scope of the evidence rule

If none of the specific presumptions in Art. 24 a, Art. 24 b (a), (b), or (c) Implementing Regulation can be applied, Art. 24 b (d) Implementing Regulation constitutes the "evidence rule". According to this paragraph suppliers shall presume that the consumer is resident "at the place identified […] on the basis of two items of non-contradictory evidence" (Art. 24 b (d) Implementing Regulation). Those items are listed in Art. 24 f Implementing Regulation. Therefore, the billing address, IP address, bank details, SIM card country code or location of the fixed land line of the customer, as well as other commercially relevant information can serve as an item of evidence. It is the supplier's decision, which items they consider as most accurate to determine the place of residence.[127]

These items do not only apply to suppliers, which do not fall into the scope of the specific presumptions. Suppliers, which want to rebut one of the specific presumptions, may also rely on this rule by using three non-contradictory items of evidence (Art. 24 d Implementing Regulation). They may do so if they have information to determine the actual place of the customer.[128] However as it is of huge compliance effort to find three non-contradictory items and suppliers are not obliged to rebut any of the presumptions, it is very unlikely that the suppliers will actually make use of this possibility and more likely that they will just apply the specific presumption.[129] The listed items are "in particular" sufficient evidence, which means that the list is non-exhaustive, and suppliers may also rely on other items.[130] Thus, this rule provides for more flexibility for companies.

4.4.2 Items listed in Art. 24 f (a-e) Implementing Regulation

The billing address as given to the supplier by the customer serves as a proper presumption for the place of residence. It is likely that the customer actually resides at the place he wants to receive the invoice. The presumption, however, can only be valid if the address is a home address. Hence, a postal address (PO box) cannot justify the presumption of residence at this

[126] ibid.
[127] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 13.
[128] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[129] ibid.
[130] Explanatory Notes, p. 68.

place.[131] If the address is a company address, this may also not be a valid ground for determination of the place of residence.

While it should not be of significant compliance burden for the supplier to ask the customer for a billing address and that usually happens, it is necessary for the supplier to design the purchase process in a way that recognizes automatically addresses not suitable for this presumption. This may be possible for recognizing and blocking PO boxes, at least for the determination of the place of supply, but may be hard to distinguish home and commercial addresses. Should the billing address only consist of an electronic address of the customer, to which an electronic invoice is sent, this cannot meet the requirements of the billing address as an item of evidence.[132] Nevertheless, that information can still be used as regards the IP address according to Art. 24 f (b) Implementing Regulation and the electronic address as other commercial information (Art. 24 f (f) Implementing Regulation).[133]

Art. 24 f (b) Implementing Regulation refers not only to the IP address, but also to "any method of geolocation". It might be relatively easy for customers to influence the determination arbitrarily by "hiding their actual IP address by using a free proxy server or the Tor network"[134]. Together with giving a false billing address that implies the customer would live outside the EU it may be relatively easy to obtain a tax-free supply for the customers.[135] In any case, unless there is a sign of abuse or misuse, the suppliers should not be liable for false information provided by the customers, as long as they do not apply a presumption to the benefit of their customers.[136] Another problem may be to ensure that companies only use the IP information for tax purposes and not for marketing methods.[137]

Regarding bank details (Art. 24 f (c) Implementing Regulation), it should be borne in mind, that the credit card information of the customers will in most cases only be available to the supplier once the payment is completed.[138] But for the correct calculation of VAT it is needed to determine the place of residence before the payment takes place.[139]

It is rather surprising, that the Implementing Regulation lists the SIM card country code as well as the location of a fixed land line as an item of evidence (Art. 24 f (d) (e) Implementing Regulation), because if those items would have been available to the suppliers they could

[131] ibid, p. 70.
[132] ibid.
[133] ibid.
[134] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 269.
[135] Marie Lamensch*, Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 61.
[136] Explanatory Notes, p. 72.
[137] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 15.
[138] Marie Lamensch, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, ec Tax review 2018-4, p. 188.
[139] ibid.

already base their determination on the specific presumptions in Art. 24 b Implementing Regulation.[140]

4.4.3 Other commercial information, Art. 24 f (f) Implementing Regulation

Especially the item of "other commercial information" (Art. 24 f (f) Implementing Regulation) shall provide flexibility for different business models and the development of technology.[141] However, the Explanatory Notes give some exemplary kind of information, which may be used by the suppliers if available.

When the customer uses a payment method that is exclusively available in one Member State this is pinpointing towards a residence in that country and may therefore serve as one item of evidence.[142] An example for such a service is Swish, which is exclusively available in Sweden. Precondition for the usage of this information is of course that the supplier is offering the customer those payment services. Since the presumptions do only apply to cross-border transactions, it might be less likely that a non-Swedish supplier (in the example of Swish) will offer Swish payments to his Swedish customers. It is a bigger administration effort to offer those specific payment options to customers, which smaller companies may shy away from. Nevertheless, bigger companies may be able to use this item of evidence. Because the possibility that the customer is resident in the country of which he is using a specific payment service seems to be quite high. Thus, the presumption is suitable to lead to a taxation at destination.

The trading history of the specific customer may also be considerable business information for the determination.[143] It can be doubted if the usage of the trading history will result in a taxation at destination for the specific purchase, since it is only assuming that the customer is still resident at the same place. Of course, there is still a certain implication that the customer is still resident at the place determined at the last purchases. Regarding the compliance aspect, it seems difficult for an automatized software to determine and evaluate the trading history in any other way, than just applying the latest or the most used place of residence. Without such a software it would be an extremely burdensome and almost impossible task to check the trading history within the short time digital supplies are made and the high quantity of (low value) transactions. Additionally, the supplier must have had other items of evidence for the previous purchases, when there was not a sufficient trading history. Those could also be used for the current purchase.

If a gift card is used for the purchase the supplier can also use the information, he gets from it as an evidence. When a physical gift card is sold and used it is likely that the customer is resident in the country of purchase.[144] Additionally, a country-locked gift card justifies the presumption that the services are consumed in that country.[145] The situation is similar to the rule in Art. 24 a Implementing Regulation. It is presumed that the customer is resident at the

[140] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 15.
[141] Explanatory Notes, p. 69.
[142] ibid.
[143] ibid.
[144] ibid.
[145] ibid, p. 70.

country the card can exclusively be used in, because he needs to be physically present there. Therefore, it is similar to the presumption for wi-fi hotspots.[146] Like the latter, this presumption also seems to be artificial and a detour. The customer is presumed to be resident at the supplier's place of the gift card. If the rules would be designed to tax primary at the place of consumption, there would be no need to assume that a customer is resident at the suppliers' place. The transaction could be taxed according to the actual place of consumption, which is known in this scenario. To the contrary, the place of residence is not known sufficiently enough.

In most cases payment providers do not share their verification results of their customers with the supplier of digital services. However, if they do so the supplier could use this as a commercial relevant information.[147]

Lastly the Explanatory Notes mention customer self-certification as a possible item of evidence. Meaning, that customers confirm their country, bank accounts, or similar.[148] Since bank details already constitute an item of evidence, this point can only be understood in the way that the confirmation by the customer itself may serve as an item. This could be used together with the trading history. The customers could confirm that they reside in the country the trading history is pinpointing at. However, because the suppliers need to rely on the information given by the customers, the possibility for errors or fraud rises.[149]

The Explanatory Notes recognize that there might be only items of that category (business information) available to the supplier. It is still necessary to provide two non-contradictory items of evidence in this case, but they can both be from that category.[150]

4.5 Requirements for the collection of the items

When it comes to the required details of the information, which the suppliers need to collect, the Explanatory Notes admit that in many cases a "100% accuracy"[151] in identification cannot be reached by the supplier. Additionally, because most customers will have a regular relation to the suppliers, one could think of an App Store, the suppliers could not be expected to check the identity and location of the customer each and every time.[152] The initial verification should be sufficient and could be applied for following purchases as well.[153] However, a verification should be done on a "regular basis (in line with normal commercial practice)"[154].

This is for sure a release from compliance burden for the suppliers. They do not need to do a verification each time, which is especially burdensome for those with a high amount of (low value) transactions. At the same time, it leads to the situation for supplies to be taxed at a place that might not be the place of residence of the customer. However, it is true that the

[146] ibid.
[147] ibid.
[148] ibid.
[149] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 110.
[150] Explanatory Notes, p. 69.
[151] ibid, p. 71.
[152] ibid.
[153] ibid.
[154] ibid.

system cannot be designed to be extremely burdensome for the suppliers, to reach a 100% accurate determination of the place of supply. It is immanent to a system that needs to rely on presumptions that this level cannot be reached.

When suppliers have items of evidence that contradict each other they have to decide which of them is more accurate to actually determine the place of residence.[155] The Regulation is not offering "useful guidance"[156] on that. Priority should always be given to the place of the final consumption.[157] The decision may only be challenged by the tax authorities if there is an indication for misuse or abuse.[158] The Explanatory Notes stress that it is the decision of the suppliers to collect more than two items of evidence.[159] If they do so, they have to determine, which of them are more accurate if they are contradicting each other. It is doubtful if suppliers are even able to meet the expectations regarding the determination on a case-by-case basis, when thousands of digital supplies can be carried out every single minute.[160] This statement seems also quite remarkable, since it is encouraging suppliers to not collect more items of evidence, or make their business information usable for this purpose, because then they are faced with a bigger compliance burden. To put it in other words, suppliers may be motivated to limit themselves to the minimum number of items, even though they could maybe use or collect other information to gain a more accurate image of the residence of their customers. Therefore, suppliers may only collect other information if the two, they already have, are contradicting each other.

The limitation to two items shall lower the compliance for the suppliers but leads to a taxation not necessarily reflecting the destination principle. Thus, if suppliers do collect more items voluntarily, which increases the possibility to find the actual place of residence, they should be supported with additional guidance, how to evaluate the items regarding their accuracy (e.g. with a list of items that should be prioritized over others). For example, some items are not as easy to manipulate by the customers as others, but they might not be sufficient to determine the place of residence, which is right now the legal basis in the VAT Directive.[161] Such guidance would make it easier for suppliers to design automated software for their ordering processes.

The risk of manipulation by the customers could be reduced by charging the same price to the customers, whatever the applicable tax rate may be.[162] But considering the differences in rates in EU, suppliers will either risk their margin or their compatibility regarding the prices, since they charge a higher price than the others.[163]

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[155] ibid, p. 72.
[156] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[157] Explanatory Notes, p. 72.
[158] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 13.
[159] Explanatory Notes, p. 72.
[160] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[161] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 269.
[162] ibid.
[163] ibid.

The items should not be duplicating each other.[164] Bank details as given by the customer and the confirmation of these by a payment provider can only form one item of evidence.[165] It could happen that a supplier may not be able to find more than one item of evidence. The Explanatory Notes do not give further guidance for this scenario than pointing out that the supplier shall "continue to seek further evidence"[166].

What makes the determination for the suppliers even harder is that they cannot rely on the information collected by a third-party (like a payment provider) to relieve themselves from the liability for that information.[167] This limits the items accessible for the suppliers even more. Either they need to use other items of evidence, than those related to payment information (because they are provided by the payment service), or they rely on this information with the risk to be liable for any possible fraud or abuse by the payment provider.

Another problem suppliers are faced with is data protection. For different kind of information, different "Telemedia, Telecommunication and Data Protection Acts could [apply]"[168]. Suppliers need to have "a legal basis for the collection, storage and processing of data"[169], which they need for the determination of the place of residence and a possible future tax audit. They would also need to inform the recipient of the services about the data collection, usage and storage.[170] If they cannot base it on a legal basis, they would also need the permission of each customer.[171] If they would deny the permission, the suppliers would have serious problems to comply with their VAT obligations. It is obvious that all those requirements lead to more compliance effort for the suppliers and could also face them with legal issues, regarding data protection. Moreover, they have to consider different data protection standards and requirements among all Member States, as well as different requirements for the storage time and format of the collected items.[172]

The rules expect that it is possible for suppliers to determine the place of supply on a transaction basis.[173] This is questionable for digital supplies, because they do not have the personal contact, which traditional services have to their customers.[174] They also do not have the same time for the determination, since digital supplies are carried out in a very short time

[164] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[165] ibid.
[166] Explanatory Notes, p. 72.
[167] ibid, p. 73.
[168] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 109.
[169] ibid.
[170] ibid.
[171] ibid.
[172] Marie Lamensch*, Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules* in: Marie Lamensch/ Edoardo Traversa/Servaas van Thiel, *Value Added Tax and the Digital Economy – The 2015 EU Rules and Broader Issues*, Wolters Kluwer, 2016, p. 65.
[173] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 12.
[174] ibid.

and high amount.[175] The system needs to provide rules that allow for an efficient and instant determination, because otherwise the transactions may not be profitably any longer.[176]

4.6 Presumption for digital services connected to accommodation, Art. 31 c Implementing Regulation

Rules for the determination of the place of supply for digital services can also be found in Art. 31 c Implementing Regulation. Therefore, digital services supplied together with accommodation services are deemed to be supplied at those locations. This shall only apply, when the accommodation and digital service are really supplied together and not if the customer is billed separately for the services.[177] The rule actually applies the destination principle. When the services are supplied together the customer needs to be physically present at the location and therefore consumes the services at that spot. Unlike inter alia the presumptions in Art. 24 a (1) Implementing Regulation, this rule is not presuming that the customer is permanently resident at the hotel, but rules for the supply to happen there. Thus, an artificial construction is avoided. Furthermore, it is not burdensome for the suppliers of accommodation, because they can tax the digital services in the same way as their accommodation supplies.

4.7 Thresholds for smaller companies introduced 2019

Amendments to the VAT Directive[178] as well as to the Implementing Regulation[179] were adopted in 2017. Besides inter alia changes for platform liabilities and invoicing requirements, the so called "e-commerce VAT package" also changed Art. 58 VAT Directive and Art. 24 b Implementing Regulation. The changes came into force on 1st January 2019, four years after the introduction of the presumption rules.

According to Art. 58 (2) VAT Directive the rule (destination-based taxation for TBE services) does not apply to suppliers with an annual turnover below 10,000€ for their digital services to non-taxable persons since then. Additionally, the supplier has to be established in only one Member State and the customer in another Member State. The intention was to lower the compliance burden for smaller companies, because it was hard for them to put measures into place for determining the residence of the customer.[180]

This exception to the principle of taxation at destination may be reasonable for small businesses with a lower annual turnover of 10,000€, because the amount is quite small, and the Directive also includes the possibility for Member States to introduce special schemes for

[175] ibid.
[176] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 265.
[177] Explanatory Notes, p. 74.
[178] Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ L 348 17/7.
[179] Council Implementing Regulation of 5 December 2017 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC in the common system of value added tax, OJ L 17/32.
[180] ibid, preamble (2).

small and medium enterprises (SME)[181]. A possibility to especially lower compliance costs and obligations for small companies by the Member States. But those schemes are not applicable to cross-border digital services.[182] A small enterprise therefore did not need to collect VAT for the supplies made in the Member State of establishment, but on the transactions to consumers in other Member States.[183] That different treatment ran counter to the initial purpose for the SME schemes. The introduced threshold helps to reach a unison relief for smaller companies.

However, this rule is not just covering those small companies. Since only the turnover for cross-border supplies is taken into account for the threshold, the application is not just limited to small businesses. Bigger companies, which just have a small amount of turnover in cross-border supplies but may have a high turnover for domestic supplies could also benefit from this exception.[184] The proportionality of this measure could be doubted, since it goes "further than necessary to achieve the purpose of lowering compliance cost for micro-businesses"[185].

Additionally, the simplification only applies to companies that are established in the European Union. Regarding the compliance burden there can be no difference between smaller EU and smaller Non-EU companies. Therefore, this restriction seems to be discriminative for Non-EU companies and not in line with the intention to "create a level playing field"[186] regarding suppliers in the digital economy.[187]

The introduction of this simplification actually means that the legislator has now gone back to the origin principle for supplies falling under this rule.[188] Therefore, this rule is contradicting the principles from the OECD guidelines.[189] Also, this is not in line with the aim of the Commission for a definitive VAT system, which shall be based on a destination-based taxation. A change back to the origin principle might therefore be surprising. Nevertheless, if the system would be less burdensome for the companies there would no longer be a need for this simplification and the return to an origin-based taxation.

Another simplification for companies regarding the determination of the place of supply was adopted in Art. 24 b Implementing Regulation. For companies with an annual threshold below 100,000€ of B2C digital supplies it is sufficient to determine the place where the customer resides with only one item of evidence instead of two non-contradictory ones.

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[181] See Art. 281f. VAT Directive.
[182] Aleksandra Bal, *The Changing Landscape of the EU VAT: Digital VAT Package and Definitive VAT System*, European Taxation February/March 2019, p. 74.
[183] ibid.
[184] Marie Lamensch, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, ec Tax review 2018-4, p. 189.
[185] Marta Papis-Almansa, *VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?*, ERA Forum (2019) 20, p. 207.
[186] Aleksandra Bal, *The Changing Landscape of the EU VAT: Digital VAT Package and Definitive VAT System*, European Taxation February/March 2019, p. 75.
[187] Marie Lamensch, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, ec Tax review 2018-4, p. 189.
[188] ibid.
[189] ibid; Aleksandra Bal, *The Changing Landscape of the EU VAT: Digital VAT Package and Definitive VAT System*, European Taxation February/March 2019, p. 75; Marta Papis-Almansa, *VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?*, ERA Forum (2019) 20, p. 206.

The condition of two non-contradictory items of evidence serves also as a sort of control mechanism. With just one item for determination the possibility for taxation at a place that is not the actual place of residence rises and the system itself is more prone to errors. By requiring two items, which do not contradict each other, the possibility that the place determined by them is equal to the actual place of residence is much higher. It is also harder for customers to arbitrarily influence the determination "by changing […] IP address or by providing a false billing address"[190].

On the other hand, there might be cases, where the supplier is not able to find more than one item of evidence. Especially, if a payment service is used as an intermediary the information the supplier will get from the customer is limited.[191] If suppliers rely on the verification done by the intermediary, they are still responsible, when it comes to abuse.[192]

Without doubt the rule is a release of compliance burden for the companies falling under the scope of it, but at the same time it is likely that it will impact the accuracy of the determination. In the end more transactions are taxed at a place not representing the state of residence and consequently not in the state that is presumed to be the place the final consumption takes place. Furthermore, this simplification also is just applicable for EU companies, which again runs counter a level playing field.[193]

Maybe the solution should not be seen in easing the requirements for compliance for a limited group (smaller companies), but to adjust the system for a less burdensome compliance and more accuracy to tax at destination.[194]

4.8 Legal problems regarding the Implementing Regulation and Explanatory Notes

As seen, the suppliers are faced with a huge compliance effort to fulfill the determination and obligations by the Implementing Regulation. Considering this, and the fact that suppliers of digital services in some cases may not be able to rightly identify the state of residence of their customers, it is questionable if these rules and obligations "are still appropriate and proportionate"[195]. Especially, when considering that suppliers are only "tax collector[s] on behalf of the state"[196] according to the CJEU.[197]

[190] Marie Lamensch, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, ec Tax review 2018-4, p. 190.
[191] Aleksandra Bal, *The Changing Landscape of the EU VAT: Digital VAT Package and Definitive VAT System*, European Taxation February/March 2019, p. 75.
[192] ibid.
[193] ibid.
[194] Marie Lamensch, *Adoption of the E-Commerce VAT Package: The Road Ahead Is Still a Rocky One*, ec Tax review 2018-4, p. 190.
[195] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 110.
[196] Judgment of 23 November 2017, *Enzo die Maura*, C-246/16, EU:C:2017:887, p. 23.
[197] Robert C. Prätzler, *Split Payments in VAT Systems – Is This the Future?*, International VAT Monitor March/April 2018, p. 66.

Furthermore, the Implementing Regulation may also "go beyond a reasonable interpretation of the VAT Directive"[198]. As shown, the rules in the Implementing Regulation actually change the place of supply as set out in the VAT Directive.[199] The Directive states that digital services are taxed at the place of residence. However, under some presumptions the Implementing Regulation changes that place to the place those services are actually enjoyed (especially Art. 24 a (1) Implementing Regulation), or the ship, aircraft or train departs (Art. 24 a (2) Implementing Regulation).[200] This is also contradicting Art. 57 VAT Directive, which clearly states that just restaurant and catering services on board a ship, aircraft, or train are taxed in the country of departure.[201] Digital services are not mentioned there and "it seems unlawful to interpret [that provision] as meaning that restaurant and catering services include e-services"[202].

The Commission argues that these presumptions do not change the place of supply rules, because suppliers are able to rebut them if they have evidence that the customer is established elsewhere.[203] But in fact, suppliers need three items of evidence to rebut the specific presumptions and are not obliged to actually do so.[204] Therefore, it is likely that suppliers will not continue to find other items of evidence and the actual place of residence.[205] Thus, the Implementing Regulation does change the rules as set out in the VAT Directive. This also questions the legal status of the Implementing Regulation, since the Treaty on the Functioning of the European Union seems to give a hierarchy between legislative acts, delegated acts and implementing acts.[206]

In conjunction with the burdensome compliance effort for the supplying companies it could be possible that the CJEU will reject some of the presumptions as invalid.[207] Additionally, some presumptions should be evaluated regarding their actual simplification effect.[208]

The Explanatory Notes also go further than the Implementing Regulation, since they formulate limitations to the presumption rules. As seen, for example, according to the Explanatory Notes the used landline has to be a residential one while the wording of the

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[198] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 269.
[199] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[200] ibid; Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 356.
[201] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[202] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 267.
[203] Explanatory Notes p. 64, Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[204] Aleksandra Bal*, EU VAT: New Rules on B2C Supplies of Digital Services from 2015*, European Taxation July 2014, p. 304.
[205] ibid.
[206] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[207] Martijn Veltrop*, Identification of Customers of E-Services under EU VAT*, International VAT Monitor September/October 2014, p. 270.
[208] Matthias Weidmann, *The New EU VAT Rules on the Place of Supply of B2C E-Services – Practical Consequences – The German Example*, ec Tax Review. 2015-2, p. 117.

Implementing Regulation does not necessarily support this limitation.[209] Since "the exact scope of application of some of the presumptions [seems] unclear"[210], problems regarding legal certainty could also be raised.[211]

The Explanatory Notes of the Commission, however, do only reflect the opinion of the Commission on how the rules in the Implementing Regulation should be interpreted. They are not binding for the Member States and therefore they are able to interpret them differently and in the end demand different evidence and compliance from the suppliers.[212] Thus, this clearly contradicts the aim of harmonized tax rules. Suppliers still need to consider the interpretation by all Member States they have customers in, since those domestic rules are decisive.[213] Hence, the Member State of consumption is responsible for the audit.[214] If the taxing system still relies on the presumptions in the Implementing Regulation, a uniform interpretation of them within the EU is needed.

5 Alternatives to the current taxation of digital services

5.1 Introduction

This chapter will provide possible alternatives for the taxation of digital services, taking into account the huge compliance burden companies are faced under the current system, but also a more accurate implementation of the destination principle. First a proposal by *Lamensch* is discussed. Afterwards it is discussed, how other jurisdictions designed their rules for the taxation of digital services.

5.2 Proposal of Lamensch

As *Lamensch* described in 2012, a solution for solving the compliance burden for companies would be a change from destination-based taxation to an origin-based one.[215] As seen, the Commission aims to introduce a definitive VAT system based on the destination principle. Therefore, such a measure would be very unlikely to happen. *Lamensch* proposed a use of technology instead to solve the problems by already considering the presumption rules as set into force in 2015.[216]

[209] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[210] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015, p. 14.
[211] ibid.
[212] ibid, p. 12.
[213] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 350.
[214] Marie Lamensch, *European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, International VAT Monitor March/April 2017, p. 139.
[215] Marie Lamensch, *Unsuitable EU VAT Place of Supply Rules for Electronic Services – Proposal for an Alternative Approach*, World Tax Journal February 2012, p. 88.
[216] ibid.

The core element of her proposal is the "secured payment area"[217]. Today customers are usually already forwarded to such an area after each online purchase.[218] The customer needs to log into a payment account, for example a bank account, or insert credit card information.[219] Thus, making it possible for the payment service provider (e.g. a bank) to "identify users with certainty"[220] and figure out, where the customer is established or resides.[221] Afterwards the supplier sends the payment amount and the VAT rate applying for the particular transaction using the secured payment area so that the customer can complete the payment procedure.[222]

In the system *Lamensch* proposes, the supplier would be obliged to send the information including the net price to the bank or payment service through this payment area.[223] "A software program"[224] should then determine the amount of VAT due for the supply.[225] Finally the payment provider would transfer the net amount to the supplier of the electronic service.[226] But it would nevertheless still be necessary to determine the place of supply which would be the place of residence, to apply the correct tax rate. This should be up to the payment providers, since it would not be of huge difficulty for them, because they should have checked the identity of the customer when opening for example the bank account.[227]

Lamensch underlines that such a system would have inter alia five advantages compared to the current system. Firstly, it would take the compliance burden for the determination of the customers residence from the supplier and would make the destination-based taxation "practicable"[228] for the companies.[229] Additionally, since it would work in an "automated way"[230], the active involvement of the payment provider would be minimal.[231] It would also reduce the risk of fraud, since the tax would be paid to tax authorities right at the moment of the payment.[232]

Furthermore, payment systems like PayPal, would be able to "channel the information"[233] regarding the bank information of the customers, since there has to be a bank account or credit card linked to the PayPal account.[234] Meaning, that they would provide the location of the customer based on PayPal's former verification regarding the bank account to the secure payment area. Therefore, those "intermediary payment systems"[235] could still be used. Even if

[217] ibid, p. 89.
[218] ibid.
[219] ibid.
[220] ibid.
[221] ibid.
[222] ibid.
[223] ibid.
[224] ibid.
[225] ibid.
[226] ibid.
[227] ibid.
[228] ibid.
[229] ibid.
[230] ibid, p. 90.
[231] ibid.
[232] ibid.
[233] ibid, p. 89.
[234] ibid.
[235] ibid

the customer would use a credit card issued in another country the system would work, since the bank issuing the card knows that the customer is not resident in the state the bank is situated.[236] Same would apply to foreign bank accounts.

Lastly, the preparation and necessary changes to implement this system would not be huge, because it mostly builds up on the existing online payment procedures.[237] Only the software to automate the calculation of the tax needs to be developed.[238]

Lamensch also admits flaws of her proposed system. There would still be costs for both, the implementation of such a system and the maintenance of it.[239] Those would now be on the banks and no longer on the supplier of the digital service.[240] *Lamensch* mentions that those would still be lower than the compliance costs caused by the current system, especially since there is already a security system for online payments that banks are using.[241]

Tax fraud would still be possible if the supplier asks the customer to pay the service in a different way by avoiding the secured payment area.[242] She mentions correctly that this is also possible under the current system. But with the proposed system fraud would only be possible if supplier and customer cooperate to commit tax fraud.[243] Contrary to the current system, where the customer usually cannot know if the supplier will transfer the applicable VAT to the tax authorities, it would be obvious for the customer if the supplier suggests transferring money by avoiding the secured payment area.

Moreover, a bigger obstacle would be the different exemptions and rates within the different jurisdictions in the EU.[244] It would be hard for the banks to determine which VAT rate is applicable for the specific supply. Therefore, it is important to design an automated software, to not just shift the compliance burden from the supplier to the bank.[245] To solve this issue *Lamensch* suggests that the supplier should notice the bank, when sending the value of the transaction, to which defined category the supply belongs.[246] The software would then be able to apply the appropriate tax rate applicable for this category.[247] However, for such a system to function it would be necessary to harmonize those categories of services within the EU.[248] The Member States would need to agree on guidelines for the qualification of supplies.[249] Another precondition necessary for this system would be the duty for all banks to offer an online payment system.[250]

[236] ibid.
[237] ibid, p. 90.
[238] ibid.
[239] ibid.
[240] ibid.
[241] ibid.
[242] ibid.
[243] ibid.
[244] ibid.
[245] ibid.
[246] ibid.
[247] ibid.
[248] ibid.
[249] ibid.
[250] ibid.

Additionally, a weakness of the system lies in the fact that not all online transactions involve such a payment system. While payment on account is considered to be relatively rare for supplies of digital services, the usage of electronic money is a relevant factor. It can consist in the usage of crypto currency or simply gift cards. Purchases paid with one of these do not involve a payment procedure, where an intermediary could verify the location of the customer and collect the VAT.

However, if the difficulties could be solved and such a system would be introduced the suppliers would be relieved from their compliance burden. At the same time, the services would be taxed according to the place of residence as set out by the general rule in Art. 58 VAT Directive. The VAT system would no longer need to rely on other presumptions to determine the place of residence, which is also nothing else than a presumption, where the services will be consumed. But on the other hand, there are certain situations, where the actual place of consumption can be determined, and it is not equal to the place of residence those would not be covered by such a system. Additionally, the inclusion of a third party to the VAT collection could cause "even greater risks of proper use of information and data misuse"[251].

5.3 Split-payment method

A similar system to the one proposed by *Lamensch* can be seen in the split payment method, which is applied in some Member States. But currently this method is just applied to B2B supplies.[252] Generally, a split payment method requires the amount to be paid to the supplier to be split into a net amount and the VAT part, while the latter will be either paid directly to the treasury or to a special bank account.[253]

The intention of the Member States that have introduced a split payment method was mainly to overcome the missing trader fraud.[254] This describes the situation, when the supplier charges VAT from his customer although he does not pay it to the treasury afterwards; he simply disappears.[255] This aim could also be reached by applying a reverse charge mechanism.[256] Reverse charge is difficult to apply to final consumers, since they would also need to be subject to tax audits and control.[257] Additionally, the compliance requirements (e.g. register, accounting) will be hard to meet by private consumers. Therefore, the split payment method is discussed recently.[258] Its biggest advantage is that it can also be applied to final

[251] Anna Salewski, *The Taxation of electronic services in VAT/GST and direct taxes* in: Michael Lang, *Global Trends in VAT/GST and Direct Taxes*, Schriftenreihe IStR Band 93, Linde, 2015, p. 358.
[252] Robert C. Prätzler, *Split Payments in VAT Systems – Is This the Future?*, International VAT Monitor March/April 2018, p. 67.
[253] Bartosz Gryziak, *Split Payment across the European Union – Review and Analysis*, International VAT Monitor January/February 2020, p. 24.
[254] ibid.
[255] ibid.
[256] ibid, p. 25.
[257] Robert C. Prätzler, *Split Payments in VAT Systems – Is This the Future?*, International VAT Monitor March/April 2018, p. 67.
[258] ibid.

consumers.[259] However, the introduction of a mandatory split payment scheme needs to be authorized by the Council of the European Union.[260]

A split payment system increases the compliance burden for the supplier, the customer or the service provider.[261] But in the situation of digital supplies, we already have a high compliance burden for the supplier. If the same compliance effort is not just transferred to the payment provider, it would still be an improvement regarding the overall compliance burden. Furthermore, the introduction for digital supplies as *Lamensch* proposed would not result in a need for compliance for the final customers, since the payment provider is involved as an intermediary. Still, the problem would be that the payment provider would need to have sufficient information about the transaction to determine the applicable tax rate for the specific transaction.[262]

France and the UK drafted bills to introduce a split-payment system for online B2C supplies of goods in cross-border situations.[263] The British draft included the opportunity to extend the scheme to other transactions later on.[264] Both drafts aimed to introduce a withholding scheme, obliging an intermediary or agent to split the payment and forward the VAT on behalf of the supplier to the treasury.[265] Thus, similar to the system *Lamensch* proposed. However, later French drafts proposed to introduce a voluntary withholding scheme with the operators of digital platforms as the withholding agent.[266] So the system would only solve the problem of determination for companies offering supplies through such platforms, while others would still be faced with the compliance burden.

The British proposal stated that payment providers, such as credit card companies or banks, need to withhold the VAT for the supplier.[267] To secure the fulfilment of the obligations, the authorities create a list with approved payment providers.[268] It is then up to the card issuing bank (the customer's bank) to verify whether the payment providers are listed as approved.[269] If they are not listed, the bank needs to withhold one sixth of the amount by itself and transfer it to the treasury.[270] This system would ensure that the split payment is applied, even if no payment intermediary is involved.[271] But the problem of determining the applicable tax rate for the specific transaction would not be solved. There would still be the need for an automated software and a harmonization of categories to not just shift the burden from the supplier to the intermediary.

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[259] ibid, p. 70.
[260] Bartosz Gryziak, *Split Payment across the European Union – Review and Analysis*, International VAT Monitor January/February 2020, p. 26.
[261] Robert C. Prätzler, *Split Payments in VAT Systems – Is This the Future?*, International VAT Monitor March/April 2018, p. 69.
[262] ibid.
[263] Bartosz Gryziak, *Split Payment across the European Union – Review and Analysis*, International VAT Monitor January/February 2020, p. 27.
[264] ibid.
[265] ibid.
[266] ibid.
[267] ibid.
[268] ibid.
[269] ibid.
[270] ibid, p. 28.
[271] ibid.

Both proposals have not been enacted. Due to the VAT Directive changes they lost their relevance regarding the upcoming liability for online marketplaces. The French draft was finally rejected by the National Assembly, while the UK "might get back to the idea of enforcing split payment"[272] after Brexit.[273]

5.4 Determination of place of supply in other jurisdictions

As the taxation of cross-border digital services is not just a problem for the European VAT system, it can be contributing to the debate to take a look at how other jurisdictions are dealing with this issue.

Singapore recently changed its taxation of digital services. Since 1st January 2020 suppliers not established in Singapore have to levy GST (Goods and Services Tax) on their digital services if the customers have their residence in Singapore.[274] Before, services were just covered by GST when the supplier was established in Singapore.[275] Singapore also relies on presumptions for the determination of the place of residence, such as IP address, or credit card information.[276] The guideline on the application of the so-called "overseas vendor registration scheme" categorizes the proxies a supplier may rely on into three groups: payment proxies, residence proxies and access proxies.[277] Suppliers are required to give two non-contradictory items of evidence, such as under the EU rules. However, suppliers shall base their determination on "one payment proxy, and either a residence or access proxy"[278]. If a payment proxy is not available or the items contradict each other, a residence and an access proxy may be sufficient.[279] When none of these conditions can be fulfilled by the suppliers, they shall seek approval by the Comptroller for any alternative way of determination.[280] Contrary to the EU, companies are given a guidance on how to rank certain proxies and verify their way of determination by the authorities. EU companies could also ask for an administrative ruling in the different Member States, but cross-border rulings are in general not binding.[281] Additionally, suppliers would need to ask in several Member States, which also seems burdensome.

Suppliers that do not have a global turnover exceeding 1 mio. S$ (≈ 650,000€) and a turnover of B2C digital supplies in Singapore under 100,000 S$ do not fall in the scope of this scheme, meaning they do not need to register and charge GST.[282]

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[272] ibid.
[273] ibid.
[274] IRAS e-Tax Guide – GST: Taxing imported services by way of an overseas vendor registration regime, Second Edition, Singapore, 26 August 2019, https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/e-Tax_Guides/etaxguide_GST_Taxing%20imported%20services%20by%20way%20of%20an%20overseas%20vendor%20registration%20regime.pdf (last access: 13 May 2020)(IRAS e-Tax guide in the following), p. 2.1.
[275] Francesco Cannas, *What Singapore Could Learn from the New Trends for VAT/GST Taxation of B2C Digital Supplies around the World*, International VAT Monitor September/October 2016, p. 321.
[276]IRAS e-Tax guide, p. 2.3.
[277] ibid, p. 8.6.
[278] ibid, p. 8.7.
[279] ibid.
[280] ibid, p. 8.9.
[281] Marie Lamensch, *The 2015 Rules for Electronically Supplied Services – Compliance Issues*, International VAT Monitor January/February 2015p. 16.
[282] IRAS e-Tax guide, p. 2.1.

A system which is similar to the one proposed by *Lamensch* was introduced in Argentina in 2018. According to the Argentinean rules the consumers are liable for the payment of VAT on digital services performed by suppliers which are not established in Argentina.[283] However, the system is based on a withholding scheme obliging intermediary services that are involved in the payment process to withhold the applicable VAT.[284] The tax authority publishes two lists annually.[285] One list contains suppliers that are not established in Argentina for which VAT has to be withhold (e.g. Spotify or Netflix).[286] The other contains non-resident suppliers, which not just provide digital services, but also other services or goods for which VAT has to be withhold only when exceeding 10 USD.[287] Whenever a digital service is supplied by a supplier not listed or without the involvement of an intermediary, customers have to pay the VAT by the last day of the month of purchase to the treasury.[288]

Contrary to the proposal by *Lamensch*, a reverse charge mechanism applies in Argentina, making the final customer liable for VAT. The problem of classification of digital supplies to figure out the applicable tax rate for each transaction does not occur in Argentina, since all digital services are taxed at a rate of 21%.[289] However, the risk of fraud and loss of revenue for the treasury might be higher, when final customers need to do a VAT declaration. Additionally, this runs counter the characteristics of VAT as an indirect tax. But if the system would be applied globally, it has to be admitted that the determination of the place of residence for the suppliers would not be necessary anymore, since it would be the customer's liability to pay in their country of residence.[290]

[283] Fabiola Annacondia, *Cross-Border B2C Digital Services: A New Way to Collect VAT?*, International VAT Monitor September/October 2018, p. 177.
[284] ibid.
[285] ibid, p. 178.
[286] ibid.
[287] ibid.
[288] ibid.
[289] ibid.
[290] ibid.

6 Conclusions

It is apparent that the determination of the place of supply for cross-border digital supplies is crucial for jurisdictions and suppliers. The thesis analysed and examined the presumption rules for the place of supply regarding their actual compliance burden for companies and if the presumptions result in a destination-based taxation.

The assessment showed that the destination principle is not stringently applied, even though the plan of the European Commission for a definitive VAT system shows that such a system shall be based on this principle and it is also strongly endorsed by the OECD guidelines. The destination principle promises a fair taxation system, since it avoids the distortion of competition between different jurisdictions by applying a low tax rate. However, the reintroduction of the origin principle for smaller businesses and some presumptions, such as the one in Art. 24a (2) Implementing Regulation for ships, trains and aircrafts clearly contradict this principle. They result in a taxation that neither considers the place of residence nor the place of consumption.

Regarding the compliance effort for suppliers of digital cross-border services it is clear from the analysis that the presumptions result in a high compliance burden for the suppliers. They are faced with several problems by determining the place of supply of their customers. Some presumptions are almost impossible to apply or very narrow in their scope. When collecting and storing items of evidence for the determination, companies do also have to comply with Data Protection Acts of each Member State.

The Implementing Regulation does not provide further guidance for companies, so the Explanatory Notes by the Commission are welcomed as a guideline for the determination. However, they are not legally binding and just reflecting the interpretation of the European Commission. Member States may now apply a different interpretation and making it even harder for suppliers to comply with the interpretations in each Member State. A uniform interpretation among the Member States should be agreed to lower the compliance effort and provide for more certainty. Additionally, a further guidance on how to rank different items of evidence for companies should be given on a European level, such as the Singaporean tax authority does. It is essential that tax authorities can only refuse the determination performed by the companies in case of misuse or abuse, as it is the case under the current rules, but this is only helpful if companies can determine the place of supply somehow.

Besides the practical difficulties by applying the presumptions there are also legal concerns. As the Implementing Regulation actually changes the place of supply, for example for on the spot services, which contradicts the general rule as set out in Art. 58 VAT Directive. Moreover, the interpretation provided by the Explanatory Notes seem to go further than the wording of the Implementing Regulation.

All in all, there is a huge uncertainty for the suppliers, when applying the presumptions. The overall compliance burden even questions the proportionality of the presumptions, as the suppliers just act as tax collectors on behalf of the treasury.

Another aspect that needs to be taken into account is the nature of digital services. They are supplied without any human intervention, in a huge quantity within a short time frame. The

determination cannot be done in any other way than automated. Therefore, clear rules for the design of such an automated determination process need to be provided.

An alternative system to the current one, the application of a split payment scheme to digital supplies, would indeed solve the problem of the huge compliance burden for the service suppliers. However, a harmonization of categories of rates would be needed within the EU to not just shift the compliance burden from the suppliers to the payment intermediaries. Moreover, the system would only work if a payment intermediary is involved in each transaction. If not, the compliance burden would be simply shifted to the suppliers again, or to the customers, as it is the case in Argentina. The author doubts if a tax compliance for VAT can be expected from final consumers. The amount of fraud would probably increase, and the effort needed for auditing all final consumers would be enormous for tax authorities. Additionally, such a system would also tax at the place of residence in scenarios where the actual place of final consumption can be sufficiently determined. But one of the huge benefits of such a system surely lies in the fact that it would just need to rely on one presumption. The place of residence is presumed to be the place, where the final consumption takes place. The current system needs more presumptions, as set out in the Implementing Regulation, to determine where the place of residence is. We see a system right now where a presumption is needed to determine another presumption. In the end, it is therefore unlikely to tax at the place that initially was wanted: the place of consumption.

The author believes that the difficulties we are faced with in VAT for the cross-border supply of services was caused by the rapid changes of digitalization and, therefore, a solution can only be found by taking advantage of these to establish a tax system. The compliance effort and the accuracy to tax as many supplies at their actual place of consumption as possible have to be considered and balanced. Unfortunately, neither the current VAT rules for digital supplies nor the OECD guidelines offer such a balanced system. Furthermore, as the digitalization has shown that borders become less and less important an internationally coordinated attempt for a unison reformed system is necessary.

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