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

Prof. Madeleine Merkx[1]

1. Introduction

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

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

2. Effective and fair collection of VAT

In 1998 the OECD developed the Ottawa Taxation Framework[5] when it comes to taxation of e-commerce. Within this framework both an efficient and an effective and fair taxation play an important role. To start with the latter principle, according to the framework an effective and fair taxation means that taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimized while keeping counteracting measures proportionate to risks involved. Efficient taxation means that compliance costs for businesses and administrative costs for the tax authorities should be minimized as far as possible. In my view these principles are very closely related to other principles addressed in the Ottawa taxation framework: neutrality, certainty and simplicity and flexibility. Neutrality means that taxation should seek to be neutral and equitable between forms of electronic

---

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

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

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

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

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

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

3. Platform business models[7]

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

The business model of platforms can be distinguished from classical pipeline business models[10] which were common when the EU VAT system was introduced. Within a pipeline model, goods are produced and then supplied to the consumer through sales in various links of a supply and distribution chain, such as wholesalers. Platform's business models are different. This type of business model does not create value through production or resale, but by facilitating exchanges among users that would otherwise have difficulty finding each other.[11] For a platform business model to be successful platforms will need a sufficiently large user base consisting of parties from both sides of the market. A platform with only

---

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

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

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

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

[10] A.M. Bal, 'Managing EU VAT Risks for Platform Business Models, 72 Bull.Intl.Taxn. 4a/Special Issue (2018) Journal Articles & Opinion Pieces, IBFD.

[11] P. Evans & A. Gawer, 'The rise of the platform enterprise: A global survey (2016) available at https://www.thecge.net/wp-content/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf, Marie Lamensch et. al, supra 7, p. 445 and 446 and R. Arendsen, A.D.M. Janssen, J.I.W. Lock and M.M.W.D. Merkx, 'De toekomst van btw bij e-commerce: heffing via platforms (the future of VAT and e-commerce: taxation via platforms), MBB 2019/5, para. 3.2.

sellers or only buyers cannot be successful.[12] To keep a right balance and a sufficiently large database platforms will need to safeguard their users bases, because users can easily switch to other platforms.[13] Another difference is that platforms can monetize value in different ways. They can charge periodical fees to users operating on the platform or a fee per transaction. Platforms can charge both sides of the market, e.g. sellers and buyers or can choose to only charge one of those parties, to ensure the balance between both sides of the market, as described above.[14]

Considering the characteristics of platforms described above one might easily tar all platforms with the same brush. It should however be noted that there is no 'one size fits all' -approach for platforms.[15] Within transactions taking place on the platform three levels of facilitation can be distinguished: facilitation during the order phase, execution phase and result phase.[16] Platforms operating during the order phase are involved in the conclusion of a contract between the seller and the buyer. They can provide matching and trust-building facilities. Matching can be done through show and search mechanisms.[17] Creating trust is an important function that platforms perform, as people operating on the platform often do not know each other personally. Trust can be created by record keeping (collecting and presenting information about the seller and their products, including possibly ratings by other buyers)[18] and providing guarantees. During the execution phase the transaction is carried out, i.e. the good or service is supplied and the customer makes a payment. A platform may provide payment services or even logistics. During the result phase platforms may facilitate by providing e.g. dispute resolution services, customer services and purchase protection.[19] Platforms can facilitate in the order phase only. Those platforms facilitate on a low level. Platforms that facilitate during the order phase and execution phase are facilitating on a medium level, while platforms facilitating during all three phases are facilitating on the highest level. It is not always the platform's choice whether it can facilitate to the highest level. Additional services come at additional costs and risks. It is only possible to facilitate at higher levels if costs can be passed on to users. Customers may also require additional services for some supplies, for example customer protection in case of high value goods that are notorious for invisible defects, while they may not require those additional services for other types of goods. Hence, different levels of facilitation can coexist on a platform.[20]

4. Full liability rules for platforms in EU VAT

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

Supplies covered

Art. 9a VAT IR applies to electronically supplied services and telephone services provided through the internet, including voice over internet Protocol (VoIP). Art. 14a VAT Directive applies to distance sales of goods imported from third territories or third countries[21] in consignments of an intrinsic value not

[12] D.S. Evans, supra. 8, pp. 7-8, A. Hagiu & J. Wright, 'Marketplace or reseller', Harvard Business School Working Paper, 13-092, 31 Jan 2014, p. 3.
[13] Evans, supra. 8, p. 16.
[14] Marie Lamensch et. al. supra 7, p. 447.
[15] Marie Lamensch et. al. supra 7, p. 447.
[16] J.L.G. Dietz, 'Understanding and Modelling Business Processes with DEMO, Proc. 18th International Conference on Conceptual Modeling (ER'99, 1999), p. 193.
[17] OECD (2019), 'Unpacking E-Commerce: Business Models. Trends and Policies', https://doi.org/10.1787/23561431-en, p. 80
[18] A. Tikhomirova & C. Shyuai, Assessment of trust building mechanisms of e-commerce: a discourse analysis approach', Professional Discourse &Communication 1 (4). 2019, p. 25.
[19] Marie Lamensch et. al. supra 7, pp. 447-450.
[20] Marie Lamensch et. al. supra 7, p. 451.
[21] Defined by art. 14 (4) (2) VAT Directive.

exceeding EUR 150 and, in case of a supplier established outside the EU, also to B2C-supplies of goods within the EU.[22]

Intermediaries caught by the provisions

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

A business operating an electronic interface such as a marketplace, platform, portal or similar means is caught by the provision of art. 14a VAT Directive. The term electronic interface is defined by non-legally binding explanatory notes. According to these explanatory notes electronic interface is a broad concept which allows two independent systems or a system and the end user to communicate with the help of a device or program. It could be a website, portal, gateway, marketplace or API (application program interface).[27]

Activities of intermediaries need to be in scope

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

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

---

[22] This includes local sales and intra-Community distance sales of goods as defined by art. 14, (4) (1) VAT Directive.
[23] Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015, 3 April 2014, https://ec.europa.eu/taxation_customs/business/vat/telecommunications-broadcasting-electronic-services/content/explanatory-notes-place-supply-tbe-services_en (hereinafter: explanatory notes 2015).
[24] Ibid, p. 13. Telecommunication networks include but are not necessarily limited to cable networks, telecom networks and ISP (Internet Service Provider) networks. They cover any facility which allows access to telecommunications, broadcasting or electronic services.
[25] Ibid, p. 13.
[26] Ibid, p. 13.
[27] Explanatory Notes on VAT e-commerce rules, September 2020, https://ec.europa.eu/taxation_customs/commission-guidelines_nl (hereinafter: Explantory notes 2020) p. 8 and 9.
[28] Explantory notes 2015, p. 28.
[29] Ibid, p. 28.
[30] Guidelines resulting from the 106th meeting of 14 March 2016, document A-taxud.c.1(2016)604550, poinnt 2 available at: https://ec.europa.eu/taxation_customs/vat-committee_en

Escape for intermediaries caught by the provision

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

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

General exclusions from the provision

Art. 9a (1) VAT IR does not apply to taxable persons only processing payments. According to the non-legally binding explanatory notes a taxable person only making the internet network available for carrying the content and/or collection of payment is not caught by the provision. The same applies for a mobile operator only carrying out these type of activities.[33] Pursuant to art. 5b VAT IR a taxable person who only provides any of the following is out of scope of art. 14a VAT Directive: (a) the processing of payments in relation to the supply of goods; (b) the listing or advertising of goods; or (c)
the redirecting or transferring of customers to other electronic interfaces where goods are offered for sale, without any further intervention in the supply.

Consequences if the provision applies

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

Under art. 14a VAT Directive the intermediary is deemed to have received and supplied the goods himself. It should however be noted that different from art. 9a VAT IR, where the intermediary is presumed to be within scope of the provision of art. 28 VAT Directive, the platform can under art. 14a VAT Directive still make a separate supply of services to the supplier and/or buyer, e.g. providing access to the platform for

[31] Explanatory notes 2015, p. 34.
[32] Explanatory notes 2020, p. 17 and 18.
[33] Ibid, p. 29.

a fee.[34] It should also be noted that under art. 14a VAT Directive only one platform can facilitate a sale, whereas under art. 9a VAT Implementing Regulation multiple platforms can take part in the supply, making an intermediary providing a B2B electronically supplied service to another intermediary and the last intermediary in the chain supplying the B2C-service.

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

---

[34] See also: A.J. van Doesum, 'Een faciliterend online goederenplatform is nog geen commissionair' (A facilitating online goods platform is not yet a commission agent), WFR 2020/210. Paragraaf 3.
[35] Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax, OJ 2018, L 195, p. 3-22
[36] In my view however the UK should also qualify based on a protocol included in the EU-UK trade and cooperation agreement, Protocol on Administrative Cooperation and Combating Fraud in the Field of Value Added Tax on Mutual Assistance for the Recovery of Claims Relating to Taxes and Duties, Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539.
[37] More extensively on this topic: M.M.W.D. Merkx, 'Nieuwe btw-regels voor e-commerce: platform kiest zelf voor btw-plicht (New VAT rules for e-commerce: platform chooses for VAT liability), NLF Wetenschapelijk 2021/11. It should be noted that due to a change in customs legislation it is not allowed to release goods with a value of no more than 150 euros for free circulation in an EU Member State different from the EU Member State of destination if I-OSS is not used, art. 221 (4) of the implementing regulation UCC (Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 29.12.2015, p. 558–893). The place of supply rule of art. 33 (b) VAT Directive stating that, 'the place of supply of distance sales of goods imported from third territories or third countries into a Member State other than that in which dispatch or transport of the goods to the customer ends, shall be deemed to be the place where the goods

Special provisions connected to the deeming provision

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

Interesting facts

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

5. An efficient and fair collection of VAT

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

5.1 Efficient collection of VAT?

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

A collection model using platforms to collect the VAT is considerably simplifying the administrative burden for platform sellers. However, a Deloitte study demonstrates that as regards art. 9a VAT IR the intermediaries caught by the provision have mixed feelings about their obligations, depending on their

---

are located at the time when dispatch or transport of the goods to the customer ends', will therefore only apply if I-OSS is used or if the value of the goods is more than 150 euros.

[38] Pending case C-695/20.

[39] Compare: James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 12 and OECD (2017) Mechanisms for the Effective Collection of VAT/GST – Where the supplier is not located in the jurisdiction of taxation, section C.3.2, point 67.

[40] Compare: James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 12 and 13.

[41] Kyriaki Yiallourou, 'The Limitations of the VAT Gap Measurement', EC Tax Review 2019-4, p. 203, James Alm and Chandler McClellan, 'Tax Morale and Tax Compliance from the Firm's Perspective', KYKLOS, Vol. 65 – February 2012 – No. 1, 1–17, p. 8.

business model.[42] It is in my view obvious that while compliance costs for platform sellers and administrative burdens for tax authorities will decrease, compliance costs for platforms will increase, with even the risk of making the platform's business loss-making and thus threatening its existence.[43] So on a micro level considering the position of platforms the deeming provisions are not efficient. Looking at macro level, however, if compliance costs for platform sellers and administrative costs for tax authorities decrease more than compliance costs increase for platforms the legislation can as far as I am concerned as such be regarded as efficient. Whether putting an additional burden on platforms is fair, will be addressed in the next section.

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

The next thing that should be taken into account is possible fraud. Platforms that do not have all the information to correctly establish the correct VAT amount to be paid or depend on information from platform sellers (who can have an interest in providing false information to offer products to their customers at lower prices including VAT) may submit an insufficient amount of VAT to the tax authorities. Platforms may under art. 5c VAT IR not be held liable for an additional VAT payment when they depend on information from third parties, the information was erroneous and the platform didn't and couldn't have known that that information was false. It should be noted though that in respect of this provision the burden of proof is on the platform. As I see it, this provision will either hinder the effective collection of VAT or will hinder a fair collection of VAT. If the platform is easily released from its obligation to pay additional VAT the provision hinders the effective collection of VAT, because the additional VAT cannot be collected from the underlying supplier either, unless a joint and several liability provision is in place in the EU Member State in question. If applied too strictly the platform will be held liable even in situations where it has acted in good faith, therefore detracting from the fairness of the deeming provision. I do expect EU Member States to apply the provision strictly, meaning the provision will hinder a fair collection of VAT.

The I-OSS numbers that platforms who do not arrange the shipments must provide to platform suppliers to be able to apply the exemption on imports also creates risks of fraud and can be regarded as the Achilles' heel of the system. Because who guarantees that a seller who operates on a platform and has the platform's I-OSS number will not use it to get the exemption for supplies not facilitated by the platform,

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

or even worse sell it to some people having no good in mind?[47] Measures taken to 'stop the bleeding' such as blocking the I-OSS number will have a major impact on transactions effected through the platform,[48] e.g. delays in importing the goods and the need to pay import VAT even though the customer has already paid VAT to the supplier or platform.

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

Due to the fact that platforms are easily caught by deeming provisions, I think it can be fairly said that such a model offers the necessary flexibility. However, for direct sales, the model does not offer any solace. As a result, a platform liability will always have to be accompanied by an obligation on suppliers to pay VAT in the case of direct sales. Moreover, if direct sales increase and platform sales decrease, the model becomes less efficient. Blockchain technology may also make platforms redundant. After all, the characteristic of this technology is that intermediaries become superfluous.[51,52]

5.2 Fair collection of VAT?

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

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

[47] Marie Lamensch, 'Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?', Internatinoal VAT Monitor March/April 2018, p. 49.
[48] Lamensch et al, supra 7, p. 464.
[49] See also: Sparidis and Middelburg, supra 40, section 2.2 and Noorlander, supra 39, section 3.3.
[50] Reference for a preliminary ruling from First-tier Tribunal (Tax Chamber) (United Kingdom) made on 22 December 2020 – Fenix International Limited v Commissioners for Her Majesty's Revenue and Customs, Case C-695/20.
[51] Madeleine Merkx, 'VAT and Blockchain: Challenges and Opportunities Ahead', (2019) 28 EC Tax Review, Issue 2, p. 83-89.
[52] Madeleine Merkx, 'The wizard of OSS: effective collection of VAT in cross-border e-commerce', NL Fiscaal 2020, inaugural lecture, p. 71 and 72.
[53] Merkx, ibid, p. 71.

bleeding' measures in case of misuse of the I-OSS number can have disproportionate effects for platforms, platform sellers and their customers.

A tension between neutrality and efficiency has been established before. From the perspective of efficiency the deeming provision should have a wide scope. From the perspective of neutrality and fairness the deeming provision should apply only if the correct VAT amount can be established and the platform has access to the VAT amount.[54] The platform collection model also creates differences between direct sales and sales via platforms[55] as well as sales by EU and non-EU suppliers under the deeming provision applicable to EU-distance sales and local sales of goods.[56] Deeming provisions also provide a competitive advantage for bigger platforms, who are more able and have more means to deal with the implications of the provisions, including changing their business model without losing their critical user base.[57] Last but not least, even though C2C-transactions are not covered by the deeming provision of art. 14a VAT Directive, the fact that art. 5d VAT IR requires platforms to regard the supplier as a taxable person (unless it has information to the contrary), creates the risk that C2C-transactions will be caught unintentionally by the deeming provision. In that case transactions that would normally not be subject to VAT are included in the VAT system, creating a difference between transactions via platforms and transactions taking place in the traditional markets. Transactions where the suppliers could make use of the exemption for small businesses will also be covered by the deeming provision, making those transactions subject to VAT instead of being exempt from VAT.[58] In my view, it can however be questioned whether it is indeed an issue that C2C transactions and transactions of small businesses are included in VAT under a deeming provision. Looking at the nature and purpose of VAT, to tax private consumption, including these transactions under the scope of taxation can be welcomed. As I see it, C2C-transactions and transactions of small businesses remain untaxed for efficiency purposes, because including those transactions in the VAT system would create excessive compliance and administrative burdens. One can also argue that the position of platform sellers is not comparable to that of sellers in the traditional economy. After all, the platform makes it possible for platform sellers to enter a large market with limited efforts. Something that is not possible in the traditional market. Platforms also allow small platform vendors to compete with large companies (think, for example, of Airbnb, which is the largest hotel chain in the world without owning a single hotel room). So in my view the accidental inclusion of C2C-transactions in the VAT system because of the provision of art. 5d VAT IR does not affect a fair VAT collection model. The same is true for transactions by businesses applying the exemption for small businesses. The only issue is the accumulation of the tax because the platform seller that does not qualify as a VAT entrepreneur and the small business do not have the right to deduct VAT.

5.3 Interim conclusion

Even though the deeming provisions create efficiency to a certain extent the model does not stand the test of fairness and needs much improvement to take account of the platform's different business models and individual situations. A turnover threshold to exclude smaller platforms from the provisions with an opt-in for platforms that are able to take on the VAT obligations accompanied with the deeming provision, can in my view be considered to deal with the fact that smaller platforms are less able to cope with the obligations related to the deeming provisions. In particular the grip on non-EU platforms should be increased through more administrative cooperation with non-EU countries that have to deal with similar issues in the field of e-commerce. There is therefore a joint interest, but it should be noted that there are of course countries, such as China, from which the export of B2C sales to the EU is many times greater than the other way around. The Achilles' heel of the I-OSS, the misuse of the I-OSS number, should be dealt with.[59] A joint and several liability for underlying suppliers should be mandatory, while the burden

[54] Merkx, ibid, p. 72 and Arendsen, et al, supra 10, p. 40.
[55] Merkx, ibid, p. 71.
[56] Noorlander, supra. 39, section 3.1.
[57] Middelburg and Sparidis, supra. 39, section 5.3, Lamensch et al, supra. 40, section 6 and Noorlander, supra. 40, section 3.1.
[58] Sparidis and Middelburg, supra. 40, section 5.1.
[59] From Group on the Future of VAT, 'OSS VAT identification number - Securing the IOSS process', GFV 119, Brussels 25 April 2022, taxud.c.1(2022)3455702, p. 3 it becomes clear that a project group will be established to deal with this. Options that are considered is the use of an uniquely generated transaction

of proof for platforms to escape the payment of additional VAT should be equally divided between platforms and tax authorities. Including C2C-transactions and transactions of small businesses in the VAT system is in my view not a problem, because it is line with the nature and purpose of the tax, while the traditional and platform economy are sufficiently incomparable to conclude that there is no infringement of the neutrality principle. Accumulation of the tax because of the lack of VAT deduction should be dealt with. Last but not least, streamlining of (conditions of) application of the deeming provisions can contribute to an efficient collection of VAT.

5.4 Extending the scope of platform liability?

The European Commission is considering the extension of the deeming provision of art. 14a VAT Directive to the transfer of own goods.[60] If adopted the platform instead of the underlying supplier will be required to report the deemed intra-Community supply and acquisition because of the transfer of own goods. This only applies if the platform is the one moving the underlying supplier's goods from one EU Member State to the other. Considering the latter the extension is in my view acceptable. Platforms that offer fulfillment warehousing services will have information available about the location of the goods, whereas suppliers will have to rely on the information from the platform. The deeming provision therefore in my view creates a fair and efficient collection of VAT, because it puts the burden on bigger market players that have the information available instead of smaller market players that rely on information from a third party. As noted by the European Commission the deeming provision may give platforms offering fulfillment warehousing services a competitive advantage over other platforms.[61] In my view however commercial reasons, e.g. shorter delivery times, and not VAT consequences will predominate a decision of a supplier to use fulfillment services (or not). What's more, in case suppliers that move their own goods can use the OSS to report the transfer of own goods compliance costs will substantially decrease. Extension of the OSS to cover transfer of own goods is also considered by the European Commission.[62] Last but not least, I agree with the European Commission that taxable persons transferring own goods who do not have a full right to deduct VAT should be considered. Because under the deeming provision the level of deduction of the platform is to be applied and most platforms will have a full deduction right, the VAT on the deemed intracommunity acquisition will be fully deductible, whereas it is not the case if the goods are transferred by a supplier without a full right to deduct VAT. The number of goods of which the supply is exempt from VAT is limited under the VAT Directive and it is not likely that there will be a huge amount of platforms transferring goods like human organs, human blood and human milk (exempt under art. 132 (1) d) VAT Directive) or dental prostheses (only exempt if supplied by dentists and dental technicians under art. 132 (1) (e) VAT Directive). Its also unlikely that small business under the exemption for small businesses will use the fulfillment warehousing services offered by platforms, considering they have a small turnover. What's more, those businesses will normally not be required to report intra-Community acquisitions or transfers of own goods, unless they exceed a certain yearly threshold set by Member States, which cannot be lower than EUR 10.000. So they can only benefit of the deeming provision in case their intra-Community acquisitions and transfers exceed that threshold.

From a document discussed at a meeting of the group on the future of VAT it becomes clear that the European Commission is considering options for implementing deeming provisions for platforms in what is called the sharing economy. Under option C the deeming provision will have a narrow scope and will apply to certain accommodation and transport services (ride on demand, delivery services and residence renting). Under option D the deeming provision will apply to all accommodation and transport services and under option E to all services, where there seems to be a preference for D over C because of demarcation

---

number as a new controlling mechanism, the direct exchange of information between customs and e-commerce platforms and the upgrade of the I-OSS monthly listings to include the Member State of final destination. The latter allows the Member State of consumption to compare the information in the listings with the monthly I-OSS returns.

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

[61] GFV 120, supra. 56, p. 9 and VEG 105, supra. 56, p. 9.

[62] GFV 120, supra. 56, p. 5-8 and VEG 105, supra. 56, p. 5-8.

issues.[63] The deeming provision will apply when the supplier is a not established in the EU *and* not identified for VAT purposes, a private individual established in the EU or a person established in the EU and a member of the so called group of four: (i) taxable persons carrying out only supplies of goods or services in respect of which VAT is not deductible; (ii) taxable persons subject to the common flat-rate scheme for farmers; (iii) taxable persons subject to the SME scheme; and (iv) non-taxable legal persons.[64] What this group of four has in common is that they are typically not VAT registered in the EU Member States or, if they are, they do not file VAT returns on a regular basis. Under the deeming provision the supply from the platform seller to the platform is out of scope[65] and the platform seller cannot deduct the VAT. According to the European Commission this is justified because the seller can benefit of network effects.[66]

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

[63] Group on the Future of VAT, 'VAT in the Platform Economy – focus on specific issues – follow up', GFV 116, Brussels 26 January 2022, taxud.c.1(2022)669826, p. 11.
[64] GFV 116, supra. 59, p. 15.
[65] GFV 116, supra. 59, p. 10.
[66] GFV 116, supra. 59, p. 9.

customer lives (and where he uses the service), but that is less likely compared to the situation where the service is taxed in the country of the supplier.[67]

6. Conclusion

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

[67] This was also addressed by the committee of the sharing economy of the Dutch Association of Tax research of which I was the president. Vereniging voor Belastingwetenschap (Dutch Association of Tax Research), 'Fiscale aspecten van de deeleconomie' (Tax aspects of the sharing economy), 2021, p. 174 and 175.