VAT challenges and opportunities in the new digital economy

Christian Amand
Martina Danz
Gorka Echevarría
Alfredo Espada
Sascha Jafari
Fernando Matesanz
Madeleine Merkx

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Introduction

It is with great pleasure and enthusiasm for the Madrid VAT Forum Foundation to present this project on the challenges and opportunities posed by the digital economy in the field of VAT.

This project was conceived several months ago and in order to bring it to life, the Foundation contacted some recognized voices in the field of VAT in Europe and invited them to take part on it. Some of them are good friends of mine for many years. Others are excellent professionals and VAT experts whom I had not had the pleasure to meet until the realization of this project. In all cases, without exception, they accepted the invitation to participate in this work. I would like to thank them for their willingness to work with the Madrid VAT Forum Foundation.

The phenomenon of the digital economy is undergoing a real revolution today. An enormous effort is being made by national administrations, as well as supranational bodies to ensure that this type of economy is taxed in the most reasonable and fair way possible. In the field of VAT there are many challenges posed by this new type of economy affecting the role of the parties involved in this new way of doing business, the fight against fraud or the obligations to declare and pay the VAT. All these and other issues are addressed in the present project.

I am confident that the project will be welcome by the VAT community and we will be more than satisfied if it serves, in some way, to consider what are the challenges that the lawmaker, businesses and VAT professionals can encounter when navigating the waters of the digital economy and what can be the ways to tackle them.

In the hope that this work will be well received by all of you and with the certainty that it will not be the last, we at the Madrid VAT Forum Foundation will continue to work tirelessly to make VAT a better tax and to contribute to the spread of knowledge and to the generation of debates and ideas around VAT in Europe.

Fernando Matesanz

President Madrid VAT Forum Foundation

A VAT problem solved with modern cryptography: EU Digital Reporting Requirements

Sascha Jafari[1]

The €134 billion VAT gap is still a matter of concern for the European Union (EU).[2] Real-time reporting and e-invoicing are more often than not part of the political discussion regarding how to tackle this problem. Various EU Member States decided to take matters into their own hands and implement some form of these technologies, with success. The VAT gap in many of these countries has fallen sharply. The downside is that it resulted in a scattered landscape of so-called Digital Reporting Requirements (DRR). Therefore, the European Commission (EC) is now planning to present a proposal for legislation in this regard by the end of 2022. DRR is discussed in two different contexts, the domestic and the intra-Community context. The following will mainly focus on the latter and emphasises on how modern cryptography can help to make such a DRR a reality by allowing for confidential VAT data exchange between EU Member States. Before explaining this concept, we will first discuss what DRR is and what the exact plans of the EC are in this regard.

1.- Digital Reporting Requirements and the plans of the EC

Spain introduced the SII in 2017[3], Hungary the RTIR in 2018[4] and Italy the SdI in 2019[5]. The similarity is that they are all DRRs. Furthermore, all have shown that such a mechanism helps to reduce the VAT gap. For instance, the Italian VAT gap has decreased from €35 billion in 2017 to €26 billion in 2019 according to the Italian Ministry of Finance.[6] Comparable mechanisms all over the world achieved similar results. However, there are also many differences between these systems. For example, in terms of the frequency of reporting, the usage of clearance and the reporting standard used. As more and more countries are following the footsteps of these early adopters, the EC decided to take part in the discussion in order to guide this process and promote harmonisation. A legislative proposal regarding an EU DRR is therefore expected by Q3 2022.[7]

It is important to emphasise that this DRR proposal consists of two parts: DRR for intra-Community transactions and DRR for domestic transactions. A main topic of discussion is if the legislative proposal should focus on full harmonisation of both types of DRR or first on DRR for intra-Community transactions, while only a DRR template is offered for domestic transactions. After which in the longer term full-harmonisation will be achieved. As there has not been too much attention in public debate around a DRR for intra-Community transactions, in the following we will focus on this mechanism.

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[1] Sascha Jafari. Co-founder Summitto.

[2] https://ec.europa.eu/taxation_customs/business/vat/vat-gap_nl

[3] https://www2.deloitte.com/es/es/pages/technology/solutions/suministro-inmediato-informacion-sii.html

[4] https://sovos.com/vat/tax-rules/rtir-hungary/

[5] https://www.avalara.com/vatlive/en/country-guides/europe/italy/italy-sdi-real-time-e-invoices.html

[6] SOURCE

[7] https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-vat-in-the-digital-age

Regarding the design of such a system several "modalities" are considered such as VAT listings, SAF-T, real-time reporting or real-time reporting combined with e-invoicing. Other open questions are: how often should information be reported, should it include B2B, B2C and/or B2G transactions and should such a requirement include clearance.[8] All are extremely relevant questions, but in the end political decisions. We will focus on a more technological problem: data sharing. However, before we explain how technology can help to overcome challenges regarding data sharing, we first explore what a DRR for intra-Community transactions exactly entails.

2.- DRR for intra-Community transactions: benefits and challenges

Currently data for intra-Community transactions is mainly exchanged via the VAT Information Exchange System (VIES), which receives input from the recapitulative statements (IC-sales lists). This helps EU Member States to cross-check the data with the IC-purchases data declared in the VAT return of the buyer. In order to automate this process and provide more advanced analytics the Transaction Network Analysis (TNA) tool was implemented in 2019.[9] Although this has been a great tool for tax authorities, the data quality of the reported VAT amounts is far too low. This results in an enormous amount of mistakes that cannot all be checked by the tax administration.

The implementation of a DRR for intra-Community transactions would help to improve this data quality. First of all it will offer digital tools to companies to become compliant. Results from DRR for domestic transactions, such as in Italy and Hungary, are promising. In these countries the usage of digital invoicing tools increased massively, which makes it easier for companies to correctly send invoices.[10] Furthermore, by increasing the frequency of reporting (per transactions, instead of at the end of the period) errors will also be less likely. The increase in data quality can help to improve existing tools such as TNA to deliver the right signals to the tax authorities. This will enable tax authorities to focus their investigations on the actual VAT fraudsters, and not on the honest businesses.

However, increasing the data quality is not enough to actually tackle fraud. For this tax authorities should be able to cross-check the reported data with the data reported in the other EU Member State. So ideally 2 tax authorities will benefit from 1 data field. This will enable them to react faster to fraud signals and can significantly increase fraud detection time. Additionally, the implementation of a DRR for intra-Community transactions might also be a great opportunity to improve the existing VIES system from a technical point of view. In recent years, many companies have been complaining about the limited availability of VIES due to downtime. This led to questions from Dutch parliamentarians to the Dutch State Secretary of Finance, Marnix van Rij.[11]

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[8] https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/1d355c07-e3af-42ef-b871-17ebd6cff9d0/details

[9]https://blog.summitto.com/posts/how_do_member_states_exchange_vat_information_vies_intrastat_eurofisc_tna_explained/

[10] For example, in Hungary it's mandatory to report invoices electronically to the tax administration, while in Italy e-invoicing is made mandatory following the FatturaPA standard.

[11] https://www.rijksoverheid.nl/documenten/kamerstukken/2022/01/20/kamerbrief-reactie-op-klacht-over-communicatie-bij-storing-vies-systeem

Moreover, as the EC already suggests, the introduction of an EU DRR for intra-Community transactions can be a stepping stone for full-harmonisation of DRR solutions all over the EU. A DRR that offers both benefits for public and private parties, can offer a guideline for the implementation of DRRs for domestic transactions as well. This should be done in a coordinated way, providing a template or a rule set for a successful DRR implementation. In this way, the EU could really benefit from a more harmonised VAT reporting landscape which offers digital tools and options for reporting automation. Furthermore, the recapitulative statement can be pre-filled or simply be replaced by an online cross-check of the data that is reported.

However, not all EU Member States are happy to share the information with each other. For example, Germany has for a long time been reluctant in participating in TNA, because of data secrecy reasons.[12] So although it is very much needed to improve data quality and the exchange of data on an EU level, it is quite difficult to achieve this as many EU Member States (it's not only Germany) would not want that the valuable invoice data of their national companies are automatically shared all over the EU. This is a very valid concern.

3.- The importance of data protection in the context of DRR

It seems an excellent idea to introduce a DRR for intra-Community transactions both from the perspective of reducing the VAT gap as to increase harmonisation, digitalisation and automation of VAT reporting. However, EU Member States are right in their judgement that increasing the collection of data also comes with challenges regarding data protection. This is especially relevant in the context of invoices which contain valuable pricing information. If this information is leaked it can be used by (foreign) competitors to outcompete them. Furthermore, it is also often the case that companies are offering different prices to different buyers. When this data is exposed, it could seriously hurt the customer relationship. Also never underestimate the data leaked with only extracts. In 2009, German politician Malte Spitz required his telecom company to hand in the data collected by the company through his mobile phone: the company had collected his geographical location and what he had been doing with his phone more than 35,000 different times over a period of six months.[13]

Unfortunately the risks of these data breaches are extremely high as the number of cyber attacks are rising almost by the day. For example, whereas businesses were suffering a ransomware attack every 40 seconds in 2015, the figure is 11 seconds for 2021. The impact from such, and other, cyberattacks are enormous. According to Cybersecurity Ventures the costs incurred because of cybercrime will rise towards $10.5 trillion in 2025, up from $6 trillion in 2021.[14] To put this figure in a different perspective: Chair and CEO of Cisco, Chuck Robbins, stated that "if we think about cybercrime the way we think about GDP, it would be the third largest economy in the world."[15] Thus, it seems only logical to optimally protect taxpayers' data.

[12] https://protax-project.eu/protax_publications/countering-vat-fraud-in-the-eu-is-there-a-reason-to-be-hopeful-in-germany/

[13] https://blog.summitto.com/posts/risk_without_benefits_data_minimisation_is_not_the_solution/

[14] https://cybersecurityventures.com/cybercrime-damage-costs-10-trillion-by-2025/

[15] https://video.cisco.com/video/6253894536001

4.- Which technology can help to implement a DRR for intra-Community transactions?

As explained above, next to the difficult policy decisions that need to be made, one of the main challenges for a DRR for intra-Community transactions is to optimally protect the exchanged data. For this part, technology can help. Over recent years more and more research has been done in the realm of cryptography. These studies resulted in tools that allow organisations to perform calculations on fully encrypted data. In the following we will refer to this technology as modern cryptography.

To give one example: modern cryptography applied to DRR would mean that not all the invoice information is stored, but just the hash of an invoice. This hash is fully encrypted information which does not allow you to go back to the original data. If only one tiny detail in the original invoice is changed, a completely different hash will be the result. In this way integrity can be assured without revealing invoice information. Subsequently, modern cryptography makes it possible for tax authorities to make calculations on encrypted information. In this way, confidential analyses can be done on invoice data without revealing any confidential information. Not even to the tax authority.

Only in case discrepancies are detected, tax authorities can ask for permission to look into the detailed data reported. This results in an optimal protection of the taxpayer's right to confidentiality. Just as relevant is that it enables EU Member States to share information in a fully confidential way. Making implementation of a DRR for intra-Community, which is subject to the unanimity rule[16], more realistic.

5.- Additional benefits for companies of applying modern cryptography to DRR

Many benefits of applying modern cryptography to DRR were already discussed above, but there is another benefit specifically interesting for companies. The hashes that would be stored in such a DRR, can be made publicly available to enable companies to reuse the data they have reported for VAT purposes. Whereas in DRR systems that are currently implemented for domestic transactions all reported VAT data ends up in the black box of the tax authority, modern cryptography can help to open up this box. The hashes are encrypted data, and therefore can be made publicly available without risking the infringement of confidentiality.

Companies will be able to use these hashes as a proof that they have reported the invoice to the tax authority. This increases the chance that an actual transaction is connected to the invoice. Namely, the buyer will be able to cross-check what is reported by the supplier and reporting will have actual consequences for the VAT return. This proof can then be used to, for example, automate audits or to prove to an investor that your company actually generated an X amount of intra-Community sales. And these are just a few examples of how companies can reap the benefits of a DRR based on modern cryptography.

6.- Conclusion

With the upcoming legislative proposal of the EC in Q3 2022 regarding DRR, it is essential to explore how this could be implemented successfully. In this article we discussed how a technological solution can help to overcome data exchange challenges in the context of DRR for intra-Community transactions. First we showed what DRR for intra-Community transactions is and how this could help to reduce the VAT gap and steer harmonisation. Although it seems like the right path to take, not all EU Member States are willing to share invoice data with others. To solve this problem, modern cryptography can be used. It allows tax authorities to

[16] https://ec.europa.eu/taxation_customs/taxation-and-qualified-majority-voting_en

only store the hash (fully encrypted information) of an invoice. At the same time, calculations can be made on this data without anyone seeing confidential information, such as pricing information. This makes a DRR for intra-Community transactions more realistic, which will help to prepare the EU and the EU Single Market for the digital age.

Taxation of cryptocurrency transactions for Swiss VAT purposes

Martina Danz[1]

1 Introduction

The purpose of this report is to present the solutions currently implemented at the Swiss level for VAT taxation of major cryptocurrency transactions. After an initial introduction to key concepts such as cryptocurrencies and the blockchain, the transactions selected for the purpose of this study will be presented. These include cryptocurrency transfer in the context of airdrops/ICOs, exchange and trading, cryptocurrency transfer as payment for goods and/or services, mining and staking activities. The second part of the report will focus on the tax analysis of the mentioned transactions.

2 Key concepts and transactions under analysis

2.1 Cryptocurrencies and blockchain

In 2014, cryptocurrencies – also known as digital or virtual currencies – have been defined by the European Banking Authority (EBA) as *"representations of value that is neither issued by a central bank or public authority nor necessarily attached to a FC [fiat currency], but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically"*[2]. Being blockchain-based, cryptocurrencies use a decentralized cryptography system to secure and record transactions[3]. More generally, these are a category of crypto-assets, which are DLT-based[4] digital financial assets[5]. Although a common taxonomy is not available, there are three main categories of crypto assets that are recognized internationally: (i) payment/exchange/currency tokens[6], (ii) investment tokens and (iii) utility tokens[7].

Payment tokens are used as a means of payment for goods/services or as a means of investment/value storage on par with traditional currencies[8]. Cryptocurrencies fall into this

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[1] Martina Danz. PhD Candidate. University of Neuchâtel, Switzerland

[2] See EBA, EBA Opinion on 'virtual currencies', 4 July 2014, p. 11. Available at https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf?retry=1 (accessed 1 August 2022).

[3] Martina Danz, *VAT Treatment of Cryptocurrencies – Some Thoughts on the Libra Project*, International VAT Monitor, May/June 2020, p. 145.

[4] Based on distributed ledger technology (DLT), of which blockchain is an exemplary implementation.

[5] OECD, Taxing Virtual Currencies – An Overview of Tax treatments and Emerging Tax Policy Issues, 2020, p. 10. Available at www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emergingtax-policy issues.htm (accessed 1 August 2022).

[6] A token is *"a piece of computer code, a piece of digital information, stored in a blockchain, which can be transferred via a protocol, and which may (or may not) perform additional functions governed by the software that created it"*. Non-official translation from Vaïk Müller & Vincent Mignon, *La qualification juridique des tokens : aspects réglementaires*, Gesellschafts- und Kapitalmarktrecht, 2017, p. 488.

[7] EBA, Report with advice for the European Commission, p. 7. Available at https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2545547/67493daa-85a8-4429-aa91-e9a5ed880684/EBA%20Report%20on%20crypto%20assets.pdf?retry=1 (accessed 1 August 2022). This categorization is not, according to some authors, the most suitable in a VAT context. A functional distinction would be more appropriate and would allow a division into *(i)* native tokens *(ii)* counterparty tokens and *(iii)* property tokens. For more information, see Thomas Linder & Fredrik Dekker, *MWST und Krypto-Token*, Novità fiscali 7/20, p. 458;

[8] Cryptocurrencies (or digital/virtual currencies) fall into this category.

category. No rights are granted to the holder, in contrast to investment tokens, which typically incorporate a right to a "financial stake" in the issuing entity[9]. Utility tokens grant their holder access to a DLT-enabled product or service. Payment tokens also include Non-Fungible Tokens (NFTs), a peculiar form of cryptocurrency initially developed and supported by the Ethereum blockchain. Unlike "traditional" cryptocurrencies (such as Bitcoin), whose units are interchangeable and equivalent[10], NFTs are distinguished by being unique and identifiable (hence, non-fungible). These tokens therefore lend themselves to representing identifiable physical or digital assets on the blockchain on which they are inscribed and to guaranteeing their ownership and authenticity. Indeed, their integrative function is what actually characterizes them[11] and tremendously facilitates the transmission of the underlying asset's ownership via the blockchain. The applications of NFTs can be extremely diverse. For this reason, they will not be included in this analysis, which is limited to "traditional" cryptocurrencies.

As mentioned, cryptocurrencies are blockchain-based. The blockchain, which is one possible application of the DLT[12], is a software that works like a digital, decentralized database which records chronologically all transactions occurring through it. The transactions are then recorded in "blocks" of information that are inserted into this virtual "chain" (hence, the term "blockchain"), which is constantly updated and shared with users. Any manipulation would result in a discrepancy between users' ledgers and would therefore not pass the verification and validation phase by validators, called "nodes". In the diagram below, a commonly used simplified version of the process of requesting and validating a transaction on the blockchain is depicted.

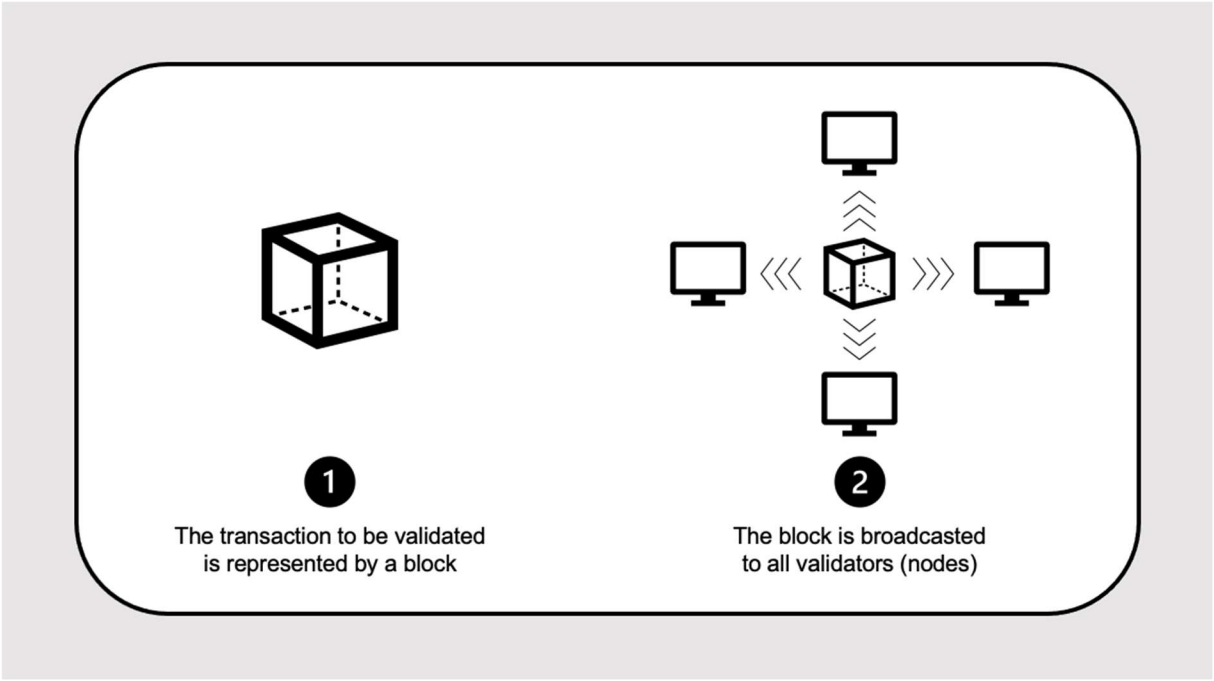
9 Ownership rights and/or entitlements similar to dividends or interest.

10 To claim that Bitcoin units are completely interchangeable with each other, and that 1 Bitcoin equals 1 Bitcoin is inaccurate. In fact, since cryptocurrency transactions are recorded and traceable, their value can change considerably depending on their history. A "virgin" Bitcoin, i.e., one with a short or inexistent history, can be worth up to 20% more than a regular Bitcoin. In contrast, a "tainted" Bitcoin, i.e., one implicated in illicit transactions or stolen in the past, loses value.

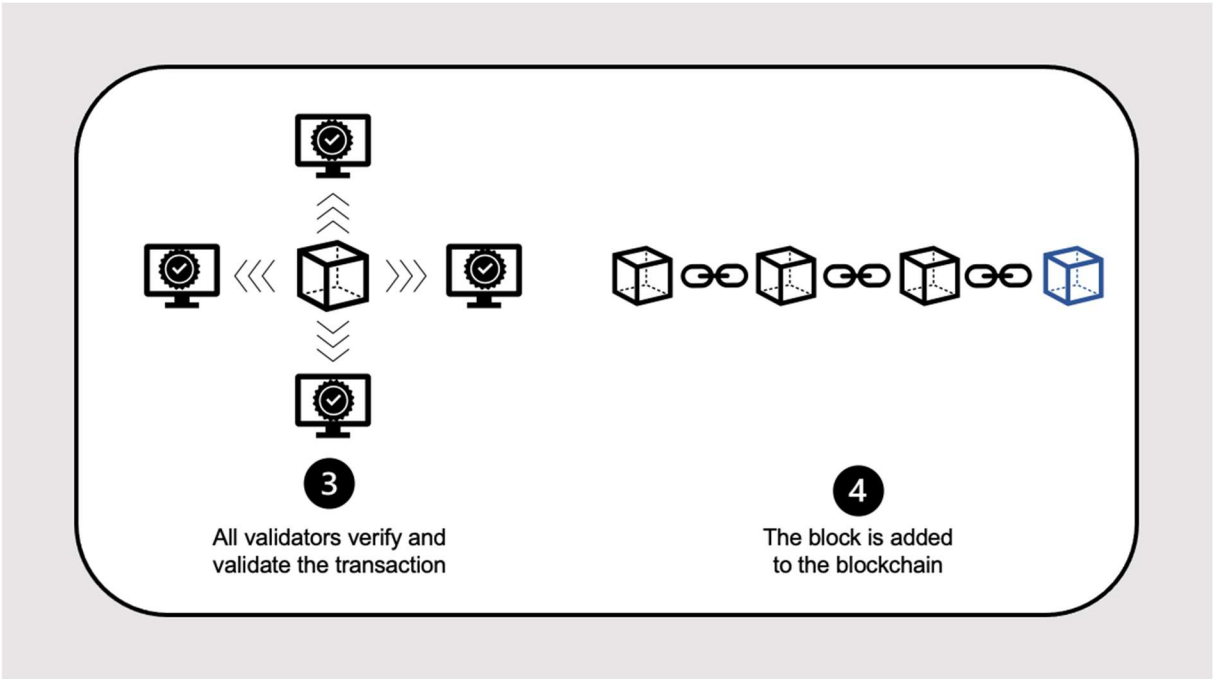
11 Michel José Reymond, *Mises au point sur la notion de Non Fungible Token*, Jusletter 31 May 2021, p. 4.

12 Distributed Ledger Technology.

Broadcast phase



Verification and validation phase



Most new cryptocurrency units are created through transactions' validation processes, which may occur in a variety of forms, the main ones being mining (also known as *"Proof of Work",* PoW) and staking (also known as *"Proof of Stake",* PoS). Besides verifying the accuracy of transactions and avoiding the "double spending" problem, typical of digital currencies, an interesting byproduct of these validation processes is indeed the creation of new cryptocurrencies and/or the payment of transaction fees. Cryptocurrencies can also be created and *(i)* distributed for free via an "airdrop" event or *(ii)* (pre-)sold at an Initial Coin Offering (ICO). Once bought, cryptocurrencies are stored in a digital wallet and can be traded with fiat money or with other cryptocurrencies via online exchange platforms.

2.2 Transactions under analysis

For Swiss VAT purposes, we have identified the following transactions as potentially taxable:

- Cryptocurrency transfer in the context of airdrops/ICOs: airdrops are events where cryptocurrencies are granted to users for free. No consideration is required. Generally, this kind of operation is mostly chosen for marketing purposes, when a newly issued cryptocurrency needs to be known and possibly traded on the secondary market. On the other hand, gratuity is not foreseen in the case of an Initial Coin Offering (ICO), a form of blockchain-based crowdfunding where specific project-related cryptocurrencies are (pre-)sold in exchange for fiat money or other cryptocurrencies[13].
- Cryptocurrency exchange and trade: once owned, cryptocurrencies can be exchanged and traded on exchange platforms, which normally charge fees for their services. Cryptocurrencies are stored in digital wallets that, when managed by third parties, also charge fees.
- Cryptocurrency transfer as payment for goods and/or services: cryptocurrencies may also be employed to purchase goods or pay for services.
- Mining/staking activities: in mining, a few participants in the system, called miners, compete to solve a complicated cryptographic algorithm and earn the right to add a new block of information to the blockchain via a PoW process. The first miner who solves the problem and validates the transaction receives newly minted cryptocurrency units and/or fees on the transaction as a reward[14]. In staking, the cryptocurrency holder pledges an amount of their choice[15] in order to participate in the validation mechanism via a PoS process. The higher the upright, the better the chances of being chosen because of the greater interest in validating legitimate transactions. Indeed, endorsing a transaction that later turns out to be invalid can cost the staker a portion of the committed cryptocurrencies through the network's implementation of the so-called "slashing"[16].

3 Tax analysis

3.1 Swiss VAT

Swiss VAT[17] is a general tax levied on all supplies of goods and/or services for consideration[18] provided in Switzerland at all stages of production and which, allowing the deduction of the input tax, is intended to tax only the added value realized by the taxable person. It is a consumption tax as the end-consumers, independently of their economic situation, support it[19]. In order for the transaction to be subject to Swiss VAT, the taxpayer must be considered as a

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13 Thomas Linder & Mónika Molnár, *Blockchain, Token und Mehrwertsteuer*, Expert Focus 12/18, p. 1026; Marc-André B. Schauwecker, *Initial Coin Offering (ICO)*, Revue fiscale 73/2018, p. 932 et seq.

14 Taotao Wang & Soung Chang Liew et al., *When blockchain meets AI: Optimal mining strategy achieved by machine learning*, International journal of intelligent systems, vol. 36 (5), 2019, p. 2184.

15 A minimum is usually required.

16 The destruction of staked tokens.

17 The purchase tax for services provided by companies established abroad (Art. 45 VATA) and the import tax on imported goods (Art. 50 VATA) will not be dealt with in this report.

18 A close economic link should exist between the supply and its consideration. See Art. 18(1) VATA; CH: Swiss Federal Administrative Court, Case A-1496/2006, para. 2.1.

19 CH: Swiss Federal Administrative Court, Case A-1382/2015, para. 3.3.2.

VAT taxable person according to the VATA (i.e., the Swiss VAT Act – VATA[20]). According to Art. 10(1) VATA, whoever runs a business, even a non-profit one, and whatever the legal form of the business and the purpose pursued, is subject to VAT as long as they meet certain conditions, namely the realization of an annual turnover in Switzerland and abroad equal to or higher than CHF 100'000. Due to the frequent economic exchanges between Switzerland and Europe and in order to avoid situations of double (non-)taxation[21], the Swiss VAT system, although presenting some peculiarities[22], has been designed to be "compatible" with the European one[23]. Harmonization is such that on several occasions the Swiss Federal Court has relied on European decisions to interpret domestic law[24].

3.2 VAT treatment of cryptocurrency transactions

3.2.1 General remarks

When dealing with cryptocurrencies (and with payment/exchange/currency tokens in general), the focus of analysis from a VAT perspective revolves around the relative and absolute rights that underlie the coin *vis-à-vis* its issuer. Normally, as opposed to other tokens, cryptocurrencies are distinguished by not providing any defined counterparty or consideration to their owner, but rather payment functionalities that derive from the technical features of the blockchain on which they are embedded. With cryptocurrencies there is, *de facto*, a lack of any promise of performance[25]. As a result, at the European level, from 2015 onwards cryptocurrencies have been assimilated for VAT purposes to legal means of payment as a result of the ECJ decision that will be analyzed below.

3.2.2 Relevant case law of the ECJ

The ECJ has ruled on the VAT treatment of transactions involving bitcoins in a 2015 decision that is renowned in the crypto world: *Skatteverket v. Hedqvist*[26]. Mr. Hedqvist was a businessman running a Swedish trading company that bought and sold bitcoin units (cryptocurrency) in exchange for fiat currencies, or *vice versa.* For this service, the company did not charge any fees but made a profit based on the difference (margin) between the purchase and the selling price offered to customers.

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20 CH: Federal Act on Value Added Tax, 12 June 2009 [hereinafter: VATA].

21 CH: Swiss Federal Council, Message concerning the simplification of VAT, 25 June 2006, FF 2008 6277, p. 6315 [hereinafter Message on VAT simplification].

22 In addition to a tax rate of 7.7% that is significantly lower than European standards, other differences include the definitions of supply, the tax treatment of donations and subsidies and the basis for calculating self-supply.

23 CH: Message on VAT simplification, p. 6314: a "compatibility of results" is sufficient, without necessarily resorting to a "technical compatibility" at the legislative level.

24 Diego Clavadetscher, *Kommentar zum Schweizerischen Steuerrecht*, in Martin Zweifel et al. eds., *Bundesgesetz über die Mehrwertsteuer*, para. 37 ad Art. 1 (Helbing Lichtenhahn Verlag 2015). On the euro-compatibility of Swiss VAT, see also CH: Swiss Federal Court, Case 125 II 480; 138 II 251; 124 II 193; 123 II 295; Xavier Oberson, *Droit fiscal suisse*, p. 441 (5th ed., Helbing Lichtenhahn 2021); Thierry Obrist, *Introduction au droit fiscal suisse*, p. 268 (2nd ed., Helbing Lichtenhahn 2018), p. 268.

25 In this sense, Ronald Kogens & Catrina Luchsinger Gähwiler, *Ein 360-Grad Blick auf Token*, Expert Focus 8/18, p. 591; Marcel R. Jung, *Initial Token Offerings und Tokens im Schweizer Steuerrecht*, Expert Focus 4/18, p. 286; Mónika Molnár & Thomas Linder, *Blockchain und Mehrwertsteuer: verstehen Sie «kybernetisch» ?*, Expert Focus 1-2/19, p. 86; Thobias F. Rohner & Andrea B. Bolliger, *Mehrwertsteuerliche Aspekte von Initial Coin Offerings*, Expert Focus 8/18, p. 639.

26 SE: ECJ, 22 October 2015, Case C-264/14, *Skatteverket v. David Hedqvist* [hereinafter *Hedqvist* (C-264/14)].

After ascertaining that the exchanged currencies (crypto and fiat) both served as means of payment, referring to bitcoins the ECJ qualified them as intangible property that had no purpose other than the one identified[27]. This qualification of the transactions enabled the ECJ to identify their nature as supply of services within the meaning of Art. 24 VAT Directive[28]. Indeed, the margin perceived by the company on the exchange of currencies represented to all intents and purposes a consideration for the service provided, with which it featured a direct link[29]. Accordingly, the transactions consisted of a supply of services for consideration within the meaning of Art. 2(1)(c) VAT Directive.

Thereafter, it remained to be determined whether the exemption applicable to transactions involving legal tender provided for in Art. 135(1)(e) VAT Directive could apply by analogy to the transactions under consideration. In accordance with a teleological interpretation of the provision, the ECJ concluded that, when traded, cryptocurrencies raised the same difficulties as fiat currencies in terms of identification of the taxable base and deductible VAT and therefore deserved to be exempted from VAT to the same extent. Although innovative and of appreciable result, we consider that the analysis made by the ECJ could have gone further with regard to the qualification of the bitcoin itself and the VAT aspects of the transactions under examination[30].

3.2.3 Taxation at the Swiss level

As mentioned, the ECJ's case law analyzed above had a significant influence on the practice later developed by the Swiss authorities. On that basis, the latter have, in June 2018, published the first VAT guidelines on cryptocurrencies, updating them regularly since then[31].The Swiss VAT treatment currently applicable to the previously selected transactions will be then described below, based on the practice established by the Swiss authorities and the analysis made by Switzerland's most distinguished scholars.

- Cryptocurrency transfer in the context of airdrops/ICOs: the main characteristic of airdrops being a free delivery of new coins for marketing purposes, we consider that, since there is no counter-performance by the recipient, the transaction is not relevant for VAT purposes. On the other hand, when cryptocurrencies are issued and sold in the context of an ICO, as long as they do not provide any absolute or relative rights to the recipient, a simple exchange of means of payment is performed with no impact on Swiss VAT, which therefore does not have to be levied on the amount raised[32].
- Cryptocurrency exchange and trade: in line with the ECJ's case law, the exchange of cryptocurrencies into fiat currencies and *vice versa* constitutes a simple exchange of means of payment that does not fall within the scope of the VATA. Similarly, the exchange between different types of cryptocurrencies is not relevant for VAT

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27 *Hedqvist* (C-264/14), para. 24 et seq.

28 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [hereinafter VAT Directive].

29 *Hedqvist* (C-264/14), para. 28 et seq.

30 In this sense, see Mónika Molnár & Thomas Linder (2019), footnote 24, p. 86.

31 Swiss TVA practice [hereinafter Info VAT] is available for reference at the following address https://www.estv.admin.ch/estv/fr/accueil/taxe-sur-la-valeur-ajoutee/informations-specialisees-tva/publications-basees-sur-web.html (accessed 1 August 2022).

32 Info VAT 04, section 2.7.3.2; Thomas Linder & Fredrik Dekker (2020), footnote 6, p. 456; Ronald Kogens & Catrina Luchsinger Gähwiler (2018), footnote 24, p. 593; Thomas Linder & Mónika Molnár (2018), footnote 12, p. 1026; Thobias F. Rohner & Andrea B. Bolliger (2018), footnote 24, p. 642.

purposes[33]. Cryptocurrency trading activities are not VAT-relevant if conducted as a hobby (simple exchange of means of payment). At the professional level, commissions or other fees charged by exchange platforms are VAT-exempted in accordance with Art. 21(2)(19)(d) VATA, applied by analogy[34]. On the other hand, the storage of cryptocurrencies in a wallet managed by a third party is a taxable service. The determination of the place of supply is made in accordance with Art. 8(1) VATA[35].

- Cryptocurrency transfer as payment for goods and/or services: when cryptocurrencies are deployed to pay for the purchase of goods or the supply of services, a question may arise as to whether the supply of cryptocurrencies as consideration may represent an additional service for VAT purposes. Insofar as the cryptocurrency merely constitutes a contractual or *de facto* means of payment for the good or service in question and does not confer any further relative or absolute rights to its holder, then an exchange (or similar) relationship within the meaning of Art. 24(3) VATA is to be excluded. This kind of transaction is therefore not relevant for VAT purposes[36]. Consideration in cryptocurrencies must be invoiced in a legal tender (domestic or foreign)[37].
- Mining/staking activities: in case of transaction validation activities on the blockchain, a distinction should be made depending on whether the remuneration received is in *(i)* new cryptocurrency units ("block reward") and/or *(ii)* transaction fees. In the former case, there is no actual exchange relationship[38], and the new cryptocurrencies are not considered to be part of the counter-performance within the meaning of Art. 18(2) VATA. On the other hand, where the consideration for the validation activity takes the form of a transaction fee paid by the sender to the validator for a given transaction, an exchange relationship exists. The transaction consists then of a taxable service in accordance with Art. 18(1) VATA, in conjunction with Art. 8(1) VATA[39].

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33 Info VAT 04, section 2.7.3.4; Thomas Linder & Fredrik Dekker (2020), footnote 6, p. 457; Ronald Kogens & Catrina Luchsinger Gähwiler (2018), footnote 24, p. 593; Thomas Linder & Mónika Molnár (2018), footnote 12, p. 1025 et seq.; Christoph M. Meier & Luzius Meisser, *Bitcoin und Mehrwertsteuer*, Expert Focus 3/16, p. 186 et seq.; Lukas Müller & Milena Reutlinger et al., *Entwicklungen in der Regulierung von virtuellen Währungen in der Schweiz und der Europäischen Union*, EuZ 2018 p. 88; Marc-André B. Schauwecker (2018), footnote 12, p. 935 et seq.;

34 Info VAT 04, section 2.7.3.4; Thomas Linder & Fredrik Dekker (2020), footnote 6, p. 457; Ronald Kogens & Catrina Luchsinger Gähwiler (2018), footnote 24, p. 593; Thomas Linder & Mónika Molnár (2018), footnote 12, p. 1025 et seq.; Christoph M. Meier & Luzius Meisser (2016), footnote 32, p. 186 et seq.; Lukas Müller & Milena Reutlinger et al. (2018), footnote 32, p. 88; Marc-André B. Schauwecker (2018), footnote 12, p. 935 et seq.

35 Info VAT 04, section 2.7.3.3.

36 Info VAT 04, section 2.7.3.4; Thomas Linder & Fredrik Dekker (2020), footnote 6, p. 457; Ronald Kogens & Catrina Luchsinger Gähwiler (2018), footnote 24, p. 593; Thomas Linder & Mónika Molnár (2018), footnote 12, p. 1024 et seq.

37 Info VAT 06, section 1.10.

38 On this issue, the Bitcoin-Association (https://www.bitcoinassociation.ch/, accessed 1 August 2022) supported by some specialists in the field, has proposed to consider miners and stakers' services as provided directly to the system itself (i.e., the blockchain) in which they operate. The system not being locatable but operating as a foreign decentralized entity, mining and staking services provided by taxable persons in Switzerland would be qualified and taxed as exports. In this sense, see Thomas Linder & Mónika Molnár (2018), footnote 12, p. 1026.

39 Info VAT 04, section 2.7.3.5.

Where applicable, the VAT statement must be drawn up in national currency. It is at the time of collection or invoicing (Art. 40 VATA) that the service provider must convert the consideration in cryptocurrencies into a legal currency (national or foreign)[40].

4 Conclusion

In line with the international developments, the Swiss tax treatment of cryptocurrencies has been the focus of numerous publications issued by authorities and scholars in recent years. Nevertheless, legal uncertainty remains to some extent, as crypto assets still require case-by-case assessment, and the underlying technology is constantly evolving. Regarding VAT specifically, although it is always a step behind practitioners' latest concerns, the online accessible practice is consistently updated by Swiss authorities. In addition, any residual uncertainty regarding the tax treatment of a specific crypto asset can still be limited by requesting a tax ruling, which should prevent any unpleasant surprises for the taxpayer.

[40] Info VAT 07, section 1.3.3; Thomas Linder & Fredrik Dekker (2020), footnote 6, p. 457.

Platform liability: an efficient and fair collection model for VAT?

Prof. Madeleine Merkx[1]

1.- Introduction

Since 2015 the EU has availed itself of the option to shift the VAT liability on B2C supplies from suppliers to platforms through deeming provisions. On 1 July 2021 new deeming provisions for platforms came into effect. In such a full liability model the supplier is deemed to supply the goods or services in question to the platform and the platform is deemed to supply the goods or services to the consumer. Meanwhile, some EU Member States have also adopted joint and several liability for platforms.[2] At first sight it seems efficient to shift the burden to collect VAT from numerous (small) suppliers to bigger market players: the platforms. Suppliers do not need to bother with charging the correct VAT amount to the customer and transmitting it to the tax authority, while tax authorities only need to enforce the VAT legislation on platforms. One may also argue that it is fair to shift the burden to platforms because they have more means to deal with VAT obligations and they have benefited from the rise of the digital and platform economy.

In this contribution these premises will be addressed and it will be examined whether full liability models are indeed creating an efficient and fair collection of VAT on B2C supplies. In section 2 principles of efficient and fair collection of VAT will first be addressed. Section 3 subsequently discusses the concept of platforms, after which section 4 will describe the VAT rules under the full liability regime applying since 2015 and 2021. Section 5 will subsequently answer the main research question of this contribution: whether the rules discussed in section 4 are an efficient and fair model to collect VAT on B2C supplies considering the business models of platforms discussed in section 3. This section will also address the extension of the full liability regime to other supplies of goods or services, notably within the sharing economy. The provision of information collected on platform sellers and their transactions by platforms that is currently part of the VAT legislation as well (art. 242a VAT Directive[3]), and the DAC7 directive are beyond the scope of this contribution.[4]

2.- Effective and fair collection of VAT

In 1998 the OECD developed the Ottawa Taxation Framework[5] when it comes to taxation of e-commerce. Within this framework both an efficient and an effective and fair taxation play an important role. To start with the latter principle, according to the framework an effective and fair taxation means that taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimized while keeping counteracting

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[1] Professor of Indirect Taxes at Erasmus University and partner at the Tax Research Center of BDO. the Netherlands. The author can be reached at merkx@law.eur.nl. The manuscript was closed on 30 June 2022.

[2] These type of models implemented by individual Member States are beyond the scope of this article. The author refers to Anne Janssen, 'The Problematic Combination of EU Harmonized and Domestic Legislation regarding VAT Platform Liability', International VAT Monitor 2021 (Volume 32), No. 5.

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

[4] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, *OJ L 104*, 25.3.2021, pp. 1–26.

[5] OECD (2003), 'Implementation of the Ottawa Taxation Framework Conditions', The 2003 Report, p. 12. More recently: OECD (2019), The Role of Digital Platforms in the Collection of VAT/GST on Online Sales, OECD, Paris. www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf, p. 18.

measures proportionate to risks involved. Efficient taxation means that compliance costs for businesses and administrative costs for the tax authorities should be minimized as far as possible. In my view these principles are very closely related to other principles addressed in the Ottawa taxation framework: neutrality, certainty and simplicity and flexibility. Neutrality means that taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation. This is closely related to and in my view part of a fair taxation model, because without neutrality taxation would not be fair. Neutrality will be tested in this contribution within the principle of effectiveness and fairness. The principle of certainty and simplicity means that tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted. In my view this is part of an efficient taxation. Simplicity and certainty will result in less compliance costs for businesses. These principles will therefore be part of testing the full liability for platforms against the backdrop of the principle of efficiency. Lastly, the principle of flexibility implies that the system for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments. In my view, this is both part of a neutral tax system (and therefore part of a fair taxation model) as well as an efficient tax system. Without the ability to adapt to new developments or business models there is a risk that those new developments or business models will either escape taxation or create a lower tax burden despite of activities being similar to existing business models that are fully taxed. New developments or business models could also create extra compliance or administrative costs creating a less efficient tax system in case the tax system is not able to adapt to these changes.[6]

3.- Platform business models[7]

Platforms are often associated with the rise of the digital economy, but in fact the concept is much older. Platforms are means of facilitating reciprocal exchanges between parties.[8] This is why platforms are also called multisided platforms.[9] Different parties operating on the platform must be able to exchange something with each other. In the old 'brick and mortar world' those reciprocal exchanges for example took place on physical market places, such as local farmer markets. In the new or digital economy platforms operate on the internet. This also means that digital platforms have a much wider range compared to their physical equivalents. In fact, parties on the platform may come from all over the world, although in the case of the supply of physical goods or services where the service provider and/or customer must be physically present, travel and shipping costs may constitute a barrier to the effective supply of goods or services worldwide.

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[6] All definitions of these principles can be found on p. 12 of OECD (2003), 'Implementation of the Ottawa Taxation Framework Conditions', The 2003 Report.

[7] Section 3 of this article is based on section 2 of the article by Marie Lamensch, Madeleine Merkx, Jurian Lock and Anne Janssen, 'New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment, World Tax Journal August 2021, p 441-479.

[8] Lamensch et. al, supra 7, p. 444.

[9] A. Aslam & A. Shah, 'Taxation and the Peer-to-Peer-Economy, IMF Working Paper WP 17/187, 2017, p. 10, L. Filistrucchi, D. Geradin & E. van Damme, 'Identifiying Two-Sides Markets', TILEC Discussion paper, DP 2012-008, 2012, p. 2, D.S. Evans, 'Multisided Platforms. Dynamic Competition and the Assessment of Market Power for Internet Based Firms', Chicago Coas-Sandor Institute for Law and Economics, Working Paper No. 753, March 2016, p. 2.

The business model of platforms can be distinguished from classical pipeline business models[10] which were common when the EU VAT system was introduced. Within a pipeline model, goods are produced and then supplied to the consumer through sales in various links of a supply and distribution chain, such as wholesalers. Platform's business models are different. This type of business model does not create value through production or resale, but by facilitating exchanges among users that would otherwise have difficulty finding each other.[11] For a platform business model to be successful platforms will need a sufficiently large user base consisting of parties from both sides of the market. A platform with only sellers or only buyers cannot be successful.[12] To keep a right balance and a sufficiently large database platforms will need to safeguard their users bases, because users can easily switch to other platforms.[13] Another difference is that platforms can monetize value in different ways. They can charge periodical fees to users operating on the platform or a fee per transaction. Platforms can charge both sides of the market, e.g. sellers and buyers or can choose to only charge one of those parties, to ensure the balance between both sides of the market, as described above.[14]

Considering the characteristics of platforms described above one might easily tar all platforms with the same brush. It should however be noted that there is no 'one size fits all' -approach for platforms.[15] Within transactions taking place on the platform three levels of facilitation can be distinguished: facilitation during the order phase, execution phase and result phase.[16] Platforms operating during the order phase are involved in the conclusion of a contract between the seller and the buyer. They can provide matching and trust-building facilities. Matching can be done through show and search mechanisms.[17] Creating trust is an important function that platforms perform, as people operating on the platform often do not know each other personally. Trust can be created by record keeping (collecting and presenting information about the seller and their products, including possibly ratings by other buyers)[18] and providing guarantees. During the execution phase the transaction is carried out, i.e. the good or service is supplied and the customer makes a payment. A platform may provide payment services or even logistics. During the result phase platforms may facilitate by providing e.g. dispute resolution services, customer services and purchase protection.[19] Platforms can facilitate in the order phase only. Those platforms facilitate on a low level. Platforms that facilitate during the order phase and execution phase are facilitating on a medium level, while platforms facilitating during all three phases are facilitating on the highest level. It is not always the platform's choice whether it can facilitate to the highest level. Additional services come at additional costs and risks. It is only possible to facilitate at higher levels if costs can be passed

[10] A.M. Bal, 'Managing EU VAT Risks for Platform Business Models, 72 Bull.Intl.Taxn. 4a/Special Issue (2018) Journal Articles & Opinion Pieces, IBFD.
[11] P. Evans & A. Gawer, 'The rise of the platform enterprise: A global survey (2016) available at https://www.thecge.net/wp-content/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf, Marie Lamensch et. al, supra 7, p. 445 and 446 and R. Arendsen, A.D.M. Janssen, J.I.W. Lock and M.M.W.D. Merkx, 'De toekomst van btw bij e-commerce: heffing via platforms (the future of VAT and e-commerce: taxation via platforms), MBB 2019/5, para. 3.2.
[12] D.S. Evans, supra. 8, pp. 7-8, A. Hagiu & J. Wright, 'Marketplace or reseller', Harvard Business School Working Paper, 13-092, 31 Jan 2014, p. 3.
[13] Evans, supra. 8, p. 16.
[14] Marie Lamensch et. al. supra 7, p. 447.
[15] Marie Lamensch et. al. supra 7, p. 447.
[16] J.L.G. Dietz, 'Understanding and Modelling Business Processes with DEMO, Proc. 18th International Conference on Conceptual Modeling (ER'99, 1999), p. 193.
[17] OECD (2019), 'Unpacking E-Commerce: Business Models. Trends and Policies', https://doi.org/10.1787/23561431-en, p. 80
[18] A. Tikhomirova & C. Shyuai, Assessment of trust building mechanisms of e-commerce: a discourse analysis approach', Professional Discourse &Communication 1 (4). 2019, p. 25.
[19] Marie Lamensch et. al. supra 7, pp. 447-450.

on to users. Customers may also require additional services for some supplies, for example customer protection in case of high value goods that are notorious for invisible defects, while they may not require those additional services for other types of goods. Hence, different levels of facilitation can coexist on a platform.[20]

4.- Full liability rules for platforms in EU VAT

The EU has chosen a full liability model for both electronically provided services and certain supplies of goods. Full liability means that liability on a B2C-transaction is shifted from the supplier to the platform as opposed to joint and several liability where the supplier and the platform are both liable for the VAT. Below the scope and differences between the deeming provisions for electronically provided services of art. 9a VAT Implementing Regulation (hereinafter: IR) and certain supplies of goods of art. 14a VAT Directive are discussed.

Supplies covered

Art. 9a VAT IR applies to electronically supplied services and telephone services provided through the internet, including voice over internet Protocol (VoIP). Art. 14a VAT Directive applies to distance sales of goods imported from third territories or third countries[21] in consignments of an intrinsic value not exceeding EUR 150 and, in case of a supplier established outside the EU, also to B2C-supplies of goods within the EU.[22]

Intermediaries caught by the provisions

A business operating a telecommunications network, an interface or a portal is caught by the provision of art. 9a VAT IR. These terms are not defined in the VAT Directive or the VAT IR. A definition is provided by non-legally binding explanatory notes.[23] According to the definitions used in these explanatory notes, telecommunications networks should be understood as networks that can be used to transfer voice and data.[24] Portals are any type of electronic shop, website or similar environment that offer electronic services directly to the consumer without diverting them to another supplier's website, portal etc. to conclude the transaction.[25] The term interface includes a portal but it is a wider concept. It should be understood as a device or a program which allows two independent systems or the system or the end user to communicate.[26]

A business operating an electronic interface such as a marketplace, platform, portal or similar means is caught by the provision of art. 14a VAT Directive. The term electronic interface is defined by non-legally binding explanatory notes. According to these explanatory notes electronic interface is a broad concept which allows two independent systems or a system and

[20] Marie Lamensch et. al. supra 7, p. 451.
[21] Defined by art. 14 (4) (2) VAT Directive.
[22] This includes local sales and intra-Community distance sales of goods as defined by art. 14, (4) (1) VAT Directive.
[23] Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 April 2014, https://ec.europa.eu/taxation_customs/business/vat/telecommunications-broadcasting-electronic-services/content/explanatory-notes-place-supply-tbe-services_en (hereinafter: explanatory notes 2015).
[24] Ibid, p. 13. Telecommunication networks include but are not necessarily limited to cable networks, telecom networks and ISP (Internet Service Provider) networks. They cover any facility which allows access to telecommunications, broadcasting or electronic services.
[25] Ibid, p. 13.
[26] Ibid, p. 13.

the end user to communicate with the help of a device or program. It could be a website, portal, gateway, marketplace or API (application program interface).[27]

Activities of intermediaries need to be in scope

The provision of art. 9a VAT IR applies when the intermediary takes part in the supplies in scope. Taking part in a supply is mentioned in art. 28 VAT Directive and its meaning in art. 9a VAT IR should be equal to its meaning in art. 28 VAT Directive.[28] Both facts and legal relations need to be taken into account in assessing whether a taxable person takes part in the supply.[29] On page 28 and 29 of the non-legally binding explanatory notes circumstances are mentioned which indicate that a person takes part in a supply. According to a guideline published by the VAT Committee (almost unanimous) a wide definition of taking part applies: when a taxable person provides services, other than processing of payment in relation to the services covered by Article 9a VAT IR, that taxable person shall be seen as taking part in the supply within the meaning of this provision unless he is only making his networks available for carrying the content or/and for processing payment.[30] It should be noted that VAT Committee guidelines are also not legally binding.

The provision of art. 14a VAT Directive applies if a platform facilitates the supplies in scope of the provision. Pursuant to art. 5b VAT IR the term facilitates means the use of an electronic interface to allow a customer and a supplier offering goods for sale through the electronic interface to enter into contact which results in a supply of goods through that electronic interface.

Escape for intermediaries caught by the provision

The provision of art. 9a VAT IR is a rebuttable presumption that art. 28 VAT Directive applies. An intermediary caught by the provision is allowed to rebut the provision. In order to rebut the presumption the underlying supplier must be explicitly indicated as the supplier by the intermediary and that should be reflected in the contractual arrangements between the parties. An intermediary that authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services. Page 34 and 35 of the explanatory notes describe how these activities that disallow the platform to rebut the application of art. 9a VAT IR should be interpreted. It should be noted that according to the explanatory notes setting the general terms and conditions includes the terms and conditions for use of the website or application.[31] Because of this platforms seem unable to rebut the provision in any case. In my view this explanation expands the provision to the extent not covered by art. 9a VAT IR. General terms and conditions should be set 'with regard to a supply of electronically supplied services' as mentioned by art. 9a VAT IR. The following conditions should also be met to be able to indicate the underlying supplier as supplier of the service: the invoice made available to each party taking part in the supply and the bill or receipt made available to the customer must identify the services and the supplier.

[27] Explanatory Notes on VAT e-commerce rules, September 2020, https://ec.europa.eu/taxation_customs/commission-guidelines_nl (hereinafter: Explantory notes 2020) p. 8 and 9.
[28] Explantory notes 2015, p. 28.
[29] Ibid, p. 28.
[30] Guidelines resulting from the 106th meeting of 14 March 2016, document A-taxud.c.1(2016)604550, poinnt 2 available at: https://ec.europa.eu/taxation_customs/vat-committee_en
[31] Explanatory notes 2015, p. 34.

Pursuant to art. 5b VAT IR a taxable person is not facilitating under art. 14a VAT Directive when all of the following conditions are met: (a) that taxable person does not set, either directly or indirectly, any of the terms and conditions under which the supply of goods is made; (b) that taxable person is not, either directly or indirectly, involved in authorising the charge to the customer in respect of the payment made; and (c) that taxable person is not, either directly or indirectly, involved in the ordering or delivery of the goods. Pursuant to non-legally binding explanatory notes setting the terms and conditions also includes the terms and conditions for using the website and platform including the terms and conditions for maintaining an account on the platform.[32] Again this explanation in my view expands the scope of the deeming provision to an extent not in line with the legal provision of art. 14a VAT Directive.

General exclusions from the provision

Art. 9a (1) VAT IR does not apply to taxable persons only processing payments. According to the non-legally binding explanatory notes a taxable person only making the internet network available for carrying the content and/or collection of payment is not caught by the provision. The same applies for a mobile operator only carrying out these type of activities.[33] Pursuant to art. 5b VAT IR a taxable person who only provides any of the following is out of scope of art. 14a VAT Directive: (a) the processing of payments in relation to the supply of goods; (b) the listing or advertising of goods; or (c)

the redirecting or transferring of customers to other electronic interfaces where goods are offered for sale, without any further intervention in the supply.

Consequences if the provision applies

If the provision of art. 9a VAT IR applies the intermediary is presumed to act in its own name, meaning that the provision of art. 28 VAT Directive applies. Under art. 28 VAT Directive the supplier is deemed to provide the service to the intermediary and the intermediary is deemed to supply the service to the customer. This means that the intermediary will be responsible for the payment of VAT on the B2C-transaction if the customer is a consumer. Under art. 28 VAT Directive there is no separate service provided by the intermediary. Its commission is included in the taxable amount for the supply made to the customer.

Under art. 14a VAT Directive the intermediary is deemed to have received and supplied the goods himself. It should however be noted that different from art. 9a VAT IR, where the intermediary is presumed to be within scope of the provision of art. 28 VAT Directive, the platform can under art. 14a VAT Directive still make a separate supply of services to the supplier and/or buyer, e.g. providing access to the platform for a fee.[34] It should also be noted that under art. 14a VAT Directive only one platform can facilitate a sale, whereas under art. 9a VAT Implementing Regulation multiple platforms can take part in the supply, making an intermediary providing a B2B electronically supplied service to another intermediary and the last intermediary in the chain supplying the B2C-service.

Platforms caught by the deeming provisions can remit the VAT either through a direct VAT registration in the EU Member State where VAT is due or by using the OSS or I-OSS. The OSS can be used for reporting B2C-services subject to VAT in an EU Member State other than the EU Member State where the intermediary is established (if it is established in the EU) and for reporting of intra-Community distance sales. When the deeming provision applies to local

[32] Explanatory notes 2020, p. 17 and 18.
[33] Ibid, p. 29.
[34] See also: A.J. van Doesum, 'Een faciliterend online goederenplatform is nog geen commissionair' (A facilitating online goods platform is not yet a commission agent), WFR 2020/210. Paragraaf 3.

supplies intermediaries liable for VAT under the deeming provision are allowed to report this VAT through the OSS VAT return as well, while other suppliers are allowed to only report intra-Community distance sales and B2C-services in OSS. Under OSS a single VAT return is filed in one EU Member State to which the VAT is also remitted. That EU Member State will subsequently forward the relevant parts of the VAT return and corresponding payments to each individual EU Member State. Distance sales of goods imported from third territories or third countries can be reported under the I-OSS, also allowing the intermediary to report and remit VAT due on supplies of goods in all EU Member States to one single EU Member State. Each supplier or intermediary using the I-OSS will get an I-OSS number. When this I-OSS number is provided to Customs upon import the import will be exempt. It should be noted that the I-OSS cannot be used by non-EU businesses without an EU intermediary, except when goods are supplied from Norway to the EU and the non-EU business is established in Norway, because Norway and the EU have an agreement on administrative cooperation,[35] whereas other non-EU countries do not have qualifying agreements on administrative cooperation.[36] If the intermediary opts not to use I-OSS import VAT will have to be reported by the person designated by the EU Member State of importation to be liable for import VAT, art. 201 VAT Directive. If the private person in the EU Member State of importation is liable the intermediary may not be required to report VAT on the supply in the EU, because art. 32, second paragraph states that 'if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods.' This second paragraph does not apply on the supply from the intermediary to the consumer if the consumer is liable for import VAT under art. 201 VAT Directive. Instead the first paragraph will apply stating that: 'Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.' The supply will therefore be subject to VAT in the non-EU country.[37]

[35] Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax, OJ 2018, L 195, p. 3-22

[36] In my view however the UK should also qualify based on a protocol included in the EU-UK trade and cooperation agreement, Protocol on Administrative Cooperation and Combating Fraud in the Field of Value Added Tax on Mutual Assistance for the Recovery of Claims Relating to Taxes and Duties, Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539.

[37] More extensively on this topic: M.M.W.D. Merkx, 'Nieuwe btw-regels voor e-commerce: platform kiest zelf voor btw-plicht (New VAT rules for e-commerce: platform chooses for VAT liability), NLF Wetenschapelijk 2021/11. It should be noted that due to a change in customs legislation it is not allowed to release goods with a value of no more than 150 euros for free circulation in an EU Member State different from the EU Member State of destination if I-OSS is not used, art. 221 (4) of the implementing regulation UCC (Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 29.12.2015, p. 558–893). The place of supply rule of art. 33 (b) VAT Directive stating that, 'the place of supply of distance sales of goods imported from third territories or third countries into a Member State other than that in which dispatch or transport of the goods to the customer ends, shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends', will therefore only apply if I-OSS is used or if the value of the goods is more than 150 euros.

Special provisions connected to the deeming provision

Some special provisions apply to the deeming provision of art. 14a VAT Directive that we may find both in the VAT Directive and the VAT IR. Pursuant to art. 36b VAT Directive the transport of the goods is ascribed to the supply by the platform to the customer, making this supply the distance sale. Pursuant to art. 136a VAT Directive the supply by the seller to the platform is exempt from VAT (exemption with a right to deduct) in case the deeming provision applies for B2C-supplies within the EU. Art. 66a VAT Directive states that the VAT becomes chargeable at the time when the payment has been accepted. Pursuant to art. 41a VAT IR this means the time when the payment confirmation, the payment authorisation message or a commitment for payment from the customer is received by or on behalf of the supplier selling goods through the electronic interface, regardless of when the actual payment of money is made, whichever is the earliest. Art. 5c VAT IR limits the liability of the platform to pay VAT in case the platform is dependent on information from suppliers or third parties, the information is erroneous and the platform can demonstrate that it did not and could not reasonably know that the information was incorrect. Pursuant to art. 5d VAT IR the platform can presume that the seller is a taxable person and the buyer is a non-taxable person, making the deeming provision in principle applicable if all other conditions are met. There are no special provisions linked to art. 9a VAT IR. The provision only is explained in detail in chapter 3 of the explanatory notes mentioned above.

Interesting facts

The validity of the provision on the basis that it goes beyond the implementing power established by art. 397 VAT Directive is currently under dispute in the Fenix International case.[38]

5.- An efficient and fair collection of VAT

In this section the main research question of this contribution will be addressed: is collection of VAT via platforms an efficient and fair collection of VAT?

5.1.- Efficient collection of VAT?

An efficient collection of VAT means that compliance costs for businesses and administrative costs for tax authorities should be minimized as far as possible. Collecting VAT through platforms in particular has benefits when it comes to efficiency. VAT liability within e-commerce and the sharing economy will generally be shifted from smaller market players to bigger market players. The latter will generally be more able and willing to comply, considering these are well known businesses who operate in a highly competitive market and do not want to attract bad media, because of reputational risks, and litigation.[39] Higher transparency standards also apply to larger companies. This reduces the opportunity and incentive to evade.[40] Small businesses will also have more opportunity to evade taxes, because of lower detection risks.[41]

[38] Pending case C-695/20.
[39] Compare: James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 12 and OECD (2017) Mechanisms for the Effective Collection of VAT/GST – Where the supplier is not located in the jurisdiction of taxation, section C.3.2, point 67.
[40] Compare: James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 12 and 13.
[41] Kyriaki Yiallourou, 'The Limitations of the VAT Gap Measurement', EC Tax Review 2019-4, p. 203, James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 8.

A collection model using platforms to collect the VAT is considerably simplifying the administrative burden for platform sellers. However, a Deloitte study demonstrates that as regards art. 9a VAT IR the intermediaries caught by the provision have mixed feelings about their obligations, depending on their business model.[42] It is in my view obvious that while compliance costs for platform sellers and administrative burdens for tax authorities will decrease, compliance costs for platforms will increase, with even the risk of making the platform's business loss-making and thus threatening its existence.[43] So on a micro level considering the position of platforms the deeming provisions are not efficient. Looking at macro level, however, if compliance costs for platform sellers and administrative costs for tax authorities decrease more than compliance costs increase for platforms the legislation can as far as I am concerned as such be regarded as efficient. Whether putting an additional burden on platforms is fair, will be addressed in the next section.

Account should also be given to the existence of non-EU platforms who are also caught by the deeming provisions. Like I described in the article I wrote together with Lamensch, Lock and Janssen there is a risk that facilitation at the lowest level will not be provided by EU platforms anymore because it seems impossible to combine this low level facilitation with the obligations under the deeming provisions. Platforms at the lowest level of facilitation will need to shift to the medium or even the highest level of facilitation.[44] In particular platforms need to monitor payments, because they must collect the VAT and remit it to the tax authorities.[45] Even though non-EU platforms are caught by the deeming provision, enforcement of EU legislation on non-EU platforms, over which EU Member States have no jurisdiction, may hinder an efficient collection of VAT.[46] In particular if the EU Member States have jurisdiction over the platform sellers (because they are EU businesses), but not over the platform (because it is established outside the EU).

The next thing that should be taken into account is possible fraud. Platforms that do not have all the information to correctly establish the correct VAT amount to be paid or depend on information from platform sellers (who can have an interest in providing false information to offer products to their customers at lower prices including VAT) may submit an insufficient amount of VAT to the tax authorities. Platforms may under art. 5c VAT IR not be held liable for an additional VAT payment when they depend on information from third parties, the information was erroneous and the platform didn't and couldn't have known that that information was false. It should be noted though that in respect of this provision the burden of proof is on the platform. As I see it, this provision will either hinder the effective collection of VAT or will hinder a fair collection of VAT. If the platform is easily released from its obligation to pay additional VAT the provision hinders the effective collection of VAT, because the additional VAT cannot be

[42] Deloitte (2016), 'VAT Aspects of cross-border e-commerce – Options for modernization. Final report – Lot 3. Assessment of the implementation of the 2015 place of supply rules and the Mini-One Stop Shop', p. 11.
[43] See also: C. Noorlander, 'Frictie rondom de Unierechtelijke platformfictie' (Friction around the Union law platform fiction), MBB 2022/18, section 3.2.
[44] Marie Lamensch, Madeleine Merkx, Jurian Lock and Anne Janssen, 'New EU VAT-Related Obligations for E-commerce Platforms Worldwide: A Qualitative Impact Assessment', World Tax Journal, volume 13, 2021, issue 3, p. 477-478. See also: E. Sparidis and D.B. Middelburg, 'Intermediary Platforms en btw: stand van zaken en blik op de toekomst' (Intermediary platforms and VAT: state of play and look at the future), WFR 2021/119, section 2.3, who state that in practice platforms that do not have an own payment system were forced to change this in anticipation of the deeming provision.
[45] Lamensch et al, supra 40, p. 460.
[46] Lamensch et al, supra 40, p. 477.

collected from the underlying supplier either, unless a joint and several liability provision is in place in the EU Member State in question. If applied too strictly the platform will be held liable even in situations where it has acted in good faith, therefore detracting from the fairness of the deeming provision. I do expect EU Member States to apply the provision strictly, meaning the provision will hinder a fair collection of VAT.

The I-OSS numbers that platforms who do not arrange the shipments must provide to platform suppliers to be able to apply the exemption on imports also creates risks of fraud and can be regarded as the Achilles' heel of the system. Because who guarantees that a seller who operates on a platform and has the platform's I-OSS number will not use it to get the exemption for supplies not facilitated by the platform, or even worse sell it to some people having no good in mind?[47] Measures taken to 'stop the bleeding' such as blocking the I-OSS number will have a major impact on transactions effected through the platform,[48] e.g. delays in importing the goods and the need to pay import VAT even though the customer has already paid VAT to the supplier or platform.

A deeming provision may also contribute to legal certainty and thus to an efficient collection of VAT as well. In particular when it comes to art. 9a VAT IR the provision makes it unnecessary to establish whether a platform is acting in its own name and on its own account, as an undisclosed agent under art. 28 VAT Directive or as a disclosed agent. As long as the platform takes part in the supply and does not rebut the provision art. 28 VAT Directive will apply to it. Art. 14a VAT Directive does not create this type of legal certainty. As discussed in section 4 under this deeming provision the platform can still provide a service to e.g. the platform seller, when it does not act as an undisclosed agent or supplies the goods in its own name and for its own account. On the other hand the different conditions applying to rebut or escape application of the deeming provision and the explanation in the explanatory notes that seem to go beyond the text of the provisions create uncertainty.[49] I therefore doubt whether the deeming provisions indeed contribute to legal certainty and thus to efficiency. Furthermore, it should be noted that the provisions are different in scope and application, which does not contribute to the legal certainty of platforms who provide a platform for both the supply of goods and the provision of electronically provided services. This also creates additional compliance and administrative burdens and therefore the different scope and application do not contribute to efficiency. To my way of thinking, the provisions should be more aligned and the opportunity should be ceased to include the deeming provision of art. 9a VAT IR in the VAT Directive, because in my view its validity is rightfully questioned in the Fenix International case.[50]

Due to the fact that platforms are easily caught by deeming provisions, I think it can be fairly said that such a model offers the necessary flexibility. However, for direct sales, the model does not offer any solace. As a result, a platform liability will always have to be accompanied by an obligation on suppliers to pay VAT in the case of direct sales. Moreover, if direct sales increase and platform sales decrease, the model becomes less efficient. Blockchain

[47] Marie Lamensch, 'Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?', Internatinoal VAT Monitor March/April 2018, p. 49.
[48] Lamensch et al, supra 7, p. 464.
[49] See also: Sparidis and Middelburg, supra 40, section 2.2 and Noorlander, supra 39, section 3.3.
[50] Reference for a preliminary ruling from First-tier Tribunal (Tax Chamber) (United Kingdom) made on 22 December 2020 – Fenix International Limited v Commissioners for Her Majesty's Revenue and Customs, Case C-695/20.

technology may also make platforms redundant. After all, the characteristic of this technology is that intermediaries become superfluous.[51,52]

5.2.- Fair collection of VAT?

Under a fair collection model taxation should produce the right amount of taxation at the right time. The potential for tax evasion and avoidance should be minimized, while keeping counteracting measures proportionate to risks involved. In my view, a fair collection model also includes a neutral model.

In order to be considered fair, platforms should be able to determine the correct VAT amount and have access to the VAT amount included in the payment.[53] This is in my view not a factor that has been taken into account in designing the deeming provisions. Platforms at the lowest facilitation level are caught by the provision, but will not always have the necessary information available and do not have access to the payment. The shift from low level to moderate or even the highest level of facilitation to comply with the deeming provision, as mentioned before, is not in line with a fair and neutral collection of VAT. The risks of fraud (use of non-EU-platforms, misuse of I-OSS numbers and the provision of art. 5c VAT IR) discussed in the previous section also hinder the fair collection of VAT. As discussed in the previous section 'stop the bleeding' measures in case of misuse of the I-OSS number can have disproportionate effects for platforms, platform sellers and their customers.

A tension between neutrality and efficiency has been established before. From the perspective of efficiency the deeming provision should have a wide scope. From the perspective of neutrality and fairness the deeming provision should apply only if the correct VAT amount can be established and the platform has access to the VAT amount.[54] The platform collection model also creates differences between direct sales and sales via platforms[55] as well as sales by EU and non-EU suppliers under the deeming provision applicable to EU-distance sales and local sales of goods.[56] Deeming provisions also provide a competitive advantage for bigger platforms, who are more able and have more means to deal with the implications of the provisions, including changing their business model without losing their critical user base.[57] Last but not least, even though C2C-transactions are not covered by the deeming provision of art. 14a VAT Directive, the fact that art. 5d VAT IR requires platforms to regard the supplier as a taxable person (unless it has information to the contrary), creates the risk that C2C-transactions will be caught unintentionally by the deeming provision. In that case transactions that would normally not be subject to VAT are included in the VAT system, creating a difference between transactions via platforms and transactions taking place in the traditional markets. Transactions where the suppliers could make use of the exemption for small businesses will also be covered by the deeming provision, making those transactions subject to VAT instead of being exempt from VAT.[58] In my view, it can however be questioned whether it is indeed an issue that C2C transactions and transactions of small businesses are included in VAT under a deeming provision. Looking at the nature and purpose of VAT, to tax private consumption,

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[51] Madeleine Merkx, 'VAT and Blockchain: Challenges and Opportunities Ahead', (2019) 28 EC Tax Review, Issue 2, p. 83-89.
[52] Madeleine Merkx, 'The wizard of OSS: effective collection of VAT in cross-border e-commerce', NL Fiscaal 2020, inaugural lecture, p. 71 and 72.
[53] Merkx, ibid, p. 71.
[54] Merkx, ibid, p. 72 and Arendsen, et al, supra 10, p. 40.
[55] Merkx, ibid, p. 71.
[56] Noorlander, supra. 39, section 3.1.
[57] Middelburg and Sparidis, supra. 39, section 5.3, Lamensch et al, supra. 40, section 6 and Noorlander, supra. 40, section 3.1.
[58] Sparidis and Middelburg, supra. 40, section 5.1.

including these transactions under the scope of taxation can be welcomed. As I see it, C2C-transactions and transactions of small businesses remain untaxed for efficiency purposes, because including those transactions in the VAT system would create excessive compliance and administrative burdens. One can also argue that the position of platform sellers is not comparable to that of sellers in the traditional economy. After all, the platform makes it possible for platform sellers to enter a large market with limited efforts. Something that is not possible in the traditional market. Platforms also allow small platform vendors to compete with large companies (think, for example, of Airbnb, which is the largest hotel chain in the world without owning a single hotel room). So in my view the accidental inclusion of C2C-transactions in the VAT system because of the provision of art. 5d VAT IR does not affect a fair VAT collection model. The same is true for transactions by businesses applying the exemption for small businesses. The only issue is the accumulation of the tax because the platform seller that does not qualify as a VAT entrepreneur and the small business do not have the right to deduct VAT.

5.3.- Interim conclusion

Even though the deeming provisions create efficiency to a certain extent the model does not stand the test of fairness and needs much improvement to take account of the platform's different business models and individual situations. A turnover threshold to exclude smaller platforms from the provisions with an opt-in for platforms that are able to take on the VAT obligations accompanied with the deeming provision, can in my view be considered to deal with the fact that smaller platforms are less able to cope with the obligations related to the deeming provisions. In particular the grip on non-EU platforms should be increased through more administrative cooperation with non-EU countries that have to deal with similar issues in the field of e-commerce. There is therefore a joint interest, but it should be noted that there are of course countries, such as China, from which the export of B2C sales to the EU is many times greater than the other way around. The Achilles' heel of the I-OSS, the misuse of the I-OSS number, should be dealt with.[59] A joint and several liability for underlying suppliers should be mandatory, while the burden of proof for platforms to escape the payment of additional VAT should be equally divided between platforms and tax authorities. Including C2C-transactions and transactions of small businesses in the VAT system is in my view not a problem, because it is line with the nature and purpose of the tax, while the traditional and platform economy are sufficiently incomparable to conclude that there is no infringement of the neutrality principle. Accumulation of the tax because of the lack of VAT deduction should be dealt with. Last but not least, streamlining of (conditions of) application of the deeming provisions can contribute to an efficient collection of VAT.

5.4.- Extending the scope of platform liability?

The European Commission is considering the extension of the deeming provision of art. 14a VAT Directive to the transfer of own goods.[60] If adopted the platform instead of the underlying supplier will be required to report the deemed intra-Community supply and acquisition because

[59] From Group on the Future of VAT, 'OSS VAT identification number - Securing the IOSS process', GFV 119, Brussels 25 April 2022, taxud.c.1(2022)3455702, p. 3 it becomes clear that a project group will be established to deal with this. Options that are considered is the use of an uniquely generated transaction number as a new controlling mechanism, the direct exchange of information between customs and e-commerce platforms and the upgrade of the I-OSS monthly listings to include the Member State of final destination. The latter allows the Member State of consumption to compare the information in the listings with the monthly I-OSS returns.

[60] Group on the Future of VAT, 'Single VAT Registration (SVR) – Transfer of own goods', GFV 120, Brussels 25 April 2022, taxud.c.1(2022)3457463, p. 8-11. See also VAT Expert Group, 'Single VAT Registration (SVR) – Transfer of own goods', VEG 105, Brussels 20 May 2022, taxud.c.1(2022)4160781, p. 8-11.

of the transfer of own goods. This only applies if the platform is the one moving the underlying supplier's goods from one EU Member State to the other. Considering the latter the extension is in my view acceptable. Platforms that offer fulfillment warehousing services will have information available about the location of the goods, whereas suppliers will have to rely on the information from the platform. The deeming provision therefore in my view creates a fair and efficient collection of VAT, because it puts the burden on bigger market players that have the information available instead of smaller market players that rely on information from a third party. As noted by the European Commission the deeming provision may give platforms offering fulfillment warehousing services a competitive advantage over other platforms.[61] In my view however commercial reasons, e.g. shorter delivery times, and not VAT consequences will predominate a decision of a supplier to use fulfillment services (or not). What's more, in case suppliers that move their own goods can use the OSS to report the transfer of own goods compliance costs will substantially decrease. Extension of the OSS to cover transfer of own goods is also considered by the European Commission.[62] Last but not least, I agree with the European Commission that taxable persons transferring own goods who do not have a full right to deduct VAT should be considered. Because under the deeming provision the level of deduction of the platform is to be applied and most platforms will have a full deduction right, the VAT on the deemed intracommunity acquisition will be fully deductible, whereas it is not the case if the goods are transferred by a supplier without a full right to deduct VAT. The number of goods of which the supply is exempt from VAT is limited under the VAT Directive and it is not likely that there will be a huge amount of platforms transferring goods like human organs, human blood and human milk (exempt under art. 132 (1) d) VAT Directive) or dental prostheses (only exempt if supplied by dentists and dental technicians under art. 132 (1) (e) VAT Directive). Its also unlikely that small business under the exemption for small businesses will use the fulfillment warehousing services offered by platforms, considering they have a small turnover. What's more, those businesses will normally not be required to report intra-Community acquisitions or transfers of own goods, unless they exceed a certain yearly threshold set by Member States, which cannot be lower than EUR 10.000. So they can only benefit of the deeming provision in case their intra-Community acquisitions and transfers exceed that threshold.

From a document discussed at a meeting of the group on the future of VAT it becomes clear that the European Commission is considering options for implementing deeming provisions for platforms in what is called the sharing economy. Under option C the deeming provision will have a narrow scope and will apply to certain accommodation and transport services (ride on demand, delivery services and residence renting). Under option D the deeming provision will apply to all accommodation and transport services and under option E to all services, where there seems to be a preference for D over C because of demarcation issues.[63] The deeming provision will apply when the supplier is a not established in the EU ***and*** not identified for VAT purposes, a private individual established in the EU or a person established in the EU and a member of the so called group of four: (i) taxable persons carrying out only supplies of goods or services in respect of which VAT is not deductible; (ii) taxable persons subject to the common flat-rate scheme for farmers; (iii) taxable persons subject to the SME scheme; and (iv) non-taxable legal persons.[64] What this group of four has in common is that they are typically not VAT registered in the EU Member States or, if they are, they do not file VAT returns on a regular basis. Under the deeming provision the supply from the platform seller to the platform

[61] GFV 120, supra. 56, p. 9 and VEG 105, supra. 56, p. 9.
[62] GFV 120, supra. 56, p. 5-8 and VEG 105, supra. 56, p. 5-8.
[63] Group on the Future of VAT, 'VAT in the Platform Economy – focus on specific issues – follow up', GFV 116, Brussels 26 January 2022, taxud.c.1(2022)669826, p. 11.
[64] GFV 116, supra. 59, p. 15.

is out of scope[65] and the platform seller cannot deduct the VAT. According to the European Commission this is justified because the seller can benefit of network effects.[66]

It is striking, in my opinion, that the deeming provision being considered is different in nature from the existing deeming provisions. Platforms facilitating different types of transactions may thus have to deal with three different deeming provisions. Not surprisingly, this does not contribute to efficiency. Under the deeming provision currently under discussion if a person is VAT registered (non-EU) or should be VAT registered (EU) and regularly files VAT returns (not in the group of four), it will be the supplier held liable for the payment of VAT instead of the platform. This provides more flexibility, but will also require platforms to check the VAT status of their platform sellers. Under the proposed provision there is a more balanced liability for VAT, because it is both the supplier and the platform that can be held liable depending on the circumstances at hand, while administrative burdens for tax authorities seem manageable, because the platform is liable in case a non-EU platform seller is not VAT registered in the EU and they have jurisdiction over the EU platform seller that is a business (either because it is established in their country or through administrative cooperation with the EU Member State where it is established). In my estimation, the possible negative effects (to be assessed at the macro level) on efficiency of a shared burden between platforms and platform sellers are manageable, while such an equal burden ensures more fairness. Platforms could also require non-EU traders to register for VAT (otherwise they are not allowed to do business via the platform) if - in view of their business model - they are (practically) unable to meet the VAT obligations with regard to transactions taking place on their platform or on the other hand, they can indicate that they can take care of the VAT but in order to do that the non-EU business should not register as a VAT taxable person. Although technically obliged to do so, I can imagine that if the VAT revenue is received via the platform by the EU Member States, there will be little priority for the EU tax authorities to compel the non-EU trader to register for VAT. Again, bigger platforms can obtain a competitive advantage over smaller platforms that are less up to the task of taking on VAT obligations related to transactions taking place on their platform. Non-EU sellers can also obtain a competitive advantage or disadvantage over EU sellers for which the deeming provision does not apply if they are a VAT taxable person and are not part of the group of four. Whether there is an advantage or a disadvantage depends on the extra fees charged by the platform for carrying out the VAT obligations compared to the compliance costs for the platform seller when dealing with the VAT obligations himself. Providing a choice to platform sellers or platforms to either use a deeming provision or not, regardless of where the platform sellers are established creates a more neutral and therefore fairer VAT collection model. Last but not least, it should be noted that for some type of services amendments of the place of supply rules are necessary to ensure taxation in the country of consumption. For example, in the case of renting out tools via a platform such as Peerby, the supplier and the customer will be living close to each other, while the platform may be located anywhere in the world. In the case of a B2C transaction, the main place of supply rule applies and the rental of this movable item is taxed in the country where the service provider is located. By applying a deeming provision, VAT is due in the country where the platform is located instead of the country where the supplier is located. This may be the country where the private customer lives (and where he uses the service), but that is less likely compared to the situation where the service is taxed in the country of the supplier.[67]

[65] GFV 116, supra. 59, p. 10.
[66] GFV 116, supra. 59, p. 9.
[67] This was also addressed by the committee of the sharing economy of the Dutch Association of Tax research of which I was the president. Vereniging voor Belastingwetenschap (Dutch Association of

6.- Conclusion

In this contribution the efficiency and fairness of a full VAT liability model for platforms has been addressed. Even though this model creates efficiency to a certain extent there are improvements necessary to make it a fairer collection model. Suggestions for improvements were made in section 5.3. The EU is already considering the extension of the full liability model. The extension of the deeming provision of art. 14a VAT Directive considered should in my view be welcomed, because it creates an efficient and fair collection of VAT and downsides seem minimal. A downside of the deeming provision for what is called the sharing economy is that the deeming provision considered is different in nature compared to the existing deeming provisions. Platforms could potentially be in scope of three different deeming provisions when they facilitate different types of supplies. An upside is that the VAT burden is more equally divided between platforms and suppliers, which makes the deeming provision less efficient to some - but in my view manageable - extent, but contributes to the fairness of the system. Still there are some considerations that should be taken into account when further developing this provision. In particular the business models of platforms should be taken into account when developing deeming provisions (further).

Tax Research), 'Fiscale aspecten van de deeleconomie' (Tax aspects of the sharing economy), 2021, p. 174 and 175.

VAT and online events. Light at the end of the tunnel?

Fernando Matesanz[1]

1.- Online events are not electronically supplied services

In order to clarify the correct VAT treatment applicable to online events, one of the first things we need to do is to determine the type of services we are referring to. In particular, to distinguish them from electronically supplied services, as these services have their own place of supply rules. It is, therefore, necessary to understand the way in which these services are supplied. In particular, the degree of human intervention in the provision of the service and the interaction between the provider and the recipient of the service must be always considered.

A service can only be classified as electronically supplied for VAT purposes where there is no human intervention at all in its execution, which would not be possible in many case, or where such human intervention can be regarded as minimal.

The criterion of the degree of human intervention has been and continues to be the subject of discussion in the EU[2].

The purpose of this article is not to analyze the VAT treatment of electronically supplied services, but of events broadcasted online, e.g. webinars or training services provided via the internet. We are, therefore referring to services where there is interaction between the parties involved and where there is undoubtedly a high degree of human intervention.

2.- The VAT treatment of online services. A controversial matter

Online events have multiplied in recent times as a consequence of the global situation which has restricted face-to-face events. From a VAT perspective, determining the place of supply of online events has always been a controversial issue. Since participation in such events is done via the internet, it is possible that the event organizer and the participants are located anywhere in the world. This circumstance creates an additional complication for the determination of the VAT applicable to these services.

The current VAT rules have proven to be outdated as they do not respond to this new form of economic activity in which reality is always much faster than the lawmaker. For decades we have been lacking a legislative framework that clearly regulates this type of activity. Therefore, we were forced to analyze each specific case, making assumptions and interpreting rulings and circulars from the different Tax Administration as well as different case law, which in many cases were contradictory or misleading.

The taxation for VAT of these services is explained below.

In cases where the recipient of the service is a VAT taxable person:

- It is first necessary to determine whether the fee paid for access to such an event is subject to the general place of supply rules (Article 44 of the VAT Directive), which would mean that

[1] Managing Director Spanish VAt Services Asesores. President Madrid VAT Forum Foundation. Board Member International VAT Association.

[2] Working paper 882 VAT Committee. 28/02/2015. Taxud.c.1(2015)4459580 and Working paper 896. VAT Committee. 09/02/2018. Taxud.c.1(2016)922288.

the event organizer should not charge VAT to its business recipients established in other EU Member States; or whether,

- On the other hand, the special place of supply rule (Article 53 of the VAT Directive) applies which states that access to cultural, artistic, sporting, scientific, educational, entertainment or similar events must be taxed for VAT where the event actually takes place. In such a case, the organizer of the event must charge to the attendee the VAT due in the place where the event is held, unless the reverse charge applies.

In cases where the recipient of the service is not a VAT taxable person:

- It will also be necessary to determine whether the general place of supply rules apply (Article 45 of the Directive in this case), which would mean that the organizer of the event should charge VAT in the country where he is established; or whether

- On the other hand, the special place of supply rule applies (Article 54 of the Directive) which states that access to these events must be taxed for VAT, as in the previous case, where the event actually takes place. Again, in this case the organizer of the event must charge to the attendees the VAT due in the place where the event is held.

All of the above only applies if the activities in question qualify as “events” within the meaning of the aforementioned articles of the VAT Directive. If the activities cannot be considered as an “event”, articles 53 and 54 of the VAT Directive do not come into play.

In this regard, the EU Commission´s VAT Committee has stated that this type of activities should be considered as an "event" as long as the duration of the event is not excessive (one week is given as a guideline)[3]. In other words, the longer the duration is, the less likely it is to qualify as an "event". Therefore, it could be argued that these activities when they have not an excessive duration could qualify as "events" as foreseen in the VAT Directive and would be subject to the above-mentioned rules.

Secondly, it will be necessary to determine whether the fee paid for participation in such an event is considered "admission" within the meaning of Articles 53 and 54 of the VAT Directive. The Court of Justice of the European Union (CJEU) has pointed out that participation in an event of these characteristics (online) is closely linked to admission to the event, so that the amount paid for participating in the event must also be considered access or admission[4] and, thus, the general place of supply rules should not be applied but rather the above-mentioned special place of supply rules (Articles 53 and 54 of the VAT Directive).

Thirdly, we must also analyze whether the above conclusions are distorted by the fact that the event is online, rather than face-to-face. There is no clear answer and it is currently necessary to interpret certain rulings and judgments that have been made in this respect (e.g. the CJEU judgment in case C-568/17, L.W. Geelen) in order to adapt them to the specific case. This is,

[3] VAT Committee guidelines resulting from the 114th meeting of 2 December 2019. Taxud.c.1(2020)2254683 – 986

[4] CJEU, C-647/17, Skatteverket vSrf konsulterna AB. Paragraph 29 “admission to seminars given to taxable persons for payment necessarily involves the possibility of attending and participating in those seminars. Therefore, such participation is closely linked to admission to the seminars. In those circumstances, the distinction drawn by the Revenue Law Commission between the right to enter a place and the right to participate in a specific training course cannot be accepted for the purposes of the application of Article 53 of the VAT Directive”.

in short, a complicated exercise that depends on each case and as it often happens, subject to interpretation[5].

The EU Commission´s VAT Committee in April 2021 agreed by a large majority (not unanimously) that such services should be subject to VAT where the recipient of the service is domiciled and not the supplier[6]. It is important to mention that the opinions of the VAT Committee are not binding at the moment (they are likely to become so in the future), so the fact that the agreed decision was not unanimous creates additional complexity and legal uncertainty.

3.- Place of supply rules for online events as of 2025

The EU Commission gave us a pleasant surprise with the adoption of the Directive amending on the VAT rates[7]. In this Directive it is not only approved giving greater flexibility to Member States to establish their structure of VAT rates. The Directive also includes a modification of articles 53 and 54 of the Directive which must be implemented by EU Member States by January 1st 2025.

The amendments included in this Directive are described below.

- Article 53 of the VAT Directive, thus, the special place of supply rules for events, will not apply in those cases "*where the assistance is virtual*".

- As regards article 54, its wording would be as follows: "*where the services and ancillary services relate to activities which are streamed or otherwise made virtually available, the place of supply shall, however, be the place where the non-taxable person is established, has his permanent address or usually resides*"

Both things above mean that in case of online events (either B2B or B2C), the special place of supply rules (*where the event actually takes place*) will not apply. With the newly approved rules, the taxation of this type of events would be as follows:

- Where the customer is a taxable person for VAT purposes, the general place of supply rule will apply and, consequently, the service is taxable for VAT where the customer is established. This will imply in practice that the supplier does not have to charge VAT to his customer when both are established in different Member States.

- Where the customer is not a VAT taxable person, the service would be taxed for VAT in the Member State where person accessing the service is domiciled, with the supplier being obliged to charge the VAT due on said Member State to its customer.

Accordingly, both in B2B or B2C cases, the destination principle is generalized. In the latter case, since a reverse charge system cannot be applied, suppliers of services may be obliged to charge different VAT rates depending on where their recipients are domiciled and to pay it to different Tax Administrations. At first sight, this may sound like an additional complexity. However, with the extension of the special OSS VAT returns this should not be a major difficulty for event organizers.

[5] See also Madeleine Merkx. "Closing the Geelen loophole and creating new issues. IBFD, International VAT Monitos, 2022 (Volume 33), no 4.

[6] VAT Committee guidelines resulting from the 118th meeting of 19 april 2021. Taxud.c.1(2021)6378389 – 1016

[7] Council directive (EU) 2022/542, of 5 April 2022 amending directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax

Another important change is the possibility to apply reduced VAT rates to online events. In this respect, the mentioned Directive includes corresponding amendments to Annex III of the VAT Directive[8].

There may even be an additional complication in cases where a hybrid event takes place which are quite common activities nowadays. That is, attendees can either attend in person or join online. In this case, the service provider should distinguish between one type of attendee and the other. For face-to-face attendees, the usual VAT place of supply rules would still apply (*where the event actually takes place*), while for online attendees the rules described in the previous paragraphs would apply as of January 1st 2025.

The above is an important step forward in the European Commission's work to establish a common framework for taxing the digital economy and also a very welcome measure for businesses as this type of activity is very common nowadays and until now, the applicable VAT treatment was unclear and a non-harmonized issue at EU level.

[8] Annex III. List of supplies of goods and services to which the reduced rates referred to in article 98 may be applied: (7) “admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities or access to the live-streaming of those events or visits or both”.

VAT Gap. How to tackle the endemic illness affecting the VAT system in a business-friendly manner?

Alfredo Espada & Gorka Echevarria[1]

1. Introduction

EU Member States lost an estimated €134 billion in Value-Added Tax (VAT) in 2019, according to the annual report released by the European Commission last December 2021[2].This so-called "VAT Gap" is the overall difference between the expected VAT revenue and the amount finally collected by tax Authorities.

The above figure comprises VAT revenues lost to fraud and evasion, tax avoidance and optimization practices, bankruptcies and financial insolvencies, as well as miscalculations and administrative errors.

Many of these situations occur or are exacerbated by Intra-Community trade. In this sense, the report acknowledges that "*While some revenue losses are impossible to avoid, decisive action and targeted policy responses could make a real difference, particularly when it comes to non-compliance".*

In this fight against the loss of VAT revenue, that is, reducing the VAT gap, the European Commission and Member States seem to be considering two main solutions:

- End the transitory system of intra-community taxation and,
- Leverage transactional business information (aka Transactional Digitalization).

In this chapter, the authors analyse the effectiveness of both solutions towards reducing the VAT gap and its potential side-effects for businesses operating in the EU, the single market and the future of investments in the EU zone.

2. Definitive regime[3]

Looking back at the Intra-Community transitional regime, one can only recall Nassim Nicholas Taleb's quote: "*Nothing is more permanent than temporary arrangements, deficits, truces and relationships and nothing is more temporary than permanent ones*".

The proposals to reform the Intra-Community VAT system in place for 25 years, under which trade in the European Union has flourished seem doomed to end and have made us raise the question of how "definitive" the "definitive regime" will become under the premise of professor Taleb.

Under the current regime and subject to meeting certain conditions, companies are not penalized when carrying out transactions with other businesses throughout the European Union because (i) Intra-Community supplies of goods are zero-rated in the Member State of

[1] Alfredo Espada and Gorka Echevarria are members of the Tax Executives Institute, EMEA Chapter and in house global indirect tax leaders based in the UK and Switzerland, respectively.

[2] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6466

[3] Some of the paragraphs of this section were previously published in the journal, International VAT Monitor, June 2018 (Volume 29), No. 4 under the title "European Union - Definitive VAT Regime … Really? "

dispatch and (ii) the subsequent intra-Community acquisitions of goods are taxed in the Member State of destination generally causing no cash-flow impact.

In practice, the zero-rated treatment is conditioned to suppliers proving the transport of the goods or evidencing that the goods have left the Member State of dispatch. Upon receiving the goods, the acquirers are obliged to account for domestic VAT as output VAT on the value of those while also being allowed to deduct such VAT as input VAT (assuming no limitations exit) hence, as advanced, having no cash-flow effect.

Contrary to the above under the definitive regime, suppliers would have to collect the VAT due on their "intra-Community" supplies of goods and either register in each Member State of destination or use a one-stop-shop mechanism (OSS) to remit the VAT centrally in their Member State of identification, which in turn, will distribute the VAT revenue to the respective Member States of destination.

The European Commission seems to believe that a definitive regime offers a fraud-proof legal environment, in contrast with the transitional regime. Member States on the contrary, seem generally opposed to the idea.

In the authors' opinion, a definitive system could overcomplicate European trade for all those businesses that do not have the scale and capacity to manage the end-to-end process of charging, collecting, reporting and remitting VAT at destination, at the correct rate (as applicable in the Member State of destination). Moreover, those businesses could also be confronted with the inextricable bad-debt relief rules which in many cases make it impossible to recover VAT paid in failed commercial transactions. Finally, those business could potentially face questions from Tax Authorities and even audits in 26 different tax jurisdictions, governed by unfamiliar procedural rules and in foreign languages.

Based on the above, a definitive regime could end up damaging the correct functioning of the EU internal market making it not attractive to much needed non-EU investment.

3. Transactional Digitalization

The European Commission also considers leveraging business data a potential solution to tackle the VAT GAP. Back in 2017, when analysing 2015 VAT GAP and proposing solutions to tackle it the very first agreement reached was to:

"*Investigate the possibility of extending the use of automated access to data. It [the European Commission] will also explore with Member States the possibility to develop an automated mechanism that would allow a cross-matching between the data reported by each party of every single transaction. That would allow detecting fraud in early stages and ultimately prevent a missing trader fraud, be it domestic or intra-Community*".

Their plan has worked. Since then, the VAT GAP has reduced in EUR 17.5 billion.

Currently almost all European Tax Authorities are running or planning to run different initiatives to capture large amounts of multipurpose information aiming to achieve a "real picture" of the business activity that would help them (i) tackle fraud and (ii) increase the VAT revenue.

Beside the traditional VAT reporting, the efforts to leverage business data is currently being operated via 5+ different types of so-called "Digital Mandates" throughout the EU. Namely the following:

1a) SAF-T according to OECD model (e.g. Portugal)

1b) SAF-T plus VAT reporting (e.g. Poland)

2) Real-time transactional reporting (e.g. Spain)

3) E-invoicing (e.g. Italy)

4) Complex VAT returns / Control statements (e.g. Czech Republic)

5) E-filing of VAT returns (e.g. UK)

6) Logistic / transport information i.e. EKAER (e.g. Hungary)

Beside the above, other Member States operate combinations of the above (e.g. Hungary or Greece) and it is even possible that the above list might soon grow throughout other EU Member States developing or implementing new types of Digital Mandates.

The above situation, as positive as it might seem, implies significant challenges for companies all across the EU, namely the following:

- The lack of timely available IT solutions for companies to be compliant with new Digital Mandates.

  Due to numerous circumstances not always in their hands, IT providers have traditionally struggle to timely offer fully compliant IT solutions for companies operating throughout the EU.

  These circumstances translate into a significant risk, burden and cost for companies trying to be timely compliant not only because of the lack of an IT solution but also due to its rushed implementation (generally supported by third parties). Ultimately, also due to business disruption caused by the significant effort posed in securing that the information required is available and correct.

- The unnecessary variety of Digital Mandates in existence throughout the EU.

  Not standardising the different Digital Mandates both, with regards to the data points interested (the “WHAT”) and/or the way to provide the business information (the “HOW”), imply an enormous challenge to companies since they are obliged to run specific initiatives that again disrupt usual business activities.

  This is an aspect which is rarely acknowledged. The workforce effort required within companies to support the ad-hoc projects (occasionally run simultaneously since Member States do not coordinate) and the economic impact for their business and investment plans.

- The internal challenge for the accountable tax professionals to explain the challenge to the business and to obtain funding, resources and “license” to operate.

  It might sound counter intuitive but tax is not the priority for businesses. In this sense the tax professional might struggle to quickly caught the attention of the leadership team and therefore access resources and funds due to other existing more business-critical priorities.

- Security and confidentiality of the transactional business information provided.

  The volume, reporting cadence, significance, and level of granularity of the transactional business information being collected by Tax Authorities throughout the EU is extraordinary and so it is the business risk associated to it.

  A raising concern among businesses operating in the EU is understanding and, to a certain extent, validating the strength of Tax Authorities' IT systems operating the Digital Mandates.

In the author's view, businesses operating throughout the EU clearly favour Transactional Digitalization but with a very strong preference for an EU-wide single type of Digital Mandate. The consensus is that in a less burdensome environment, companies would more easily find and invest in IT solutions that would make them timely compliant with the Digital Mandates.

As a second option, the authors suggest that Tax Authorities should aim to agree on an EU-wide closed list of data points (at transactional level) to be provided by businesses regardless of the typology of Digital Mandate. This should greatly simplify the review, comparison and sharing exercise between different Tax Authorities while greatly benefiting business then being able to efficiently review and sensitise the correctness and availability of the standardised transactional information being required.

Failing the above, which is something that should not be discarded taking into account the difficulties in finding consensus among 27 representatives of Member States, the authors suggest Member States to at least coordinate the implementation / roll-out of new Digital Tax Mandates in a time sequential manner.

4. Conclusions

The above remarks should not be understood as killing arguments against the main solutions to tackle the VAT GAT currently operated by the European Commission and Member States. Rather, as a genuine well-intentioned suggestion that maybe, a more coordinated approach among Tax Authorities and business operating in the EU could achieve more, in a less convoluted way and therefore significantly improve the current status quo.

Without business support, EU Tax Authorities will not be able to effectively deal with the dire consequences of widespread fraud across the EU.

By adopting a cooperative approach, as the Commission embraces at any opportunity, more can be achieved in less time and more effectively.

There's definitely a lot of strain on the Government's sides to balance the budget and collect revenues but if this was done without a serious and thorough strategy where the business is considered and invited to be part of, it will definitely hurt the bottom line of the business and erode the capacity of companies to grow and continue hiring people.

A united EU in the forefront of the fight for VAT gap reduction that takes into account all these factors is an EU that can succeed in this endeavor.

Fleet cards and e-vehicles recharge

Christian Amand[1]

How the EU VAT slows down the adoption of new technologies and fragments the single market[2]

In *Vega International*, the Court of justice of the European Union decided on 15 May 2019 that the provision of fuel cards by a parent company to its subsidiaries, enabling them to refuel their own vehicles is a credit service[3]. The EU VAT Committee unanimously agreed on 19 April 2021 that in a chain of charging of electric vehicles where there is a Charge Point Operator (CPO) and a Mobility Provider (eMP), the CPO shall be seen to supply electricity to the eMP, while the eMP shall be seen to carry out the same supply of electricity to the driver[4]. In addition, other interpretations are adopted in practice, or at least suggested for such supplies: a means of payment of supply of goods, a complex service[5], a supply of goods ancillary to a supply of car leasing services[6], a voucher[7], and an electronic service.

The question arises as to whether some of these interpretations are well justified[8]or why so many interpretations are flourishing. The average car or truck driver has the choice between many cards, means of payments and e-mobility operators. The variety of the offers seems to be influenced by the consumers requirements, their habits of payments and by the VAT. The nature of electric vehicles recharge will be decided by the Court of justice in *P.wW.*[9], probably before the end of 2023.This illustrates how new technologies are struggling to anticipate the organizational consequences of political compromises or of temporary measures that were rational 60, 30 or 15 years ago, but that today prevent business to benefit from the internal market and distort competition.

The present study examines (1) the origin of the differences of interpretation between the Court of justice and the VAT Committee, (2) the various ways business have adapted their offers of fleet cards and electric vehicles recharge to the VAT rules, (3) the views of some national tax authorities and (4) of the literature, (5) the legal challenges and (6) possible ways forward. It illustrates a permanent tension between two approaches that characterizes VAT debates since the early 1960's in the EU[10], and already in France in the 1950's: from one side, the pragmatics

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[1] Christian Amand. Xirius Avocats, Brussels.

[2] Study for the Madrid VAT Forum Foundation by Christian Amand. The author thanks Jean-Claude Bouchard and Fernando Matesanz for their comments.

[3]CJEU, 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, ECLI:EU:C:2019:412).

[4] meeting of 19th April 2021 and working paper n° 969 , taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019.

[5] E-mobility operators views.

[6] Car leasing operators views.

[7] See Value added Committee, Working paper n° 1020 taxud.c.1(2021)7229659 – EN Brussels, 19 October 2021.

[8] Marie Lamensch More Legal Certainty regarding the EU VAT Treatment of the Charging of Electronic Vehicles (but This Is Not the End of the Road!) Vol. 33 Issue: *International VAT Monitor*, 2022 (Volume 33), No. 1.

[9] Case C-282/22, *P.wW.* (not yet decided).

[10] This is the reason the Parliament rejected the First Proposal of a First VAT Directive submitted by the European Commission – see *Report of the Committee for the internal market on the Proposal of*

who had been forced to accept concessions and exceptions to the essential characteristics of VAT in exchange of the immediate adoption of rules favorable to the functioning of the economy and of the internal market and, from another side, the legalists committed to a strict interpretation of the rules and the immediate collection of taxes, whatever the costs in the long term. What is new is the fact that these antagonistic approaches emerge from documents that the Court of Justice, the European Commission and business make public.

1. Court of justice versus VAT Committee: contradictory solutions for similar transactions

Fuel is a tangible property. Supply of electricity is generally considered as a service by EU rules[11] but it had been assimilated to a tangible property by the VAT Directives (see *infra* 5.3.3.)[12]. Both fuel(s) and electricity are used in order to move vehicles, but their supplies are subject to different VAT rules[13].

1.1. The Court of justice: fuel cards are a VAT exempt credit service

National judges are the first ones in charge of the implementation of the EU Law[14] and they may rely on the Court of justice of the European Union when they have doubts about the interpretation of the EU law[15]. In *Vega International*, Polish judges had difficulties to understand interpretations previously adopted by the Court of justice in *Auto Lease Holland*.

1.1.1. Vega International

Fuel suppliers in different EU Member States invoiced Vega International, a transport company established in Austria for the supply of fuel, including VAT. That transport services were provided via several subsidiaries of Vega International in different Member States, including Vega Poland. Drivers employed by Vega Poland disposed of an individual card and allowing to choose from among the service stations indicated by Vega International which service station to refuel at and to decide on the quality, quantity and type of fuel, as well when to purchase and how to use it. According to the facts as described by the Court of Justice, for organizational reasons and having regard to the level of costs, all the transactions carried out by means of fuel cards were centralized by Vega International, which received invoices from

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the Commission to the Council (Doc 121, 1962-1963) concerning a Directive on the harmonization of the legislations of the Member States on turnover taxes ("Deringer Report") (European Parliament, Documents Session 1963-1964, Document 56, 20 August 1963). This also why in 1976 the European Parliament has agreed on a proposal of Sixth VAT Directive in exchange of immediate own resources for the European institutions; see declarations of Harry Notenboom on behalf of the Budget Commission during the plenary session of the European Parliament on 20 April 1977 and requiring the Parliament to submit as soon as possible a proposal of Seventh Directive in order to solve the difficulties caused by the political compromises contained in the Sixth VAT Directive, *Debates of the European Parliament*, Report of the sessions from 18 to 22 April 1977, *OJ* 216, Enclosures, p 180.

[11] Art . 4(8) of the Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and its recast Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

[12] Art.15 of the VAT Directive.

[13] For the fuel art. 31 to 33 of the VAT Directive and for the electricity art. 38 and 39 of the VAT Directive.

[14] Koen Lenaerts and Piet Van Nuffel, *European Union Law,* Third Edition, Sweet & Maxwell 2011 p. 524.

[15] Art. 19(3) TEU.

the fuel suppliers establishing, in particular, the purchase of fuel with VAT. Next, at the end of each month, Vega International passed on the costs of the fuel made available for the purpose of the supply of the vehicle transportation service, together with a surcharge of 2%, to its subsidiaries. Those subsidiaries were permitted to offset the invoices relating to the use of the fuel cards with invoices issued to the Austrian company or to settle those invoices within one to three months of their receipt. Although this is not explicitly mentioned by the Court, this allowed Vega International to negotiate substantial price reduction and to monitor on a more efficient way a substantial cost.

The Polish Tax authorities refused to refund to Vega International the VAT charged by fuel suppliers in Poland. But the Polish administrative supreme court had doubts concerning the interpretation of article 135(1)(b) of Directive 2006/112 (the VAT exemptions on granting or the negotiation of credit and the management of credit by the person granting it), as it had been decided in *Auto Lease Holland* [16]. The question was raised as to whether *"the transactions carried out by Vega International in Austria in connection with the provision and settlement of fuel cards used to purchase fuel by its subsidiaries within the group can be regarded as such credit transactions*". Those doubts were increased by the diverging lines of case-law within the national courts, which have referred to that precedent in order to assess the nature of transactions concluded in the context of the provision of fuel cards. In those circumstances, the Polish Supreme Administrative Court referred the following question to the Court of Justice:

> *'Does Article 135(1)(b) of [Directive 2006/112] concerning VAT exempt credits include transactions consisting in the provision of fuel cards and in negotiating, financing and accounting for the purchase of fuel using those cards, or can such complex transactions be considered to be chain transactions the primary purpose of which is the supply of fuel?'*

It is not clear whether the question specifically concerned the supply of a card (ie two distinct transactions, one for the fuel and one for the card[17]) or the supply of fuel with such a card (one single price for the fuel and the use of the card). In addition, according to the Polish VAT rules, when the supplier is not established in Poland, the person liable of the payment of the VAT is the acquirer when this latter is a taxable person established in Poland[18]. Of course, this does not prevent the supplier to issue an invoice allowing the Polish tax authorities to control the correct application of the reverse charge procedure and the possible limitation of the right of deduction of input VAT. However, from a business perspective, the question was to know whether or not the Polish authorities where entitled the reject the claim of Vega International for refund of the Polish VAT on the fuel charged by the oil companies.

According to the Court of justice, the supply of Vega International to it's Polish subsidiaries would be a credit service that was VAT exempt in Poland. Indeed, as suggested by the European Commission in its observations before the Court[19],

- there is no supply of goods but only a simple instrument to enabling truck drivers to purchase fuel and thereby Vega International playing no more than an intermediary role in the purchase transaction concerning that product. That fuel is actually purchased by Vega Poland directly from the suppliers indicated by Vega International,

[16] CJEU,6 February 2003, *Auto Lease Holland* (C-185/01, ECR 2003 p. I-1317) ECLI:EU:C:2003:73.
[17] See Yves Bernaerts, La mise à disposition de cartes de carburant est une prestation financière exonérée, à savoir l'octroi d'un crédit, *TaxWin* 24 mai 2019.
[18] Art. 17 Ustawa o podatku od towarów i usług.
[19] Observations écrites du 12 juillet 2018 sj.a(2018)4154822.

which service station to refuel at and may freely decide on the quality, quantity and type of fuel, as well as when to purchase and how to use it[20];

- applying that surcharge of 2% to Vega Poland, Vega International receives a payment for the service provided to its Polish subsidiary. Vega International thus provides a financial service to Vega Poland by financing in advance the purchase of fuel and therefore acts, for that purpose, in the same way as an ordinary financial or credit institution. This sentence of the observations of the Commission has been literarily taken over by the Court in para 46 of the judgement;
- the General Principle of Equal Treatment would prevent that granting by a bank of financing for a purchase would be exempt from VAT, while the financing provided by an economic operator not having the particular status of a financial or banking sector entity for the same purchase would be subject to VAT (para. 26);
- There is a precedent, the case *Auto Lease Holland BV.* And the Court of justice refers 5 times to this precedent. And the Court cannot easily change it's case law.

1.1.2. The precedent of *Auto Lease Holland BV*[21]

In *Auto Lease Holland BV*, the facts and the question to the Court of justice were different from those in the case *Vega International*. Auto Lease was a car leasing company established in the Netherlands. The clients paid to Auto Lease monthly instalments. From the facts described by the Court, it appears that : *"Auto Lease also offers the lessee the option of entering into a fuel management agreement with it. The agreement permits the lessee to fill up his motor vehicle with fuel and from time to time to purchase oil products*, in the name and at the expense of Auto Lease*. For that purpose the lessee receives a so-called ALH-Pass as well as* a fuel credit card from the German credit card company DKV. That card names Auto Lease as the DKV customer[22]. *DKV regularly submits its account to Auto Lease and itemises the various supplies per vehicle".* The lessee paid to Auto Lease each month in advance one twelfth [23]of the likely annual petrol costs. At the end of the year, the account was then settled according to actual the consumption. There was a supplementary charge for fuel management. The order for reference showed that Auto Lease paid VAT in the Netherlands on all the leasing supplies, including the fuel costs purchased in Germany. According to the rules applicable before 2010, the car leasing services where taxable where the supplier was established (art. 9(1) of the Sixth VAT Directive), but the supply of fuel was (and is still in 2022) taxable where the fuel is physically supplied. The fact that the supply of car leasing and of fuel were separated would have forced the lessor to register for VAT in each EU Member State where the cardholder purchases fuel and then take into account each of the national limitations of the right of deduction that are not harmonized. According to Auto Lease Holland, the supply of fuel was considered as ancillary to the lease of the car. This allowed the lessor not to register for VAT in Germany and in each EU Member State where the lessee was circulating and the lessee was not obliged to submit an 8th Directive refund that was a long a cumbersome procedure even if such a refund was possible in some Member States (but not in all Member States). Similar schemes were accepted by the Belgian tax authorities[24]. In so far as the fuel costs are based on supplies by German undertakings, Auto Lease applied for the refund of the

[20] see, to that effect, judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:299, para. 26, referring to judgment in *Auto Lease Holland*, C-185/01, EU:C:2003:73, para. 36.
[21] Case C- 185/01, *Auto Lease Holland BV.*
[22] DKV is a major fleet card operator.
[23] Case C- 185/01, *Auto Lease Holland BV Para*.12.
[24] Decision E.T.91290/84799/M/C/W/ of 9 January 1998.

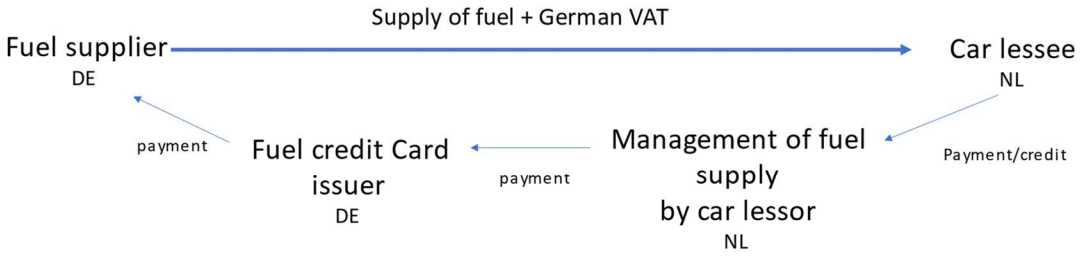
VAT charged by the German fuel suppliers, but this request had been rejected by the Bundesamt.

After long legal procedures, the German Supreme Court asked to the Court of justice where a lessee fills up a leased car in the name and at the expense of the lessor at filling stations, is there a supply of fuel by the lessor to the lessee and must tax be paid on this supply at the place of supply or is the onward supply included in the lessor's supply of a service that is taxable under Article 9 of Directive 77/388/EEC? The question was to know where the supply of fuel by the leasing company to its customer was taxable, ie in Germany (a supply of goods) or in the Netherlands (supply of goods ancillary to a supply of services). Unfortunately, Auto Lease Holland did not appear at the time of the public hearing, nor submitted observations before the Court and it had not explained the underlying economic purpose.

According to the observations of the European Commission in *Auto Lease Holland BV*[25], the German Supreme Court tends to think that Auto Lease Holland BV has supplied the fuel. It is apparent from the content of the fuel credit card ("*sowie eine Tankkreditkarte")* that the lessees purchase the fuel in the name and on behalf of Auto Lease Holland BV.

[25] Observations écrites dans l'affaire C-185/01, *Auto Lease Holland BV*, 8 août 2001, JURT (2001)3052, para. 20 and 23.

Supply of fuel in the Case *Auto Lease Holland* BV according to the European Commission



Interpretation adopted by:

- The European Commission (VAT Committee Working paper n° 969 p. 4; n ° 1012 p.8; n ° 1020 p.6)
- The interpretation of the position of French Tax authorities by the European Commission (VAT Committe Working Paper n° 969 p. 4)
- The Dutch Tax Autoritjes (wetten.nl- Regeling- Omzetbelasting, maatstaf van heffing- BWBR0041125, but no explicit referenceto the Case *Auto Lease Holland BV*)

Supply of fuel in the Case *Auto Lease HollandBV*

Facts as related by:

- Question raised by the German Supreme Court
- French delegation before the VAT Committee (VAT Comittee Working Paper n° 969 p. 8)
- The German tax authorities (BMF v. 15.06.2004 - IV B 7 - S 7100 - 125/04 BStBl 2004 I 605)

In this scheme, the Commission sees the words "credit card", even if it has only the external apparency of such a card and not the intrinsic legal nor the financial characteristics. And although this concept had not been defined by VAT Directives, it had been subject to a Guideline of the EU VAT Committee that at that time were not published but mentioned occasionally in Commission's reports. And according to this guideline, the credit card company is not involved in the transaction itself ie that it does not issue an invoice allowing a deduction of input VAT[26]. Therefore, the legal department of the European Commission concluded in its observations before the Court of justice and without examining the details of the transaction that it is entirely appropriate to include in the analysis of the question the

[26] Guidelines resulting from the 14th meeting of 23-24 June 1982 XV/150/82.

possibility of a direct delivery relationship between the oil company and the lessee. It is not clear whether or not this emphasize on the concept of "credit card" is the consequence of gross error or is a deliberate (possibly in order to promote uniform means of payment in the EU)[27]. Another explanation is that the legal department of the European Commission knew that since the case *Daily Mail*[28] (a corporate tax case*)* and *DFDS*[29]*,* the Court is averse to any legal structure that may appear to hide the actual transactions in order to benefit from advantages granted by the EU law and therefore the Court is entitled to base its reasoning on the "correct qualification of facts" with a view to defeating legal structures perceived as aimed at reducing the amount of tax, even if this would have as consequence to qualify a subsidiary as a branch.

Based on the assumption that the intermediary would be a "credit card", the Court logically considered that the fuel management agreement by Holland Auto Lease (the lessor) was not a contract for the supply of fuel, but rather a contract to finance its purchase, even if the Court observed that the payment of the fuel by the card user was made in advance ! So, according to the Court of justice following the reasoning of the European Commission, the purchase of fuel with a "dedicated credit card" is a credit even if the intermediary already used a fuel card and that one of the function such cards is the management of the supply of fuel.

The practical consequence of this judgement has been the disallowance of the input VAT by business who would normally have a full or a partial right of deduction because the final consumer does not receive a valid invoice from the gas station. Although it seems that this case has a rather limited impact (see *infra* 3), the Court has subsequently referred more than 10 times to this case. And at the time of discussion of the VAT rules applicable to recharge of electric vehicles in 2019, the European commission repeated that Auto Lease Holland would not have acted in its own name[30], while from the facts described by the national judge, Auto Lease Holland acted in its own name. But before Poland in the *Case Vega International,* no Member State seems to have ever implemented this judgement and the Commission never enforced it. And the reason of this is very simple: the structure as described by the European Commission had no sense from a business perspective at that time. Therefore, it did not exist and the national tax authorities had no need to comment it.

The misdirection did indeed take place at the level of the Court of Justice. And as Jean-Claude Bouchard observed, it finds its source in the poverty of the adversarial debate before the judge, who is the only institution legally obliged to provide a reply and to decide when a problem is submitted. This failure is primarily attributable to the Commission, whose mission, as guardian of the proper functioning of the institutions and the proper application of secondary legislation, is to fully enlighten the judge on the reality of the facts and the applicable texts[31].

1.2. The VAT Committee: e mobility cards are taxable intermediation

[27] This is only an assumption but it has been observed among other in the efforts of the Commission to promote electronic invoicing.
[28] CJEU, 27 September 1988, *The Queen / Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* (81/87, ECR 1988 p. 5483)(SVIX/00693 FIIX/00713) ECLI:EU:C:1988:456.
[29] CJEU, 20 February 1997, *Commissioners of Customs and Excise / DFDS* (C-260/95, ECR 1997 p. I-1005) ECLI:EU:C:1997:77.
[30] Working Paper n° 969 taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019, p. 4/13.
[31] Jean-Claude Bouchard, L'utilisation d'une carte de paiement est-elle toujours une opération financière exonérée de TVA ? *Revue de Droit Fiscal* n° 49, 9 décembre 2021 p. 21 comm. 46.

The national tax authorities discuss their views on practical implementation of the VAT rules and of VAT CJEU cases within the VAT Committee[32] that his chaired by the European Commission. From time to time, the VAT Committee adopts unanimous guidelines that are not legally compulsory, except when they are taken over in an interpretative regulation of the VAT Directive[33]. Sometimes, the national tax authorities conclude that a particular ruling of the Court of Justice concern a specific situation and therefore it does not impact existing national interpretations[34].

The French tax authorities wanted to obtain the views of the European Commission and of the other Member States about the recharging of electric vehicles between an infrastructure operator (CPO or charge point operator) and mobility operators (e-mobility service provider, eMP), as well between, eMP's and drivers[35]. Fuel cards providers, or at least some of them, are also providing means in order to charge electric vehicles (e-mobility, electromobility), with the same cards, even if today both consumers and operator tends to use other means of payment that are also cheaper to install and maintain, such as QR Codes and web-based solutions that are not using cards.

According to the opinion of the European Commission prior to this guideline, the supply to the car driver by an e-MP could be qualified either as a supply of goods or a supply of services, but then it should be qualified as an electronic service (see *infra 5.3.4.*) that is taxable where the customer is established, even if this latter would be a private individual. This qualification as "electronic service" had not been envisaged by the French delegation that considered that the supply of electricity was either a supply of tangible property or a service. From the enclosure to the question raised by the French delegation, it appears that if such transaction would be regarded as a service (but not as an electronic service) and when it would be supplied by an intermediary in its own name and established outside of the EU, the supply of electricity to non-taxable persons established in the EU would not be taxable in the EU[36]. Of course, such consequences were totally inacceptable for any tax authorities.

During its meeting of 19th April 2021, the EU VAT Committee unanimously agreed[37] that:

> *1. in a typical value chain of charging of electric vehicles where there is a Charge Point Operator (CPO) and a Mobility Provider (eMP), the CPO shall be seen to supply electricity within the meaning of Articles 14(1) and 15(1) of the VAT Directive to the eMP, while the eMP shall be seen to carry out the same supply of electricity to the driver.*
>
> *2. in these circumstances the eMP shall be considered to be acting as a taxable dealer within the meaning of Article 38(2) of the VAT Directive[38]. Therefore, the VAT Committee unanimously agrees that the supply of electricity by the CPO to the eMP shall be deemed to be made at the place where the taxable dealer (the eMP) has established his business according to Article 38(1) of the VAT Directive.*

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[32] Art. 398 of the Directive 2006/112/EC.
[33] 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
[34] See for example Guidelines resulting from the 107th meeting of 8 July 2016 document B – taxud.c.1(2016)7297391 – 911 concerning the case C-526/13 *Fast Bunkering Klaipėda.*
[35] Working Paper n° 969 taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019.
[36] Working Paper n° 969 taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019.
[37] Guidelines resulting from the 118th meeting of 19 April 2021 Document C – taxud.c.1(2021)6657618 – 1018.
[38] Article 38 of the VAT Directive concerns supplies of electricity to network operators (see infra 5.3.3.).

3. the supply of electricity by the eMP to a driver recharging his or her electric vehicle shall be deemed to be made at the place where the driver effectively uses and consumes the goods, thus at the location of the charging terminal in line with Article 39 of the VAT Directive.

This unanimous guideline of the delegations of the national tax authorities should be read having in mind the precise wordings of article 38 and 39 of the VAT Directive about the place of supply of electricity, as well article 195 of the VAT Directive concerning the person liable of the payment of the VAT on such supplies (see *infra 5.3.3.*). Indeed, such rules for electricity are not the same than those applicable to fuel, even if the same card is possibly used for the acquisition of fuel or for electricity, sometimes for the same vehicle in case of hybrid models.

After a contribution of the VAT expert Group[39], Italy submitted to the VAT Committee a question suggesting that e-mobility cards should not be treated as a supply of electricity, but as a complex supply of services ie the recharging of electric vehicles[40] (taxable where the recipient is established)[41]. Indeed, according to the Italian delegation, the recharging of the battery of electric vehicles would not constitute a supply of electricity. According to a request for a preliminary ruling submitted by the Polish Supreme Administrative Court to the Court of justice of the European Union[42], this transaction should be considered as a composite supply, in which the main element will be an access to the infrastructure enabling the charging of an electric vehicle (service). The main need of users is not buying electricity but the possibility to use advanced infrastructure which enables to charge cars faster, an alternative would be, for example, to use a standard electrical connection. This approach:

- has been confirmed by Polish Provincial Administrative Courts in the past[43];
- is consistent with the rules provided in the Polish Act on electromobility and alternative fuels. This Act[44], like the Directive 2014/94/EU treats charging of electricity as a service, not as a supply of goods[45].

2. Nature of fleet cards

Before to analyze the VAT rules applicable to transactions using fleet cards, it is important to describe such cards as they present themselves to their customers, even if trade associations observe that continuously new payment technologies such as web-based application are developed[46]. The cards such as credit cards or using a similar format are using terminals and card readers while consumers tend to pay with their smartphone that do not require costs

[39] Working Paper n° 1008, taxud.c.1(2021)1759933-EN Brussels 2 March 2021.
[40] Working Paper n° 1012, taxud.c.1(2021)2099876-EN-Brussels 17 March 2021 p. 5; see also request of a Preliminary ruling to the CJEU from the Polish Administrative supreme Court , 23 February 2022 – I FSK 1712/18.
[41] Art. 44 of the VAT Directive.
[42] Polish Administrative supreme Court , 23 February 2022, registered by the Court of justice as case C-282/22, ¨P.wW.
[43] court of the 1st instance iIII SA/Wa 3071/ confirms that the supply should be seen as a supply of service (letting to use the charging infrastructure) - this is in line with dominant line of jurisprudence of Polish tax courts.
[44] Art . 4(8) of the Directive 2014/94/EU of the European Parliament and of the Councilof 22 October 2014 on the deployment of alternative fuels infrastructure.
[45] MDDP Tax Alert n° 218/26.02.2021.
[46] CharIn position on Payment Systems for EV Chargin -Part I with context of the German "Ladesäulenverordenung -LSV" and the revision of the Alternative Fuels Infrastructure Directive (2014/94/EU) October 20th 2020.

of installation and of maintenance of cards readers. Even Apple announced the possibility to pay the purchase of fuel from the vehicle dashboard.

2.1. The average consumer as criteria in order to qualify a transaction

VAT entails the application of a general tax strictly proportional to the price of the goods and services at the stage immediately prior to the consumption[47]. From the origin of the system, it appears that the intention of the European Legislature was to prevent any discrimination between the producers on the base on their place of establishment, their legal organization or the technology[48].

It is apparent from the CJEU settled case-law that, in order to determine whether a transaction is to be classified as a supply of goods or services, account must be taken of all the circumstances in which a transaction takes place in order to ascertain its characteristic and predominant elements. The predominant element must be determined from the point of view of the average consumer and having regard, in the context of an overall assessment, to the importance, not merely quantitative, but qualitative, of the elements of the supply of services compared to those of a supply of goods[49]. When they have to take a decision, business or the average consumer will not have a look to the reports of the European Commission but to advertising or sometimes, to Wikipedia, statistical data or similar sources of information.

2.2. Views of the average consumer

The primary objective of a car driver in front of an unmanned tank station in the middle of the night is firstly how to pay and, possibly, to pay at a lower price. And the first way to obtain immediately a price reduction of about 20 or 10% depending of the countries is to receive a valid invoice from the supplier. Indeed, what the cardholder or rather the business requires, it is a valid invoice allowing him to deduct input VAT[50] and a card allowing him to purchase fuel where he circulates, without being obliged to drive long distances in order to purchase fuel from a specific supplier. When he is fueling his vehicle, he does not want to waste precious minutes in order to communicate all the data allowing the tank station to issue a valid invoice necessary in order to obtain the refund of input VAT. According to article 10 of the Council Directive 2008/9/EC regarding the refund of input VAT to foreign taxable persons, tax authorities are entitled to require an invoice for each supply of fuel exceeding 250 Eur. But fundamentally, the average consumer will use, among others means of payment, a fleet card in order to obtain fuel or electricity[51]. If he needs a credit, the average consumer will ask a credit to his bank or he will possibly use a credit card, even if in Europe, the payment function of such a card is more popular than the credit function.

The average consumer has the choice between a large number of fleet cards or others means of payment. The offer is influenced by various factors such as:

- the absence of harmonization or the right of deduction of VAT applicable to fuel and other vehicles costs in a particular EU Member State[52]: sometimes, it is fully or partly deductible according to complex rules and sometimes, it is not deductible at all;

[47] Art. 1(2) of the Directive 2006/112/EC.
[48] For the references see Christian Amand What Does the EU VAT Actually Tax? *International VAT Monitor,* 2022 (Volume 33), No. 2.
[49] See ao. *Dyrektor Izby Administracji Skarbowej w Katowicach,* case C-703/19 para. 48 and 49; judgment of 10 March 2011, *Bog and Others,* C 497/09, C 499/09, C 501/09 and C 502/09, EU:C:2011:135, paragraph 62).
[50] Art. 178 of the Directive 2006/112/EC.
[51] See in that sense Working Paper n°1012 p. 17/24.
[52] Art. 176 of the Directive 2006/112/EC.

- the fact that the end user generally needs to purchase fuel in one or more countries. Indeed, the place of supply of fuel will be where the oil company is established and not where the vehicle is actually used,
- the type of vehicle (truck, car or other motorized engine, type of fuel used),
- the fact a card is only accepted by one fuel supplier or many,
- some kind of cards offer the possibility to obtain the refund of input VAT abroad, sometimes in a couple of countries, sometimes in all the EU Member States,
- some offer the possibility to pay toll or repairs, others not,
- the position of the driver in a company or the necessity to control expenses,
- the possibility to obtain a price rebate (this important for large organisations that do not have a right of deduction of input VAT),
- etc.

At first sight, there is no reason why the average consumer would make any difference between the fuel and the electricity as long it allows to use his car. With the danger of non-taxation, this probably what is underlying the unanimous guideline of the VAT Committee on e-mobility cards. However, an e-mobility card is much more than a mean to obtain a simple global invoice and a particular method of payment. The average consumer will immediately take into account the time of charging an electric car, the access to charge points and the costs. The time of charging is substantial for electricity and this influence the access to charge points whose cost may supported or not by the consumer. This will probably will not change with the evolution of the technology and of course the price of charging a car with electricity and fuel is very different. Therefore, it is not unreasonable to argue that fuel cards and e-mobility cards have fundamentally different functions, although both are allowing to acquire a means allowing a car to move (see *infra 5.3.4.*).

2.3. Different types of business models of fleet cards

All types of fleet cards allow a cashless payment, like credit or debit cards or a smartphone. The supply by the oil company is always subject to the VAT applicable at the point of delivery since there is no evidence that it is dispatched to another EU member State[53], even if the cardholder is established in another EU Member State. But the similarities stop there. What concerns the supply of electricity, the situation is more complex because of the existence of specific rules of place of supply (see *infra 5.3.3.*).

2.3.1. Direct invoicing by an oil company

Some oil companies offer fleet cards allowing to purchase fuel from their network in a specific EU Member State. The oil company issues a global invoice monthly to its clients. This allows the card holder to pay and at the same time to receive a valid invoice that will allow him to deduct input VAT, to know which member of the company purchased fuel and where was it purchased.

But such cards only allow purchase of fuel from this specific company in a particular Member State, because if the supply would take place in other Member States, this oil company should register for VAT in each of these Member States. The facts a fuel card that can be used only in one particular Member States is sufficient for some categories of customers who will use their vehicle occasionally or only for private purposes is other EU Member States, but it is not enough for others.

[53] Art. 138(1)(a) of the Directive 2006/112/EC.

2.3.2. Commissionaire and buy-sell structures

Sales and purchase commissionaires (acting in their own name but for the account of a principal), from one side, and buy-sell structures (suppliers acting in their own name and for their own account), from another side, are treated on the same way for VAT purposes, even if they present major differences from a legal, accounting and direct tax purpose (see *infra 5.2.*).

Before the introduction of the article 236 of the VAT Directive (ex-art. 22(3)(c) of the Sixth VAT Directive applicable as from January 1, 2005)[54], such structure was the only one possible allowing business to obtain a single invoice for different supplies by multiple suppliers. For car or truck users, this was and is still a major saving in time (accounting procedures) and money (right of deduction of input VAT). Indeed, the traditional credit and debit cards have no impact on the traditional invoicing procedures and do not allow the deduction of input VAT.

Depending of the type of cards or of the card operator, various documents are issued:

- a recapitulative of the payments,
- an invoice by country, mentioning the name of a local branch/ subsidiary and allowing to deduct input VAT,
- some cards include a "reverse charge invoice" when VAT is due in the EU Member State of establishment (eg. for mechanical repair services)[55],
- a fleet report mentioning the detail of the transactions by card user, type of goods/services, the vehicle etc.

Since VAT is due at the place of physical delivery of the fuel (or – as argued by the European Commission– of the electricity), whatever the place of establishment of the purchaser, this requires that the card company should register for VAT in each EU Member State where the oil is delivered. Indeed, even if the EU Member State has adopted a national reverse charge procedure, in case of supplies by foreign business not established to local business, the card company should register for VAT for supplies to business not established in this member state, because the supply of goods is anyway taxable in this country[56].

2.3.3. Advance payments[57]

Some fuel card companies have obtained the authorization to issue invoices in the name and for the account of the supplier (partners) directly to their customers (corporates). Contrary to the buy/sell and commissionaire structures, there is a direct legal obligation between the Oil company and the final consumer, like it is the case for traditional credit card structures and the card issuer is acting in the name and for the account of a customer (in the line with the CJEU Case *Auto Lease Holland BV*). There is also a direct invoicing from the oil company to the purchaser, but with an intermediary phase managed by the card operator:

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[54] Council Directive 2001/115/EC of 20 December 2001 amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax

[55] This concerns the situations of national reverse charge that are not harmonized.

[56] Art. 31 *juncto* art. 194 of the VAT Directive.

[57] Tony Lamparelli, *La TVA et l'automobile,* 5ième Edition Larcier 2021, p. 37; see ao. https://www.xximo.be/en_be/options/

i) the oil company (oil companies´ partner) issues a recapitulative invoice to the fuel card company with the detail of the supplies of fuel to all the corporate purchasers.

ii) the fuel card company issues by corporate (or customer) a recapitulative invoice (generally monthly) with the details of the purchase from each partner by each corporate.

In addition, the card operator keeps a separate sub-book by supplier (oil company partner) and by corporate purchaser.

On the base of the document issued by the card operator in the name and for the account of the various suppliers, each client is entitled to deduct input VAT.

This system is based on a combination of two provisions of the VAT Directive that are only applicable since 2005:

- every taxable person shall ensure that an invoice is issued either by himself or by his customer or in his name and on his behalf by a third party (art. 220 of the VAT Directive),
- Member States shall allow taxable persons to issue summary invoices which detail several separate supplies of goods or services, provided that VAT on the supplies mentioned in the summary invoice becomes chargeable during the same calendar month. Without prejudice to article 222, Member States may allow summary invoices to include supplies for which VAT has become chargeable during a period of time longer than one calendar month (art.226 of the VAT Directive).

This system presents the advantage that it allows the card holder to obtain the deduction of the VAT charged by the oil company according to the 8th VAT Directive procedure, at least in certain countries.

For the Purchase Card operator, this does not require a VAT identification in each EU Member State, but it is subject to particular non-tax constraints (see *infra* 2.4).

2.4. Credit cards and purchase cards versus fuel/fleets cards and other new methods of payment

Although all cards allow payments, they are not subject to a similar regulatory environment. Credit, debit or purchase cards have to comply with the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC and its implementing regulations. This imposes a huge cost. However, such rules are not applicable to:

- payment transactions from the payer to the payee through a commercial agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee[58];

[58] Art. 3 (b) of the Directive 2007/64/EC of The European Parliament and of the Council of 13 November 2007on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC and its implementing regulations.

- to services based on instruments that can be used to acquire goods or services only in the premises used by the issuer or under a commercial agreement with the issuer either within a limited network of service providers or for a limited range of goods or services[59].

The right of deduction of input VAT by the card issuers or operators are also very different depending on whether their supply qualifies as a mean of payment or not and depending in which EU Member State they are established. And currently, the major concern of lobby's like CharIn is the intention of the European Commission to impose the general installation of credit card terminals in order to ensure access to EV chargers while this technology is costly and credit cards are relatively less used in Europe compared to smartphones and other web-based methods of payment[60].

2.4.1. Credit cards, charge cards and purchase cards

2.4.1.1. Credit cards

Credit cards are intended to allow cardholders to purchase goods and services without having to pay in cash only at the time of purchase. These cards are issued, for a fixed annual fee, by financial institutions that are responsible for paying the sellers of goods or services the sums due to them (less a deduction representing the remuneration of the issuing body), the cardholder having the obligation to pay his debt to the issuing body after receipt of a statement of his account. According to the VAT Committee, payment cards are a relatively complex situation, characterized by two different relationships, one between the card issuer and the holder and the other between the issuer and the sellers of goods and services. It is not explicitly addressed in the Sixth Directive. The credit card company is not involved in the transaction itself ie that it does not issue an invoice allowing a deduction of input VAT[61].

According to Wikipedia, "a credit card is a payment card issued to users (cardholders) to enable the cardholder to pay a merchant for goods and services based on the cardholder's accrued debt (i.e., promise to the card issuer to pay them for the amounts plus the other agreed charges)[62]. The card issuer (usually a bank or credit union) creates a revolving account and grants a line of credit to the cardholder, from which the cardholder can borrow money for payment to a merchant or as a cash advance".

The VAT Committee unanimously considered that the service rendered by the card issuer to the cardholder constitutes a payment facility and therefore falls within the scope of the exemptions of Article 13b lit. d) of the Sixth VAT Directive[63] [64] (now art. 135(1)(d) of the VAT Directive). It will be noticed that contrary to the Court of justice that considers in *Vega International* that essential element of a credit card is a credit, the VAT Committee consider

[59] Art. 3 (k) of the Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC and its implementing regulations.
[60] CharIn positions on: Payments Systems for EV Charging – Part I, October 20th 2020.
[61] Guidelines resulting from the 14th meeting of 23-24 June 1982 XV/150/82.
[62] https://en.wikipedia.org/wiki/Credit_card, accessed on July 12th 2022; O'Sullivan, Arthur; Steven M. Sheffrin (2003). *Economics: Principles in action* (Textbook). Upper Saddle River, New Jersey: Pearson Prentice Hall. p. 261. ISBN 0-13-063085-3.
[63] First report from the Commission to the Council on the application of the common system of value added tax submitted pursuant to Article 34 of the Sixth Directive, Com(83) 426 final of 14 September 1983, p. 49.
[64] Guidelines resulting from the 14th meeting of 23-24 June 1982 XV/150/82.

that this is essentially a means of payment. Indeed, credit card networks have developed an infrastructure fitted to e-commerce and distance sales.

However, in a proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, the Commission suggested that credit cards contrary to charge cards were credit services.[65] And credit is VAT exempt without a right of deduction of input VAT, unless the Member State where the card operator is established is allowing an option to tax[66]. But this distinction credit/payment is not relevant for VAT except if a Member State has granted a right of option to tax only for payments and not for credit[67].

2.4.1.2. Charge cards

The difference between credit cards and charge cards lies in ability to carry a balance that is, roll debt over from one month to the next. Credit cards let carry a balance from month to month, while charge cards require to pay in full each month.

According to a background paper requested by the EU Council presidency, *"Debit card services cover scenarios were fund are directly withdrawn from the card holders monetary account when the debit card is used for the acquisition of goods and services; in most cases it also allows the card holder to withdraw himself cash from his monetary account. Such card services do not provide for a lending of money"*[68]. However, payments transactions are also VAT exempt without right of deduction of input VAT, unless the Member State of establishment is granting an option to tax.

2.4.1.3. Purchase chards

A purchase / procurement card (also abbreviated as PCard, P-Card, or ProCard)[69] is a form of company charge card that allows goods and services to be procured without using a traditional purchasing process used by business. Indeed, the costs of treatment of invoices for small value purchases is very high and frequently costs more that the transactions itself. Purchasing Cards are usually issued to employees who are expected to follow their organization's policies and procedures related to P-Card use, including reviewing and approving transactions according to a set schedule (at least once per month). The organization can implement a variety of controls for each P-Card. For example, a single-purchase limit, a monthly limit, merchant category code (MCC) restrictions and so on. In addition, a cardholder's P-Card activity is reviewed periodically by someone independent of the cardholder. Regular reviews are part of an organization's ongoing Purchasing Card program management efforts. The individual employees who are issued a P-Card to initiate transactions/payments on behalf of their employer (the end-user organization) are known as "cardholders."[70]

A Purchasing Card (P-Card) allows to take advantage of the existing credit card infrastructure to make electronic payments for a variety of business expenses (e.g., goods and services). In

[65] Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services {SEC(2007) 1554} {SEC(2007) 1555} /* COM/2007/0747 final - CNS 2007/0267 */

[66] Art. 137 of the VAT Directive.

[67] Like it is the case in Belgium since 1969.

[68] Background paper requested by the Council Presidency about financial and insurance service, Taxud /2414/08 – EN Brussels 5 March 2008, p.22.

[69] https://en.wikipedia.org/wiki/Purchasing_card, accessed on January, 20, 2022.

[70] See NAPCP https://www.napcp.org/page/WhatArePCards (accessed on March 10th, 2022).

the simplest terms, a P-Card is a charge card, similar to a consumer credit card. However, the card-using organization must pay the card issuer in full each month, at a minimum.

Such a card allows the purchaser to receive a single summary invoice for purchases from various suppliers in various EU Member states. But the card issuer is not deemed to act as a commissionaire and each transaction happens directly between the supplier and the customer. The card issuer is supplying a valid invoice (unlike the traditional credit card operators) for each individual transaction, but he is acting in the name and for the account of the suppliers (and not in its own name and for account of suppliers or purchasers like in a commissionaire structure). This allows the fuel card operator not to register for VAT in each EU Member State where it intervenes in a supply of fuel. The procedure uses article 236 of the VAT Directive. Accordingly, where batches containing several electronic invoices are sent or made available to the same recipient, the details common to the individual invoices may be mentioned only once where, for each invoice, all the information is accessible. For consumers, Purchase Cards offer most of the advantages of fleet cards. Although they are not obliged to register for VAT in all the EU Member States, they have to support substantial regulatory costs. In addition, it is questionable if they could not be assimilated to credit cards since they can be used for a large variety of goods and services, contrary to others fuel cards models. This could possibly trigger the rejection of the deduction of input VAT on the substantial IT investments, as far as this card operator is not established in the appropriate EU Member State.

2.4.2. Fuel or Fleet cards and e-mobility cards

2.4.2.1. Fuel cards

A fuel card or fleet card is used as a payment card most commonly for gasoline, diesel, and other fuels at a gas station. Fleet cards can also be used to pay for vehicle maintenance and expenses at the discretion of the fleet owner or manager. Most fuel cards are charge cards, even if some of them are Purchasing Cards using the credit card infrastructures.

Fleet cards enable fleet owners/ managers to receive real time reports and set purchase controls with their cards helping them to stay informed of all business related expenses. Fleet cards are unique due to the convenient and comprehensive reporting that accompanies their use.

The fuel card issuer determines directly:
– the place, i.e., petrol stations at which customers can purchase goods;
– the price, i.e., fuel card issuers agree with customers on the price for which they can purchase goods from fuel card issuers;
– the type of goods, i.e., fuel card issuers use the so-called goods restriction levels for certain types of goods which the customer can receive using a fuel card;
– the amount, i.e., fuel card issuers determine the amount which the customer can use using a fuel card (the so-called limit for each card);
– the right to dispose when purchasing goods with a fuel card, i.e., the fuel card issuer may prohibit the purchase of certain goods rejecting a certain transaction by the fuel card issuer's online authorisation;
– the material risk, i.e., in the event of execution failures, all customer's claims for the compensation of losses must be addressed to the fuel card issuer. The customer cannot pursue a claim directly against the supplier. Further on, all fuel card issuer's claims for the compensation of losses are addressed to the supplier;
– the reservation of ownership right, i.e., it is agreed with the customer that the fuel card

issuer remains the owner of goods until the full payment is made therefor (reservation of ownership right)[71].

2.4.2.2. e-mobility cards and operators

E-mobility charge cards or software present similarities with fuel cards[72], but they pursue other objectives. Charging electric cars consists of the provision of charging devices (including integration of the charger with the vehicle's operating system) ie fleets cards, ensuring the flow of electricity with parameters correctly applied to the batteries of electric vehicles, the necessary technical support for vehicle users, providing users with a platform, website or special application to reserve a given connector, view the history of transactions and payments made, as well as the possibility of using the so-called e-wallet, which is used to make payments for individual top-up sessions[73]. Contrary to the purchase of fuel, the recharge of electricity takes time and the availability of charge point is therefore crucial. As noticed by trade association, electric vehicles differ significantly from Internal combustion vehicles as to where and how they can be recharged at home and at destination like workplaces or commercial sites[74]. And indeed, there is a substantial difference if one recharge his car home, with electricity home produced[75] and the recharge of the same vehicle abroad or at "fast charge point", even if the time necessary for a 'fast charge' of electricity is much longer than refueling. The normal charging time of 80% of the capacity of a vehicle battery using fast charging connectors is typically 20-30 minutes (but much longer for 100% recharge). The charging time of a vehicle using slow charging connectors is usually about 4 to 6 hours (depending on the power of the connector). According to some observers, it is not expected that a possible technological evolution would reduce the time necessary in order to recharge batteries and the offer of charge points will be limited by their costs and the number of charge points available at critical places[76]. For this reason, it is argued that electric cars are only an alternative for the second car used by households and only useful for limited business trips or in peri-urban areas.

The means of payment and their combination with effective invoicing procedures are also essential. Position papers denounce the fact that there is no widespread industry standard for payment acceptance at EV Charging point and notice that new methods of payments such as QR Codes or RF/ID are more and more adopted by consumers. This leads to a system where consumers across Europe often do not have the choice of payment methods and are forced into a single option (for example, signing up to an app or provider program) or even face not being able to charge their vehicle because they aren't registered with the required subscription service.[77]

Taking into account the fact that according to EU Directives other than the one on VAT, the supply of electricity is a service, it is arguable that the predominant character is an electronic supplied service according to article 58(1)(c) of the VAT Directive (see *infra 5.3.4.*). This would

[71] Value Added Tax Committee – Working Paper n° 1020, Brussels 19 October 2021 and in particular the views of the Latvian delegation.
[72] ChargeUp Europe Position paper on VAT for EV charging May,12 2021.
[73] Request of Polish Administrative supreme Court , 23 February 2022 – P.wW.
[74] AVERE's Position on the Revision of the Alternative Fuels Infrastructure Directive (AFID) June 2021.
[75] This can also make impossible the determination of the benefit in kind taxable for personal income taxes.
[76] See Christian Gerondeau, La voiture électrique et autres folies, Ed L'artilleur 2022.
[77] VISA calls for standardized seamless, interoperable payment in electric vehicle charging, 2 February 2022 https://www.visa.co.uk/about-visa/newsroom/press-releases.3159153.html

allow e-mobility card operators not to register in each EU Member State and have no difficulties in deducting input VAT.

2.4.3. Right of deduction of input VAT by cards issuers and e-mobility operators

The oil companies and the electricity Charge Point Operators charging directly their supplies to the end consumer have a full right of deduction of input VAT.

The intermediaries acting in their own name are deemed to intervene in taxable transactions and therefore they have a full right of deduction of input VAT.

The intermediaries acting in the name and for the account of a final customer are generally considered a performing payments and other services such as issuing invoices. Payment services are generally VAT exempt in the EU, except if the operator is established in one of the few EU Member States having allowed an option to tax and that this option has been let by the operator.

3. Tax authorities` views

According to the Irish Authorities, fuel cards schemes are structured in fundamentally different ways from credit or charge cards. Fuel cards are issued by the major oil companies for use by commercial concerns where employees are required to use them in company vehicles. When the employee presents the employer's charge card at a retail petrol outlet, there is a sale of goods at that point by the retailer to the card company at a discounted price, and then from the card company to the cardholder ie the employer a the full retail price. The Cardholder duly settles with the card company. The transaction between the card company and the retailer is an ordinary commercial sale of goods transaction and this is borne out by the documentation. The discount is thus a reduction on the sale price of the goods and does not form part of the taxable consideration in the hands of the retailer[78].

In unpublished decisions, the Belgian Tax Authorities considered that such supplies by car lessors were either qualified as ancillary to the car leasing service or supplies of goods[79].

Pursuant to the Case *Auto Lease Holland* in 2004, the German Bundesministerium de Finanzen confirmed under which circumstance there was a supply of goods between the oil company and the user of the vehicle[80] and the Belgian Tax authorities referred to the Court case, but apparently, this has not changed the business practice[81].

In a decision of 1 December 2008, the Danish supreme court ruled that the fleet management offering the lessees the option to get fuel in Denmark with a fuel card supplied by the leasing company is regarded as the refinancing of fuel purchase, which eliminates the right to deduct input VAT[82]. According to the European Commission, the Netherlands would have explicitly mentioned the case *Auto Lease Holland* in the approving policy of the Dutch Government[83]. According to Dutch decisions, costs incurred in the Netherlands for the supply of energy for land vehicles by the station operator paid by the issuer of a fuel card in the name and on behalf

[78] Irish Revenue, *VAT and financial services,* 1999 p. 34.
[79] Decision E.T.91290/84799/M/C/W/ of 9 January 1998.
[80] BMF v. 15.06.2004 - IV B 7 - S 7100 - 125/04 BStBl 2004 I 605.
[81] Question n° 43 du député Dirk Van der Maelen du 16 septembre 2010 et *Commentaire TVA,* Chapitre 2, section 4, 1 B, B).
[82] Danish Supreme Court , 1 December 2008, Case SKM2009.25.HR (IBDF sources).
[83] Working Paper n° 1012, taxud.c.1(2021)2099876-EN-Brussels 17 March 2021 p. 6.

of the fuel card holder, are costs of transit. In that case, these costs must be individualizable, for example on the basis of the card numbers and registrations.[84]

The European Commission notices that 24 out of 27 Member States have not taken any specific action in relation to those cases[85].According to the European Commission, in other EU member States, the cost of the supply of energy for land vehicles by the station operator which are paid by the issuer of a fuel card in the name and on behalf of the fuel card holder are considered as a cost of transit[86]. However, as observed *infra* 5.2.6., this is the case for all type of intermediaries, regardless the fact that they act disclosed or undisclosed intermediaries (commissionaire fiction).

The French tax authorities consider that in *Auto Lease Holland BV*, the lessor is acting in its own name[87]. According to the German tax authorities, the card user acquired the right to refuel fuel in the name and for the account of the lessor[88] ie Auto Lease Holland BV acted in its own name.

Pursuant to the case *Fast Bunkering Klaipèda[89],* the VAT Committee unanimously decided that *"Where goods are being supplied through intermediaries (chain transactions) acting in their own name, (…)in qualifying each of the transactions involved consideration must, in addition to Article 14(1) of the VAT Directive, be given to Article 14(2)(c) according to which the transfer of goods pursuant to a contract under which commission is payable on purchase or sale shall be regarded as a supply of goods. Where there is a transfer of goods pursuant to such a contract, the VAT Committee is of the unanimous view that of the two ensuing transactions, the recipient of the first supply shall be the intermediary acting in his own name."[90]*

Pursuant to the *Case Vega International,* the Austrian Tax authorities considered that when a company only organizes and manages the supply of fuel trough fuel cards, this is a VAT exempt supply[91].However, the purchase and resale of fuel through fuel cards in its own name and for its own account is a supply of goods and therefore may qualify as a chain transaction.

Poland's Ministry of Finance published on 16th February 2021, a general tax ruling regarding the right to recover input VAT for goods and services purchased using fuel cards[92] in which it indicated the four criteria that must be met jointly to qualify the fuel transactions as a service for VAT purposes,

- purchase of fuel by the recipient (cardholder) takes place directly from suppliers operating petrol stations.
- the recipient decides solely on the means of purchase of the fuel (choice of place of purchase), the quantity and quality of fuel, the time of purchase and the way in which the fuel is to be used.

[84] wetten.nl - Regeling - Omzetbelasting, maatstaf van heffing - BWBR0041125. Interestingly, the Dutch Tax Authorities never mention the case Auto Lease Holland in their comments, even if the wording of their comments mentions the view of the Commission of the factual situation in *Auto Lease Holland.*

[85] Working Paper n° 1012, taxud.c.1(2021)2099876-EN-Brussels 17 March 2021 p. 6.

[86] See Working Paper n° 1008 2 March 2021 p. 12 ; Art. 79 c of the VAT Directive.

[87] VAT Committee Working Paper n° 969 p.8.

[88] BMF v. 15.06.2004 - IV B 7 - S 7100 - 125/04 BStBl 2004 I 605.

[89] CJEU 3 September 2015, *Fast Bunkering Klaipéda* (C-526/13) ECLI:EU:C:2015:536.

[90] Guidelines resulting from the 107th meeting of 8 July 2016 document B – taxud.c.1(2016)7297391 – 911

[91] Austrian VAT Guidelines Nr 345, GZ 09 4501/58-IV / 9/00 as amended GZ BMF 010219/0270-IV / 4/2019 from November 28, 2019.

[92] Poland General ruling PT9.8101.3.2020 (15 February 2021).

- the recipient (excluding the intermediary) bears the entire cost of the fuel purchase.
- the role of an intermediary is limited to providing the recipient with a financial instrument (fuel card) allowing for the purchase of goods.

4. Literature about the Case Law of the Court of Justice

In an opinion statement submitted in November 2009, the CFE- Tax Advisers Europe strongly criticized the case *Auto Lease Holland BV* ao. because it prevented the intermediary to obtain the refund of input VAT, it did not take into account the fictions of the undisclosed intermediaries contained in article 14(2)(c) and 28 of the VAT Directive, it was contrary to the common business practice and, in fact, it was not implemented by many Member States. Therefore, the CFE invited the Commission to suggest the Court of Justice to reconsider the case.

Pursuant to the Case *Vega International,* the violation of the neutrality principle and of the fiction of the undisclosed intermediary has been remembered by various authors[93].

David Gómez and Gorka Echevarria Zubeldia[94] observe ao. that contrary to what the ECJ considers in *Vega International*:

- each and every company that participated in the chain is freely deciding on the quality, quantity and type of the goods and it acquires and sell, as well as the moment at which it intervenes in the transaction and also the use to which it is to put the goods concerned.
- each party intervening in the chain agrees to accept the costs and to pay the consideration for the supplies received from the preceding parties in the chain.
- the purchaser that occupies the last place in the chain is not the only one that makes the aforementioned decisions and assumers the related costs.

The companies that intervene as “intermediaries” in chain deliveries act in their own name and on their own behalf, both as buyers and as sellers on the same goods. In Poland, tax advisers complained about the imprecise character of the criteria adopted by the Polish tax authorities in their ruling of 16th February 2021 and insisted on the fact that if at least one of these criteria is not met, then the transactions between a station operator, card issuer and cardholder – will continue to be treated as chain supply of goods for VAT purposes (with general right for VAT deduction)[95]. Others considered that the intermediary operator makes available (hands over) fuel cards (of which the intermediary operator is not the issuer) to the recipient (e.g. a lessee or a subsidiary)[96].

In a contribution of the VAT Experts Group, two types of structure are mentioned:

- a chain transaction.

[93] Sebastian Kirsch & Caroline Orban, CJEU confirms that the provision and Settlement of Fuel Cards May Constitute a Financial Service that Is Exempt from VAT in Vega International Case*, Intertax*, 2019, vol. 47, issue 10 p. 898; Andrea Parolini/Andrea Rottoli, Exemptions in VAT Law – Recent Case Law of the CJEU in Kofler ea Eds CJEU *Recent Developments in Value Added Tax 2019*, Linde 2020 p.237; Jean-Claude Bouchard, L’utilisation d’une carte de paiement est-elle toujours une opération financière exonérée de TVA ? *Revue de Droit Fiscal* n° 49, 9 décembre 2021 p. 21 comm. 46; Tony Lamparelli, *La TVA et l’automobile*, 5ième Edition, Larcier 2021, p. 39.

[94] David Gómez and Gorka Echevarría Zubeldia The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International Vol. 30 Issue: *International VAT Monitor*, 2019 (Volume 30), No. 6.

[95] MDDP Tax Alert n° 218/26.02.2021.

[96] KPMG Tax Alert: General ruling on proper classification of transactions with the use of fuel cards for VAT purposes February 19, 2021.

- a cost in transit made to a third party by a taxable person in the *name and on behalf of this customer*[97].

In a presentation on behalf the VAT experts Group, Joachim Englisch & Madeleine Merkx observe that legal uncertainty is caused by the CJEU cases themselves and this is a suggestion for future support from the VEG[98]. In a presentation of the VEG before the VAT Committee[99], it has been suggested that:

- the *Vega International* case is outside the generally accepted and applied fuel card business models and operations. The conclusion of that case should not apply to main fuel card business model. Fuel card models generally operate on the basis that there is purchase and resale of the fuel by the Fuel Card Issuer for VAT purposes (regardless of whether, legally, the Fuel Card Issuer is acting as a principal or commissionaire). The "buy – sell" (or deemed buy/sell) approach is clearly the dominant and easiest model for the industry and Member States.
- the Fuel Card usually has no payment function, it only has an authorization function.
- the Fuel Card user acts *in the name and on behalf of the Fuel Card issuer* when purchasing fuel in a buy/sell arrangement.

The view of the VEG seems to describe the organization of large traditional fleet cards operators who obviously do not take account the case law of the Court of Justice.

5. Legal issues raised by the Vega Case and the guideline of the VAT Committee on e-recharge

The case *Vega International* raises various critical distinctions and issues such as the distinction between credit cards and fleet cards/e-mobility cards (see *supra*), the difficulty to qualify facts that are not defined by legal provisions, the concept of undisclosed agent, the extension of VAT exemptions, the supply of fuel versus the supply of electricity and the concept of non-discrimination.

5.1. Interpretation of rules versus interpretation of facts

The VAT system developed by the European Commission in the early 1960's entails the application of a general tax proportional to the price of goods and services at a level as close as possible of the final consumer. As such, the EU VAT is not so much different from a sales tax. However, it is much more efficient than a sales tax because it succeeds to reduce the incentive to fraud at the retail stage. This result is attained by levying at each stage of the production and of the distribution a portion of the tax paid by the retailer to the tax authorities and supported by the final consumer. The right of deduction of the tax levied at the previous stages granted to each participant to the production and distribution process allows an equal treatment between the various producers whatever the country where they are established and ensures a minimal influence of the tax on this production and distribution process ie the neutrality of the tax[100]. This process before the levy of the "single tax" charged by the retailer

[97] See contribution of the VAT Expert Group enclosed to the VAT Committee Working Paper n° 1008 2 March 2021 p. 12 ; Art. 79 c of the VAT Directive.
[98] Presentation of Working Paper n° 1008 April 19th 2021.
[99] VEG Issues arising from recent judgments of the Court of Justice of the EU CJEU Case C-235/18 Vega International: Fuel Cards.
[100] See Agence Européenne de productivité de l'Organisation Européenne de Coopération Economique, *Le Régime Fiscal du Chiffre d'Affaires et son incidence sur la productivité (The Regime of Turnover Tax and its Effect on Productivity),* Project No. 315, (November 1957) and C. Amand,

to the final consumer is subject to 8 sequential steps (or switching points) defined with precision by the rules and combined with multiple factual situations that are generally not defined by the VAT Directive itself:

i) economic activity, i.e. existence of reciprocal obligations. In absence of economic activity, the subsequent steps are not applicable.
ii) classification of transactions or activities (taxable events)[101] according to their traceability: supply of goods, supply of services or imports (for goods only). Specific subsequent procedures (place of supply, exemptions, chargeability, taxable base, rates, person liable of the payment of the tax) are applicable to each of these categories. This includes some assimilation to transactions or to supplies.
iii) which member state is entitled to collect the tax (depending on whether the transaction is a supply of goods and services or imports). This depends on a large number of particular situations. As from this step, only subsequent VAT rules applicable in a specific EU Member State are applicable, even if they are exceptions to the general rules pursuant to concessions granted in the 1970's[102] or by the accession Treaties.
iv) grant or not an exemption – with or without right of deduction - on specific transactions.
v) when a Member State is entitled to collect the tax.
vi) the taxable base.
vii) The rates, variable depending specific goods or services.
viii) Determine the person liable of the payment of the tax and the formalities.

Each of these 8 switching points has legal consequences that are cascading: a qualification at an early stage, such as the distinction tangible property/services, has an automatic impact on the subsequent steps of whole chain of production and of distribution, and finally on the taxation at consumer's level. As such, each of these switching points are legally defined, even if some of them have or still create difficulties of application.

In addition, such switching points are combined with concepts or facts that as such have no automatic consequences, but that are not defined by the VAT Directive, such as fuel card. The distinction between goods and services is inherited from the customs rules that have been applicable on the intra-EU trade until the end of 1992. The VAT exemptions without right of deduction are mainly transactions that had no impact on the internal market in 1967[103] or for which there was technical difficulties to charge VAT.

The major difficulty faced is the description of the facts that are not defined by the Directive itself and that therefore should be interpreted according to the "common usage"[104]. But at the same time these facts are multiple and complex - by nature - and changing because of the

What Does the EU VAT Actually Tax?, 33 Intl. VAT Monitor 2 (2022), Journal Articles & Opinion Pieces IBFD (accessed 9 June 2022).

[101] A fourth taxable event has been added since 1993: the intra-EU acquisition that is comparable to imports without customs formalities and physical controls.

[102] Some of these concessions required the payment of additional financial contributions by the Members States having obtained them

[103] *Report of the Committee for the internal market on the Proposal of the Commission to the Council (Doc 121, 1962-1963) concerning a Directive on the harmonization of the legislations of the Member States on turnover taxes ("Deringer Report")* (European Parliament, Documents Session 1963-1964, Document 56, 20 August 1963).

[104] CJUE, 14 May 1985, *Van Dijk's Boekhuis / Staatsecretaris van Financiën* (139/84, ECR 1985 p. 1405) ECLI:EU:C:1985:195.

evolution of the technology and they should receive a common definition in the 27 Member States of the European Union. Indeed, when such concepts are interpreted differently, this has an impact on the functioning of the Single Market. And the interpretation of these facts is made difficult by the fact that tax authorities and courts consider that they are only bound by the "reality" and not the contractual relations that are described by business and that could reduce the administrative or financial cost by business. And when the collection of revenue for the States is at stake, the result (ie the reduction of formalities and the level of the tax) may sometimes influence the description of the causes and of the factual context, in particular when the authorities and the judge are allowed to disregard the contractual relations between business. This uncertainty about the qualification of the facts is problematic. Firstly, because the VAT system contains many provisions that can only be defined according to the "common usage". Secondly because the consequences of the multiple compromises and exceptions to the general rules are only visible after decades of practice by hundreds of lawyers, tax inspectors and judges. Thirdly, because these difficulties are observed mainly during the process of production and of distribution where the levy of the tax is only provisional and functions as a method in order to reduce the risk of fraud at retails level.

Although the different concepts defined according to "the common usage" are sometimes difficult to describe, this did not create difficulties because the European economies were not integrated 60 years ago. But the more the integration of economies, the more the categories need to precise or the rules simplified. In 2010, the VAT package introduced a major simplification about the rules of place of supply of services. This happened after years of marketing of aggressive tax planning enshrined in the deficiencies of the categories of the VAT system allowing non taxation.

Business act rationally and they pursue objectives such as:

- reduce the price at consumer level, for example by circumventing some type of limitation of right of deduction or taxation at consumer's level (as for example, cross-border leasing before 2010).
- reduce the administrative costs of the chain of collection of the VAT, such as multiple VAT registrations (such as fuel cards).
- Etc. But above all, business gives price to the legal certainty and it accepts major concessions in exchange of certainty from the tax authorities, whatever the intrinsic validity of the legal reasoning.

And of course, interpretation of facts such as fleet cards are influenced by such economic objectives.

Auto Lease Holland BV intended to avoid a VAT registration in each EU Member State where the cars were used by joining the supply of fuel to the rental of the cars that, at that time, was taxable where the lessor was established.

Vega international intended to use his bargaining position in order to supply fuel at lower price to its group companies.

Today, eMP business seems to require :

- Either apply the existing rules about place of supply of electronic services. This would allow them to charge their services, without registration in each EU Member State. The B2B supplies would be subject to the general rules and the B2C could be benefit of the One Stop Shop[105];

[105] Working Paper n° 1012, taxud.c.1(2021)2099876-EN-Brussels 17 March 2021 p. 5.

- or to apply the rules applicable to the place of supply of goods but with the benefit of the One Stop Shop rules[106], even if this would require an urgent modification of the VAT Directive. However, this view seems to be guided by the fact that some national tax authorities would have made clear that they would not make any concession that could lead to a reduction of resources that they currently obtain from the supplies of fuel.

5.2. Undisclosed intermediary: a concept with multiple faces

A supply of fuel to a car driver may be done directly by each oil company. But this could impose huge administrative burden to drivers circulating in various EU Member States: who would accept one card by country or by oil supplier in each country ? In order to solve this issue, it is necessary to use the services of an intermediary who has the contacts with the suppliers and who may take care of the documents allowing the car driver to obtain a valid invoice allowing him to exercise his right of deduction of input VAT, as far as this right exists for fuel in a particular Member State and his Member State of establishment[107]. This intermediary may act either in the name and for the account of the oil company or of the final purchaser (such as the credit card or the Purchase Cards), or in its own name but for the account of the car driver/ oil company. In the second situation, this is a supply of services assimilated to a supply of goods also known as “commissionaire fiction".

The distinction goods/services is of technical nature and was necessary in order to decide which rules are applicable to place of supply, taxable base, taxable event, person liable of the payment of the VAT. And when such a distinction is interpreted too literally, it sometimes leads to consequences that are hardly comprehensive by common people[108].

The concept of supply of goods is dealt by article 14 to 19 of the VAT Directive. It concerns the right to dispose of tangible of property as owner[109]. These provisions also contain exclusions from the concept of supply of goods, but also the assimilation of certain services to supply of goods (the commissionaire fiction hereunder).

5.2.1. Legal base: the direct an immediate reciprocal contractual obligations

According to the VAT Directive, the transfer of goods pursuant to a contract under which commission is payable on purchase or sale is regarded as a supply of goods[110], although such transaction is not as such a supply of goods. In addition, where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall deemed to have received and supplied those services himself[111].

This is the “commissionaire fiction” that already existed in article 5(2)(b) of the Second VAT Directive[112] , but only for goods. At the end of the negotiations of the Sixth VAT Directive, it

[106] Position paper of ChargeUp Europe, EV Charging & VAT May,3 2022.
[107] This is a consequence of the case C- 136/99, *Monte Dei Paschi Di Siena.*
[108] As for example in the Case *Oxycure* the Court decided that a member state was allowed to discriminate oxygen for disabled persons either when it was supplied in bottles or produced by portable machines (see CJUE, 9 March 2017, *Oxycure,* Case C-573/15).
[109] Art. 14(1) of the VAT Directive.
[110] Article 14(2)(c) of the VAT Directive.
[111] Art. 28 of the Directive 2006/112/EC.
[112] Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax.

has been extended to services. The official reason for such extension does not appear from the Council's preparatory documents. At first glance, it has no sense to assimilate a service to a service. However, in order not to interrupt the chain of deductions, it makes sense to assimilate a purchase commissionaire on services (C-B-A) to a chain of supply from a producer to a consumer (A-B-C).

Indeed, from the text of the Directive, it appears that there are "sales commissionaires" and "purchase commissionaires". From the text, it also appears that the key characteristic consists in acting in its own name but on behalf of another person, in other words, the existence of a contractual obligation, even in absence of transfer of a title on goods.

According to the explanatory memorandum of the Belgian VAT Code of 1969 , there is no supply between the principal and the intermediary and the transfer of the title take place between the Principal and the final acquirer, but for VAT there is a supply between the Principal and the undisclosed agent and another supply between the undisclosed agent and final customer. In addition, in presence of various undisclosed agents, there is a supply between each of the various agents. This assimilation of the undisclosed agent to a seller and to purchaser has two objectives. Firstly to avoid complex research about the nature of the transaction (either supply of goods/ services or an undisclosed agent) and secondly, to facilitate the deduction of the VAT by the purchaser on the purchase of the goods.[113]
This fiction is commonly used by business, for example by forwarding agents who commits to having goods transported in their own name but on behalf of their principal and to executing or commissioning execution of one or several operations related to these transports such as reception, handing over to third-party carriers, storage, insurance and customs clearance (the term 'remuneration' refers to any compensation either in cash or in kind, or in the form of any direct or indirect benefits)[114].

Actually, the taxable event for VAT is not so much the supply (understood as the transfer of the rights to dispose of tangible property as owner), but the reciprocal obligations and, for VAT, the transfer of the title on goods is disregarded in absence of contractual obligations in the broad sense.

5.2.2. The commissionaire fiction in the case Law of the Court of justice

The Court never interpreted the concept of commissionaire before a case *Commission v. Luxembourg*[115] concerning "independent group of persons" (also known as cost-sharing associations). At this occasion, the Court considered that:

86 Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself[116].

87 Since Article 28 of Directive 2006/112 comes under Title IV of that directive, entitled 'Taxable transactions', the two supplies of services concerned fall within the scope of VAT. It

[113] *Doc. Parl. Chambre 88* (SE 1968) – n° 1 p. 22.
[114] This is a regulated activity in some Member States. See for example in Belgium loi du 26 juin 1967 relative au statut des auxiliaires de transport de marchandises (*M.B.* 27/09/1967).
[115] CJEU, 4 May 2017, *Commission / Luxembourg* (C-274/15) ECLI:EU:C:2017:333. The Case *Henfling* concerned the intermediation of a commissionaire in a VAT exempt transaction but the Court has not dealt with the concept of commissionaire as such.
[116] CJEU, 14 July 2011, *Henfling and Others,* C-464/10, EU:C:2011:489, para. 35.

follows that, if the supply of services in which an operator takes part is subject to VAT, the legal relationship between that operator and the operator on behalf of whom it acts is also subject to VAT[117]*.*

88The same reasoning applies as regards the acquisition of goods pursuant to a contract under which commission is payable on purchase, under Article 14(2)(c) of Directive 2006/112, which also comes under Title IV of that directive. That provision thus creates the legal fiction of two identical supplies of goods made consecutively, which fall within the scope of VAT.

In the case *ITH Comercial Timișoara*,[118] the Court refers to the points 86 and 87 of the Case *Commission v. Luxembourg* and it adds that that:

51It follows that two conditions must be satisfied in order for those provisions to apply, namely, first, that there is a mandate pursuant to which the agent intervenes, on behalf of the principal, in the supply of goods and/or services and, second, that there is an identity between the supplies of the goods and/or services acquired by the agent and the supplies of the goods and the supplies of the goods. and/or the provision of services sold or transferred to the principal.

5.2.3. Sales v. Purchase commissionnaire

In a sales commissionaire structure, A is the Principal, B the undisclosed intermediary and C the final customer. C may be a taxable person or not. Legally there is a supply from A to C and B acts as a proxy holder for the account of A.

In a purchase commissionaire structure C is the principal/final customer, B the undisclosed intermediary and A the supplier. Legally, there is a supply from A to C and a proxy from C to B who acts for the account of C. Although this point has never been submitted to the Court of justice, nothing would prevent that A would be a taxable person or not: what is important is the fact that B would be a taxable person.

Although legally both structures are opposite, there are treated on the same way for VAT ie that there is a supply from A to B and subsequently from B to C[119].

5.2.4. Chain of commissionnaires

Commissionaires structures are not limited to A-B-C, but may be chain structures A-B-C-D et.. And in practice, as it is commonly the case for transport or customs clearance services, there may be more than one intermediary and a chain of intermediaries[120].

5.2.5. Undisclosed agent/commissionaire versus outsourcing

In a sales or purchase commissionaire structure, the leading role is played by the principal although he has no contact with the customer. The principal and the commissionaire have concluded a proxy contract and the commissionaire supplies to the Principal his name, his credit and possibly his knowledge of the local market, and when required, his licenses.

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[117] see, by analogy, judgment of 14 July 2011, *Henfling and Others,* C-464/10, EU:C:2011:489, para. 36.
[118] CJEU12 November 2020, *ITH Comercial Timişoara* (C-734/19) ECLI:EU:C:2020:919 , para 49 to 51.
[119] VAT Committee working paper n° 1020, issues arising from the recent judgements of the Court of justice of the European Union, taxud.c.1(2021)7229659, Brussels 19 October 2021.
[120] Explanatory memorandum of the Belgian VAT Code *Doc. Parl. 88*(S.E. 1968) n° 1 p. 22); Cour de cassation de Belgique - 22 octobre 1976, *Pasicrisie* 1977,I, 229.

In an outsourcing structure, the leading role is played by the outsourcer who has the contact with the customer.

The characteristic is not so much the fact that the final consumer does not know the Principal, but the fact that although there no legal relationship between the Principal and the final customer (or conversely, between the final customer and the actual supplier), there is a direct supply of goods and services between the Principal and the final customer.

There is a difference between outsourcing and commissionaire. The intermediary is only responsible for its own faults but not for those of its principal[121]. The intermediary has a recourse against the principal. The final client has no direct recourse against the Principal.

5.2.6. VAT rules v. legal, accounting and income taxes rules

Interestingly, this VAT fiction is ignored for accounting rule and income taxes and the service of the commissionaire is treated as a disclosed agency service between the intermediary and his principal.

In countries like Belgium and France, the VAT regulations contain specific rules including the remuneration of the undisclosed intermediary in the taxable base for VAT of this intermediary[122]. On the contrary, the remuneration of a disclosed intermediary is invoiced separately to the supplier or to the customer and it is not included in the price of the transaction.

5.2.7. Single Purpose Vouchers and agents

The European Commission suggests that a fuel card could possibly qualify as a single purpose voucher in the sense of article 30a of the VAT Directive as introduced by the Voucher Directive. Such supply should then be regarded as the supply of fuel to which the card related[123].

However, a voucher requires a payment before the supply and not possibly after the supply like it is the case for most of the fuel cards, whatever structure they have adopted.

5.3. Fuel v. electricity: supply of goods v services ?

Both fuel at a tank station and electricity at the charge point are not dispatched nor transported. Both are tangible property or assimilated to tangible property according to the VAT Directive. As noticed in a position paper of ChargUp Europe, it should not be overlooked that the situation and function of an EMP is – at least partially – comparable to that of a company issuing fuel cards[124]. However, the VAT rules vary depending on whether the supply concerns fuel or electricity, the place of establishment of the fleet card operator, the place of establishment of the customer, etc.

5.3.1. Similar distribution process

Both the supply of fuel or the recharging of electric vehicles involve two or more parties:

i) a tank station or, for electricity , an infrastructure operator also called charge point operator ('CPO').
ii) a fuel card operator or, for electricity, an e-mobility service provider ('eMP'). However, it may happen that an oil company issues its own fuel card and the charge point operator could be also an eMP.

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[121] Cour d'appel d'Aix en Provence, 2 March 2017, 14/08024 *Worms Services Maritimes.*
[122] Art. 29 of the Belgian VAT Code; art. 266 of the French Code Général des Impôts.
[123] See Value added Committee, Working paper n° 1020 taxud.c.1(2021)7229659 – EN Brussels, 19 October 2021 p. 8.
[124] ChargeUp Europe Position paper on VAT for EV charging May 12, 2021, p. 6.

iii) the customer (driver) who accesses the tank station or the recharging station, possibly or usually by signing up the fleet card or the eMP.

However, as observed *supra,* there are major differences between the supply of fuel and electricity, even from a legal point of view and this has an impact on the place of supply and of the person liable of the payment of the VAT.

5.3.2. Fuel

For the fuel, "the place of supply" in a tank station shall be deemed to the place where it is located at the time "the supply takes place"[125]. However, when the supply is made by an intermediary acting in his own name, the person liable of the payment of the VAT will not always be the supplier. It may be the customer, depending on the Member State[126].

If a tank station is located in Member State A, the person liable of the payment of the VAT will be determined as follows:

- the tank station in Member State A supplies directly fuel to any purchaser whatever his position or his country of establishment: the tank station is liable of payment of the VAT at the rate applicable in Member State A.
- the tank station in Member State A supplies the fuel to a fuel Card Operator established in Member State A who in turn supplies the fuel to any customer (business or nonbusiness), whatever his place of establishment : the tank station will charge VAT of the Member State A to the fuel card operator and the fuel card operator will charge VAT of the Member State A to his clients, whatever is capacity or place of establishment.
- the tank station in Member State A supplies the fuel to a fuel Card Operator established in Member State B who in turn supplies the fuel to a non-taxable person in this member state A: the fuel card operator should register for VAT in this Member State A and charge VAT of this Member State A.
- the tank station in Member State A supplies the fuel to a fuel Card Operator established in Member State B who in turn supplies the fuel to a taxable person in this Member State A: according to the national rules, VAT will be due by the customer in Member State A or by the fuel card operator.
- the tank station in MS A supplies the fuel- to-fuel Card Operator established in MS B who in turn supplies fuel to taxable person established in MS C: according to the national rules , VAT of the Member State A maybe generally be due by the Card operator in the member State A.

Although the VAT is due in the Member State where the tank station is located, the rules determining the person liable of the payment of the tax lead to complex situations. In order to fight against fraud, most of the Member States have adopted national reverse charge procedures that are not harmonized[127]. Even with the use of sophisticated software, it may be difficult to know who is liable of the payment of the VAT because of the diversity of the rules. As for example, when the intermediary not established in Belgium supplies fuel to a person identified for VAT but not established in Belgium, this intermediary will be liable of the payment of VAT. But if the customer is established in Belgium, the person liable for the payment of the VAT will be the customer. Unfortunately, the sole communication of the VAT number of the

[125] Art. 31 of the VAT Directive.
[126] Art.194 of the Directive 2006/112/EC.
[127] Art. 194 of the VAT Directive. According to a survey published by Krysztof Ugolik on LinkedIn on October 18, 2021 such national reverse charge procedures exist in Austria, Belgium, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal and Spain.

customer does not allow the supplier to know who is liable of the payment of the VAT. This requires very precise contractual provisions and software adapted to the legislations of each Member State. In addition, such national reverse charge imposes a huge financial cost on the intermediary (the card company not established in the Member State where the tank station is located): the card company receives from the oil supplier invoices with VAT and this VAT cannot be immediately compensated with output VAT on local supplies. The card company has to claim the refund of the VAT to the tax authorities via the VAT return or the electronic 8th VAT Directive procedure, and this may take a certain number of weeks or months depending on the Member where the supply takes place. The solution for this is to create a branch or a subsidiary in each Member State.

5.3.3. Electricity as moveable property

5.3.3.1. Legal provisions

For the electricity, the situation is more complex than fuel. Electricity is treated as tangible property for VAT[128] . This assimilation was already mentioned in the Sixth VAT Directive[129] and in the Second VAT Directive[130]. According to the proposal of a Second VAT Directive submitted by the Commission on 14 April 1965, the supply of electricity is "in the business life" (sic!) treated as a supply of tangible property and therefore should be assimilated to a supply of goods[131], even if today charging of electricity is considered as service by the Directive 2014/94/EU. The reason of assimilation of electricity to tangible property seems not to be based on essential principles of the VAT, like it is the case for the commissionaire fiction. And where goods are not dispatched or transported, the place of supply is deemed to be when the goods are located at the time the supply takes place[132].

However, in the early 2000, it appeared the nature of electricity and gas makes it particularly difficult to determine the place of supply according to the rules applicable since 1993. The physical flows do not coincide with the contractual relationship between the seller and the buyer. In addition, in case of intra-EU transactions, the supplier has to provide sufficient proof of the transport in order to obtain an exemption. In general, it will be difficult to submit evidence of the dispatch or transport, from the traditional point of view (transport documents, supporting records), since electricity is not transported via traditional transport means (lorry, train, vessel).These problems become even more complex if electricity or gas is sold in triangular transactions[133]. Such difficulties are acute for electricity that is not transportable like other moveable goods, but they also exist for all movements of goods since the 1993 and the abolition of the customs controls at the borders between EU Member States.

Therefore, the Directive 2003/92/EC of 7 October 2003 has modified the Sixth VAT Directive and introduced specific VAT rules concerning the place of supply of electricity and the person liable of the payment of the tax to be implemented by the Member States as from January

[128] Article 15(1 of the VAT Directive; ex Article 5(2) of the Sixth VAT Directive.
[129] art. 5(2) of the Sixth VAT Directive.
[130] Annex A (3) ad article 5 (1) of the Second VAT Directive.
[131] Proposition d'une deuxième directive du Conseil en matière d'harmonisation des législations des Etats membres relatives aux taxes sur le chiffre d'affaires concernant la structure et les modalités de l'application du système commun de taxe sur la valeur ajoutée (Présentée par la Commission au Conseil le 14 avril 1965), Supplément au Bulletin de la Communauté économique européenne n° 5-1965, p. 32.
[132] Art. 5(4)(b) of the Second VAT Directive.
[133] Proposal for a Council Directive amending Directive 77/388/EEC as regards the rules on the place of supply of electricity and gas /* COM/2002/0688 final - CNS 2002/0286 **/**

1,2005. This change met the difficulties faced by the electricity dealers at that time, but it has not anticipated the evolution of e-mobility.

Article 38 of the VAT Directive concerns the supply of electricity by an electricity network to a "dealer" whose principal activity is to resell electricity and article 39 of the VAT Directive concerns the supply of electricity to an end-user.

In the relation CPO and e-MP (art. 38 of the VAT Directive), the place of supply will depend on the place of establishment of the e-MP. If the CPO and the e-MP are established in the same Member State, the person liable of payment of the VAT is the CPO. If the CPO and the e-MP are not established in the same Member State, the e-MP will be liable of the payment of the VAT in his Member State.

In the relation e-MP and end-user (art. 39 of the VAT Directive), the place of supply will be where this end user effectively uses and consumes the electricity and the person liable of the payment of the VAT will be the end user identified for VAT when the e-MP will be established abroad.

But where is this end user using and consuming the electricity for his car ? According to the Proposal submitted by the European Commission *"the supply of natural gas and electricity in the final stage, that is from distributor to final consumer, will be taxed at the place where the customer has the effective use and enjoyment of the natural gas and electricity. This provision ensures that the supply is taxed at the place where the actual consumption takes place. For distributors that are not established in the country where their customers consume the gas and electricity, registration could be necessary. Where the customers are solely taxable persons no registration will be required, if the Member State in which the customer is established designates the person to whom the taxable supply is made as the person liable to pay tax."*[134]
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According to a note to a Presidency paper, for a customer who is consuming gas and electricity, the supply is taxable at the place of consumption. Where the customer is established in more than one Member State (for example a head office in MS1 and a branch in MS2), the supplies are taxable where the consumption takes place, which normally will be in two Member States[135]. According to the fourth preamble of the Directive 2003/92/EC, the place of supply is normally where the meter of the customer is located .

In addition, article 195 of the VAT Directive has to be also taken into account: *"VAT shall be payable by any person who is identified for VAT purposes in the Member State in which the tax is due and to whom goods are supplied in the circumstances specified in Articles 38 or 39, if the supplies are carried out by a taxable person not established within that Member State".*

In other words, if the supplies of electricity are carried out by a taxable person not established in the Member State of the point of sale of electricity (e.g. a fleet card operator), VAT shall be payable by the customer identified for VAT in the Member State where he is established (ie. not necessarily the Member State where the CPO is established).

Can be implied from this is that if the end-user is not identified for VAT in the Member State of the CPO either because he is not a business or he is not established, the e-MP will charge VAT of the Member State of the CPO ? Based on a strict application of article 39 of the VAT Directive, the VAT would be due in the Member States of establishment of the purchaser.

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[134] **Proposal for a Council Directive amending Directive 77/388/EEC as regards the rules on the place of supply of electricity and gas /* COM/2002/0688 final - CNS 2002/0286 */**

[135] Council Interinstiutionnal file 2002/0286(CNS) 10927/03 Brussels, 26 June 2003.

5.3.3.2. Practical consequences of the place of use and enjoyment of electricity

Based on such provisions, where the VAT on a supply by an e-MP will be charged in the situation of a French resident employed by a Luxembourg company and using a company car and a fleet card issued by a card issuer established in Germany ? According to the text of the Directive, when this employee connects is car to a charger at his domicile with home produced electricity[136], the VAT will be due by the Luxembourg company (the employer) who will have a full right of deduction. Absurd and discriminatory?

5.3.3.3. European Commission's views

The place of supply would in accordance with article 39 of the VAT Directive be deemed to be the place where the customer effectively uses and consumes the goods; that is - according to the European Commission - the location of recharging terminals. The person liable for payment of the tax would in accordance with article 193 of the VAT Directive, generally be the supplier. In very specific circumstances, the customer could be the person liable in accordance with article 195. Since eMSPs often provide to their customers the possibility of recharging their electric vehicle in various Member States, an eMSP will need to fulfil reporting and payment obligations in all the Member States in which it is liable to pay the tax. To be noted also that in most circumstances this is a B2C supply of goods that will fall outside the scope of the EU MOSS, even after the extension of its scope as of 1 January 2021. That is so as such supplies could not qualify as distance sales of goods[137].

5.3.3.4. Members States view's

According to an Opinion Statement of ChargeUp Europe, not only is the factual situation unclear (goods v. services, chain transaction v. single direct supply), but also the cited articles of the VAT Directive are assessed differently by the tax authorities of the different Member States and among industry. In some Member States, EV charging is considered as good, whereas in others it is considered a service. The authorities of some Members States are of the opinion that article 38 and 39 of the VAT Directive apply to EV charging. In others, these articles are meant to exclusively apply to the transmission of electricity by means of permanently connected networks only, which according to these authorities, is not the case for the EV charging as the EV is not permanently connected to the power grid, but only occasionally[138].

5.3.3.5. Views of stakeholders

Companies who want to offer ways to charge EV are not only confronted with an unclear legal situation, but also with conflicting approaches and interpretations of the VAT law.

There are at least two groups of business suggesting different views. Apparently, the reason of the divergence is not based on legal interpretations but is rather of strategic nature in reaction to the fact that some Member States would have made clear that they consider the fact that the electricity is a tangible property is not negotiable.

A first group is part of ChargeUp Europe. It considers that charging electricity is a supply of tangible property and that the VAT is always due by the supplier and that this would force each supplier to register in each Member State where a driver recharges his car. It advocates an

[136] This has major income tax consequences that causes concern by Human Resources departments see Vermijd verrrassing bij thuisladen bedrijfwagen, *De Tijd,* 16 juli 2022 p. 38.
[137] VAT Committee Working Paper n° 969,p. 5.
[138] ChargeUp Europe Position paper on VAT for EV charging May 12, 2021.

extension of the OSS to the recharge of cars and a consistent interpretation by the Member States[139]. This approach (that is also followed by the European Commission) seems to ignore the particularities of the text of the articles 39 *juncto* article 195 of the VAT Directive. It does not take into account the fact that a modification to a directive takes time and business is confronted to an urgency.

A second group considers that recharging of electricity is a service that should follow the rules of place of supply and of tax liability for services. This thesis has been submitted to the Court of justice in the case *P.wW.* and it is supported by the Italian Authorities before the VAT Committee. This approach insists on the fact that recharging of electricity is much more than purchase of electricity. The qualification of service suggested by some business of the e-mobility sector and the Italian tax authorities seems to be closer of the reality. The supply of electricity and of fuel are fundamentally different because recharge of electricity requires much more time than the purchase of fuel. The critical criterion for the consumer is not so much the price (that will be free or negligible depending of the place and the time slot), but the place of a charge point and the time slot available. Of course, the supply of electricity is assimilated to a good by the VAT Directive, but it is not a good but a service. And the fact that electricity is consumed where the purchaser identified for VAT or is established makes sense, even on the base of article 39 of the VAT Directive.

5.3.3.6. VAT Committee guideline of 19th April 2021

The unanimous guideline of the VAT Committee on the place of supply of ev recharge seems to have been guided by a feeling of urgency in order to protect Member States revenues. From the enclosure II to the question of French delegation describing the transactions between an eMP and its customer who is a non-taxable person, it appears that the qualification of the supply of electricity as a "supply of goods" would be the only interpretation that could reach the same result as the supply of fuel, under the assumption that place of supply would be where the point of charge would be located. A qualification as general service (in the broad sense) would have as consequence that the VAT would be due in the Member State where the eMP would be established or, or if the supplier or eMP is established outside of the EU, the supply to a non-taxable person would not be taxable in the EU[140].

In such a context, the guideline of the VAT Committee of 19th April 2021 seems to be inspired by the fact the European Commission and some national tax authorities wanted to avoid loss of revenues, despite the fact the supply of electricity in the e-mobility sector is fundamentally different from supply of fuel. But how is it possible to argue that the text of the Guideline would be in line with the one the Directive when the Guideline considers that the place of supply is at the location of the charging terminal while according to the text of the VAT Directive (and of the national legislations that have implemented it), the supply of electricity to a driver shall be deemed to be made at the place where the driver effectively uses and consumes it ? Does it mean that according to the guideline, cars do not move whatever the place of establishment of the driver ?

But the guideline of the VAT Committee, and of course the opinion of the VAT Commission or some Member states are not the VAT Directive and they not binding.

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[139] ChargeUp Europe Position paper on VAT for EV charging 12 May 2021 and EV Charging &VA Position Paper of the ChargeUp Europe E-mobility VAT Group May 2022 https://www.chargeupeurope.eu/positions

[140] Working paper n° 969 , taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019 p. 9.

5.3.4. E-mobility access: an electronic service!

5.3.4.1. Directives other than VAT

Electricity is not mentioned as tangible property in the international classification of goods for customs purposes[141], and the supply of electricity is considered as a supply of services in the directives[142] that intend to make the EU electricity market fit for the challenges of the clean energy transition – better connected, better protected against black-outs, better able to integrate renewable energy, more market-based and more consumer-oriented.

5.3.4.2. Views of French delegation before the VAT Committee

Before the VAT Committee, the French delegation was aware that these others EU Directives qualify the supply of electricity as service, but it considered that VAT must retain its "own logic" "guided by the criteria laid down by the CJEU " and cannot depend on other legal qualifications adopted in other areas of law on the basis of different considerations[143]. However, it is not clear on which considerations particular to VAT and case law it is referred: it is doubtful that the reasoning adopted by the Court of justice in the case SAFE[144] would be applicable to the supply of electricity. What is relevant is that a particular transaction would be considered in all EU Member States either as a supply of goods or a supply of service The decisive point is probably contained in the enclosure II to the question of the French delegation and describing the transactions between an eMP and its customer who is a non-taxable person. The qualification as supply of goods would be the only interpretation that could reach the same result as the supply of fuel, under the assumption that place of supply would be where the point of charge would be located. A qualification as general service (in the broad sense) would have as consequence that the VAT would be due in the Member State where the eMP would be established or, if the supplier is established outside of the EU, the supply to non-taxable persons would not be taxable in the EU. This view is correct as far as it is assumed the that the supply of electricity is a supply of tangible property and that the only alternative would be qualification as "service" and not as "electronic services".

5.3.4.3. Views of the European Commission

According to the European Commission, when the electric vehicle user is a non-taxable person, it needs to be assessed whether the services supplied by the eMP constitute those of an intermediary or rather electronic services. This matter has already been discussed by the VAT Committee previously in the working paper n° 906 and was followed by guidelines from the 107th meeting of 8 July 2016. According to the guidelines in question (that concern intermediation in the name and on behalf of another person), intermediary services provided in a digital environment shall require an active involvement of the intermediary which goes beyond the automated supply provided with the use of only minimal human intervention. The service provided by the eMP consists in providing information in an electronic form to the electric vehicle user on whether the terminals are occupied, their location, the type of socket

[141] Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.
[142] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and its recast Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.
[143] working paper n° 969 , taxud.c.1(2019)3532296 – EN Brussels, 13 May 2019 p. 9.
[144] CJEU 8 February 1990, *Staatssecretaris van Financiën / Shipping and Forwarding Enterprise* Safe (320/88, ECR 1990 p. I-285) (SVX/00295 FIX/00311) ECLI:EU:C:1990:6.

and in allowing that user to make a reservation on-line. Based on this, the Commission services would consider that providing this service requires no more than minimal human intervention and therefore is to be considered as an electronic service. According to Article 58 of the VAT Directive, such services are located at the place where the electric vehicle user is established, has his permanent address or usually resides[145].

This is exactly what is defined as 'Electronically supplied services' by the Implementing Regulation of the VAT Directive[146] and interpreting article 58 of the VAT Directive as applicable as from January 1,2015. Accordingly, the place of supply of "electronically supplied services, in particular those referred to Annex II" of the VAT Directive shall be the place where that person is established, has his permanent address or usually resides. And according to article 369b of the VAT Directive Member States shall permit the following taxable persons to use this special scheme (ie the One Stop Shop): a taxable person not established in the Member State of consumption supplying services to a non-taxable person.

And for B2B, the general rules applicable to services would be applicable. This interpretation would offer simplicity and create minimal distortions of competition.

5.3.4.4. Views of the Italian authorities and of some businesses

As noticed by a trade association, electric vehicles differ significantly from Internal combustion vehicles as to where and how they can be recharged at home and at destination like workplaces or commercial sites[147]. And indeed, there is a substantial difference if one recharge his car home, with electricity home produced and the recharge of the same vehicle abroad.

But what offer an e-mobility card or an e-mobility provider ? According to the report submitted by the Italian authorities to the VAT Committee, the contract between an e-MP and the end customer concerns the following:

- search for filing stations, bookalibilty, recharging and support services;
- apps and web portals to subscribe to a recharging service offer
- app and RFID card to manage all recharging services on public and private infrastructures, including: map display with location of recharging infrastructures, socket reservation services and payment management;
- apps and web portals for monitoring and final assessment of recharging services to B2B customers Call centers on 24/7 basis for commercial management of end customers and directing them to the reference CPO in the event of purely technical problems.

In short, the end customer receives from the eMP a service consisting of multiple elements, only if one of which is related to the recharging of the electric traction vehicle. The price charged by the e-MP to the end consumer may be (i) a flat price with periodic payments and subscription price (EUR/month), (ii) a price based on connection time, (iii) parameterized price by kWh, (iv) price per session for the e-MP, all of which can be diversified based on charging infrastructure technology. This type of service is also used in case of recharging of vehicles at home, in garage or at workplace[148]. Apparently, the price of electricity can be 60 % lower if the recharge happens with home production of electricity with solar panels or recharge during certain hours. In addition, shopping centers allows a free recharge.

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[145] VAT Committee Working Paper n° 969 pp. 4 and 5.
[146] Article 7 of Implementing Regulation n° 282/2011.
[147] AVERE's Position on the Revision of the Alternative Fuels Infrastructure Directive (AFID) June 2021.
[148] Working Paper n° 1012, taxud.c.1(2021)2099876-EN-Brussels 17 March 2021.

In the case C-282/22 *P.wW.* pending before the Court of justice, the claimant observes that:

- charging stations for electric vehicles are very different from traditional service stations that offer fuel with very different price parameters.
- from the point of view of the electric vehicle user, it is not the type of fuel that is important (because it is the same everywhere), but the standard of the equipment offered to charge the vehicle. The distinctive element of the offer is the different loading equipment;
- unlike a distributor in a service station, the comfort and degree of satisfaction of the user of the service is decisively influenced by the duration of the energy withdrawal, and this depends on the characteristics of the charging equipment.[149]

5.4. Non-discrimination versus neutrality

In *Vega International,* the Court observes that the objective of the common system introduced by the VAT Directive aims, in particular, to secure equal treatment for taxable persons[150]. Consequently, according to the Court, an interpretation whereby the granting by a bank of financing for a purchase would be exempt from VAT, while the financing provided by an economic operator not having the particular status of a financial or banking sector entity for the same purchase would be subject to VAT, would infringe one of the fundamental principles of the common system of VAT, namely the equal treatment of taxable persons.

And indeed, the absence of discrimination between suppliers on the base of their country of establishment is an essential characteristic of an internal market. However, this does not prevent the Legislature to maintain or to adopt rules that are discriminatory (ie difference of treatment between two taxable persons at comparable level of production and of distribution) or that are not neutral (difference of level of taxes supported by the consumer for identical goods or services and consecutive to the limitation of the right of deduction during the process of production and of distribution). Equality and neutrality are also of a different nature: the General Principle of Equality grants to each citizen of the EU rights to be protected by the Courts, while neutrality is only a principle of interpretation [151] . However, the Court of Justice is bound by clear political decisions of the Council. According to the Advocate General Jacobs *"It is inherent in the existence of exceptions to the VAT system that they will interfere to some extent with the application of the principles of neutrality and of equality of treatment. Whatever the merits of the decision to treat public bodies as final consumers, it forms an integral part of the Directive. In that and in comparable situations, the treatment of taxable persons and persons excluded from the VAT system will inevitably be different."*[152]
In *Ideal tourisme*, a Belgian bus transporter considered that he was discriminated by comparison to airlines. International transport of passengers by air was (and is still) zero-rated (with right of deduction) while transport by bus is either taxed, exempted (without right of deduction), or out of the VAT scope, depending on the country where the transport takes place. A single transport between two cities in the EU will be subject to various VAT rules, and it

[149] Case. C-282/22, *P.wW.*; request of a preliminary ruling submitted on 26 April 2022 by the Supreme Administrative Court of Poland.
[150] Case C-235/18, *Vega International* para 45 referring to judgment of 27 October 1993, *Muys' en De Winter's Bouw- en Aannemingsbedrijf*, C-281/91, EU:C:1993:855, para. 14.
[151] On this topic see C Amand, Neutrality vs. Equality in "*Virtues and Fallacies of VAT",* R.F. Van Brederode Ed, Kluwer International p. 43.
[152] In his Opinion, 18 November 2004 preceding the Case C-378/02, *Waterschap Zeeuws Vlaanderen,* ECLI:EU:C:2004:726, para. 38.

requires substantial administrative costs. This was, and it is still in 2022, the consequence of a temporary measure granted by the Sixth VAT Directive[153], and prolonged in the early 1990 by massive and discrete lobbying using reasoning that would today be obsolete. The Court considered that in the present state of harmonization of the laws of the Member States relating to the common system of VAT, the Principle of Equal Treatment does not preclude legislation of a Member State which in accordance with the Sixth VAT Directive continues to exempt international passengers by air, and on the other hand taxes international passenger transport by coach.[154]

In addition, according to the Court, there are objective justifications for not respecting equal treatment, such as:

- between trains and trucks, because these two modes of transport are not generally interchangeable and the situation of undertakings operating in each of those different transport sectors is accordingly not comparable.[155] Therefore a VAT exemption could be granted to trucks but not to trains.
- between travel agencies that mediate on their own behalf and those mediating on behalf of third parties was not the same.[156]
- between oxygen concentrators that are for the exclusive personal use of the disabled and those "which could also be used" in hospitals.[157]
- between reimbursable and non-reimbursable medicinal products. The reduced rate of VAT on reimbursable medicinal products does not have the effect of favoring the sale of such product over the sale of medicinal products that are not reimbursable because the consumer preference remains within the category of those products that are reimbursable and, consequently, the decision to purchase is not triggered by the lower rate of VAT.[158]
- between management services of 'special investment funds' under specific State supervision and others not subject to that regime.[159]
- between transactions by a public or a private postal operator as the former supplies postal services where under a legal regime which is substantially different from that under which the latter category provides such services;[160]
- etc.

In democratic institutions, the literature and the citizens may disagree with such discriminations that, in absence of new decision of the Legislature, should be respected as long as Courts consider that the democratic procedures and the General Principles of Law have been respected. But any discrimination and lack of neutrality create opportunities for some business and not for others. And the Member States respect, and must respect these discriminations, even when they lead to unexpected consequences (that are generally not publicly known) and massive budgetary costs, as long as business comply with national laws

[153] Art. 371 of the Directive 2006/112/EC.
[154] CJEU, 13 July 2000, Case C-36/99, *Ideal Tourisme,* ECLI:EU:C:2000:405, para. 40.
[155] CJEU, 19 July 2012, Case C-250/11, *Lietuvos geležinkeliai AB,* ECLI:EU:C:2012:496*,* para. 46.
[156] CJEU, 13 March 2014, Case C-599/12, *Jetair and BTWE Travel4you*, ECLI:EU:C:2014:144.
[157] CJEU, 9 March 2017, Case C-573/15, *Oxycure,* ECLI:EU:C:2017:189.
[158] CJEU, 3 May 2001, Case C-481/98, *Commission of the European Communities v. French Republic*, ECLI:EU:C:2001:237 para. 27.
[159] CJEU, 9 December 2015, Case C-595/13, *Fiscale Eenheid X*, ECLI:EU:C:2015:801.
[160] CJEU, 23 April 2009, Case C-357/07, *TNT Post Ltd,* ECLI:EU:C:2009:248, paras 39 and 45.

or administrative practices[161]. Therefore, it is not surprising that more and more Europeans Citizens consider all these situations that they observe directly during their daily life are the evidence that the institutions are at the service of particular interests. This has, and already had, a political price.

In addition, from a purposive perspective of a VAT system (and of the Treaties) with limited exemptions, the Court has decided that outsourcing of back-office services in the insurance sector was taxable but not in the banking sector;[162] that the transport of organs was taxable but not the supply of organs;[163] that TV services provided in a hospital room were taxable but not the provision of the room;[164] that the management of a pension fund is taxable but not the management of a fund;[165] that child care provided by an individual is taxable, but VAT exempt when performed by a legal entity,[166] etc. Based on such case law, it is not surprizing that during the Covid-19 crisis, at a time the medical sector was subject to a major pressure, the Belgian Tax authorities considered that the transport of medical samples by specialized independent business working under the control of medical laboratory were taxable while the same operation by employees of these laboratory were VAT exempt[167] or that the Belgian Constitutional Court considered that the supply of nurses staff to hospitals by a temporary employment agency should be subject to VAT while the same service, supplied by the same persons as independent nurse for social security purposes or under employment contract was not taxable[168].

In *Deutsche Bank*, the Court remembered that a VAT exemption cannot be extended in absence of clear wording of the VAT Directives to that effect[169]. If not, there is no reason for an exemption. In the case of fleet cards, where is the explicit decision of the EU Council?

As observed above, some fleet cards have not the same legal characteristics than the credit or debit cards and they are not subject to same regulations. In *Auto Lease Holland,* the Court has interpretated the factual situation (as suggested by the European Commission) but it has not justified its reasoning like a national Court would have done in a similar situation. Therefore, it is not surprising that, afterwards the national judge will hesitate to adopt an interpretation of the facts contrary to the one of the Court of justice[170] and that national tax authorities ignore judgements of the Court of justice because such judgements concern factual situations that do not exist.

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[161] CJEU, 22 December 2010, 22 December 2010, *RBS Deutschland Holding* (C-277/09, ECR 2010 p. I-13805) ECLI:EU:C:2010:810.
[162] CJEU, 3 March 2005, Case C-472/03, *Arthur Andersen,* ECLI:EU:C:2005:135.
[163] CJEU, 3 June 2010, Case C-237/09, *De Fruytier,* ECLI:EU:C:2010:316.However, it is questionable if this solution is in line with a previous case describing very accurately the legal context of such business see CJEU; 11 January 2001, Case C-76/99, *Commission / France* ECLI:EU:C:2001:12.
[164] CJEU, 1 December 2005, Case C-394/04, *Ygeia,* ECLI:EU:C:2005:734. It could be interesting to compare this case with the principles referred in CJEU, 12 June 1979, Case 126/78, *Nederlandse Spoorwegen,* ECLI:EU:C:1979:150.
[165] CJEU, 7 March 2013, Case C-424/11, *Wheels Common investment Fund Trustees*, ECLI:EU:C:2013:144.
[166] CJEU, 11 August 1995, Case C-453/93, *Bulthuis-Griffioen,* ECLI:EU:C:1995:265.
[167] Question n° 221 du 30 mars 2021 du député Josy Arens
[168] Cour constitutionnelle de Belgique 2 décembre 2021, n° 175/2021, *Maandag België Flex.*
[169] CJEU, 19 July 2012, Case C-44/11, *Deutsche Bank,* ECLI:EU:C:2012:484 para. 45.
[170] However, this happens see for example Court of appeal of Brussels 15 June 2011 that is contrary to the decision of the Court of justice of 18 November 2004, aff. C-284/03 *Temco Europe.*

Assuming that the views of the Court is correct and that fleet cards are credit or payment services, it is not certain that this would comply with the General Principle of EU Law of non-discrimination, as well with the principle of neutrality. Indeed, it would be sufficient that the card operator supplying this financial service would be established in one of the member States having let the option to tax such services[171] and by this way, the operator would have the possibility to deduct input VAT[172], regardless to the fact this service is or not taxed where it is deemed to take place according to the localization rules. And the customers established in EU Member States where such transactions are VAT exempt (even if such exemption is the consequence of not having let the option to tax) are not liable of VAT via the reverse charge procedure. Of course, this is very positive when the acquirer of such services has a limited right of deduction of input VAT. And even when judgments of the Court of Justice reveal situations of non-taxation that are undoubtfully contrary to the EU law, when has the European Commission started infringement procedures? Tax advisers and lawyers who are assisting business to implement such structures will certainly not complain and remain silent, because they are bound by professional secrecy that is imposed by law[173].

6. The way forward: adaptation of the rules to new environment

The progressive creation of an internal market had as consequence that goods, services and people circulated much easier. For business, one of various obstacles has been and is still the costs in order to obtain the refund of VAT on fuel according to 8th VAT Directive procedure. The reason was that not all means of payments allowed to receive easily valid invoices that are a condition for the deduction of input VAT when applicable. Some businesses have proposed solutions such as fuel cards based on the commissionaire fiction, even if this requested from the supplier huge investments costs such as cost of VAT registration in all EU Member States and complex contractual relations and sophisticated software in order to cope with the diversity of the national legislations and of particular situations. And despite some case law of the Court of justice, the modernization of the VAT Directive concerning invoicing and the development of new methods of payment, this model still functions and it has been recently confirmed by the VAT Committee for the charging of electric vehicles. However, as pointed out by some business and by the Italian tax authorities, the supply of fuel, from one hand, and electric vehicle recharging, from another hand, are fundamentally different. At the end, the Court of justice will decide if ev charging is a supply of goods or of services, because the Court is the only institution legally obliged to decide.

But whatever the Court will decide, this type of problem may appear again and slow down business to introduce new technologies in the European Union. As observed in the present study, the multiplicity of interpretations reflects the pragmatic approach of business attempting to reduce the administrative costs and to overcome trade barriers created by the existing legal environment such as :

- the difficulty to distinguish goods from services outside international standard classifications.
- the assimilation to supplies of goods of transactions which are not supplies.
- the use of inappropriate criteria to determine the country competent to tax some transactions such as the criteria of “use and enjoyment of electricity” for cars.

[171] Art. 137 of the Directive 2006/112/EC.
[172] Art. 168 of the Directive 2006/112/EC.
[173] Council Directive (EU) 2018/822 (DAC6) of May 25, 2018 is not applicable to Value Added Tax.

- the VAT exemption of some transactions that are qualified as VAT exempt as far as they are consumed in some Member States but produced in other Member State where they benefit from a full right of deduction.
- the multiplicity of criteria to determine the person liable of the payment of the tax.
- the fact that for some transactions, business operating in an internal market are obliged to bear the cost of VAT registration in one EU Member State or even sometimes in 27 Member States.
- the time necessary in order to obtain a right of deduction of input tax because of the application of national reverse charge procedures.
- the fact that some Member States grant a favorable treatment in order to attract business.
- etc.

In a VAT system, the only use of such distinctions prior to the retail stage or prior to the supply to business that does not have a right to deduct input VAT is to reduce the incentive of retailers not to levy a single sales tax exactly proportional to their price. That is all! These rules prior to the retail stage attained their objective in the years 1960 and 1970 when the intracommunity trade was monitored by customs rules and that the European economies were not as integrated as they are 60 years later. Any legal dispute before the retail stage or the stage of supply to business without right of deduction of input VAT should treated as it is : the waste of public and business resources! The understanding of the reasoning and the legal concessions prior to the adoption of the rules that are currently applicable would possibly make easier discussions about possible solutions and their confrontation to economic interest of business.

From a pragmatic perspective, some of these exceptions to the general VAT rules may appear today, based on the experience, as totally disproportionate by comparison to their objective at the time they have been adopted[174]. But they are the result of compromises that allowed the adoption of important measures in favor of business and of the internal market. From a more legalistic perspective, it should be remembered that the current rules are generally the results of compromises and not strict application of the VAT system that would require to get rid of most of the exceptions that today require so many resources from business and from the tax authorities, without any benefit. Remember the logical approach of those who contributed to the adoption of the existing rules could contribute to bring together the views of groups as different as pragmatists and legalists. The main problem is that these historical documents are never quoted by the literature, because for years such documents have not been available. But today, such documents are available.

In the course of functioning of democratic institutions, it is not acceptable that major decisions having a direct impact on the daily life of hundreds of millions of Europeans are not taken for the only reason such as “the decisions of Member States”, “the unanimity rule” or “a decision at highest level”[175]. The problem is not so much the unanimity rule than the absence of explanations that does not allow the concerned persons or independent observers to suggest

[174] such as for example special VAT scheme for public authorities motivated by the fact that during the negotiation of the Sixth VAT Directive, the French delegation feared that tax inspectors would never dare to control such organisms for fear of compromising their career (Historical archives of the Sixth VAT Directive, folder 12, Working document T/373/74 (fin)).

[175] For example, the VAT status of public bodies has been subject to an independent study for the European Commission suggesting that an extension of the VAT to this sector would allow for a reduction of the VAT rate with 5 percent points in all Member States. The reaction of subnational governments through Brussels’ lobby groups has been virulent and not objectively justified. The consequence has been that the efforts of the European Commission have been stopped, “by highest level decision”, without any discussion.

alternatives and to evaluate the actual cost. In the issue concerning electric recharge vehicles, the French delegation expressed a veto, but at the same time it expressed its views allowing to find alternatives. This is a very positive signal.

The VAT exemptions on financial services and the intra-EU trade have an immediate influence on the fuel cards and the e-mobility and deserve urgent attention .

6.1. Financial services

Fleet card and ev-recharge have adopted business models subject to VAT rules that require different ways of invoicing and that do not grant the same right of deduction. There is a discrimination that is the direct consequence of the VAT exemption on financial services. But why are such services exempt?

In the proposal of a Second VAT Directive submitted in 1965, B2B banking operations[176] were included in the list of the taxable transactions[177]: indeed, at that time, only a list of specific services were subject to VAT[178]. According to Maurice Lauré, this proposal has been rejected by the Banque de France because it would have forced banks to make a distinction between business and non-business customers. The VAT exemption on credit operations has been a requirement of the Banque de France in order to avoid that private individuals support VAT twice: a first time on the acquisition of goods and a second time on the credit[179] [180]. Other objections concerned the difficulty to determine the VAT taxable base, and in particular the obligation to disclose the margin of financial services[181]. The obligation to disclose the margin to its customers is another fundamental obstacle to the taxation of financial services and, from a commercial point of view, the most challenging. Actually, the disclosure of the margin is not a problem for payments, because there is no economic objection to disclose the price and to charge VAT on this service. This is the system that is optional in Belgium since 1971 and it has been adopted by all the financial institutions established in Belgium, including branches of foreign financial institutions. However, despite the failed past proposals to describe more accurately some concepts of the VAT Directive concerning financial services[182], there is no theoretical objections for taxing the gross margin of B2C transactions such as credit by regulated financial institutions. The levy of the tax at each stage of production combined with a right of deduction is only a tool in order to reduce the danger of fraud at the retail stage and it has no other function. The levy of the tax may happen only once, at the stage immediately preceding the final consumer of financial services ie non business. This is why in 1957 Charles

[176] At that time, these transactions were defined on the base of the capacity of the supplier (regulated institutions) and not on the base of a literal interpretation of the text of the Directive like it is the case-law of the Court of justice since the case C-281/91, *Muys' en De Winter's Bouw- en Aannemingsbedrijf BV.*

[177] Art. 4(2) and Annex B of a Proposal of 14 April 1965 for a Second Council Directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added, *Supplement to Bulletin of the European Economic Community* No. 5 – 1965, p. 35.

[178] It was also envisaged to charge VAT on insurance services, but this was not included in the Proposal

[179] Maurice Lauré, André Babeau et Christian Louit, *Les impôts gaspilleurs*, PUF 2001 p. 140.

[180] Lauré also mentions that application of VAT on financial services could lead in France to a reduction of the cost of the credit up to 0,4% (Lauré, *Science Fiscale,* PUF, 1993 p. 271).

[181] C. Amand, EU VAT and Financial Services: Which Rules, What Consequences and Which Possible Solutions?, 30 Intl. VAT Monitor 5 (2019), Journal Articles & Opinion Pieces IBFD (accessed 15 June 2022).

[182] Proposal for a Council Directive amending Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as regards the treatment of insurance and financial services.

Campet qualified VAT as a Single General Tax with fractionated payments[183]. However, due to the nature of the banking and insurance sector, the risk of fraud at the stage of the retail with private individuals is limited and certainly negligible by comparison to the benefits of a proper functioning of the internal market in the financial sector. This does not create any distortion of competition. Except at the retail stage (or at the stage of supply to a VAT exempt business without right of deduction), charging VAT or exempting with a full right of deduction by the supplier has the same financial result, for business and for the tax authorities.

In the Second Directive adopted in 1967, Member States have been allowed to introduce exemptions and specific taxes or let transactions out of the VAT scope as far this had no impact on the internal market. This was a suggestion of the European Parliament whose priority was the introduction of a full VAT system as soon as possible and the functioning of the internal market[184].

Most of the exceptions to the general rules of the VAT system were not disproportionate in 1967 and in 1978. Today, the Court of justice is not in position to decide whether or not essential exceptions are disproportionate today, because the evolution of the legal and economic context for 60 years. In theory the Court is legally competent to decide that provisions of the VAT Directive would violate the general principles of EU Law such as the Principle of Proportionality[185], but it does not have the technical knowledge for such fundamental decisions, in particular when VAT exemptions have also as consequence to accrue the revenues of the Country where the suppliers of such services are established and not the countries where such services are consumed[186].

6.2. Intra-EU trade

E-mobility operators seems to suffer from the cost to be identified for VAT in each Member State where a transaction is performed. This appears from the fact that from the VAT Committee documents they have met the European Commission in order to defend the view that their supplies would follow the general rules of place of supply of services. Such rules would allow them not to register for VAT in each Member State. Actually, this objection is not new and it is not limited to the supply of electricity or the recharge of electric vehicle. This explains why only few operators have been capable to develop products that are at the same time a mean of payment combined with procedures capable to issue valid invoices. The problem raised by e-mobility operators is the consequence of the fact that different VAT rules are applicable to the supply of goods and services. This distinction was essential until 1992 because the intra-EU movement of goods were subject to customs rules. Since 1993, the rules are inspired from customs rules, but the physical controls have been abolished and they concern only papers about goods that have most of the time been consumed or integrated in

[183] Agence Européenne de productivité de l'Organisation Européenne de Coopération Economique, Le Régime Fiscal du Chiffre d'Affaires et son incidence sur la productivité (The Regime of Turnover Tax and its Effect on Productivity), Project No. 315, (November 1957) p. 36.

[184] *Report of the Committee for the internal market on the Proposal of the Commission to the Council (Doc 121, 1962-1963) concerning a Directive on the harmonization of the legislations of the Member States on turnover taxes ("Deringer Report")* (European Parliament, Documents Session 1963-1964, Document 56, 20 August 1963).

[185] See Conclusion AG Jääskinen, 27 November 2012, in Case C-480/10, *Commission v. Sweden*, ECLI:EU:C:2012:751, referring to CJEU, 23 April 2009, Case C-460/07, *Puffer,* ECLI:EU:C:2009:254; CJEU, 2 July 2020, Case C-231/19, *Blackrock Investment Management (UK),* ECLI:EU:C:2020:513, para. 51.

[186] Arthur Kerrigan, *Effects of VAT in Financial Services* in *Taxing Banks Fairly* 127, 135 (Sajid M. Chaudhry and Andrew W. Mullineux, eds. Edward Elgar, 2014).

the production of other goods. Although a physical control is impossible in practice, the rules are based on physical controls.

And indeed, such rules as applicable since 1993 are extremely costly to implement by every business. In addition, they to cause massive frauds. The objection to an improvement to such rules (for example by the taxation of intra-EU supplies like it is the case for the distance sales and the e-services) is the lack of trust between the Member States. And the lack of trust is a serious objection[187] specially when it is combined to the obligation to grant a right of deduction of input VAT by a purchaser established in another EU Member State. This lack of trust is not caused by the use of directives instead of regulations but by the fact that taxes are not collected by EU Federal Agencies.

Possible legal solutions to this lack of trust are possible, even without collection of the taxes by EU Federal Agencies. They combine new technologies, current VAT procedures (slight modification to the existing recapitulative statement), taxation of intra-EU movements of goods following the rules of place of supply of services at the rate applicable in the Member State of the purchaser and direct payment of the VAT by the supplier to the tax authorities of the Member State where the customer is established[188]. Such solutions have been discussed publicly by the European Commission around 2005, but this was before the important changes of the rules of place of supply of services that have been implemented since 2010. In 2014, the Member States discussed a report that was not envisaging on a systematic way all the possible solutions and the content of the objections of the Member States has not been disclosed[189]. Therefore, one can hardly consider that debates essential for the future of Europe have been properly organized by the European Commission.

7. Conclusion

Starting from the case before the Court of justice *Auto Lease Holland* concerning fuel cards and where the business did not even appear, the European Commission suggested an interpretation of facts inspired by a guidance of the VAT Committee, but that did not corresponded to the facts submitted to the Court. When 15 years later, a new question on fuel cards has been submitted to the Court in *Vega International,* it was almost normal to adopt the same reasoning, even if the factual context was different. At the same time, the VAT Committee unanimously agreed on a different reasoning for electric vehicles recharging, by business having adopted organization comparable to some fleet cards business. In order to solve the problems of their clients struggling to obtain the benefits of the internal market, business has adopted various types or organization allowed by the VAT rules crippled by exceptions necessary to gain a political support 50, 30 of 15 years ago, but that have not been reassessed in the light of the evolution of the technology and of the internal market. All these

[187] See for the collection of customs duties CJEU, 8 March 2022, *Commission v. UK*, case C-213/19.
[188] C. Amand & E. Ceci, An EU Single VAT Registration on B2B Supplies, 32 Intl. VAT Monitor 2 (2021), Journal Articles & Opinion Pieces IBFD (accessed 15 June 2022); C. Amand, The 2016 European Commission VAT Action Plan: Weaknesses of a Clearing System and Possible Alternatives, 27 Intl. VAT Monitor 4 (2016), Journal Articles & Opinion Pieces IBFD (accessed 15 June 2022).
[189] Directorate-General for Taxation and Customs Union (TAXUD)/Ernst & Young, *Implementing the "destination principle" to intra-EU B2B supplies of goods – Feasibility and economic evaluation study* p. 42 (European Commission 2015) and C. Amand, Intra-EU Trade and VAT: Will the Distinction between Goods and Services Still Be Relevant after 2020?, 31 Intl. VAT Monitor 4 (2020), Journal Articles & Opinion Pieces IBFD

questions and legal controversies concern issues prior to the retail and intend to reduce the risk of fraud at the level of the retailer.

Taken in isolation, each of these controversies is complex and financially insignificant from a global perspective. The complexity and diversity of business active in a single market composed of old nations does not allow the institutions such as the Court of justice, the European Commission and the national tax authorities to be properly informed about the way each individual business has adapted his procedures to the rules and to solve multiple difficult factual and sectorial issues that create distortions of competition. However, taken as a whole, their economic impact is certainly considerable and would require a political action.

The present study would not have been possible without the access to documents that were not public until a few years ago such as the working papers to the VAT Committee, the observations of the Commission to the Court of justice, the request of preliminary rulings before the Court of justice and the Council's archives. These documents reveal that fundamental decisions about fleet cards and electric vehicles recharge are at risk to be taken on the base of information that are sometimes subject to controversies or that are erroneous. But such broader discussions may clarify the context of objections supporting the reasoning about veto's opposed by Member States and possibly favorize the emergence of new alternatives.

It is suggested that the European Commission would support open debates reassessing the objections and the solutions to the taxation of financial services and to the intra-EU movements of goods and services. The method during such debates should be the one that has allowed the adoption of the VAT in the years 1950 and 1960 i.e. examining the pros and cons of all possible alternatives, in the light of the new technologies and the proper functioning of the internal market .

The phenomenon of the digital economy is undergoing a real revolution today. An enormous effort is being made by national administrations, as well as supranational bodies to ensure that this type of economy is taxed in the most reasonable and fair way possible.

In the field of VAT there are many challenges posed by this new type of economy affecting the role of the parties involved in this new way of doing business, the fight against fraud or the obligations to declare and pay the VAT.

All these and other issues are addressed in this project developed by the Madrid VAT Forum Foundation with the participation of some renowned voices in the field of VAT in Europe.

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