Title: The role of third-parties in the VAT collection and remittance, and in the compliance with the VAT law

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List of Abbreviations

AMEXIPAC  Associación Mexicana de Proveedores Autorizados de Certificación, or the Mexican Association of Authorized Providers of Digital Tax Receipts in English
B2B  Business-to-business
B2C  Business-to-customers
CAS  Certified Automated System
CJEU  Court of Justice of the European Union
CSP  Certified Software Providers
e.g.  for example
EDP  Electronic Distribution Platforms
EU  European Union
EUR  Euro (currency)
GST  Goods and Services Tax
i.e.  in other words
Ibid.  likewise
ISP  Invoicing Service Provider
OECD  Organisation for Economic Co-operation and Development
PAC  Proveedor Autorizado de Comprobantes Fiscales Digitales, or Authorized Providers of Digital Tax Receipts in English
SSUTA  Streamlined Sales and Use Tax Agreement
TPSP  Third-party service provider
UK  the United Kingdom
USA  the United States of America
VAT  Value Added Tax
1. INTRODUCTION

The exchange of information from third parties of a transaction has revolutionized the income tax compliance. The reporting to the tax administrations of transactions and customers’ data by financial institutions and the requirement for tax advisors to report tax planning are among the obligations attributed to third-parties in the field of direct taxation. This trend is now moving towards the VAT field.

Current business models are complex. These business models may depart from a seller supplying goods directly to a buyer, to models where several electronic platforms are used to connect suppliers and buyers, not mentioning the payment processes around these models. In some scenarios, tax administrations have no access to data to perform an appropriate tax assessment of the taxable person’s tax obligations; and as an alternative, tax administrations may rely on information forwarded by third parties performing the taxable person’s tax functions or intermediating transactions.

In this context, the OECD published the International VAT/GST Guidelines\(^1\) in 2017, starting the discussion on the role of third parties in the VAT collection chain. For the time being, several legal changes with impact on this subject have been introduced around the world, including the European Union Council Directive 2017/2455, establishing the role of marketplaces and intermediaries in the VAT collection, and the overruling of the physical requirement by the USA Supreme Court,\(^2\) which opened the way to marketplaces targeting legislation in the country. More recently, the OECD has published a new report on the role of digital platforms in the collection of VAT/GST on online sales\(^3\) and mentioned the use of third-party service providers (e.g. invoicing service providers) as potential compliance facilitators.

In the past, only suppliers and buyers were responsible for their own VAT collection and remittance, and compliance with the VAT legislation, but now there is a trend to either impose liabilities or outsource compliance functions to third parties ordinarily seen as business partners. Considering the operating European and Latin American e-invoicing background, and the use of certified service providers to perform administrative VAT-related functions in the United States, it seems reasonable to expect a broadened legal protagonism of third

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parties, notably invoicing service providers and online marketplaces, at some point of the VAT collection chain.

The aim of this research is (i) to analyze the role of third parties in the VAT collection and remittance, and in the compliance with the VAT legislation on the OECD’s perspective; and (ii) to identify and compare concrete measures implemented by different jurisdictions on this subject with focus in invoicing service providers and online marketplaces.

1.1. Method and Material

The present paper is divided into two main parts, which adopt different methods and materials.

The first part embraces a bibliographic review over the following four OECD’s publications:

(i) The OECD International VAT/GST Guidelines (hereinafter “the Guidelines”);
(ii) the OECD Report on the Mechanisms for the effective collection of VAT/GST when the supplier is not located in the jurisdiction of taxation;
(iii) the OECD Guidance Note on tax compliance for business and accounting software, and;
(iv) the OECD Report on the role of digital platforms in the collection of VAT/GST on online sales.

In this paper, the author does not assume that the documents above-mentioned are legal sources in a strict sense but considers the publications a piece of literature.

The choice of the OECD as a main source of bibliographic material is motivated by the OECD’s constant monitoring activities within and outside its member states through a method consisting in (i) data collection, (ii) analysis, (iii) discussion, (iv) decisions, (v) implementation and (vi) peer reviews/multilateral surveillance. The documents issued by the organization are distributed between the above-numbered actions (ii) and (vi), ensuring that a given topic investigated by the OECD is a result of data collection and of some level of analysis.

The choice of the Guidelines as the main piece of literature is driven by the fact that the Guidelines provides a comprehensive overview of the ideal VAT/GST framework. Moreover, it was developed by the OECD’s Committee of Fiscal Affairs, that had recurrently published interim drafts for public

consultation, which were later considered and had impacted the draft when appropriate. This fact ensures that (i) the OECD proposed a method of work is consistent with the production of the Guidelines; and (ii) the content of the Guidelines is mature enough to be used as a building block of an academic discussion.

The other complementary documents mentioned at the beginning of this Section were grounded on the Guidelines conclusions. Therefore, the analysis of those pieces of literature is relevant because (i) they expand some topics mentioned ad-hoc in the Guidelines, and (ii) as a result of this expansion, the complementary documents may clarify, deny and/or add conclusions on the discussed issues.

The bibliographic review performed in the first part of the paper focuses on the OECD references and conclusions associated to the role of third parties in the VAT collection, remittance and in the compliance with the VAT legislation. A comparison of the findings and recommendations of these publications will be made as a conclusion of this part, along with critics on the adopted approaches.

The second part of the research consists of the identification and contrast of the role of third parties in the VAT collection, remittance, and in the compliance with the VAT legislation between different jurisdictions, with focus on invoicing service providers and online marketplaces.

Through the use of the comparative method, the author provides a descriptive understanding of different countries’ legislation or policies on the role of third parties in the VAT collection, remittance, and in the compliance with the VAT legislation.

The author is aware of interdisciplinary issues that may arise on the adoption of the comparative method, such as local policies and the requirement of a degree of knowledge of the general legal systems under study. Therefore, it is assumed that the laws and regulations issued by local organisms, and policies adopted by an organization of states (such as the European Union and the Streamlined Sales and Use Tax Agreement), were issued by its competent institutions. This assumption is made without prejudice of further references to court discussions results on certain issues.

Within the comparative method, the functional approach will be adopted: firstly, a rule and its function in different jurisdiction are found; secondly, the

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results are compared. In this paper this approach means that the rule on the role of third parties in the VAT collection, remittance, and in the compliance with the VAT legislation will be identified in different countries; then, the functionality of those rules will be compared. Court decisions and their effect over local legislation may be discussed in this context.

The choice of the countries plus the European Union as a block was motivated by the availability of legislation in English, Portuguese, Spanish or Italian. The Hungarian legislation is provided in English in the Hungarian tax administration’s website.

Moreover, there is no relation between the analysis performed in Sections 2 and 3. The issues under analysis are distinct and some countries may not have adopted legislation targeting the issues discussed in this paper (e.g. Portugal has a comprehensive rule about invoicing service providers but have not passed any rules on the taxation of marketplaces). As a result, the selection of countries in Section 3 does not reflect the selection of countries in Section 2 and vice versa.

For the purpose of this paper, Value Added Taxes (VAT) and Goods and Services Tax (GST) will be dealt with indistinctly and referred to as “VAT”, regardless the name or definition brought by local legislation. Likewise, for the purpose of this research, VAT consists in the broad-based taxes on final consumption collected from, but in principle not borne, by business through a staged collection process, whatever name or acronym is adopted in national legislation. For the sake of coherence, this concept was adopted because it is equally adopted by the Guidelines.

In this paper, VAT collection and remittance stands for the process of collecting and remitting the proportion of tax corresponding to the “value added” at each stage of production and distribution. This definition is adopted in line with the Guidelines.

The compliance with the VAT legislation embraces the major and the auxiliary obligations performed by a taxable person or third-parties in accordance to VAT-related legislation, such as VAT payment, invoicing, registration, return form fulfilling, etc.

“VAT collection and remittance, and compliance with the VAT legislation” will be referred to as “VAT compliance”.

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7 Geoffrey Samuel, An Introduction to Comparative Law Theory and Method (Hart Publishing 2014) 68.
The outline of the paper is designed to provide the reader with a theoretical background before the analysis of the legislation of the selected countries. However, throughout the text the author refers to different sections of the paper. The purpose of the references is to provide the reader with additional context and to facilitate the correlation and the comparison of an issue discussed by the OECD with the practice of some countries. Some references also compare the same issue in different countries. The author recommends a one-flow reading and the use of the references as an additional tool to retrieve contents across the text.

1.2. Delimitations

For the purposes of this study, only effects attributable to online marketplaces and invoicing service providers will be explored. The issues related to invoicing service providers focus indistinctly on domestic and cross-border transactions, and the issues involving marketplaces focus in cross-border transactions.

Digital supplies or goods and services supplied digitally are out of the scope of this paper. It is also not the purpose of this research to analyze whether European Union Member States had transposed the Directive 2017/2455. The present studies do not aim to provide an exhaustive nor comprehensive list of countries with legislation on invoicing service providers and online marketplaces.

2. THE ROLE OF THIRD PARTIES IN THE VAT COMPLIANCE ACCORDING TO THE OECD

2.1. Introduction

In this section, the OECD publications on the role of third parties in the VAT compliance are reviewed and summarized. An overall conclusion on the development of the OECD’s analysis of the role of third parties in VAT compliance is given at the end of this Section.

2.2. The OECD International VAT/GST Guidelines

The OECD International VAT/GST Guidelines\(^\text{10}\) (the “Guidelines”) are a set of recommendations aimed to create a standard VAT treatment on

\(^{10}\) Organisation for Economic Co-operation and Development, *International VAT/GST Guidelines* (n 1).
international trade. As a point of departure, the Guidelines assume that the place of taxation is one of the main issues concerning the taxation on consumption pursued on the form of VAT,\textsuperscript{11} and that this issue considers the digital background where the current economy stage is inserted along with the remote supply of goods and services.\textsuperscript{12}

One of the results of the Guidelines is the recommendation on the adoption of the destination principle in international trade\textsuperscript{13} to ensure that the tax will be levied on the jurisdiction where the final consumption happens.\textsuperscript{14} Targeting at this goal, a set of rules on the place of taxation should create a predictable environment for both taxpayers, customers and tax administrations.\textsuperscript{15} While in B2B transactions it is easier to identify to whom – an consequently, where to - a given supply is done,\textsuperscript{16} in B2C transactions this identification might be challenging.\textsuperscript{17} To tackle this problem, a rule for the determination of the customer’s residence is necessary.

However, the determination of the place of the destination of the supply does not terminate the issues resulting from the collection of an indirect tax, once the VAT compliance is an obligation usually associated to suppliers and not to buyers.\textsuperscript{18} In other words, the shift from the origin principle to the destination principle of taxation on consumption affects the tax revenue, but not the need for the supplier to comply with the VAT legislation in either the origin or destination of the supply. The OECD additionally assumes that the compliance of non-resident suppliers might be burdensome and complex\textsuperscript{19} at the same time that recognizes that keeping this burden on the non-resident supplier side is the “most effective and efficient approach to ensure the appropriate collection of VAT”.\textsuperscript{20} As a conclusion, the Guidelines recommend the creation of simplified registration mechanisms for non-residents.\textsuperscript{21}

The Guidelines also recognize the role of technology on the simplification of VAT management and compliance\textsuperscript{22} for both B2C and B2B transactions,\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{11} ibid 3.112.
  \item \textsuperscript{12} ibid.
  \item \textsuperscript{13} ibid 3.1.
  \item \textsuperscript{14} ibid 3.110.
  \item \textsuperscript{15} ibid.
  \item \textsuperscript{16} ibid 3.9.
  \item \textsuperscript{17} ibid 3.112.
  \item \textsuperscript{18} ibid 3.128.
  \item \textsuperscript{19} ibid.
  \item \textsuperscript{20} ibid 3.130.
  \item \textsuperscript{21} ibid 3.131-3.134.
  \item \textsuperscript{22} ibid 3.137.
  \item \textsuperscript{23} ibid 3.136.
\end{itemize}
such as the simplification of the registration procedure and of the invoicing requirements. The Guidelines furthermore admit that taxable persons may rely on third-party service providers aiming to affect “the core elements of the administrative and compliance process”.

Overall, the Guidelines reinforce that third-parties may have a substantial role in the VAT Compliance and provide alternatives for third-parties to assist tax administrations in their collection and compliance functions.

2.3. The OECD Report Mechanisms for the effective collection of VAT/GST when the supplier is not located in the jurisdiction of taxation.

The OECD Report Mechanisms for the effective collection of VAT/GST when the supplier is not located in the jurisdiction of taxation (hereinafter “the Mechanisms Report”) assumes that the VAT collection may be conceived from different perspectives, such as from the suppliers’, the customers’, third party service providers’ (hereinafter “TPSP”) and intermediaries’ point of view.

The Mechanisms Report recognizes the intermediaries’ role in the VAT collection on behalf of foreign suppliers, which may be analyzed through a contractual or a deemed supply approach. The contractual approach stands for a legal relationship arranged between the parties whereby an intermediary would fulfill the supplier’s tax obligations. The deemed supply approach considers an intermediary to be “the statutory designated supplier for VAT compliance purposes” (see Figure 1 on Section 2.4 for an illustrative example of this approach).

The Mechanisms Report accepts that a company supplying goods and/or services to different jurisdictions may afford administrative costs to comply with several jurisdictions’ legislation. Albeit the expected OECD position should be the reduction of the general administrative burden (conclusion motivated by the recommendations issued before in 2005, as discussed ahead), the OECD suggests instead that companies operating such businesses may resort to third-party service providers to reduce their compliance burdens. To ensure that

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24 ibid C.3.3.1.
25 ibid C.3.3.6.
26 ibid 3.137.
28 ibid 60.
29 ibid 63.
30 ibid 64.
31 ibid 66.
32 ibid 2(c).
TPSPs comply with local legislation, the OECD suggests the creation of a compliance requirement targeting the TPSPs.\textsuperscript{33}

The TPSPs’ role may depart from the facilitation of VAT-related administrative tasks, such as providing VAT calculations and remittance, return filing and archiving for suppliers operating in different jurisdictions, to the assumption of the suppliers’ tax liabilities abroad.\textsuperscript{34} While the Guidelines were silent on the assumption of the taxpayer’s liabilities, the Mechanisms Report enhances the potential role that third parties may undertake in the VAT collection chain.

It is noteworthy that the idea behind the use of TPSPs for compliance with VAT legislation is not new. In 2005, the OECD issued a guidance note on tax compliance for business and accounting software (hereinafter “the Accounting Software Guidelines”), with the purpose of establishing a set of standard rules on the development of tax accounting software.\textsuperscript{35} The Accounting Software Guidelines recognized the role of invoicing service providers and accountancy software in the VAT compliance,\textsuperscript{36} and assumed that the integration of the standard requirements with existing business records and accounting system would maximize businesses voluntary compliance.\textsuperscript{37}

The Accounting Software Guidelines resulted in recommendations for the Information Technology industry and for tax administrations. Those recommendations include the combined work between software developers and governments in the adoption of standard features that generate data predictability for taxpayers and tax authorities. Among those recommendations, certification processes and the possibility for TPSPs to issue a Standard Audit File for Tax (SAF-T)\textsuperscript{38} were included as options for implementation of standard measures.

Although the Mechanisms Report does not refer to the Accounting Software Guidelines, both documents converge in the use and in the importance of third parties in the VAT compliance.

\textsuperscript{33} Ibid 78.  
\textsuperscript{34} Ibid 77.  
\textsuperscript{36} Ibid 4.  
\textsuperscript{37} Ibid 7.  
\textsuperscript{38} According to the OECD Guidance Note on the Standard Audit File – Tax, “SAF-T is a file containing reliable accounting data exported from an original accounting system, for a specific time period, easily readable by virtue of its standardisation of layout and format, and one that is extensible according to need.”
2.4. The OECD Report on the role of digital platforms in the collection of VAT/GST on online sales

In March 2019, the OECD issued a report on the role of digital platforms in the collection of VAT/GST on online trades (hereinafter the “Marketplaces Report”). The Marketplaces Report complements the Mechanisms Report and the VAT Guidelines and focuses on platforms that enable interactions between buyers and sellers who are both customers of the platform (hereinafter the “marketplaces”). The goal of the report is to find solutions for the involvement of digital platforms in the collection of VAT due in the online sales “without creating undue administrative costs and compliance burdens”.

The leading recommendation made by the OECD under this report is to make digital platforms liable for assessing, collecting and remitting VAT due on online sales operated through their platforms. This methodology represents the deemed supply approach mentioned in the Mechanisms Report which works according to Figure 1.

![Figure 1](image)

Figure 1 represents a transaction in which a digital platform is an intermediary between a supplier and a customer, both considered customers of the digital platform. Through this approach, the supply is deemed to be made from the digital platform to the customer/buyer, instead of from the real supplier.

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40 ibid 17.
41 ibid 38.
42 ibid 23. Figure 1 is as a reproduction of Figure 2.1. in the OECD Report on the role of digital platforms in the collection of VAT/GST on online sales.
to the customer/buyer. In this case, the digital platform would be liable to assess, collect and remit the VAT due in the operation.

As a result, the marketplaces assume full VAT liability in the transaction and relieve their customers (the original suppliers in the underlying transaction) from VAT liabilities. The rationale behind this scheme is the ability of digital platforms to retain information about the persons and transactions, a feature which would allow those platforms to comply with VAT obligations. However, the Marketplaces Report admits issues in this approach, including the enforcement of the liabilities for foreign digital platforms and the doubts whether this approach must be adopted for domestic and international underlying transactions, indistinctly.\(^{43}\)

The Marketplaces Report also discusses the legal qualification or definition of a digital platform that would indicate that those platforms are capable to be liable for the VAT due in underlying transactions made through their systems. It first considers “digital platform” as entities acting in online sales that enable groups of buyers and sellers to interact directly and to enter into transactions through the use of an online platform.\(^{44}\) Despite the definition brought by the OECD, the Marketplaces Report recognizes that a digital platform cannot always be liable for VAT for underlying transactions performed in their systems. In this context, the OECD adopts a functional perspective of the digital platforms, through which marketplaces may comply with the VAT obligations due in the underlying transaction where the platforms have access to information to perform an appropriate tax determination and to means to collect the VAT due in the underlying supply.\(^{45}\) To enlighten those functions, the OECD enclosed an annex in the Marketplaces Report providing examples of functions that might indicate whether a platform is able to be liable to tax or not.\(^{46}\)

The Marketplaces Report recognizes other roles attributed to marketplaces, such as information sharing obligation, co-operation agreements, and allows platforms to act as voluntary intermediaries, which can be summarized as follows.

The information sharing obligation stands for the requirement for marketplaces to provide the tax authorities with relevant information for VAT compliance purposes, without holding the marketplaces liable for collection and remittance of the tax.\(^{47}\) Likewise the functional perspective attributed to

\(^{43}\) ibid 52–69.
\(^{44}\) ibid 43.
\(^{45}\) ibid 45.
\(^{46}\) ibid 47.
\(^{47}\) ibid 117.
platforms in the deemed supply approach, the OECD recommends that information sharing obligation is accompanied of cautions ensuring that only information reasonable to be expected from the platforms must be shared with the tax authorities.\textsuperscript{48}

As an alternative to the obligation sharing, tax authorities and marketplaces may reach formal co-operation agreements. These agreements are based in a co-operative compliance model and could include voluntary information sharing, education of suppliers to comply with their VAT obligations, notification of fraudulent activities performed by the suppliers and quick answers to notifications made by the tax authorities.\textsuperscript{49} The United Kingdom is an example of a country adopting this mechanism (see Section 3.3.1.2 – The United Kingdom).

The voluntary intermediation performed by platforms is actually an extension of the contractual approach. According to the OECD, tax authorities may consider allowing marketplaces “to act voluntarily as a third-party service provider on behalf of the underlying suppliers”.\textsuperscript{50} This marketplace’s role would be similar to the TPSP’s, where marketplaces would fulfil their customers’ tax obligation in their name on behalf, probably in return of a service fee.

2.5. \textbf{Concluding remarks}

Although the Guidelines are the main publication on the design of the VAT collection chain, the role of third parties was briefly discussed by the OECD’s Accounting Software Guidelines. The Accounting Software Guidelines recommended an integration between software developers and tax authorities for the adoption of standard features, an action which was not discussed by the subsequent general Guidelines, but somehow ignored.

The Guidelines identify the need for changes in the VAT collection chain and process. Amongst the proposals for change in the parameters for taxation, the Guidelines recognize the role of the technology on the simplification of VAT management procedures and compliance, regardless the buyer been qualified as a taxable person or not. More importantly, the Guidelines admit that third-parties may have a substantial role in the compliance process, as the OECD also recognizes that it is burdensome to comply with VAT legislation and it is even more burdensome to comply with VAT legislation in multiple jurisdictions.

The ideas suggested by the Guidelines were better explored in the Mechanisms Report, which includes TPSPs and intermediaries as important

\textsuperscript{48} ibid 119.
\textsuperscript{49} ibid 138–139.
\textsuperscript{50} ibid 148.
components in the VAT compliance chain. The Mechanisms Report provides two main approaches that may be adopted by the tax authorities in the design of the collection processes involving third-parties of a transaction, namely the contractual and deemed supply approaches.

The author believes that the contractual approach is unlikely to be adopted in a broader extent by tax administrations where the parties can freely agree on their liabilities in front of (i) the lack of objective criteria to search for and to impose tax liabilities to the supplier and to the intermediary, and (ii) the need for a case-by-case analysis of the contract between the parties to determine which party is liable for due VAT. Although the OECD exemplifies the contractual approach through the fulfillment of the supplier’s VAT compliance obligations by intermediaries, in practice the contractual approach turns out to be spread by a variety of players, including both not-intermediaries accountant companies, invoicing service providers (See Sections 3.2.1.1 and 3.2.2), and intermediaries marketplaces adopting voluntary disclosure agreement (See Section 3.3.1.2).

On the other hand, the deemed supply approach finds support on its twofold rationale: First, the number of monitored parties decreases; and while it is difficult for tax authorities to monitor thousands of foreign suppliers intermediated by a digital platform, it is easier to monitor some intermediaries concentrating several transactions; second, this approach shifts the administrative burden from the suppliers using those platforms (generally small online traders) to marketplaces that “presumably have greater capacity to comply with the relevant tax obligations”.51 This approach reveals that (i) the OECD is aware of the burden that companies bear to comply with VAT legislation, and that (ii) shifting this burden to companies that have financial capabilities to assume not only their own liabilities but also third parties’ liabilities may lead to a solution for VAT-related compliance issues.

The Mechanisms Report expands the scope of the Guidelines suggesting additional measures targeting at third-parties to ensure that the services provided by those third-parties are compliant (hereinafter “certification processes”). This approach may create certainty for taxable persons acquiring services from TPSPs with the conviction that they (taxable persons and TPSPs) are compliant with local regulations. In contrast, this approach may create an excessive administrative burden for TPSPs and market concentration for local service providers, as foreign TPSPs would face similar administrative burdens that foreign taxable persons would otherwise be required to comply with and to understand.

51 Organisation for Economic Co-operation and Development, ‘Mechanisms for the Effective Collection of VAT/GST When the Supplier Is Not Located In the Jurisdiction of Taxation’ (n 27) para 67.
The Marketplaces Report focuses on marketplaces operators’ activities only. It means that (i) third-party service providers are out of the scope of this report and, for this reason, (ii) certification processes are not mentioned in this report. It does not mean that those certification processes were ignored by the OECD, but that certification processes might not fit in a marketplace scenario where the marketplaces perform an active role in the supply chain.

As a result, the Marketplaces Report concentrates its analysis in the deemed supply approach, while the Mechanisms Report embraces both the contractual approach and the deemed supply approach analysis. Nevertheless, the Marketplaces Report implicitly assumes the use of the contractual approach when it suggests that marketplaces may perform voluntary services on behalf of underlying suppliers.

Overall, the OECD recognizes that third-parties and intermediaries perform an important role in VAT compliance and suggests that the information retained and sometimes concentrated by third parties is an asset for tax administrations in the VAT collection. For this reason, the use of intermediaries such as marketplaces or third-party service providers is convenient and advisable.

The OECD does not advise criteria for the election of the contractual or the deemed supply approach by the tax authorities. Although tax administrations may use either of the approaches to impose liabilities for third parties and suppliers, there must be certainty that such third parties are in control of every legal and factual pieces of information necessary to comply with the VAT legislation. Otherwise, if it turns out to be impossible or burdensome for third-parties to comply with VAT legislation, or if the liabilities attributed to third-parties are severe, tax administrations would hinder such third-parties to act as auxiliary compliance mechanisms.

3. THE ROLE OF THIRD PARTIES IN THE VAT COMPLIANCE FOR DIFFERENT COUNTRIES

3.1. Introduction

The experience of some countries on the role and liabilities attributed to third parties in the VAT compliance and the correspondence of the adopted measures with the OECD conclusions are discussed in this section. The author also discusses the possible consequences of case-law on aspects of the measures taken by the selected countries. An overall comparison of similarities and differences will be given at the end of Sections 3.2 and 3.3.
3.2. Invoicing Service Providers

3.2.1. European Union

In the European Union, the role and the liabilities of invoicing service providers (ISPs) are not harmonized. However, the Council Directive 2006/112/EC (also known as the VAT Directive) allows third parties to issue invoices for a taxable person in his name and on his behalf.\(^{52}\) Beyond the obligation for taxable persons to ensure that the invoices issued by third parties comply with the VAT Directive, no other liability is attributed to them.

Notwithstanding, the invoicing process is harmonized by the VAT Directive. Within the European Union, an invoice is so considered if the documents or messages meet the conditions stipulated in the VAT Directive.\(^{53}\) In other words, the existence of an invoice is dependent on the content of the document or message issued by a taxable person, and not on the form through which the invoices are documented. Although the signature is not required by the VAT Directive,\(^{54}\) electronic signatures are examples of means to ensure an electronic invoice’s authenticity of origin and integrity of the content, which is required not matter what form the invoice is issued in. When taxable persons opt to issue electronic invoices secured with electronic signatures, they fall under the scope of the Regulation n. the Regulation n. 910/2014 on electronic identification and trust services for electronic transactions in the internal market (as known as “eIDAS Regulation”).

The creation of an invoice is also dealt with in the explanatory notes delivered by the European Union along with the Council Directive 2010/45/EU, amending the VAT Directive (hereinafter the “Explanatory Notes”).\(^{55}\) The Explanatory Notes for the Article 217 VAT Directive states that an invoice is “regarded as issued when the supplier or a third party (…) makes the invoice available so that it can be received by the customer”.\(^{56}\)

The legal framework resulting from the VAT Directive and its Explanatory Notes is paradoxical. While the VAT Directive sets forth that the creation of an invoice is dependent on its content, the Explanatory Notes makes reference to the act of making the message available to the buyer. This vague description of

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\(^{53}\) ibid 219.
\(^{54}\) ibid 229.
\(^{56}\) ibid A-2.
the invoice creation results in additional issues for the Member States, for taxable persons and for ISPs (See section 3.2.1.1 – Portugal).

Even though the VAT Directive does not attribute liabilities for ISPs, Article 205 VAT Directive allows the Member States to impose joint and several liabilities to persons other than the person liable for the VAT payment.57

The attribution of joint liabilities for third parties is not unlimited. In the Case Commissioners of Customs and Excise v. Federation of Technological Industries58 (hereinafter “the FTI Case”), the Court of Justice of the European Union (“CJEU”) delivered that a third-person may be held jointly liable for the VAT payment if the third-person, at the time of the supply, knew or had reasonable grounds to suspect that the tax would go unpaid. The context for the FTI Case was the adoption of measures against fraud and abuse of the VAT system. In addition, in the Case Vlaamse Oliemaatschappij NV vs FOD Financiën,59 (hereinafter “the Case Vlaamse”) the CJEU had decided that Member States are precluded to hold warehouse-keepers unlimited liable to the VAT due by suppliers using their facilities. The Court delivered that it is not proportional to impose unlimited liability to warehouses without providing them opportunities to escape from the liabilities by offering proofs that they had nothing to do with the acts of the person originally liable to tax.60 In contrast, the Court also stated that the Member States are allowed to require third-parties “to take every step which could reasonably be required of him to satisfy himself that the transaction which he is affecting does not result in his participation in tax evasion”.61

Therefore, Member States legislation attributing unlimited tax liability for third-parties grounded on Article 205 EU VAT Directive may be challenged before the Courts.

More recently, the European Union adopted the Council Directive 2017/2455 which amends and includes several rules in the VAT Directive. Amongst the news of the 2017 Directive are the simplification of the administrative procedure and invoicing process compliance, such as (i) the extension of the scope of the (Mini)One-Stop Shop (OSS or MOSS), and (ii) the possibility of electronic services suppliers to apply invoicing rules of the

58 Commissioners of Customs and Excise HM Attorney-General v Federation of Technological Industries and 53 others [2006] Court of Justice of the European Union C-384/04.
60 ibid 24.
61 ibid 25.
Member State where they are identified for VAT purposes, in replacement of the need to comply with rules on the place of supply.

3.2.1.1. Portugal

In February 2019, Portugal issued the Law-Decree 28/2019. The goal of this new legislation is to regulate the invoicing and book-keeping procedures for VAT purposes.

The Law-Decree mandates taxable persons to issue invoices through one out of the following three alternatives: (i) invoicing software, (ii) electronic cashiers, or (iii) pre-print forms. Accordingly, where taxable persons opt to use invoicing software to either issue or receive invoices, the software must be certified for this purpose by the Portuguese tax authority.

Although the certification requirement is not new in the Portuguese background, it has been continuously generating interpretation issues as the obligation is tied to the invoicing process. Accordingly, ISPs participate in several parts of the invoicing mechanisms. Just to mention a few examples, some ISPs build up procurement functions and link the invoicing process with the information received by their customers-taxable persons. Other ISPs receive from procurement software the taxable person’s data required by the VAT Directive for an invoice to be issued and apply an electronic signature as suggested by the Directive’s Article 233(2). And other ISPs make the document or message available for the buyers. In view of the vague concept of invoicing creation brought by the European framework, it is not clear for taxable persons and ISPs which fact creates the need for an ISP to be certified by the Portuguese tax authority.

Moreover, the 2019 Law-Decree brings a feature not seen in other countries and requires ISPs to have their software certified also when they receive invoices on behalf of the buyer. As for the issuance of invoices, TPSPs that receive invoices on behalf of the buyer pursues different roles in the market: some of them receive invoices for accountancy processes, for archiving, and/or for other administrative controls. It is not clear which fact triggers the certification requirement for TPSPs.

It is noteworthy that the certification requirement for systems that create and issue invoices is not a result of any provision in the European Union framework. On the other hand, this requirement touches supplies made within the Portuguese territory, even when it is made by a branch operated by a non-resident company. In this context, the legality and/or proportionality of the

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measure could be challenged before the CJEU, as the certification requirement may restrict the actuation of other European players in a field which is harmonized by the VAT Directive.

Notwithstanding, the certification requirement for a third party to perform invoicing services is in line with the OECD approach since it provides certainty to taxable persons making use of third parties to comply with local legislation.

No liabilities for TPSPs are mentioned in the Portuguese legislation. In contrast, taxable persons outsourcing their tax functions to TPSPs are liable for the TPSP’s performance.

3.2.1.2. Hungary

The Hungarian legislation allows taxable persons to outsource the issuance of the invoice to third parties, and third-parties do not need to be certified to perform taxable persons’ tax functions. In addition, Hungary sets forth joint liability between suppliers and ISPs for the compliance of invoice issuance.

Within the European Union, VAT is a harmonized field and Members States are restricted by the content and permissions set in the VAT Directive.

It is not clear from the Hungarian law whether Article 205 VAT Directive, discussed in Section 3.2.1, is the legal background for the joint liability set in the national law. However, no other rule in the VAT Directive has a similar meaning and could be applied in the context of shared liability in the invoice issuance and/or VAT payment contexts.

From the author’s point of view, the unlimited attribution of liabilities to ISPs is not in line with the VAT Directive and with the CJEU decision taken in the Vlaamse64 and FTI65 Cases for the following reasons:

First, the attribution of joint liability in the Hungarian legislation is not a result of fraud or abuse of the VAT system. It is actually an error in the invoicing process that does not affect the country’s revenue, as fraud cases do, once the taxable transaction was performed by a taxable person and, as a consequence, the VAT is still chargeable.

Second, Article 205 VAT Directive deals with due payments of VAT. ISPs are not intermediaries in a transaction, but only issue invoices in the name and on behalf of taxable persons. Moreover, ISPs issue invoices using data submitted by taxable persons, through data imported from a purchase order (a process known as “purchase order flip”), among other means, and do not check whether

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63 Act CXXVII of 2007 on Value Added Tax 2007 s 160. The English version is available in the tax authority’s website.
64 Vlaamse Oliemaatschappij NV vs. FOD Financiën (n 59).
65 Commissioners of Customs and Excise H.M. Attorney-General v. Federation of Technological Industries and 53 others (n 58).
the received data is supported by any relevant business trail. In other words, ISPs are not in control of the taxable events and of the supply chain data. As a result, holding ISPs liable for the tax due by the taxable person is not proportional.

Third, Section 160 of the Hungarian VAT Code stipulates that the ISP is jointly liable for the compliance with the invoice issuance. ISPs might be in control of the invoicing issuance process, however holding them liable for penalties resulting from non-compliance with VAT issuance rules is not supported by Article 205 VAT Directive. Once Article 205 VAT Directive sets forth third-parties’ joint liabilities exclusively for VAT payments, an extensive interpretation through which ISPs are held liable for penalties is not acceptable.\(^{66}\)

Notwithstanding, it is reasonable to expect that third parties performing tax functions for taxable persons has contractually assumed liabilities for mistakes executed in the invoicing process. In such cases, the OECD contractual approach would be a better fit. Assuming that the contracting parties may agree on the liabilities attributed to each part in case of faults, Hungarian-like legislation is redundant and not necessary.

Moreover, issues arise regarding law enforcement against a foreign ISP despite the attribution of joint liability to ISPs. In practice, law enforcement against foreign entities would require agreements on international cooperation; otherwise, the liabilities would be practically attributed to domestic taxable persons in front of the enforcement difficulties.

### 3.2.2. The USA and the Streamlined Sales and Use Tax Agreement

Sales tax is legislated in the state level in the United States and there is no uniform legislation at the federal level. Although some common features may be found in the different American States, several differences exist, including tax bases and rates, and administrative procedures.\(^{67}\)

The disparities between the States engender great burden for taxpayers with interstate operations. The wish for some simplification and uniformization of the sales and use tax administration in the different States resulted in the association and agreement of several American States around this objective. The cooperation between them originated the Streamlined Sales and Use Tax Agreement (SSUTA), which has the purpose to create a simplified environment

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for sales and use tax taxpayers, including a central electronic registration system for all member states.\textsuperscript{68}

To reduce the supplier’s administrative burden, the SSUTA also provides the certification of intermediaries. Accordingly, these intermediaries may be either (i) certified software providers (hereinafter “CSP”) or (ii) certified automated systems (hereinafter “CAS”).\textsuperscript{69} Beyond the automatization of tax compliance brought by those certified intermediaries, the SSUTA also relieves taxpayers from some of the liabilities for errors in the tax determination of certain jurisdictions.\textsuperscript{70}

According to Section 203 SSUTA, a CSP is a certified agent that performs the seller’s sales and use tax functions, other than its obligation to remit tax on the purchases. The use of a CSP by a seller constitutes outsourcing of the sales and use tax collection.\textsuperscript{71}

The attractive feature for sellers to outsource their tax collection and administration lies on the liability for the tax administrated by the CSP. Once sellers opt to outsource their tax collection and administration to CSP, the seller is relieved from the tax liabilities, except in case of fraud or misrepresentation of the type of items sold.\textsuperscript{72}

In this context, the certification of service providers represents not only the compliance by a third-party with the tax requirements but provides certainty that a seller will not be liable for mistakes attributed to accredited third-parties.

A CAS is a certified software that calculates taxes according to each jurisdiction, determine and remit the amount of taxes to the due State, and keeps book records of the transactions.\textsuperscript{73}

In the CAS framework, the main liabilities for due taxes remain with the seller, although the CASs are held liable for underpayments attributed to their errors.\textsuperscript{74}

The use of accredited parties to perform tax functions is in line with the OECD publications. The use of and the reliance on the technology was discussed in the Guidelines and repeated in the Mechanisms Report.

\textsuperscript{69} ibid 202–203.
\textsuperscript{70} Hellerstein (n 67) 181.
\textsuperscript{71} ibid.
\textsuperscript{73} Streamlined Sales Tax Governing Board (n 68) s 202.
\textsuperscript{74} ibid 502.
The use of CAS and/or CSP in the SSUTA context reflects the adoption of the contractual approach. It is noteworthy that the contractual approach usually stands for a legal relationship freely arranged between the parties whereby an intermediary would fulfill the supplier’s tax obligations. However, in the SSUTA context, taxable persons’ and third parties’ liabilities are predetermined by the tax authorities. As a result, the issues related to the lack of objective criteria to audit and impose tax liabilities for the parties, and the need for a case-by-case contractual analysis are no more existent.

In summary, CAS and CSP certification processes relieve taxable persons making use of those certifies third-parties from some tax liabilities, and perform a psychological function, ensuring to taxable persons that the intermediaries are compliant with local requirements.

3.2.3. Mexico

In Mexico, the Authorized Providers of Digital Tax Receipts (Proveedor Autorizado de Comprobantes Fiscales Digitales, herein after referred by its Spanish acronym “PAC”), were introduced along with electronic invoicing. Before electronic invoicing was introduced, Mexican taxable persons were required to ask the Mexican Revenue Agency for sets of pre-printed invoices forms. With the start of electronic invoicing, taxable persons become able to issue invoices through the use of more sophisticated and technological methods instead of having to require physical pre-printed forms from the Mexican tax authority. Given that some business had not enough technological infrastructure to do so, the Mexican tax authority authorized PACs to provide invoicing services for such taxable persons.

According to the Mexican Tax authority, PACs shall be able to generate and process electronic invoices outside the fiscal domicile of the taxable persons. The PAC’s function is best described by the Mexican Association of Authorized Certification Providers (a.k.a. AMEXIPAC; or in Spanish Asociación Mexicana de Proveedores Autorizados de Certificación). According to AMEXIPAC, PACs provide certified digital communication with the Mexican tax authority, in compliance with “authentication, non-repudiation,

76 ibid 39.
confidentiality, and data integrity principles”. In other words, PACs are responsible for validating and signing the invoices, and ultimately for certifying, on behalf of the Mexican tax authority, that the invoice was formally issued. It means that the PACs, unlike the American CSP and/or CAS, do not originally perform tax functions, such as tax and rate determination, book-keeping etc, but only verify formal requirements for the invoice to be issued.

Notwithstanding, PACs are free to perform complementary activities (as additional service offerings) such as those performed by the American CSP and/or CAS, or by the software certified by the Portuguese tax authority, e.g. the integration of the invoicing features with procurement functions and financial controls.

Differently from the USA counterparts, taxable persons are not relieved from any liabilities, but only from the burden to prove that the invoices were formally issued and exist. In other words, neither the taxable persons nor the PACs (when performing complementary activities) are relieved from the liabilities related to the invoice’s content, such as the correctness of the used tax rate, exemptions etc.

Another characteristic that differs PACs from the other authorized or certified service providers evaluated in this paper, is the fact that the PACs are required to present a substantial guarantee as a certification requirement. This guarantee must ensure that any damages caused either to the taxable persons or to the Mexican tax agency can be duly paid.

The Mexican framework creates difficulties for taxable persons to perform their tax functions without relying on TPSPs – the PACs. While in Portugal, Hungary and in the United States the TPSPs pursue an auxiliary and voluntary character, the TPSPs have a distinct role in Mexico; and once their use is in practice non-optional, the regulation is stricter, requiring registration, certification and a guarantee in the country.

Most of the PACs in fact perform complementary services along with the services they are certified to provide, such as accountancy software and book-keeping, and as a result, PACs act in a regulated but free market offering a range of services. This high-regulated market and burdensome certification process would suggest a low number of PACs. However, there are 78 PACs registered

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79 Mexico. Resolución Miscelanea Fiscal 2018. ch 2.7.2.5.
80 ibid 2.7.2.5, III.
81 ibid 2.7.2.8.
The need for a company to use a PAC is an important variable for the number of accredited PACs. It may suggest that the practical mandate for taxable persons to outsource some of the tax functions to PACs allows a higher bar of compliance requirements.

The Mexican approach fits in the OECD’s contractual approach definition, as the framework allows taxable persons to outsource to TPSPs the compliance of some formal requirements of the invoice. The requirement to operate through PACs, the high regulation over those TPSPs and the number of companies certified to operate as PACs suggest that the regulation of the contractual approach may offer a feasible solution for tax administrations to ensure that invoices are in fact issued.

### 3.2.4. Concluding remarks

The framework regarding the role, liabilities and certification processes related to TSPSs differ from country to country.

In Portugal, Mexico and in the United States, TPSPs must perform their respective functions after having been certified either by the tax authority or by an entity authorized by the public administration. However, once the focus of the performance of the TPSPs in those countries is different, the certification processes and their requisites differ as well. In Portugal and Mexico, the certification process focuses on the invoicing procedures and in the invoicing format, ensuring the existence of the invoices. In the United States, CASs and CSPs act on the content of invoices and tax returns, instead of acting on the invoicing process or format.

In Hungary, despite no certification requirement is imposed for companies that outsource their tax functions, the legislation imposes joint liabilities. On the other hand, in the United States, the certification process is used as an instrument to ensure that some of the liabilities will be borne exclusively by the TSPSs. In Mexico, the certification process of the PACs ensures that the invoicing process is compliant but relieve neither the PACs nor the taxable persons from mistakes in the content of the invoices.

A general framework of liabilities for TPSPs cannot be concluded from the analyzed countries. In the United States, the liabilities attributed to CAS and CSP reflect the acts performed by the parts who are in control of a given piece

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of information (e.g. CAS calculate taxes according to each jurisdiction and their liabilities are strictly connected with this tax function). In Mexico, PACs perform formal functions and provide a substantial collateral to ensure that taxable persons and tax administrations will be compensated in case of damages caused by them. In Portugal, the legislation is silent on the liabilities attributed to ISPs and, in Hungary, the liability is unlimited and jointly attributed to TSPSs.

This context suggests the need for a consensus around the content and the format of the invoices. Consequently, consensus on the certification requirements related to TPSPs performing tax functions is advisable which enables the reduction of the TPSPs’ administrative burden. Moreover, the uncertain scenario of liabilities advises a movement for a more uniform framework where TSPSs are held liable only for mistakes attributed exclusively to them.

3.3. Marketplaces

3.3.1. European Union

Beyond the simplification of administrative registration procedures and some parts of the invoicing processes, the Council Directive 2017/2455 makes marketplaces liable for tax chargeable in transactions they had facilitated and sets joint liability for transporters for the VAT due in underlying transactions not involving marketplaces. Moreover, the 2017 Directive attributes additional compliance requirements for marketplaces, such as requiring marketplaces to keep records of the transactions they had facilitated for a 10-year period.

The 2017 Directive adopts both the OECD’s deemed supply approach and contractual approach, each applicable in different purposes and scenarios, as the author explores ahead.

As of 2021, taxable persons that facilitate distance sales of goods imported from third countries with intrinsic value not exceeding 150 EUR are deemed to have received and supplied the goods themselves. Likewise, taxable persons that facilitate the supply of goods within the European Union by a taxable person not established in the European Union to a non-taxable person are deemed to have received and supplied the goods themselves. This provision translates the European Union’s adherence to the OECD’s deemed supply approach.

The European framework differs however from the OECD’s deemed supply approach in at least two points. First, the European Union elected the “facilitation” as the key function performed by marketplaces which make them

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liable for the suppliers’ tax. As discussed in Section 2.4, the OECD adopts a functional perspective for the liabilities to be attributed to the marketplaces and provides a list of functions performed by the marketplaces that indicate that such marketplaces have enough information to make an appropriate tax determination. In contrast, the European Union assumes that every marketplace platform which facilitates transactions between suppliers and buyers have enough means to make appropriate tax determination and collect the VAT due in the underlying supply. Second, it is unclear whether Member States may not hold marketplaces liable for VAT if the marketplaces agree with their customers-suppliers that they (the original suppliers) will comply with the VAT legislation, adopting a contractual approach within the context of the deemed supply approach, such as the Australian framework (See section 3.3.2 - Australia).

It is also not clear from the 2017 Directive if the Member States may impose more lenient or harsher measures, which could include other operators as persons liable to tax on behalf of the suppliers, such as payment processors, and the mandatory information disclosure to the tax authorities.

The contractual approach is also introduced by the 2017 Directive but has a narrow scope when compared with the unrestricted adoption of the deemed supply approach. As of 2021, a special import scheme for distance sales of goods imported from third countries will be in effect for transactions in which the value of the involved goods does not exceed 150 EUR. The special scheme affects some tax obligations that the supplier would otherwise have to fulfill. Accordingly, a taxable person not established in the European Union must generally appoint an intermediary responsible to fulfil the supplier’s VAT obligation in their name and on their behalf to be eligible for this special scheme. In this case, this intermediary will fulfill the supplier’s tax obligations on their behalf and his performance would be regulated by a contract between marketplaces and their customers.

The European Union Member States must transpose the 2017 Directive rules on the above-mentioned topics until 2021. It is not the purpose of this research to provide an analysis of the 2017 Directive transposition on national systems. However, some countries have passed statutes or provided opportunities for marketplaces to act in the compliance chain. The following sections will explore some of those rules or mechanisms.

85 ibid Title 12, Chapter 6, Section 4.
3.3.1.1. **Italy**

In April 2019, Italy issued a Decree\(^{86}\) establishing, among other rules, a reporting obligation for marketplaces facilitating the distance sales of goods through the use of a digital platform. The Decree embraces intra-Community supplies and imported goods.

According to the Italian Decree, marketplaces must report suppliers’ and transactions’ data to the tax authorities, each quarter of the year. If a marketplace does not report the required data or so transmits the data in a complete manner, the marketplace is considered liable for the tax due in the underlying transaction. This reporting obligation will be in place until the end of 2020 when it will be replaced to partial reporting obligations. As of 2021, the reporting will be narrowed to some supplies, such as mobile phones, tablets, and laptops.\(^{87}\)

The Italian Decree adopts the information sharing obligation of the OECD Marketplaces Report, through which the marketplaces must report the data kept in their hands to the tax authorities.

If the information sharing obligation fails, the marketplace becomes liable for the VAT due in the underlying transaction. Even though it resembles the deemed supply approach, it is not clear from the Italian decree whether this consequence results in (i) holding marketplaces jointly liable to the VAT due in the underlying transaction or (ii) relieving the original debtors from their VAT obligations and shifting this obligation to the marketplace platform. If the joint liability scenario is adopted, it is not clear how suppliers, marketplaces and tax authorities will be aware of taxes paid in duplicity neither whether suppliers will be entitled to VAT output credits paid by the platforms.

It is unclear whether the deemed supply approach as a penalty-practical result is supported by the current VAT Directive. The shift of liabilities for a third party is set by Article 205 VAT Directive; and the Italian Decree does not reflect the conditions imposed by the CJEU for Article 205 VAT Directive to be applicable, because it reflects an unlimited shift. As a consequence, for the Italian Decree to be compatible with the European framework, (i) the marketplaces must know or have reasonable grounds to suspect that the tax of the underlying transaction will not be paid in a fraud context,\(^{88}\) and (ii) the tax authorities must provide opportunities for the third-party to prove no relationship with the taxable person’s activities. In this context, if the Italian Decree assumes that every transaction facilitated and not reported is considered

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\(^{86}\) Italy. Decreto-Legge 30 aprile 2019, n. 34. 2019.

\(^{87}\) Italy. Legge 11 febbraio 2019, n. 12. 2019 ss 11-bis.

\(^{88}\) Commissioners of Customs and Excise H.M. Attorney-General v. Federation of Technological Industries and 53 others (n 58); Vlaamse Oliemaatschappij NV vs. FOD Financiën (n 59).
not paid in a fraud context, and if the Italian Decree does not allow third-parties to demonstrate that they have not participated in the underlying acts, the legislation might be challenged as not proportional.

3.3.1.2. The United Kingdom

The 2018 Finance Act (the “2018 Act”) amended the UK’s Value Added Tax Act and introduced joint and several liabilities for online marketplaces. According to the 2018 Act, overseas sellers operating through marketplaces must be registered for the UK VAT; if the sellers fail to do so, and if the marketplace operator “knew or should have known” that that the seller is in breach with the UK VAT legislation, the marketplace operator is liable for the VAT due in the underlying operation.89

Like the Italian legislation, the practical results of a deemed supply approach is used as a penalty for marketplaces’ negligence. The “knew or should have known” test is a feature in the UK’s framework that points towards the adoption of a functional perspective in the implementation of the deemed supply approach. The test aims to establish whether the marketplaces operators have or should have asked for information that helps the platforms to decide if the seller is registered for VAT, and/or how much diligence the marketplaces had taken to check whether the seller is compliant with the UK VAT law. The checks may include the sellers’ VAT registration number and location, location of the goods sold by the suppliers, how quickly sellers are able to fulfil orders from UK customers etc.90

Although the UK approach assimilated the functional perspective of the deemed supply approach, the checks performed by the marketplaces contradict the teleology of the functional perspective set in the Marketplaces Report. The OECD suggests that liabilities might be attributed to marketplaces performing given functions, but do not demand them to perform such functions; in contrast, the UK interfered in the business processes and mandates checks that must be performed by the online marketplaces that could be, initially, not relevant for their business but only to the tax administration.

Moreover, some problems identified in the Italian legislation remains in the UK framework. It is unclear from the UK’s legislation how suppliers, marketplaces and tax authorities will be aware of taxes paid in duplicity as well as whether suppliers will be entitled to VAT output credits paid by the platforms. Another similarity with the Italian legislation concerns the lack of reference to

89 Value Added Tax Act 1994 - Amended until 30 May 2019 s 77BA.
Article 205 of the EU VAT Directive, despite the fact that the 2018 Act expressly mentions a joint liability situation. It is unclear whether this rule is authorized by Article 205 of the EU VAT Directive and, if grounded in this rule, the same issues mentioned in the Italian framework exist in the UK context.

It is noteworthy that although the wording of the 2018 Act resembles the wording of the FTI Case, the FTI Case decision was delivered in a fraud context in which a third-person knew or had reasonable grounds to suspect that the tax would go unpaid. The 2018 Act, however, turns the third-party an audit member and regulates a checks routine, but (i) none of the tests performed provides evidence that the tax will or not go unpaid, (ii) the underlying taxable transaction is still existent or simulated, at the suppliers’ discretion, regardless the procedures performed either by the taxable person or by the third-parties.

The United Kingdom additionally adopted the OECD’s formal cooperation agreement alternative. As a result, marketplaces operators may agree with the UK’s tax authorities on the provision of data, education for sellers and response to evidence of non-compliance. The provision of data obligation stands for the deliverance of suppliers’ and transactions’ minimum data, which is sufficient for the UK’s tax authorities to identify individual business sellers, calculate the value and the volume of the seller’s sales in the UK, and contact the seller directly. The education for sellers refers to the marketplaces’ obligation to inform sellers about the VAT obligations in the UK. Finally, the response to evidence on non-compliance stands for the marketplaces’ accordance on answering to the tax authority’s notifications related to marketplaces’ suppliers in breach with the VAT law; and to implement actions against the suppliers when there is evidence of potential non-compliance with the UK VAT obligations.

It is noteworthy that marketplaces cooperating with the UK’s tax authorities are not relieved from the joint liability set by the 2018 Finance Act.

3.3.2. Australia

In 2017, Australia passed a bill (hereinafter “the Australian 2017 Act”) holding electronic distribution platforms (or “EDP”) responsible for the VAT due on sales made through their platforms.

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92 ibid Purpose.
According to the Australian 2017 Act, a company is qualified as an EDP if it allows persons to make supplies available to end-users by means of electronic communication, and the supply is an inbound intangible consumer supply.\(^94\) In case of low-value goods, the requirement for a supply to be an inbound intangible consumer supply is not applicable and, as a consequence, and EDP is liable for the VAT payable in the underlying transaction.\(^95\) In addition, some suppliers such as carriage service, payment service providers and “face value vouchers” are excluded from that definition.\(^96\)

A supplier is generally liable for the VAT payable on taxable supplies.\(^97\) Nonetheless, where a company is qualified as an EDP, the EDP operation is treated for VAT purposes as “(a) having made the supply, (b) having done so for the consideration for which it was made, and (c) have done so in the course of furtherance of an enterprise that the operation carries on”.\(^98\)

The Australian framework is compatible with the OECD deemed supply approach. The EDP is however not always liable for the VAT of the suppliers that use the platform. When the following criteria are met, the EDP is not liable for the VAT payable in the transactions made through the EDP: the EDP does not authorize the charge for the buyer and the delivery of the supply, does not set any terms and conditions under which the supply is made, agrees with the supplier that the supplier is liable for paying the VAT, and an invoice is issued identifying the supply and the supplier as so.\(^99\) This exception from the general deemed supply rule suggests the adoption of the functional perspective of the deemed supply approach.

Moreover, to comply with the Australian legislation, an entity qualified as an EDP whose VAT turnover exceeds a certain amount are required to be registered for VAT in the country.

The Australian legislation was passed before the OECD Marketplaces report been issued. However, it adopts several of the principles established in that report concerning the identification of functions performed by digital platforms which would be able to make them liable for the VAT due in the underlying transactions.

On the other hand, this legislation fails to tackle some other issues mentioned by the OECD Guidelines. The Australian legislation does not

\(^{95}\) Australia. Law Companion Ruling 2018 para 40.
\(^{97}\) ibid 9(40).
\(^{98}\) ibid 84(55).
\(^{99}\) ibid 84(55)(2); Australia. Law Companion Ruling para 70.
differentiate resident and non-resident EDPs, and it is reasonable to assume that
the law enforcement mechanisms for non-residents EDPs to comply with the
new Act are loose. In this same context, while the OECD Guidelines suggest
that non-resident may have on their disposal simplified registration
mechanisms,\(^\text{100}\) the Australian legislation just extends the obligation of resident
suppliers to non-resident entities.

3.3.3. The United States

The American States are competent to impose sales tax, which results in a
diversified framework. Nonetheless, as of 1967, the United States Supreme
Court had conditioned the tax imposition on the suppliers’ physical presence in
the taxing state, precedent which was later in 1992 confirmed by the same
Court.\(^\text{101}\) When sellers were not required to collect and remit the tax to that State, the
buyers were responsible for paying the tax instead.

These precedents were overruled in June 2018, when the Supreme Court
discussed the validity of the legislation of the State of North Dakota. The
legislation required out-of-State suppliers to collect and remit taxes “as if the
sellers had a physical presence in the State” when they deliver more than
100,000 dollars of goods and services in that State in 200 or more transactions
into the State.\(^\text{102}\) The 2018 decision was grounded on the fact that the current
economy background differs substantially from that one decided in 1967 and
1992, and that the precedents had created market distortions and formalistic
distinction to identical economic actors.\(^\text{103}\)

The overruling of the physical presence requirement did not leave the
American States free to tax supplies however they wish to do. Instead, it
remained mandatory for the supplier to be subject to tax that when this supplier
maintains substantial nexus with the taxing state.\(^\text{104}\) According to the Supreme
Court, the legislation under judgement satisfied this requirement provided that
it is sufficiently grounded on economic and virtual nexus.\(^\text{105}\)

Moreover, the Court mentions that albeit not discussed in the case, the
legislation sub judice is likely to prevent discrimination and undue burdens in

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\(^{100}\) Organisation for Economic Co-operation and Development, *International VAT/GST Guidelines* (n 1) ch C.3.2.


\(^{103}\) ibid 10–14.

\(^{104}\) ibid 22–23.

\(^{105}\) ibid.
interstate commerce. The decision further mentions the adoption of the SSUTA by the State of North Dakota as one of the means to reduce administrative and compliance costs, through the adoption of software which relieves sellers from audit liabilities.106

After this decision, several States are passing laws on the ground of the economic nexus requirement, creating presumptions that a company with a given amount of transactions or sales is deemed to have enough nexus to be taxed in a State.

Before the Wayfair case, the American States could not impose taxes on the sales made by a remote supplier (i.e. a supplier with no physical presence in that State). And whether the States were precluded to tax remote suppliers, it was pointless to establish obligations for marketplaces to remit and collect VAT on behalf of out-of-State suppliers. The States effort to tax the remote suppliers, with the consequently overruling of the physical presence rule, opened the way for States legislation imposing an obligation for intermediaries of remote sales.

Cross-border suppliers and marketplaces operators can now expect to be affected by the results of the Wayfair case and by the legislation issued in consequence of the judgement,107 even though the enforcement of such legislation for foreign suppliers and marketplaces operators might be challenging.108

The legislation that has been adopted by the American States109 holding marketplaces liable for taxes due in the transactions they intermediate seems to reflect the functional perspective of the deemed supply approach suggested by the OECD, once it requires marketplaces to perform specific transactions or gather information rather than reflecting a general definition.

It is noteworthy that the physical presence threshold was originally determined in relation to the seller. However, after the Wayfair case, the State Tax Administrations are now determining the substantial nexus regarding the marketplaces’ amount of sales and transactions. This paradox is crucial once the taxable person can still rely on the protection conferred by the American Constitution and by the Wayfair precedent. Should the seller rely on the substantial nexus requirement, it is reasonable to conclude that the seller may be

106 ibid 23.
accountable for the performance of a number of transactions or sales, and not the marketplaces.

It is therefore unclear whether such laws are actually changing the taxable person who would be originally held liable to tax. If this is not the case, and the laws are deeming the marketplace as the supplier, then the supply of the underlying transaction might not be considered to determine the marketplaces threshold for the liability shift. On the other hand, where the supplier sells goods or services through multiple platforms, that supplier would be liable to tax if the sum of the transactions reaches the substantial nexus threshold.

### 3.3.4. Concluding remarks

Marketplaces-targeting legislation reflects the rise of the platform economy and new business models. The pieces of law analyzed in this paper suggest that the tax authorities assume that the current tax assessment model lacks the necessary data for a complete evaluation. As a consequence, measures allowing triangulation of data – such as those observed in Italy’s and in the UK’s framework – are adopted along with the shifting of liabilities from the supplier to intermediary marketplaces.

Overall, all the countries adopted some variation of the OECD’s deemed supply approach, either considering marketplaces as the person originally liable to tax (European Union as of 2021, Australia, and the United States), or as a penalty, imposing liabilities to marketplaces as if they had supplied the goods themselves (Italy until 2021, and the United Kingdom).

When countries adopt the OECD’s deemed supply approach as a penalty, their legislation lacks regulation on the VAT flow and administrative procedures. As consequences, (i) the VAT credit flow when the tax is paid by the marketplaces is not regulated, (ii) it is unclear whether marketplaces penalized by the deemed supply approach will relieve their customers’ liabilities, and (iii) methods to ensure that the VAT is not paid in duplicity are uncertain.

The grounds for the qualification of marketplaces as such and for the attribution of liabilities to those marketplaces are diversified. In our analysis, Australia and some American States had adopted a functional perspective of the deemed supply approach, whereby a marketplace is held liable for underlying transactions if they perform functions that somehow can be connected to the liabilities attributed to them (e.g. when marketplaces operators do not set any terms and conditions under which the supply is made, the marketplaces are not intermediaries and cannot be liable for VAT due in the underlying transaction). On the other hand, Italy and the European Union adopted the “facilitation”
criteria, establishing liabilities for marketplaces that had facilitated transactions between suppliers and buyers, regardless if marketplaces are on top of the information or resources of the underlying flow.

Only the European Union set the contractual approach as an alternative for marketplaces liabilities, and the block did so in a specific case only. This result proves our conclusions mentioned in Section 2.5, regarding the unlikely widespread adoption of this approach by tax administrations.

Although the European Union established a threshold for underlying transactions with origin outside the block, the analyzed countries do not differ domestic and international transactions. The proportionality of this measure might be discussed as long as the tax authorities have technical means and jurisdiction to collect VAT from a domestic underlying supply. Likewise, proportionality and practical issues arise if foreign marketplaces are held liable for the VAT due in domestic underlying transactions (i.e. where both buyer and supplier are domestic taxable persons, for taxable transactions performed domestically but intermediated by a foreign marketplace).

4. FINDINGS AND CONCLUSIONS

The aim of this paper is twofold: (i) to analyze the role of third parties in the VAT collection and remittance, and VAT legislation compliance according to the OECD; and (ii) to identify and compare concrete measures implemented by different jurisdictions on this subject with a focus in invoicing service providers and online marketplaces.

In Section 2, the OECD publications related to the role of third parties in the VAT collection chain and compliance were discussed. The author concluded that the role attributed to third parties is expanded in each of the OECD’s publications.

However, the OECD deviates from the conclusions of the Accounting Software Guidelines on the adoption of standard procedures. The OECD suggests, instead, the adoption of TPSPs to ensure compliance on a worldwide scale. The adoption of standard procedures for invoicing processes, certification requirements, registration, and exchange of information are measures that could be designed to facilitate the VAT compliance for taxable persons and third parties. The author is aware of the political issues involving the design of a multilateral instrument, however, believes that the adoption of multilateral instruments and technological standards could ensure a voluntary compliant collection chain.
Overall, the role of third parties in the VAT compliance from the OECD’s perspective can be summarized by the adoption of either the deemed supply or the contractual approach, being other configurations just different angles of the same two approaches or a confluence between them.

The OECD’s publications do not mention the role of sole payment processors and it is unclear why they are excluded from tax liabilities, being that they participate in the transaction, have means to trace the parties and effectively intermediate financial transactions. The author suggests further studies on the role of payment processors in the VAT collection and compliance chain.

In Section 3, the role of third parties in the VAT compliance for different countries was discussed, with a focus on invoicing service providers and in marketplaces. Regulations and liabilities involving ISPs and taxable persons outsourcing they tax functions to ISPs differ considerably according to different jurisdictions; therefore, a general outline cannot be concluded from the analyzed countries, which suggests the need for the adoption of international standards to ensure VAT compliance in a worldwide scale. When it comes to marketplaces, the attribution of liabilities concentrates in the deemed supply approach (as such or as a penalty), and the contractual approach is rarely mentioned. The functional perspective of the deemed supply approach is a discordant point in the analyzed jurisdictions.

When comparing the findings in Section 3 with the findings in Section 2, it becomes clear that the discussions performed by the OECD are relevant, once the legislation affecting third-parties is being edited by some countries, and that there is a need for the adoption of international standards relating to invoicing procedures and invoicing service providers. Regarding invoicing service providers, the American States’ measures are close to the OECD’s suggestions on certification requirements, certainty for taxable persons, and relief of liabilities for the underlying suppliers. In the other studied countries, the degree of liabilities shifting is unclear as much as it is unclear whether the certification requirements are able to ensure certainty and relief of liabilities for taxable persons. In contrast, the analyzed legislation affecting marketplaces are somehow similar, even though administrative procedures and the credit flow is unclear depending on the adoption of the deemed supply approach as such or as a penalty.
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