European Value Added Tax and Digital Economy

Does the new legal framework make EU VAT system truly fit for the digital economy?

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LIST OF ABBREVIATIONS

VAT – Value Added Tax

EU – European Union

OECD – Organization for Economic Cooperation and Development

B2B – Business to business supplies

B2C – Business to customer supplies

VIES – VAT Information Exchange System (Europe)

ECJ – European Court of Justice

MS – Member State

MOSS – Mini One Stop Shop

OSS – One Stop Shop

TBE – Telecommunication, broadcasting and electronic services

MNE – Multinational enterprises

SME – Small and medium enterprises
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1. INTRODUCTION

1.1. Digitalization of global economy and traditional VAT system

Digitalization of the global economy has been, in the past decade, a widely discussed topic by the OECD and the European Commission (hereinafter referred to as Commission).¹ Use of Internet has spread widely in the past decade and facilitated development of the international trade. It has led to the commercialization of the traditional goods and services and enabled MNEs and SMEs to reach their potential partners and customers all around the world.² Furthermore, it created opportunities for new ways of doing business and selling new types of products and services. Importantly, it has led to the creation of new types of products that are supplied “online” and not limited geographically or by the time. Additionally, it is now possible to supply goods and services without need for partners to meet in person.³

Unfortunately a traditional VAT system, constructed to be in line with “tangible “nature of supplies that were physically supplied cross-border and for which origin and destination were easy to identify, does not fit for the digital economy. Current VAT system has been identified as one of the major barriers for business engaging in cross-border trade. Furthermore, as indicated in the Impact Assessment⁴, current VAT system was a major source of distortions for EU losses and has led to substantial losses for Member States. Taking into consideration dynamics of economic and technological development, it was necessary for EU VAT rules to be modernized and brought up-to-date, in order to ensure that correct VAT is declared and

collected, that possibilities for fraud are limited and that application of VAT to cross-border supplies is simplified.\textsuperscript{5}

Being aware of all the flows of the existing VAT system, the Commission has proposed series of amendments to the existing VAT Directive and Implementing Council Regulation. Commission’s objective was to ensure the free movement of goods and services and to ensure that “individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition”\textsuperscript{6}. This was further indicated by the adoption of the Digital Single Market strategy in May 2015, which consisted of a series of actions designed to remove obstacles for the growth of e-commerce in the EU.\textsuperscript{7}

In order to achieve its objective the Commission has proposed EU legislation in two stages. First package has entered into force in 2015 and included new place of supply rules for supplies of telecommunications, broadcasting and electronic services and introduction of a Mini One Stop Shop (MOSS), which is a simplified electronic registration and payment system. Impact Assessment has shown that introduction of the 2015 rules has been successful, with satisfaction on the business side and increase in the revenue in a majority of the Member States. However, some issues of concern with the new rules have been identified and the Commission has proposed new amendments in order to improve the current system.

Second package of the proposed measures is referred to as “VAT e-commerce package”. By proposing the VAT e-commerce package the Commission aimed at addressing issues of concern identified with 2015 rules and at facilitating cross-border trade, combating VAT fraud and ensuring fair

\textsuperscript{6} Impact Assessment, at 1.
\textsuperscript{7} Id.
competition within internal market. Commission´s plan was to create robust and simpler VAT that will fit for the digital environment.

1.2. Objective and purpose

The objective of the thesis is to analyze and identify what are problems and loopholes in 2015 rules (new place of supply rules and the MOSS) and see in what way and to what extent have those problems been addressed and properly solved with introduction of the VAT e-commerce package in 2017. Therefore, the purpose of the thesis is to determine if we are moving towards a definitive VAT system, as suggested by the Commission, or even after the recently proposed amendments there will be some unresolved issues.

To achieve the objective, the author will try to address the following questions:

- Will taxation at destination of electronically supplied services ensure that VAT revenues actually accrue to the MS of consumption?
- Is the application of destination principle in B2C supplies of electronically supplied services easy going from supplier´s perspective or it is quite burdensome and costly?
- Does the MOSS scheme reduce administrative burden and compliance costs for cross-border traders?
- Does VAT e-commerce package address all the issues of concern identified in regard to the 2015 place of supply rules and MOSS?

1.3. Delimitations

The aim of this thesis is to address the changes made to the VAT Directive and the Implementing Council Regulation in 2015 as well as the proposed amendments included in the VAT e-commerce package, some of which entered into force in 2019 and some of which will enter into force in 2021. The author aims at analyzing practical aspects of applying new rules in the digital environment in order to see if we are moving towards a definitive EU VAT system. Therefore, the rules which were in force prior to 2015 will be
only briefly addressed in order to explain why it was necessary to modernize traditional VAT system and no deeper analysis will be provided in regard to this.

The thesis contains critical analysis of the proposed amendments to modernize VAT for cross-border e-commerce. Within the field of e-commerce distinction has to be made between “distance sales” (supplies that are ordered online but have to be delivered physically) and “online/digital supplies” (supplies that are ordered and delivered/perform online). From the tax perspective online supplies are more challenging. Applying VAT rules to online supplies raises a lot of difficulties when it comes to identifying a customer and his location. Therefore, major part of the analysis will be made in relation to difficulties arising when identifying customer and his location in online supplies and how new rules address those issues. Only minor part of the analysis will be dedicated to the existing rules and proposed amendments on distance sales.

1.4. Legal method and materials

The method that will be used to achieve previously defined objective of the thesis is legal doctrinal method. The doctrine includes law and legal concepts and principles of all types (cases, statutes and rules). Firstly, legal doctrinal method aims at identifying and locating the relevant sources of law. Secondly, it aims at analyzing previously identified sources of law with the use of deductive logic, legal reasoning and analogy.

Taking into consideration that the objective of the thesis is to analyze new rules by which VAT Directive (Council Directive 2006/112/EC) and VAT Implementing Regulation (Council Regulation (EU) No 282/2011) are amended, author’s view is that legal doctrinal method is the appropriate method to conduct this analysis and find the answers to the research questions identified in the objective and purpose section.
Topic of the thesis is limited to the EU area and will primarily contain analysis of the EU secondary law. Secondary legislation includes, among other legislative acts, regulations and directives. Regulations and directives are both binding legislative acts, however there is difference in their applicability. Regulations are directly applicable in all Member States and are binding in their entirety. This means that they do not need to be transposed into the national law. On the other side, directives are binding in terms of the result that has to be achieved by the Member States, but national authorities have discretion to the form and methods. Therefore, directives have to be transposed into the national law.

Major part of the analysis will be based on the EU secondary legislation and in the area if indirect taxation that is the VAT Directive and the Council Regulation (EU) No 282/2011 (“the VAT Implementing Regulation”). As was previously mentioned, regulation is considered as binding legislative act and is directly applicable in all Member States. The VAT Implementing Regulation provides for the binding rules that are necessary for the implementation of the VAT Directive. On the other hand, directives are not directly applicable and need to be transposed into the national legislation. VAT Directive provides for the common system of the VAT with aim of harmonizing the VAT system within the EU area. Even though directives always leave some discretion to the Member States, discretion left to the Member States is very limited when it comes to the VAT Directive.

While analyzing most recent amendments to the VAT Directive and Implementing Regulation, author will also use and refer to the Explanatory notes prepared by the Commission and published in April 2014. Explanatory notes provide guidance and aim at making it easier to apply new place of supply rules for TBE services. However, explanatory notes are not legally binding sources and they can only provide help with interpretation of other sources (in this case VAT Directive and Implementing Regulation).
Furthermore, working papers, proposals and Impact Assessment provided by the European Commission will be used in the analysis in order to get clearer picture of all the amendments that were made. Other sources used in this thesis include relevant books as well as journal articles.

1.5. Outline

Firstly, introductory chapter provides for an overview of the research problem and definition of the e-commerce and digital supplies. Chapter 2 provides for an overview of how are online supplies taxed and what are difficulties in relation to this, in order to explain why is this topic interesting and relevant.

Chapter 3 briefly summarizes EU VAT legislative framework for online supplies before new place of supply rules and Mini One Stop Shop scheme were introduced in 2015. Consequently, in the chapter 4 new place of supply rules and the MOSS system will be explained in details and critically analyzed, identifying all the difficulties and problems when applying those rules and taxing online supplies.

Chapter 5 is dedicated to the recently proposed amendments by the Commission, also known as VAT e-commerce package. This chapter provides an overview of the major amendments included in the VAT e-commerce package with the critical analysis in order to see if all the issues, identified in the previous chapter, have been addressed properly and whether we are moving towards a definitive EU VAT system. Furthermore, with the reference to online platforms as an example, author will try to underline some of the flaws that still exist in the VAT system even after recently proposed amendments. This chapter will be followed by an overall conclusion where author will try to answer research questions and see if the objective identified at the very beginning has been achieved.
1.6. Terminology
1.6.1. Definition of e-commerce

E-commerce emerged in 1991 when Internet was made available for commercial use. From that point a lot of businesses were set up in order to supply goods and services online. However, there is no homogeneous definition of e-commerce. It can be defined in a way that it covers different technical solutions of conducting business via electronic media (e.g. Internet or mobile phone) or it can have more delimited scope.\(^8\)

E-commerce can be defined as “the production, advertising, sale and distribution of goods and services via telecommunication networks”.\(^9\) Even though electronic commerce is primarily associated with Internet this definition also covers transactions made through other telecommunication networks. Those can include broadcasting or transmission of sound, images, data or other information via telephone, radio, television.\(^10\)

On the other side, it is also possible to define e-commerce as the process of buying and selling or exchange of products, services and information online, using computer networks.\(^11\)

1.6.2. Digital supplies

In contrast to the previously mentioned broad definition of e-commerce, more narrow definition puts transactions that are primarily made through Internet (“online transactions”) in the focus. Because of the opportunities Internet is offering, online transactions have been put in the focus in the recent years.\(^12\)

\(^12\) Marie Lamensch, *European Value Added Tax in the Digital Era*, p. 33.
Therefore, distinction has to be made between supplies of tangible goods and conventional services, which although ordered online are still delivered physically (“distance sales”) and supplies that are ordered and delivered/ performed online (referred to as “online supplies” or “digital supplies”).\(^{13}\) Definition of the “electronically supplied services”, also referred to as electronic services, is given in Article 7 of the Regulation (EU) No. 1042/2013.\(^{14}\)

Digital supplies are various and they among others include supplies of music, movies, books, artwork, cooking recipes, IT services (anti-virus, web hosting, mastering and maintenance), consultancy services, gaming, gambling, e-learning modules, online teaching and tutorials, online libraries, news, etc. Some of those supplies can be linked to traditional supplies which are now made available via Internet (known as “digital convergence”)\(^ {15}\). On the other hand, some supplies were developed around Internet and have no connection with traditional supplies (e.g. web hosting, data processing)\(^ {16}\).

2. TAXATION OF ONLINE SUPPLIES

2.1. Introduction

Within e-commerce, as mentioned in the previous chapter, difference has to be made between supplies that are ordered online but still need to be “physically” delivered (“distance sales”) and those supplies that are both ordered and delivered/ performed online (“online supplies” or “digital supplies”).

It is very difficult to estimate the volume of online supplies and their economic importance. However, it is certain that volume of online supplies

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\(^{13}\) Marie Lamensch, *European Value Added Tax in the Digital Era*, p. 33.

\(^{14}\) “Electronically supplied services” include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology (Article 7 of Regulation No. 1042/2013 amending implementing Regulation (EU) No. 282/2011).


\(^{16}\) Marie Lamensch, *European Value Added Tax in the Digital Era*, p. 34.
has increased over the past years and will continue to increase. This is expectable taking into consideration that online supplies are easy to make, cheaper and crisis resistant.\(^{17}\)

First of all, online supplies are easy flowing because there are no location or time constraints and they can be supplied through variety of devices. They are easy to make from supplier’s and consumer’s perspective. Suppliers will find it easier to engage in international trade relying on the Internet technology. From the consumer’s perspective, the digital convergence has made online supplies more accessible and has opened possibilities to obtain and enjoy more easily information, entertainment and different kinds of services.\(^{18}\)

Secondly, online supplies are cheaper since the costs of delivering services online are lower. Thirdly, the advantage of online supplies is that during the economic crisis in 2007, e-commerce has resisted the crisis and managed to continue its growth.\(^{19}\)

On the other hand, some of the advantages of the e-commerce, related to its existence in non-physical and borderless world, are placing a lot of challenges to the traditional tax system. Therefore, the need for amendments of the traditional VAT system seemed inevitable to make it fit for the digital economy.\(^{20}\)

2.2. Challenges of taxing online supplies

There are a lot of issues related to the online supplies that make them very challenging from the tax perspective. First of all, taxation of online supplies is challenging because they take place on an “e-market place”, which does

\(^{17}\) Marie Lamensch, *European Value Added Tax in the Digital Era*, p. 36.

\(^{18}\) Id. p. 36.

\(^{19}\) Id. p. 38.

not have space or time constraints. Therefore, location of the parties and their
time zones are irrelevant.\textsuperscript{21} Secondly, online supplies require no physical
presence and are supplied without “physically” crossing the border. Consequently, they do not require supplier’s intervention in the tangible
world. Thirdly, for online services to be supplied contractual or legal
relationship between the parties does not have to exist. Furthermore, there is
no need for physical contact between the parties, since when it comes to
online supplies they only meet virtually and it enables users to stay
anonymous.\textsuperscript{22}

The global nature of the e-marketplace along with relative anonymity of the
Internet users is the reason why taxation of e-commerce is very challenging
from the perspective of traditional tax system. Traditional tax systems are
based on the principle of territory and intended to apply to subjects that are
easy to identify and locate (link to certain national jurisdiction). Therefore, it
is very difficult for the supplier to be “globally” compliant on the e-
marketplace.\textsuperscript{23} From all the above mentioned facts it can be easily concluded
that it is very challenging to tax online supplies and to apply provisions of
traditional tax system to online supplies.

2.3. Treatment of online supplies from EU VAT perspective

From the very beginning of the e-commerce development, in early 1990s, the
Commission has indicated the importance of putting e-commerce under VAT
system in the same way as the conventional commerce.\textsuperscript{24} It was clear that it
is essential to be able to apply VAT to the online supplies and that traditional
EU VAT system is not be appropriate to address all issues related to the e-
commerce.\textsuperscript{25}

\textsuperscript{21} Marie Lamensch, European Value Added Tax in the Digital Era, p. 39.
\textsuperscript{22} Id, p. 33.
\textsuperscript{23} Id, p. 40.
\textsuperscript{24} Id, p. 67.
\textsuperscript{25} European Commission Working Party I, Harmonisation of Turnover Taxes, Interim report on
the implications of electronic commerce for VAT and customs, (Working Paper XXI/98/0359,
1998), p. 3.
The areas of uncertainty, as indicated in the Working Paper I by the Commission (1998), included:

- difficulties in identifying parties to an e-commerce transaction,
- weaknesses in identifying geographic location or jurisdiction,
- problems in availability and access to information that may arise when records are kept in other jurisdictions or when the manner in which e-commerce functions leads to a degradation in audit trails.\textsuperscript{26}

In the proposal that the Commission submitted in June 2000, they have realized the need to simplify and strengthen the EU VAT system and adopt rules that would “be predictable and inspire business and consumer confidence”.\textsuperscript{27}

In simpler words, EU VAT framework applicable to online supplies consists of five sets of provisions. These provisions can be described as following:

- The identification of “electronically supplied services” under the VAT Directive, with specific rules regarding place of supply and collection mechanism,
- Exclusion of reduced tax rates for electronically supplied services,
- Shift in tax liability when electronically supplied services are provided through intermediaries.\textsuperscript{28}


\textsuperscript{28} Marie Lamensch, \textit{European Value Added Tax in the Digital Era}, p. 70.
3. THE EU VAT LEGISLATIVE FRAMEWORK FOR E-COMMERCE

3.1. Introduction

In this chapter major legislative acts forming EU VAT framework for e-commerce will be explained. Since recently introduced changes, including new place of supply rules, MOSS scheme and VAT e-commerce package, are subject of this thesis they will be analyzed in details in the separate chapters later in the thesis.

Foundations for EU VAT framework for e-commerce are found in the OECD 1998 ‘Ottawa Framework’ recommendations on e-commerce. OECD Ottawa Framework emphasized the need to ensure taxation at destination and to achieve fiscal neutrality between online supplies and conventional commerce.  

EU has taken gradual steps in ensuring the applicability of destination principle. The first step in this process was E-commerce Directive that came into force in 2003, in which they have introduced destination principle in relation to third countries. The second step was introduction of VAT package in 2008. At this stage it was acknowledged that by the 2015, in the case of intra-Community B2C supplies of TBE services, there will be a shift in regard to the place of supply from origin principle to destination principle.

These changes were further accompanied with introduction of MOSS (Mini One Stop Shop) that enabled suppliers to account for their EU-wide VAT in the Member State of establishment. The last step in this process was adoption of the VAT e-commerce package in 2017, with parts of it coming into force in 2019 and parts in 2021.

30 Id, p. 4.
It is clear that EU has done a lot in order to ensure that online supplies are taxed at destination while trying to minimize administrative costs for tax administrations and compliance burdens for taxable persons.31

3.2. The E-Commerce Directive

With adoption of E-Commerce Directive, in May 2002, EU has provided institutional framework, a definition of electronically supplied services and a new place of supply rules.32 According to the new legal framework customers located in the EU were charged EU VAT regardless of the supplier’s place of establishment. In the case of inbound international supplies charging of the VAT depended on whether it was B2B or B2C supply. If the recipient was a taxable person then according to the reverse charge mechanism he was obliged to declare and pay VAT. Non-EU established suppliers of electronic services were not obliged to charge VAT and therefore not required to register for VAT. In B2C supplies it was the supplier that was required to charge VAT and therefore had the obligation to register for VAT in each Member State in which he supplied electronic services.33

At first, e-suppliers were given a chance to register only in one MS of their choice. Regarding non-EU traders, the suggestion of the Commission was that they should charge VAT at the rate applicable in the MS of their registration. However, during Council negotiations they have decided that they should charge VAT at the rate applicable in the MS in which the customer is established. This system has enabled non-EU suppliers to deal with single tax administration and was applicable until the end of 2014.34

34 Id, p. 26.
On the other side, in the case of intra-EU B2C supplies of electronic services the E-commerce Directive did not amend the existing rules. The place of supply was still the place where supplier was established.

The measures introduced with the E-commerce Directive were supposed to be applied until 30 June 2006 and unless new rules are introduced EU would again apply rules that were applied before 2003. Taking into consideration all disadvantages of the pre-2003 rules the Commission has decided to extend the application of those measures until 31 December 2008.35

The E-commerce Directive aimed at encouraging EU e-suppliers to develop their business and clients in the market outside EU. It was also expected that the new rules will motivate non-EU traders to comply with EU rules and prevent distortions in the competition on the international and EU market. On the other hand, it created the opportunity for e-suppliers to choose or modify their place of establishment and take advantage of the jurisdictions with lower VAT rates. This tax forum-shopping has created new problems and caused distortions in the competition between Member States.36

3.3. Adoption of the VAT package in 2008

As previously mentioned, even with the changes implemented in 2003, the place of taxation for intra-EU B2C supplies of electronic services was still in the MS in which supplier was established, while for supplies from third countries destination principle was already introduced. Consequently, suppliers were establishing themselves in the MSs with low VAT rates. This has led to a distortion of competition and erosion of tax base of the MSs with higher VAT rates. Therefore, further reforms of the place of supply were needed.37

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36 Id, p. 28.
37 Id, p. 13.
In 2005 the Commission has made a proposal for a new place of supply rules, in order to apply destination principle also to intra-EU supplies of e-services. This proposal has been followed by few years of negotiations that finally resulted in the Council adopting new place of supply rules as part of 2008 ‘VAT package’ compromise.\(^{38}\) Consequently, as of 1 January 2015, the place of supply of TBE services to non-taxable persons is a MS in which the customer is located. Now the same principle was applicable to intra-EU and inbound supplies from third countries, putting EU and non-EU suppliers on equal footing.\(^ {39}\)

For EU-suppliers of electronically supplied services, regardless if they are B2B\(^ {40}\) or B2C\(^ {41}\) supplies, the place of supply is a MS where customer is established. However, this did not mean that the person liable to pay VAT has changed. It is still the customer in B2B supplies and supplier in B2C supplies who is liable to pay tax. The only difference is that in B2C supplies the supplier has the obligation to declare and pay foreign VAT.\(^ {42}\)

Furthermore, in 2004, the Commission has made a proposal for ‘one stop’ mechanism that would enable traders to fulfill EU-wide VAT obligations in the MS of their establishment. This principle of vendor registration and remittance model was part of the VAT package, with the intention that a Mini One Stop Shop (MOSS) would apply from 2015 as a support to the new place of supply rules.\(^ {43}\)

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\(^{39}\) Id. p. 14.

\(^{40}\) Article 44 of the VAT Directive.


4. NEW PLACE OF SUPPLY RULES AND MINI ONE STOP SHOP (MOSS)

4.1. Legislative framework

EU is actively working on completing a “Digital Single Market” by 2020 and has for that purpose adopted a “Digital Agenda” and “Single Market Act”. As indicated by the Commission, the aim of EU Digital Single Market is to reduce barriers and open more opportunities to conduct business within the EU in legal, secure, safe and affordable way. New place of supply rules and the MOSS system are considered as crucial instruments in achieving this aim. Those reforms are EU’s way towards simple, efficient and neutral, robust and fraud proof EU VAT system.

In order to implement new place of supply rules and the MOSS it was necessary to ensure proper legal structure that can support it. Council Regulation 282/2011, which came into effect on 1 July 2011, has provided guidance for easier identification of the customer and his location when taxation is at destination. Consequently, the Regulation was applicable to intra-EU B2C supplies of electronically supplied services starting from 1 January 2015.

Furthermore, the Commission has proposed three implementing regulations, which Member States have agreed to. First of those regulations was a Council Regulation that concerned obligations under the MOSS, adopted in October 2011.

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44 Marie Lamensch, European Value Added Tax in the Digital Era, p. 3.
46 Id.
49 It provided guidance in the case of supplies of all services taxed at destination and not only electronically supplied service.
2012.\textsuperscript{50} It was adopted along with the Commission Regulation\textsuperscript{51} that was related to the standard forms and returns to be used.\textsuperscript{52} Moreover, these were followed by the adoption of another Council Regulation in October 2013. This Regulation has substantially amended Council Regulation 282/2011\textsuperscript{53} and has provided guidance in identifying the place of supply and location of the customer by introducing number of proxies in relation to that.\textsuperscript{54} More precisely, this last Regulation gives clarifications in the case when customer has multiple locations or in case when he used devices to acquire TBE services in a MS other than the one in which he is established. Furthermore, new legal framework has introduced a more detailed definition of TBE services.

In order to ensure harmonized and consistent application of the new rules the Commission has, in collaboration with Member States and business representatives, prepared extensive Explanatory Notes published in April 2014.\textsuperscript{55} ‘Explanatory Notes‘ were intended to serve as a guidance tool and provide clarifications for applying new place of supply rules for TBE services. They have a non-binding nature.\textsuperscript{56}

Additionally, the Commission made a draft of Guide to the MOSS adopted by the Standing Committee on Administrative Cooperation (SCAC) in


\textsuperscript{52} M. Lamensch, E. Traversa, S. van Thiel, Value Added Tax and the Digital Economy, p.15.


\textsuperscript{54} Id, p.1.


\textsuperscript{56} M. Lamensch, E. Traversa, S. van Thiel, Value Added Tax and the Digital Economy, p.16.
October 2013. These guidelines have provided detailed information on how MOSS will work in practice.

4.2. New place of supply rules

4.2.1. Identifying customer and his location

4.2.1.1. B2B supplies

When taxation is at destination, online suppliers are required to identify the status and the location of their customer on a transactional basis. In the case of intra-EU and inbound B2B supplies they are expected to identify with certainty that a supply is made to a taxable person, before they proceed with zero-rated supply (according to a reverse charge mechanism). And when it comes to inbound and intra-EU B2C supplies, suppliers are required to identify location of the customer in order to collect and pay correct VAT.

When it comes to outbound B2B supplies of electronically supplied services, suppliers are expected to obtain a certificate issued by the customer’s competent tax authority as a confirmation that he is engaged in an economic activity. In the case when supplier is not able to obtain such certificate, he should obtain a VAT number or similar number attributed to the customer’s country of establishment. Alternatively, if none of the above can be obtained, suppliers should rely on: ´any other proof which demonstrates that the customer is a taxable person and if the supplier carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks´.


58 Article 18(3) a) of the Council Regulation 282/2011 provides that: ´Unless he has information to the contrary, the supplier may regard a customer established outside the Community as a taxable person: (a) if he obtains from the customer a certificate issued by the customer’s competent tax authorities as confirmation that the customer is engaged in economic activities in order to enable him to obtain a refund of VAT…´.

59 Article 18 (3) b) of Council Regulation 282/2011. No amendment to this provision has been made under Council Regulation 1042/2013.
Even though no changes to these provisions were made under Council Regulation 1042/2013, requirements are very difficult to implement in regard to the electronically supplied services. It is no reasonable to expect that third countries are ready to issue those kind of certificates (in the case when there is no mutual assistance agreement). Furthermore, when it comes to VAT or similar number it is also possible that some third countries will not have such kind of a number or even if it exists it is very hard for the supplier to identify that this number corresponds to a specific taxpayer.\(^6^0\) It seems contradictory to the definition of electronically supplied services, as ‘automated ‘and made with ‘minimal human intervention’, to make such extensive requirements that suppliers have to meet for the tax purposes. Additionally, supplies made to third countries are not subject to EU VAT but are rather VAT free supplies. This just indicates limitations to the application of Article 18(3).\(^6^1\)

In the case of intra-EU and inbound B2B supplies situation is simpler. According to the Article 18(2) of the Council Regulation 282/2011, suppliers are allowed to deny the customer status of taxable person if he does not communicate a VAT number, unless supplier has information that proofs differently. When it comes to electronically supplied services, as of January 2015, suppliers are allowed to deny status of taxable person to an EU customer that has not communicated a VAT number without considering information to the contrary.\(^6^2\) This amendment made with Council Regulation 1042/2013 has to some extent provided a relief for suppliers.

However, even when customers communicate a VAT number, it is not always possible to verify this information due to the limits of the VIES. One of the issues is that current VIES contains only VAT numbers attributed to the suppliers engaged in intra-EU supplies, excluding those who make


\(^{61}\) Id, p. 43.

\(^{62}\) Council Regulation 1042/2013 adds the following subparagraph: However, irrespective of information to the contrary, the supplier of (...) electronic services may regard a customer established within the Community as a non-taxable person as long as that customer has not communicated his individual VAT identification number to the supplier.
supplies only domestically. Another limitation is that in the case when VIES confirms validity of the VAT number it does not provide information on the name and the address of the taxable person. Therefore, it is difficult for the supplier to verify that VAT number corresponds to a specific name and address provided by the customer. Furthermore, in any situation when VIES is unavailable it is impossible for suppliers to verify VAT number.\textsuperscript{63}

Identifying customer’s location in B2B supplies of electronically supplied services is less difficulties than in B2C supplies. However, even in B2B supplies there are some issues related to the electronically supplied services.

In the case of intra-EU B2B supplies to customers located in a single jurisdiction, it all comes to identifying the place of establishment or usual residence of a customer. In order to identify customer’s location supplier is expected to rely on the information provided by the customer. However, suppliers also have obligation to verify the information provided by the customer by: ´normal commercial security measures such as those relating to identity or payment checks´.\textsuperscript{64}

When it comes to intra-EU B2B supplies to customers located in several countries, the process of identifying location becomes more difficult. When the supply is made to a fixed establishment of the customer established in the other jurisdiction then several issues may arise. Apart from the fact that identifying if the supply is made to a fixed establishment may cause some additional costs, the problem is that the term fixed establishment is not defined consistently in every jurisdiction. Furthermore, it is questionable if the supplier can with a certainty determine if the fixed establishment meets

\textsuperscript{63} M. Lamensch, E. Traversa, S. van Thiel, Value Added Tax and the Digital Economy, p. 44.

\textsuperscript{64} Article 20 of the Council Regulation 282/2011 provides that: ´Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable, falls within the scope of Article 44 of Directive 2006/112/EC, and where that taxable person is established in a single country, or, in the absence of a place of establishment of a business or a fixed establishment, has his permanent address and usually resides in a single country, that supply of services shall be taxable in that country. The supplier shall establish that place based on information from the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks. The information may include the VAT identification number attributed by the Member State where the customer is established.’
all required criteria to be treated as such (if it has a sufficient degree of permanence and suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs or to provide services which it supplies65) and benefit from zero-rated supply under reverse charge mechanism.66 For example, if online supplier provides certain apps for business customers, it is questionable how is he going to identify if the fixed establishment is able to use this service and is it going to use it for its own needs or is just purchasing it on behalf of the several entities of the company.

According to the provision in the Council Regulation 282/2011, when determining whether customer´s fixed establishment will use services for its own needs, supplier should consider the ´nature and use´ of supplied service.67 In the case when this does not lead to identifying the fixed establishment to which the supply is made, suppliers should: ´pay particular attention to whether the contract, the order form and the VAT identification number attributed by the MS of the customer and communicated to him by the customer identify the fixed establishment as the customer of the service and whether the fixed establishment is the entity paying for the service.´68 Finally, if the fixed establishment cannot be identified, supplier may consider that the place of supply is where the customer´s business is established.69

The aforementioned issues have not been addressed by the Council Regulation 1042/2013. Taking into consideration all the challenges related to the taxation of electronically supplied services, mentioned in the second chapter, it might be very burdensome for suppliers to comply with all those verification requirements and conduct analysis on the case by case basis. On the other hand, in the case of B2B supplies of electronically supplied services, there is less space for manipulation and VAT fraud, as is case with B2C

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68 Id., Art. 22 para. 1.
69 Id., Art. 21.
supplies. Consequently, taxation at destination ensures that VAT is charged where the supply is actually consumed.

4.2.1.2. B2C supplies

Identifying customer´s location in intra-EU and inbound B2C supplies can be very challenging and sometimes difficult. Major presumptions used to identify location of the customer in B2C supplies will be summarized and analyzed in this section.

When identifying location of the customer, in the absence of the ´official´ information as is the case with taxable persons, supplier has to do verification on the basis of ´normal commercial security measures such as those relating to identity or payment checks´. Conduct of such verification can be challenging if we take into consideration that supplier cannot always obtain payment details (e.g. when payment is made through PayPal or use of e-cash). Furthermore, it is uncertain which kind of identity check are suppliers expected to conduct if we keep in mind all the issues connected with digital supplies, identified in the second chapter (possibility of the consumers to remain anonymous).

The situation becomes complex when consumer is established in more than one state or when his permanent address and usual residence are in different countries. In that case, the Regulation gives guidance on how to determine consumer´s location. According to the Council Regulation 282/2011, the supplier in this situation had to determine the ´place that best ensures taxation at the place of actual consumption´. When it comes to non-taxable legal person preference is given to the place of central administration, unless it can be proved that the service is used by a fixed establishment. However, there are no further guidelines in the Regulation on how to identify where the place

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71 Council Regulation 282/2011, Article 24(2).
of central administration is or that service is actually used by the fixed establishment.\textsuperscript{72}

In the case when non-taxable natural person is established in more than one state, preference is given to the place of residence, unless there is evidence that the service is used at the permanent address. In the digital environment it is very challenging for the suppliers to identify the place of effective use and enjoyment of services.\textsuperscript{73} For example, when a customer whose place of residence and permanent address are in different countries downloads movie in one of these countries, it is hard to imagine how supplier will identify where the customer effectively used and enjoyed supplied services. Are they actually supposed to require their customers to provide them with those kind of information? However, even if they would require customers to provide this information there is possibility that the information is incorrect and there is no way that suppliers can verify this. Even if they would find a way to verify it, it would require additional costs and time, which does not seem to be in line with the nature of online supplies.


4.2.2.1. Presumptions for identifying location of a customer

For very difficult situations of identifying customer’s location, Council Regulation 1042/2013, which came into effect on 1 January 2015, provided presumptions as a solution for those situations. Those presumptions should be used only when it proves: ‘extremely difficult, if not practically impossible, for the supplier to know where the customer is actually established, has his permanent address or usually resides.’\textsuperscript{74} Additionally, this means that supplier cannot directly rely on those presumptions but only


\textsuperscript{74} European Commission, Explanatory Notes, p.55.
in the case when after applying normal rules it was not possible to identify customer’s location.

First of those presumptions is the ‘Wi-Fi hotspot and internet café presumption’.\(^{75}\) This presumption may be applied to supplies that are delivered at specific location at which customer is physically present (e.g. Wi-Fi hotspot, an Internet café, a restaurant or a hotel lobby).\(^{76}\) If presuming that those services are also effectively used and enjoyed there, the place of supply is at those locations. Therefore, the aim is to tax supplies at the place where the customer is when actually consuming them.\(^ {77}\) This presumption mostly relates to the telecommunication and broadcasting services, although in some rare cases it can also concern electronically supplied services.

Second presumption is the ‘fixed land line presumption’ that concerns intra-EU and inbound B2C supplies of electronically supplied services. For this presumption to apply supply to the customer has to be made through his fixed landline and supply is taxed at the place of installation of the fixed landline.\(^ {78}\) It is presumed that, as explained in the explanatory notes, this corresponds to the place where services will be used and that it is where the customer belongs.\(^ {79}\)

Third presumption is the ‘mobile network presumption’. Place of taxation of services supplied through mobile networks is the country identified by the mobile country code of the SIM card used when receiving those services.\(^ {80}\)

\(^{75}\) Council Regulation 1042/2013, Article 24a para. 1 and 2.
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Article 24b(a) of the Council Regulation 282/2011 as amended by Council Regulation 1042/2013 provides: ‘(…) where telecommunications, broadcasting or electronically supplied services are supplied to a non-taxable person: (a) through his fixed landline, it shall be presumed that the customer is established, has his permanent address or usually resides at the place of installation of the fixed landline’.\(^ {79}\) European Commission, Explanatory Notes, p.58.
\(^{80}\) Article 24b (b) of Council Regulation 282/2011 as amended by Council Regulation 1042/2013 provides: ‘(…) where telecommunications, broadcasting or electronically supplied services are supplied to a non-taxable person: (b) through mobile networks, it shall be presumed that the place where the customer is established, has his permanent address or usually resides is the country identified by the mobile country code of the SIM card used when receiving those services’.\(^{28}\)
It seems that this presumption concerns supplies made via a traditional telecommunication network rather than supplies made via Internet.

Fourth presumption or ‘the decoder presumption’ concerns electronically supplied services through the use of decoder. This presumption, as the previously mentioned ones is applicable to intra-EU and inbound B2C supplies and they are taxable at the place where decoder is located. It is applicable to supplies delivered through traditional broadcasting networks.\(^{81}\)

Fifth presumption is applicable to supplies of the electronically supplied services made in other circumstances. The place of supply is identified by the supplier on the basis of two items of non-contradictory evidence chosen from a non-exhaustive list, which includes: (a) the billing address of a customer; (b) the internet Protocol (IP) address of the device used by the customer or any method of geolocation; (c) bank details such as the location of the bank account used for payment or the billing address of the customer held by the bank; (d) the Mobile Country Code (MCC) of the International Mobile Subscriber Identity (IMSI) stored on the Subscriber Identity Module (SIM) card used by the customer; (e) the location of the customer’s fixed landline through which the service is supplied to him; (f) other commercially relevant information.\(^{82}\)

As stated in the explanatory notes, method of two non-contradictory evidences is considered as sufficiently flexible, because supplier is free to use ‘commercially relevant information’ when identifying customer’s location and is in line with development of any future services and technologies.\(^{83}\)

\(^{81}\) Article 24b(c) of Council Regulation 282/2011 as amended by Council Regulation 1042/2013, states: (…) where telecommunications, broadcasting or electronically supplied services are supplied to a non-taxable person: c) for which the use of decoder or similar device or a viewing card is needed and a fixed landline is not used, it shall be presumed that the customer is established, has his permanent address or usually resides at the place where that decoder or similar device is located, or if that place is not known, at the place to which the viewing card is sent with a view to being used there (…) .


The sixth presumption relates to the electronically supplied services supplied along with accommodation. The last presumption is the ‘abuse presumption’. According to this presumption some or all the above mentioned presumptions can be questioned by the supplier or the tax administration, on the basis of three items of non-contradictory evidence.\(^{84}\)

4.2.2.2. Feasibility of the application of the presumptions in Council Regulation 282/2011 as amended by Council Regulation 1042/2013

Previously explained presumptions, introduced with amendments made to Council Regulation 282/2011, were intended to clarify and make it easier to determine customer’s location in B2C supplies of electronically supplied services and make existing provisions of the VAT Directive more appropriate to embrace development of any future services and technologies. However, it can be questioned how relevant, reliable and feasible to implement (easy to determine, provide for a reasonable compliance burden and legal certainty) those presumptions are. It seems that some of them are burdensome and difficult to implement.\(^{85}\)

First presumption (‘Wi-Fi hot spot and internet café presumption’), as mentioned in the explanatory notes, relates only to supplies made ‘at’ specific place and excludes ‘over the top’ or subsequent supplies (e.g. the supplies which are subsequently purchased by the customer through the Internet access provided at Wi-Fi hotspot).\(^{86}\) If accepting this interpretation then presumption has very narrow scope of application and is easily applicable to electronically supplied services. In the case of electronically supplied services, the presumption is applied by default unless specific evidence is presented by the supplier.

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84 Article 24d of Council Regulation 282/2011 as amended by Council Regulation 1042/2013, provides: ‘1. Where a supplier supplies a service listed in Article 58 of Directive 2006/112/EC, he may rebut a presumption referred to in Article 24a or in point (a), (b) or (c) of Article 24b of this Regulation on the basis of three items of non-contradictory evidence indicating that the customer is established, has his permanent address or usually reside elsewhere. 2. A tax authority may rebut presumptions that have been made under Article 24a, 24b or 24c where there are indications of misuse or abuse by the supplier.’


86 European Commission, Explanatory Notes, p. 56.
services suppliers would simply have to charge VAT according to their domestic rules (in case of Wi-Fi hotspot and Internet access supplies) or according to rules in the country of departure (for services supplied on board a means of transport).\textsuperscript{87} Since the customer has to be present at the location of a supplier, especially in the case of electronically supplied services, it makes it easy for the supplier to determine where the supply was really used and enjoyed.\textsuperscript{88}

Taking into consideration non-binding nature of the explanatory notes, it is reasonable to assume that different interpretation of this presumption is also possible. It can be interpreted in a way that it also concerns ´over the top´ supplies. In those situations it is possible that supply is not used or enjoyed at the place where it is purchased, which makes it quite difficult to apply presumption and identify the place of supply.\textsuperscript{89}

The ´fixed line presumption´, as clarified in the explanatory notes, concerns only cases when customer uses residential and not business landline.\textsuperscript{90} Consequently, as of 2015, suppliers have to determine if customers are using fixed landline, and if they are is it residential or a business landline. Since no indication is made in the Regulation that can lead to this kind of interpretation, it is possible that it will be rejected by the tax administrations and the ECJ.\textsuperscript{91} If the interpretation provided in the explanatory notes is accepted, which seems logical, location of the residential fixed landline will usually correspond to customer´s place of residence. However, there are some difficulties when this presumption is applied to the electronically supplied services. It seems very difficult, if not impossible, for suppliers to get access to details of a fixed landline subscription. They probably do not have means and most importantly right to do that. Even in the cases when

\textsuperscript{88} Id. p. 55.  
\textsuperscript{89} Id. p. 55.  
\textsuperscript{90} European Commission, Explanatory Notes, p. 58.  
this is possible, it will most probably be quite burdensome and incur additional costs with no certainty for supplier that the information obtained is correct.\textsuperscript{92} And at the top of that, it seems almost impossible for the supplier to identify if the customer is taxable or non-taxable person.

According to the mobile network presumption place of supply is in the country identified by the mobile country code of customer´s SIM card. As stated in the explanatory notes this presumption has narrow scope of application and is limited to situations when customer uses his SIM card to receive supply. In that case, customer should be charged for a telecom service and not for electronically supplied service because it is not applicable to a mobile Internet networks. Leaving aside the interpretation provided in the explanatory notes, which does not follow from the wording of the Article, there is a possibility for much broader interpretation. In that sense, it is possible to assume that whenever the customer uses ´mobile Internet´ to make online purchases the supplier is able to identify his SIM country code.\textsuperscript{93}

On the one side, if accepting the narrower interpretation of the aforementioned presumption then its implementation seems easy. However, in that case we cannot talk about electronically supplied services, because we are dealing with supplies made without use of Internet. On the other side, the broader interpretation makes it more difficult to determine the actual place of supply. Firstly, it will be hard for the supplier to identify if the customer used smartphone to access Internet. Secondly, it is challenging to identify the SIM country code of the phone used to access the Internet.\textsuperscript{94}

Apart from all the above mentioned issues related to the ´mobile network presumption´, it is generally very reliable and relevant presumption because in most cases SIM card country code will correspond to the customer´s country of residence.\textsuperscript{95} Furthermore, it is very difficult for customers to

\textsuperscript{93} Id, p. 57.
\textsuperscript{94} Id, p. 58.
\textsuperscript{95} Id, p. 58.
manipulate with a SIM country code, mask or modify it. However, with the possibility to enter into an agreement with a foreign ‘Alternative Roaming Provider’ for use within the EU\textsuperscript{96}, since July 2014 (from January 2015 relevant for this presumption), SIM country code might no longer be the most reliable solution.\textsuperscript{97} This furthermore means that it is possible that a country identified by the SIM card is not actually the country where the purchase is made and a supply actually consumed and enjoyed (case when people travel or move to another country temporarily). This raises a question whether the aim of introducing destination principle (since VAT is tax on consumption, taxation should be where the consumer is established) is actually achieved in this case or the result is completely opposite.

Regarding the presumption according to which supplier has to identify the place of supply based on two non-contradictory evidence from a non-exhaustive list, the Council Regulation 1042/2013 does not define hierarchy of listed evidences. Question can be raised as to what are those other circumstances not identified in the previous presumptions. According to the explanatory notes, this presumption applies only when it is not possible for a specific presumption to be used, as is the case when the supplier was not able to obtain information that would lead to applying one of the specific presumptions.\textsuperscript{98}

This method is, according to the explanatory notes, considered as very flexible from supplier’s perspective since it enables him to use any commercially relevant information and is adjustable to any future technological developments. However, some issues are still arising when applying this presumption to digital supplies.

\textsuperscript{96} In accordance with Regulation 531/2012 of the European Parliament and the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (O.J. 30 June 2012, L 172, p.10) it is possible to contract with a provider of international roaming services.

\textsuperscript{97} M. Lamensch, E. Traversa, S. van Thiel, Value Added Tax and the Digital Economy. p. 58.

\textsuperscript{98} European Commission, Explanatory Notes.
One of the evidences that can be used by the supplier to identify customer’s location is billing address. At first, it seems that this evidence is reliable and easy to apply. However, this might not be true if we analyze it in the context of digital services. From the customer’s point of view it does not make difference if he provides correct billing address or not. Therefore, it is possible that he will provide the supplier with a wrong billing address. The situation is different when telecommunication or broadcasting companies are providing electronically supplied services to their customers with which they have already established contractual relationship. In that context it can be expected that the supplier will have the correct billing address which makes this evidence more reliable.99 Apart from the issue of reliability, suppliers can easily identify the billing address and it won’t require any additional cost, even in regard to the supply of digital services.

When it comes to the use of IP address as evidence, it seems as appropriate for application in the digital environment since suppliers can easily identify it using IP trackers. However, a lot of problems can arise in relation to this. First concern is whether it is acceptable to oblige suppliers to obtain IP trackers in order to comply with their VAT obligations. Requiring the IP trackers, especially if asking for specific characteristics, might cause unacceptable costs for the suppliers.100 Another concern regarding tracking of IP address is whether it is in line with EU data protection Directive. According to the ECJ’s decision, in C-360/10 Scarlet/SABAM, the IP address is considered as personal data. Therefore, obtaining IP address of the customer can mean violating consumer’s privacy and human rights. Even though explanatory notes suggest that characteristics and purpose of data processing has to be explicitly stated in the national legislation101, there is still no guarantee that acquired data will be used only for tax purposes.

100 Id.
101 European Commission, Explanatory Notes, p. 73.
Furthermore, the IP address does not always correspond to the customer’s place of residence/establishment. For example, when customer makes purchase while traveling, the application of the IP address test will results in a very disputable allocation of taxing rights.\textsuperscript{102} Additionally, the use of IP address offers possibilities for VAT fraud. Firstly, tracking IP address may give false results as is a cases when customer connects to a major Internet Service Provider. Moreover, it offers many possibilities for the customers to manipulate with it, display fake IP address and mislead the supplier. Being very open to the VAT fraud it is hard to consider tracking IP address as reliable indicator of the customer’s location.\textsuperscript{103}

Next evidence, which is bank location and customer’s billing address, can be expected to (in most cases) correspond to the place of residence or establishment of the customer. Considering that it is very hard to manipulate and falsify this kind of information, this presumption seems to be reliable source of information. However, it is also expectable that customer can have bank accounts in different locations. In that case, it is possible that bank location does not correspond to the customer’s place of residence/establishment. Moreover, one of the concerns with applying this evidence is how is this information going to be communicated to the supplier on his request. It is not reasonable to expect that for every transaction supplier makes such a request and waits for the information to be delivered when in the digital environment everything is automated and instantaneous, with supplies taking place every second, 24 hours a day.\textsuperscript{104}

Use of SIM country code as evidence is possible only when the presumption of mobile network cannot be applied. It is very hard to imagine when, in practice, SIM country code will be used if there is mobile network presumption. Eventually in the case when the supply is made via mobile Internet connection and not paid with SIM card it can be assumed that SIM

\textsuperscript{103} Id, p. 62.
\textsuperscript{104} Id, p. 62.
country code can be used to identify the customer’s location. However, it is very unlikely that suppliers will obtain this information easily. Furthermore, this kind of evidence is either useless or hardly implemented depending on whether the broader or narrow interpretation of mobile network presumption is accepted.\textsuperscript{105}

In the case of use of fixed landline as evidence, it is expectable that ‘fixed landline’ presumption will be applicable and not ‘other circumstances’ presumption. If relying on the explanatory notes, this indicator is used in the case when customer uses business instead of residential fixed landline.\textsuperscript{106} The same comments that were made in regard to fixed landline presumption can apply here as well. However, if this evidence concerns only business and not residential fixed landline, it might actually be easier for the supplier to obtain information on business than on residential fixed landline, which would make this evidence actually easier to apply and more reliable.

Identifying customer’s location based on other commercially relevant information means expecting that suppliers of electronically supplied services collect and analyze a lot of information for every transaction they make. In the digital environment, where transactions are fully automated and taking place every second, it seems inappropriate to oblige suppliers to conduct such detailed research and verification process for every transaction. Furthermore, it is really hard for other commercially relevant information such as unique payment systems, self-identification, gift cards and ‘documentation of third party payment service suppliers’ to fit in the digital environment.\textsuperscript{107} Therefore, it seems that all the previously mentioned presumptions and evidences are not taking into consideration the nature of digital supplies and the way they are conducted.

\textsuperscript{106} Id. p. 62.
\textsuperscript{107} European Commission, Explanatory Notes, p. 69.
The abuse presumption, by providing for possibility of rebutting the presumption, seems a positive development in the fight against VAT fraud. However, it does not seem to be in line with the reality of electronic services. When it comes to the implementation, it is hard to expect from suppliers to collect and analyze variety of information in order to raise a question of the abuse. However, the supplier does not have obligation to rebut a presumption. As stated in the explanatory notes, ‘even though there can be evidence to the contrary, the supplier may for determining the place where the customer belongs decide to rely on the presumption and disregard evidence to the contrary’.

If this kind of interpretation is accepted that means that the supplier is provided with a lot of choice, which might prove to be risky and prone to VAT fraud and the aim of the abuse presumption is to counteract VAT fraud.

In the explanatory notes it is further stated that the applicability of each presumption has to be assessed by the supplier, on the basis of available information. Moreover, it is supplier’s obligation to assess the reliability of collected information and to be able to justify why did he considered information as relevant. Additionally, when two pieces of non-contradictory evidence cannot be identified, supplier has obligation to search further in order to identify location of the customer. If we follow this interpretation, it seems quite burdensome for a supplier of electronic services to collect all the necessary information, assess their reliability and decide on the place of supply for every single transaction.

According to the “use and enjoyment” clause, EU suppliers should consider that B2B and intra-EU B2C supplies made within EU or outside of the EU, should be taxed in the EU or outside, if that is where they are effectively “used and enjoyed”. Furthermore, in the explanatory notes it is stated that

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108 European Commission, Explanatory Notes, p. 65.
109 Id, p. 72.
the effective use and enjoyment rule (Article 59a of the VAT Directive) derogates the general rules on the place of supply of services (as determined according to Articles 44, 45, 56, 58 and 59 of the VAT Directive). Additionally, according to the explanatory notes, when a supplier can identify where the real place of use and enjoyment is, it should prevail over other evidences.\textsuperscript{111} In the digital environment where electronic services are supplied without parties having to meet and where customers can stay anonymous, it is very unrealistic to expect that suppliers will actually be able to determine where supplies are effectively used and enjoyed.

For the foregoing reasons, the author’s view is that the definition of the electronically supplied services, as supplies which are automated, instantaneous and involve minimal human intervention, is not in line with all the requirements for identifying the customer and his location on transactional basis. Furthermore, another issue is also non-binding nature of the explanatory notes and the fact that the Commission did not formally address the possible disputes between Member States which can lead to double taxation of certain supplies. This further complicates and leads to uncertainty in the process of identifying customer’s location. Additionally, since VAT Directive and Council Regulations 282/2011 and 1042/2013 did not address the issue of storing the information that suppliers collect, it is a matter of each Member State to adopt their own standards and this can lead to different and not harmonized solutions.

4.2.3. Is taxation at destination best choice for taxing digital supplies?

For EU suppliers of electronic services January 2015 was a turnover. As of 1 January 2015 EU suppliers (intra-EU B2C supplies) had to charge and collect VAT at destination, as was already case with intra-EU B2B supplies and outbound B2B and B2C supplies.\textsuperscript{112}

\textsuperscript{111} European Commission, Explanatory Notes, p. 67.
New place of supply rules can be considered as being in line with the nature and logic of the VAT system, since VAT is tax on consumption. Furthermore, in this way it is ensured that all supplies, domestic or cross-border, will be treated the same way. The aim of the EU with introducing those rules was to ensure that when it comes to e-commerce the supplier does not choose his place of establishment based on the VAT rates.\textsuperscript{113} As recommended by the OECD, destination principle is appropriate way of taxing digital supplies since taxation at origin distorts the consumption decisions and also stimulates suppliers to establish in low tax jurisdictions.\textsuperscript{114} Therefore, EU Commission Expert Group has stated that destination principle is appropriate for achieving VAT neutrality and economic efficiency. Furthermore, this change can be seen as achieving ´distributional equity´ because it gives right to every Member State to tax supplies consumed on its territory. Therefore, taxation at destination ensures that the final consumption is taxed.\textsuperscript{115}

Consequently, new rules should be considered as a positive development and important step in achieving a fair competition and prevention of base erosion and profit shifting (BEPS). This is for sure a way to fight VAT fraud, prevent revenue losses and make revenue overall more ´predictable´.

Even though taxation at destination is a positive development in the EU VAT system there are some practical difficulties from tax assessment and compliance perspective. Taxing at destination, from supplier’s perspective, means that they have to acquire information about the status and location of their customers in order to determine the amount of VAT that has to be charged and collected. These things are especially challenging when it comes to digital supplies. It is very difficult for suppliers to obtain reliable information regarding customer’s location, especially taking into consideration very short time interval in which the transaction is conducted.

\textsuperscript{114} Id, p. 73.
\textsuperscript{115} Id, p. 74.
and tax assessment has to be made.\textsuperscript{116} Furthermore, interaction between supplier and customer is minimal with customers remaining often anonymous. Moreover, digital supplies are usually automated, involve minimal human intervention and take place every second, 24 hours a day, with customers being located in different MSs.\textsuperscript{117}

For the foregoing reasons taxation at destination is not always the best solution. In relation to the digital supplies it proved to be very difficult to identify customer and his location. Furthermore, it is very challenging for both, suppliers and tax administrations. Taxation at destination puts excessive burden of proof for the suppliers and it also causes excessive compliance costs for tax administrations and taxable persons. It can result in suppliers intentionally committing VAT fraud because of very burdensome and time consuming requirements. Secondly, the result can be that suppliers simply identify their customer based on available information without checking reliability of the obtained information.\textsuperscript{118}

4.3. The VAT Mini One Stop Shop System (MOSS)

Applying destination principle to B2C supplies means that suppliers of digital services have to take care of costs of VAT registration, compliance and audit requirements in multiple countries. From suppliers perspective that can be very burdensome and difficult.\textsuperscript{119}

As part of the Digital Single Market strategy, in order to reduce administrative costs of business for cross-border e-commerce, single electronic VAT registration and payment system has been introduced. The VAT Mini One Stop Shop (MOSS) system, firstly introduced in 2003 for

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\textsuperscript{116}M. Lamensch, E. Traversa, S. van Thiel, \textit{Value Added Tax and the Digital Economy}, p. 41. \\
\textsuperscript{117}Id, p. 75. \\
\textsuperscript{118}Id, p. 75. \\
\textsuperscript{119}Marie Lamensch, ‘Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?’ (2012) 1 WJOVL 1 <https://www.tandfonline.com/doi/citedby/10.5235/WJOVL.1.1.1?scroll=top&needAccess=true#HR0cHM6Ly93d3cudGFuZGZvbmxpbmUuY29tL2RvaS9wZGYvMTAuNTIzNS9XSk9WTC4xIjEuMT9uZmlyZS9XSk9ZFA> accessed 15 May 2019. \\
\end{flushright}
inbound B2C supplies, is from 2015 applicable to supplies of TBE services by EU and non-EU suppliers.\textsuperscript{120}

Introduction of the MOSS was definitely necessary in order to put EU and non-EU suppliers of digital services on equal footing. MOSS system enables supplier to register for VAT in one MS and fulfill all his EU-wide VAT obligations there. Once the supplier has chosen the MS, he has obligation to declare VAT in that MS quarterly on all of his supplies.\textsuperscript{121} It is the responsibility of that MS to distribute charged VAT to the MSs of consumption. The system is optional and it is up to the supplier to decide if he wants to avoid registering in every MS in which he is not established.\textsuperscript{122}

Introduction of the MOSS has a lot of advantages compared to the individual registration. Firstly, one single VAT registration means lower cost components and no registration threshold applies. Secondly, there is a single VAT number for all relevant B2C supplies and single standardized VAT return submitted quarterly. This further means that single quarterly payments are made to the MS of registration instead of suppliers having to meet different deadlines of each MS. Additionally, no input VAT recovery can be made through MOSS VAT return. In the Member States where supplier is not established the recovery of the input VAT can be claimed under Directive 2008/9/EC.\textsuperscript{123} According to this new system, records are kept for ten years counting from the year in which the transaction took place. This requirement was quite burdensome for suppliers, because this record keeping period is above most national requirements. However, when it comes to output VAT and invoicing, no changes were made. This means that VAT rates and invoicing rules of Member State(s) of consumption are applicable.\textsuperscript{124}

\textsuperscript{121} Id, p. 92.
\textsuperscript{122} Id, p. 92.
\textsuperscript{123} Id, p. 96.
\textsuperscript{124} Id, p. 96.
The MOSS is definitely a path towards reducing the compliance costs and is a base for broader concept of one-stop-shop system. However, one of the disadvantages of the system is that MS of consumption still retains the right to carry out controls and audits for a business registered under MOSS. This means that it is possible for tax audits to be conducted without any coordination, according to domestic rules of different MSs. Furthermore, it can result in information requests towards registered businesses in different languages. This further means that instead of reducing the administrative burden for businesses, as was the intention, it can result in disproportionate burden for suppliers. It can also affect the efficiency of tax audits and the will of businesses to voluntarily register for the MOSS.

Furthermore, 2015 rules did not set the threshold for registering under MOSS which is not beneficial for SMEs that have to submit their VAT returns quarterly, even for the period when no supplies are made. Moreover, this meant that the businesses established in the countries with high domestic exemption threshold had to account through the MOSS for very low value supplies made to the other MSs. Therefore, this was actually considered as obstacle for businesses accessing the internal market.

Even though according to the MOSS, businesses are allowed to register in only one MS, they still have to comply with rules of different MSs, especially when it comes to B2C supplies. Suppliers in B2C supplies have to deal with multiple invoicing requirements and apply different VAT rates. This is quiet opposite from to the aim of Single Digital Market strategy. It seems that this system actually creates barriers in the internal market, which should be borderless. Apparently, in the system like this, compliance costs override the benefits of its application. Furthermore, it does not relieve suppliers of the obligation to identify their consumers on transactional basis nor to comply

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126 Id, p. 103.
127 Id, p. 104.
with the rules of different MSs.\textsuperscript{128} It is clear that some improvements have to be done to resolve these issues, make the MOSS more efficient and stimulate suppliers to register for it.

5. MODERNIZING VAT FOR CROSS-BORDER E-COMMERCE (VAT E-COMMERCE PACKAGE)

5.1. Overview of the major changes included in the VAT e-commerce package

Being aware of all the flaws of the 2015 rules, the Commission has been working on simplifying VAT obligations for businesses engaged in the cross-border trade and on ensuring that destination principle is applied properly. Most recent measures, known as ‘the VAT e-commerce package’, the Council has adopted on 5 December 2017 and it consists of: Council Directive (EU) 2017/2455, Council Regulation (EU) 2017/2454 and Council Implementing Regulation (EU) 2017/2459.\textsuperscript{129}

The aim of those measures is to facilitate cross-border trade, counteract VAT fraud and ensure fair competition. These changes will be implemented gradually, with part of it coming into force in 2019 and part in 2021. Proposed amendments include improvements of the current MOSS, special provisions applicable to supplies of goods facilitated by electronic interfaces, extension of the MOSS to B2C supplies of services (other than TBE services), intra-EU and inbound distance sales of goods (imported from third countries and third territories with value of maximum EUR 150) and turning MOSS into One Stop Shop (OSS) system.\textsuperscript{130}

The VAT e-commerce package has two main parts, structural and functional part. Structural changes include, as mentioned before, extension of the

\textsuperscript{128}Marie Lamensch, ‘Are reverse charging and the one-stop-scheme efficient ways to collect VAT on digital supplies?’ (2012) 1 WJOVL 1.


\textsuperscript{130}Id.
application of the M(OSS) and removal of the exemption for distance sales of low value under Directive 2009/132/EC.\textsuperscript{131} Functional part include adjustments that aim at improving the overall performance of the system by addressing certain practical issues. These changes include amendments of some of the presumptions for identifying customer’s location and expanding the scope of the exchange of information under Regulation 904/2010 on administrative cooperation and combating fraud in the field of VAT.\textsuperscript{132}

It can be expected that recently proposed amendments will contribute to a significant reduction in compliance costs and administrative burden for businesses engaged in a cross-border trade.\textsuperscript{133} Furthermore, fair competition will be ensured by putting EU and non-EU suppliers on equal footing. Most importantly, it is also expected that there will be an increase in the VAT revenue.

5.2. Electronically supplied services

5.2.1. Non-EU Suppliers with an EU VAT Number

First of those changes addresses one of the flaws of the MOSS system. According to the MOSS adopted in 2015 non-EU taxable persons that have a VAT number in the EU were not able to use neither Union nor non-Union scheme. This means that they were not able to register for MOSS but instead had to register in every country to which they made supplies. The newest amendment, effective from 2019, enabled taxable persons not established in


the EU which have EU VAT number (obtained for occasional supplies) to apply for non-Union scheme.\textsuperscript{134}

5.2.2. Introduction of the first threshold as of 2019

The second amendment included introduction of a threshold of EUR 10,000 of the cross-border turnover. Consequently, in the case when supplier´s cross-border turnover is below the set threshold, place of supply for intra-EU B2C supplies is MS where supplier is established. The change only concerned B2C supplies and in fact meant that there is switch back to the origin principle for supplies below the threshold. This is quite a step back from the taxation at destination that was, for intra-EU B2C supplies, introduced in 2008. This change is not just a step back from the work that has been done over years but it is also not in line with OECD VAT/GST guidelines. OECD guidelines suggest taxation at destination in order to ensure neutrality in cross-border supplies.\textsuperscript{135}

Author’s view is that introduction of threshold and step back towards taxation at origin is a good change, especially in relation to the digital supplies. Taking into consideration all the problems related to identifying and locating customers of B2C supplies of electronic services, switching to the origin principle provides relief for EU-suppliers. Furthermore, it relieves microbusinesses and SMEs of the obligation to register for the MOSS and submit returns even for the period in which they made no supplies. In author’s view taxation at origin ensures higher level of certainty, especially in regard to the digital supplies, and relieves suppliers (especially those that make low value supplies) the burden of identifying the location of the customer. Furthermore, taxation at origin is optional, which means that SMEs are still allowed to register for MOSS, if it suits them better. Introduction of this


\textsuperscript{135} Id.
threshold also mitigates the possible non-applicability of the SME exemption scheme to a cross-border trade, at least for suppliers of the electronic services.\textsuperscript{136} For microbusinesses and SMEs an origin based taxation is definitely beneficial and even simpler than registering for MOSS.

One of the downsides of introducing threshold is the fact that it is applicable only to intra-EU supplies, which means that non-EU taxable persons will not be treated in the same way. They will still be required to collect tax at destination regardless of the volume of sales to the EU, which means that they are treated less favorably compared to EU-suppliers. Furthermore, another disadvantage is the possibility of taxable persons under declaring the VAT, in order to remain under the threshold. This might happen because exceeding the threshold means high compliance burden for the suppliers and they want to avoid that.\textsuperscript{137}

5.2.3. Rules regarding invoicing and record keeping

As of 2019, suppliers have to comply with the rules of the MS of identification when issuing invoices. This means that Member States, when conducting tax audits according to their domestic rules, will have to accept invoices issued according to the rules of the other MS. On the one side, this has a positive effect and provides a relief for businesses that no longer have to comply with rules of different Member States when issuing invoices. On the other side, businesses will have to keep records of all transactions for 10 years. This is definitely a downside since it creates additional burden for the suppliers if we take into consideration that record keeping requirements in most MSs are lower. Therefore, while being relieved in terms of invoicing, record keeping still creates an administrative burden for businesses.\textsuperscript{138}

\textsuperscript{137} Id.
\textsuperscript{138} Id.
Author’s view is that change regarding invoicing rules is definitely a step forward to ensure less compliance burden for businesses engaged in the cross-border trade. However, from the practical side it is not good to change invoicing rules while still keeping a rule that tax audits are done according to domestic rules of MSs. It will definitely be challenging for the tax administrations to conduct audits based on the invoices issued according to the rules and in the languages of different MSs.

5.2.4. Introduction of a second threshold of EUR 100,000

Another measure included in the VAT e-commerce package is related to identifying customer’s location in the case of electronically supplied services. As of 2019, for intra-EU B2C supplies, for suppliers whose turnover does not exceed EUR 100,000 a single piece of evidence will be sufficient when identifying location of the customer. In author’s view this is definitely a positive change if we take into consideration all the previously mentioned difficulties with identifying location of the customer for digital supplies. It will definitely lower compliance costs and administrative burden for smaller EU traders and make it simpler to conduct analysis on the transactional basis. However, the same issue can be raised as to the first threshold, which is that threshold is applicable only to intra-EU supplies, treating non-EU taxable persons less favorably. Furthermore, if compliance with two-non-contradictory evidence test proved to be quite burdensome for EU traders with low turnovers it will be even more burdensome for non-EU traders, which still have to comply with those rules.

From all the above mentioned facts it is clear that the introduction of two thresholds has lowered compliance and administrative burden that smaller EU traders were facing when applying destination principle and identifying location of the customer. Therefore, this will definitely stimulate EU

140 Id.
suppliers of electronic services to engage more in the cross-border trade and facilitate development of e-commerce within the internal market. However, as already pointed out those changes did not put non-EU suppliers on equal footing and it can lead to disparities in the competition.

5.2.5. Extended deadlines for submission of MOSS returns

One of the proposed changes, which will come into effect in 2021, is extension of the deadlines for submission of MOSS returns from 20 to 30 days following the end of the tax period.\textsuperscript{141} Furthermore, as of 2021, VAT Directive will provide for possibility to correct previous VAT returns in a subsequent return instead of doing that in the returns of the tax periods to which the corrections relate.\textsuperscript{142} These issues have been identified as flaws of the 2015 rules in the previous section and by addressing them in this way, the EU has provided simplification of the administrative procedure for the suppliers. Therefore, this can be considered as a positive change providing for a more flexible system of submitting VAT returns for suppliers registered to the MOSS.

5.3. Intra-EU B2C supplies of goods (distance sales)

5.3.1. The MOSS and the threshold of EUR 10,000

According to the current rules on distance sales\textsuperscript{143}, taxable person making supplies to non-taxable person in another MS, below the threshold of EUR 35,000 (per country threshold), can charge and collect VAT at origin. On the other hand, suppliers who exceed this per country threshold (selling from EUR 35,000 to EUR 100,000 depending on the MS) have to collect and charge VAT at destination and have to register in that MS.\textsuperscript{144}

\textsuperscript{141} New Art. 369f of the VAT Directive for the EU scheme and new Art. 364 of the VAT Directive for the non-EU scheme.

\textsuperscript{142} New Art. 365 of the VAT Directive for the non-EU scheme and 369g (4) if the VAT Directive for the EU scheme.

\textsuperscript{143} Distance sales are B2C intra-EU supplies of goods with transport. In contrast to digital supplies, distance sales concern goods which are ordered online but still have to be delivered physically.

\textsuperscript{144} Article 34 of the VAT Directive.
Proposed changes in relation to the distance sales, coming into effect in 2021, include the abolition of the current distance sales threshold and extension of the MOSS, soon to be OSS, to taxable persons carrying out intra-Community distance sales of goods.\textsuperscript{145} If comparing distance sales and electronically supplied services it is evident that for distance sales it will be easier to comply with the OSS. This is due to the fact that all the issues, related to identifying customer and his location in the case of electronic services, do not exist when it comes to distance sales. Here, identifying customer and his location is more straightforward, since ordered goods have to be delivered physically to customer’s address. Furthermore, a positive thing is that suppliers of services and distance sales of goods will now be able to file single VAT return, which will include both types of supplies.\textsuperscript{146}

Additionally, previously mentioned EU-wide threshold of EUR 10,000 will, as of 2021, be applicable to distance sales as well. Even though with distance sales it is easier to do the tax assessment, microbusinesses and SMEs may still experience high compliance costs of registering to the OSS. By applying the same threshold to distance sales will relieve burden and lower compliance costs for smaller businesses. However, as is the case with electronic services, due to high compliance costs connected with exceeding the threshold, it may be the case that small businesses will tend to declare lower VAT in order to benefit from being under the threshold.\textsuperscript{147}

5.3.2. Deemed supply provision for supplies facilitated by electronic interfaces

Even though, it was not initially part of the Commission’s Proposal, one of the changes made to the VAT Directive was a deemed supply provision to make electronic interface (such as marketplace, platform, portal) liable to tax in certain cases. Under the new Article 14a (2) of the VAT Directive, 

\textsuperscript{145} New Article 369a ff. of the VAT Directive.
\textsuperscript{146} Marie Lamensch, ' Adoption of the E-commerce VAT Package: The Road Ahead Is Still Rocky One', (2018).
\textsuperscript{147} Id.
platforms that facilitate intra-EU distance sales of goods made by a non-EU taxable person, will be deemed to have received and supplied those goods.\textsuperscript{148} This means that a B2C supply supplied through the use of the electronic interface will be split into two supplies. There is a supply from supplier to the electronic interface (B2B supply) and a supply from the electronic interface to the customer (B2C supply).\textsuperscript{149} At this point it is also important to determine to which of those two supplies dispatch or transport should be ascribed in order to identify correctly place of the supply. Article 1 (1) provides that the dispatch or transport should be ascribed to the supply from the electronic interface to the customer.\textsuperscript{150}

This means that deemed provision will be applicable only in the case of sales made by non-EU suppliers and facilitated by the platforms. However, it is still applicable to intra-EU and domestic supplies (in the case when goods are already in the country where customer is located). Importantly, the deemed provision will also apply when non-EU business use online platforms to sell goods from ‘fulfilment centers’ (e.g. warehouse) in the EU, regardless of their value. Furthermore, it is also important to point out that this provision applies regardless if the platform is established in the EU or not, or if it is registered for the OSS or not.\textsuperscript{151} Additionally, online platforms will also be expected to keep records of sales facilitated by them to customers in EU.\textsuperscript{152} Direct application of Article 14a (2) can create administrative burden for companies and also possible risk of VAT revenue losses, as a

\textsuperscript{148} New Art. 14a(2) of the VAT Directive (as amended) states: ‘Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply itself shall be deemed to have received and supplied those goods himself.’


\textsuperscript{150} Id.


result of the payment of VAT by the electronic interface to the supplier. In order to tackle significant compliance costs the Commission has proposed that the B2B supply from the supplier selling goods facilitated by electronic interface is exempt, with a supplier having right to deduct the input VAT he paid in the respect of the purchase or import of the goods supplied.\footnote{Proposal for a Council Directive amending Council Directive 2006/112/EC of 28 November 2006 as regards provisions relating to distance sales of goods and certain domestic supplies of goods, COM (2018) 819 final, at 5.}

Furthermore, allowing OSS scheme to be used only to declare and pay VAT on intra-EU distance sales of goods and not on domestic supply of goods, deprives OSS of its purpose (to simplify the process of declaring and paying VAT) and results in additional compliance burden for electronic interfaces. In order to resolve this issue, the Commission has recently proposed to allow electronic interfaces to use the OSS also for domestic supplies when they are deemed to supply the goods under Article 14a (2).\footnote{Id.} If this proposed amendment is implemented, it will actually lower compliance costs and administrative burden for business.

On the one hand, taking into consideration how difficult it is for tax authorities to obtain the VAT due on the goods sold to EU consumers through online marketplaces, this deemed provision seems as reasonable solution for fighting VAT fraud and decreasing non-compliance. On the other hand, there are certain difficulties with implementation of the deemed provision. Firstly, it is not that easy to identify when platforms are required to collect VAT or when we can say that they have actually facilitated the supply. Logically, they should be required to do so when they handle the payment and are actually able to withhold the VAT. Otherwise, it remains questionable how are platforms supposed to collect this VAT and to what extent can they be held liable for its payment at a later stage.\footnote{Marie Lamensch, ‘ Adoption of the E-commerce VAT Package: The Road Ahead Is Still Rocky One’, (2018).} Secondly, since according to the Article 66a of the VAT Directive, in the case of deemed supply, VAT

\[\text{\textsuperscript{154}}\text{Id.}\]
\[\text{\textsuperscript{155}}\text{Marie Lamensch, ‘ Adoption of the E-commerce VAT Package: The Road Ahead Is Still Rocky One’, (2018).}\]
becomes chargeable when the payment has been accepted, it can happen that sometimes platforms will have to pre-finance VAT. Therefore, applying this provision will cause substantial compliance costs for platforms. Additionally, the issue of enforcement of the provision on non-EU platforms still remains unresolved.\textsuperscript{156}

Therefore, author’s view is that the issues of VAT fraud and non-compliance have not been addressed adequately with this deemed provision. It only seems that by making electronic interfaces liable to tax, situations that were previously escaping taxation under VAT Directive, are now put within its scope and taxed accordingly with the possibility for VAT fraud and non-compliance being reduced. However, there are a lot of issue related to the online platforms, which will be discussed after in this thesis, that will actually show how difficult it is to apply deemed provision and how it is not appropriate to rely to such extent on compliance by platforms.

5.4. Proposed changes in regard to B2C imports

5.4.1. Import of goods up to EUR 150

One of the proposed amendments included in the new e-commerce VAT package relates to the import of goods up to the value of EUR 150. As of 2021, non-EU suppliers selling goods to EU non-taxable consumers of value up to EUR 150 will have the possibility to register to the OSS and declare and pay VAT monthly. If the threshold of EUR 150 is exceeded current customs procedure applies. Furthermore, in the case when non-EU supplier does not register to the OSS the current customs procedure will apply and transporter of the goods will have to collect and pay VAT. This new provision will definitely cause administrative burden for the customs authorities and it does not solve the problem of the VAT fraud.\textsuperscript{157}

\textsuperscript{157} Id.
One of the problems with implementing this provision might be verifying validity of the OSS registration number. When non-EU supplier registers to the OSS, the import will be exempt, assuming that the supplier will declare and pay VAT before the end of the following month. Therefore, it is very questionable how will customs authorities verify validity of this registration, how much time it will take and will it affect the import procedure. Commission has not yet provided for any indication on the automated process that will simplify this verification.\textsuperscript{158}

Secondly, implementation of this provision raises question of the ability of customs authorities and/or tax authorities to check if the OSS registered non-EU suppliers have declared and paid correct VAT via the OSS return. Comparison of what is declared at import and via OSS is only reasonable in the case that accuracy of the data declared at the import is checked as well. Otherwise, it is possible that vendors will not declare the real value of the VAT.\textsuperscript{159}

Furthermore, registration to the OSS is only a possibility and not an obligation. Therefore, if non-EU supplier decides not to register to the OSS the current customs procedure will apply, which will most probably happen in most of the cases. This further indicated that the issue of VAT fraud has not been addressed properly. Even with the proposed amendments, it is clear that the system is still prone to the VAT fraud and undervaluation by non-EU suppliers.

5.4.2. Deemed supply provision for electronic interfaces

As was already mentioned previously, one of the recent amendments and not initially part of the Commission´s proposal is deemed supply provision. Deemed provision was also introduced in the case of B2C imports of value

\textsuperscript{158} Marie Lamensch, ´Adoption of the E-commerce VAT Package: The Road Ahead Is Still Rocky One´,(2018).

\textsuperscript{159} Id.
up to EUR 150, in the case when the supply is facilitated by electronic interface.\textsuperscript{160}

One of the additional issues, apart from the ones already mentioned in the section on deemed supply provision, is that in the case of import platform has to declare and pay VAT periodically and the import itself is exempted. This means that the supplier, whose supply is facilitated by the platform, in order to benefit from the import exemption will have to include OSS registration number of the platform in the import declaration. Procedure itself is very prone to the misuse by non-EU suppliers. In the Commission´s proposal there were no anti-abuse measures to address the issue of possible misuse of the OSS registration number and responsibility of the platforms for this misuse.\textsuperscript{161}

In author’s view this provision is not a good solution to the existing problems. Firstly, it is very prone to misuse and does not address the issue of VAT fraud in a proper way. Secondly, it increases the administrative and compliance burden for the platforms. Furthermore, all the issues regarding online platforms identified previously can be applied here as well. Even though it seems that deemed supply provision will help counteract VAT fraud and will tax accordingly supplies that were previously escaping taxation, it seems that it actually increases the possibility for the misuse and fraud by non-EU suppliers. Therefore, the question is whether this provision is causing more problems than it resolves?

5.5. Unresolved issues of online (hosting) platforms

In the light of the most recent EU proposals, this section indicates that legal categories on which the VAT system is based are not fit for the digital

\textsuperscript{160} Art. 14a (1) of the VAT Directive (as amended) states: ‘When a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself.’

economy. This statement will be explained using online (hosting) platforms as an example.

Some of the major online platforms nowadays as eBay, Uber, Airbnb can be considered as a major drivers of the changing economy. One of the major concerns in the field of indirect taxes is application of VAT rules to the cross-border transactions in which online platforms are involved. In regard to the previously mentioned amendments, which include deemed supply provision for electronic interfaces, it is important to make a distinction between the situations when platforms act as intermediaries and when they facilitate the supply and should be considered as deemed suppliers.162

Firstly, an online activity may include simply handling of information provided by a third parties. This activity, known as hosting, is defined in the E-Commerce Directive as: ´activity of the information society service provider (that) is limited to technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.´163 This was also subject of the dispute in the eBay/L´Oréal case, where it has been highlighted that key elements of the online platform defined as ´hosting provider´ can be found in its ´automatic and passive nature´.164 On the other hand this is not the case ´where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its

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customers, play an active role such as to give it knowledge of, or control over, those data’ (Google France and Google, paragraphs 114 and 120). Therefore, in the case when online platform takes an active step in the customer’s businesses, but without acting in its own name, it will be classified as intermediary and therefore liable to pay tax.

From the VAT perspective classification of the platform activity can have a significant impact. In the case when platforms provide services without receiving compensation, the supply is out of the scope of VAT Directive. On the contrast, in the case when platforms charge either supplier or the customer a fee, the transaction will most likely be subject to a VAT. The effect is that, in the case when platform takes active role and is considered as intermediary for VAT purpose, the place of supply, according to the Article 46 of the VAT Directive is the ‘place where the underlying transaction is supplied’. On the contrast, when platform only conducts hosting activity, the fee charged to the final consumer may be classified as compensation paid for electronically supplied service which is according to the Article 58 taxed at the place of customer’s establishment.

It is difficult to draw a clear line to distinguishing electronically supplied services from intermediary services. The problem here is that there are no criteria or qualifications that can be of any help and distinction has to be made at the level of automation of the platform activity. Because it is very difficult to make such kind of distinction there is a possibility that platform can fall within a grey area between active and passive activity.

One of the examples that shows how difficult it can be from VAT perspective to tax online platforms is house sharing platform (such as Airbnb). In many

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167 Id.
168 Id.
cases those platforms simply put in contact suppliers and customers and are therefore supplying electronic services.\textsuperscript{169} Consequently, such supplies should be taxed at destination. On the other side, the activity can also be seen as activity of a real estate agent that should be taxed at the place where the property is located. Another good example is Uber, and there is even an ECJ case on the legal nature of Uber.\textsuperscript{170} The question was actually what Uber is, is it an intermediary, a taxi service provider, IT Company or an information society service provider? This further indicates how challenging are those supplies that have developed around the Internet and have no connection with the traditional supplies. Moreover, it is hard to classify and tax accordingly those supplies according to the existing legal categories, which were developed in the time when nothing like Uber or Airbnb existed.

One of the ways in which EU has addressed those issues was introduction of Article 9a of the VAT Implementing Regulation, according to which digital platforms through which third parties are supplying e-services are liable to account for VAT on those sales.\textsuperscript{171} However, they can avoid accounting for VAT when certain conditions are met and these include: (1) the digital platform and everyone else involved in the supply chain identifies the original content owner\textsuperscript{172} in their contractual arrangements; (2) the invoice, bill or sales receipt identifies that content owner and the service supplied; (3) the digital platform does not authorize the charge to the final customer, nor the delivery of the services, nor sets the general terms and conditions of sale. In case those conditions are not met digital platforms are liable to tax. Only in the case when above mentioned requirements are met, the responsibility of declaring correct VAT falls on the original content owner and digital


\textsuperscript{171} The new Article 9a was implemented in the VAT Implementing Regulation by Council Implementing Regulation (EU) No. 1042/2013 of 7 Oct. 2013, with effect from 1 Jan. 2015.

\textsuperscript{172} Content owners include businesses that have created the digital content or owns the content rights.
platforms are considered as intermediaries. However, the result is that many small businesses will rely on the digital platforms registering and declaring the correct VAT rather than doing it on their own.\footnote{M. Lamensch, E. Traversa, S. van Thiel, Value Added Tax and the Digital Economy, p. 98.} Furthermore, if we take into consideration all the characteristics of the digital supplies, how hard it will actually be for the platforms to identify the original content owner and what will be the costs for the platforms. According to this provision, it seems that platforms will be deemed suppliers in most cases and this will lead to high compliance costs and administrative burden for them. Therefore, it is expectable that platforms will, instead of declaring and paying VAT themselves, adjust their business model in order to avoid this.

(Hosting) platforms are clear example of how difficult it can be to draw a line between intermediation and electronically supplied services. Taking into consideration that number of such platforms is increasing very fast, some further amendments to the current VAT system will have to be made in order to address all the above mentioned issues.
6. CONCLUSION

The objective of the thesis was to analyze 2015 place of supply rules and the MOSS system, identify issues of concern with 2015 changes and see to what extent have those issues been addressed and mitigated by the adoption of the VAT e-commerce package in 2017.

Analysis of the 2015 place of supply rules and the MOSS has shown that EU VAT system has improved with the introduction of those rules but that there were also some areas for further improvements. Firstly, 2015 place of supply rules and the MOSS are considered a milestone in EU taxation, as was indicated in the Commission´s Impact Assessment in 2016, because Member States were for the first time collecting taxes on behalf of each other. It was indicated, in the Impact Assessment, that a significant number of businesses used the MOSS system and that almost 70% of EU turnover of electronic services were covered by the MOSS.\footnote{Impact Assessment, at 1.2.} Furthermore, the new rules have, according to the Commission´s statistics, resulted in a significant reduction in compliance costs and administrative burden for businesses engaged in the cross-border trade. Therefore, switching to the destination principle for EU-suppliers of electronic services, regardless if they are B2B or B2C supplies, has placed EU and non-EU suppliers on equal footing and has ensured that VAT revenues accrue to the MS of consumption. The MOSS has significantly simplified process of registration and accounting of VAT for businesses engaged in the cross-border supply of electronic services. Furthermore, new rules and the MOSS have facilitated the monitoring compliance and the fight against VAT fraud, which is a significant improvement.

However, some of the major issues of concern with the 2015 changes, identified through the conducted analysis, relate to the lack of cross-border threshold, which has resulted in a micro-businesses not engaging in the cross-
border trade. Furthermore, it has been consistently proven throughout the thesis that taxation at destination of electronic services causes a lot of difficulties, especially when it comes to identifying the location of the customer (mostly in B2C supplies). Therefore, it is questionable if one of the objectives of the 2015 rules related to ensuring that VAT revenues accrue to the MS of consumption, has actually been achieved in regard to electronically supplied services. Additionally, the issue of very low level of compliance by non-EU taxable persons has not been addressed by the new rules. From all the above mentioned facts it is clear that new amendments to the VAT Directive and Implementing Regulation were inevitable.

With the VAT e-commerce package adopted on 5 December 2017, the Commission is of the view that we are moving towards a definitive VAT system, which will replace the current system and make it fit for the digital economy. After analyzing measures introduced with the VAT e-commerce package, it can be concluded that some of the issues of concern with 2015 changes have actually been addressed properly. Introduction of the two thresholds has reduced the compliance costs and relieved micro-businesses of the administrative burden. Switch to the origin principle will definitely stimulate micro-businesses to engage more in the cross-border trade. However, the fact that both thresholds are applicable only to intra-EU B2C supplies means that non-EU suppliers are treated less favorably. Furthermore, extension of the MOSS and turning it into OSS is definitely a significant improvement. Additionally, some improvements were made in relation to the rules applicable to the invoices and record keeping, as well as extension of the deadlines to submit MOSS returns and possibility to correct previous VAT returns in a subsequent return. Author’s view is that the VAT e-commerce package does not again address the issue of very low level of compliance by non-EU taxable persons (has been indicated by a very low number of MOSS registrations). Furthermore, some of the issues related to identifying location of the customer in B2C supplies of electronic services
are not addressed by the VAT e-commerce package and no exact solution has been provided.

Therefore, author´s view is that the problems that have existed in relation to the digital supplies are still present. Without appropriately addressing the problem of identifying location of the customer (and the possibility of VAT fraud) it is impossible to achieve the aim of the most recent measures, which is to ensure that VAT revenues accrue to the MS of consumption and to counteract base erosion and profit shifting. If the supplier cannot identify customer´s location with certainty, the supply will not be taxed where it is actually used and enjoyed (consumed). Furthermore, in order to create VAT system that will function properly, it is important to address the issue of the level of compliance from non-EU taxable persons, because they can undermine functioning of the whole system. That is a better solution than relying on the compliance by non-EU suppliers and platforms, which does not provide for legal certainty. Additionally, it is also possible that platforms will simply find a solution to avoid being involved and liable to tax.

Importantly, as was explained on the example of online platforms, there is a need for amending the existing VAT categories, developed to fit for another era, in order to make the system fit for the digital economy.

For the foregoing reasons author is of the opinion that we are not moving towards a definitive VAT system, as was indicated by the Commission, because there are still areas for improvement if the EU wants to make the VAT system truly fit for the digital era and solve the problem of VAT fraud effectively. Therefore, modernization of VAT is an ongoing process with the digital economy developing every day.
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