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Are 'reverse charging' and the 'one-stop-scheme' efficient ways to collect VAT on digital supplies?

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With regard to the collection of VAT on electronically supplied services, the EU VAT Directive provides for reverse charging (in B2B) and a single registration scheme (in B2C). This paper challenges the efficiency of these collection mechanisms in a digital context, and in particular their practicability for suppliers (acting as tax collectors). It also discusses whether they are in compliance with the 1998 OECD recommendations on e-commerce. After noting the current (non-)developments in the context of the European Commission's ambition to reform the EU VAT system and achieve a Digital Single Market by 2020, it sketches three proposals for further discussion.

1. Introduction

Under the destination principle (which applies almost universally),[1] suppliers are traditionally required, as taxable persons, to register and remit the VAT due on their supplies in each jurisdiction in which they have customers, and in accordance with the local rules and requirements of that jurisdiction. This results in a non-negligible compliance burden. Until recently, the question attracted only limited attention because cross-border transactions remained relatively limited. In fact, most *services* used to be 'non-transportable' and their international supplies would traditionally occur through the geographical movement of one or the other party to the transaction: either the customer would travel to the country of the supplier or the supplier would have a commercial presence or send a representative to the country of the customer.[2] In addition, cross-border supplies of *goods* mostly concerned products that could not be obtained from domestic suppliers or that could be obtained abroad at a more competitive price (including transport costs). Finally, where there would effectively be a cross-border supply, it would traditionally take place between neighbouring jurisdictions, which usually shared similar tax traditions (gravity model of trade in international economics[3]). As a consequence, those engaging in cross-border trade needed to register in only a limited number of familiar jurisdictions until recently.

1 Except in some cases of interstate trade within federations or within an integrated economic area such as the EU (eg intra-Community supplies to private consumers are in principle taxed at origin, an intra-Community supply taking place between a supplier and a customer established in two different Member States of the EU).

2 United Nations, *Manual on Statistics of International Trade in Services* (2010), p 9.

3 On the gravity model of trade see eg Céline Carrère, 'Revisiting the Effects of Regional Trade Agreements on Trade Flows with Proper Specification of the Gravity Model' (2006) 50 *European Economic Review* 223; JH Bergstrand, 'The Gravity Equation in International Trade: Some Microeconomic Foundations and Empirical Evidence' (2005) 67 *Review of Economics and Statistics* 474; Robert C Feenstra, James R Markusen and Andrew K Rose, 'Using the Gravity Equation to Differentiate among Alternative Theories of Trade' (2001) 34 *Canadian Journal of Economics* 431.

Globalisation, improved access to markets and deregulation have changed these trade patterns, and the volume of cross-border trade has grown significantly.[4] Building upon the development of information and communication technologies, and in particular the Internet, 'e-commerce' has emerged as a new business environment. In this new environment, digital products[5] developed, which have their own production and distribution schemes, and which are universally accessible on a wide variety of devices, such as personal computers, smartphones, tablets, digital radios and high-definition televisions.

In this stronghold of continued growth,[6] the concepts of distance and geographic location have blurred. Cross-border supplies to a global customer base have become as easy and common to conduct as domestic transactions and have, as a result, become mainstream. This evolution in trade flows has major consequences for suppliers of digital products who traditionally still have to collect and remit VAT in each jurisdiction of destination of their supplies.

Under the EU VAT Directive,[7] reverse charging and a one-stop-scheme aim at simplifying the compliance burden of suppliers of digital products ('electronically supplied services' in EU terminology).[8] These collection mechanisms apply respectively to business-to-business and business-to-consumer supplies.

2. The EU VAT Directive provisions

In the case of business-to-business supplies (where the destination principle applies without exception), tax assessment and collection obligations are simply shifted to the business customer under the reverse charge mechanism, which actually applies to all cross-border supplies of services to taxable persons.[9] In practice, supplies are zero-rated and business customers are liable for correctly assessing and spontaneously remitting the correct amount of tax due on their acquisitions to their own tax administration through periodic returns.[10]

4 OECD, 'Implementation of the Ottawa Taxation Framework Conditions, The 2003 Report', www.oecd.org/dataoecd/45/19/20499630.pdf, p 33 ('2003 Report'). See also OECD, 'The Future of the Internet Economy, A Statistical Profile', June 2011 update.

5 Through the technique of sampling, many items may indeed be digitised and delivered over the Internet. Digital products include, on the one hand, intangible versions of 'goods' (such as CDs, videotapes, newspapers, books and other printed matter, photographs and games) which have become competitive substitutes on the global market, even for the cheapest products. On the other hand, many services have also moved from the physical into the digital world (such as e-learning, information databases, lotteries and gambling).

6 Collins Stewart expects worldwide revenues from online trade to reach $694 billion in 2012. Forrester foresees a growth of 12% to 15% per year between 2011 and 2015 in the US (from $197 to $279 billion), and in the EU, it estimates that online sales grew by 18% in 2010 compared to 2009, and were expected to grow by 13% in 2011. The number of online buyers in Europe should, still according to Forrester, grow from 157 million to 205 million by 2015, with total sales forecast to reach €133.6 billion. Let us notice, however, that, unfortunately, none of the figures available make the distinction between digital supplies and distance sales (ie tangible goods sold over the Internet).

7 Council Directive (EC) 2006/112 of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 (EU VAT Directive).

8 Introduced by Council Directive (EC) 2002/38 of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services [2002] OJ L128/41, 15/05/2002. The Directive also provides for specific place of supply rules.

9 Art 196 of the EU VAT Directive, as amended by Council Directive 2008/8.

10 Art 196 of the EU VAT Directive (as amended by Council Directive 2008/8 on the place of supply of services (OJ L44/16, 20 February 2008) reads as follows: 'VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied

In business-to-consumer supplies (where the destination principle applies, save for intra-Community supplies until 2015[11]), reverse charging is not an option because consumers are not registered and have neither the skills to voluntarily proceed to the remittance of the tax nor any incentive to do so given that, unlike businesses, they have to bear the economic burden of the tax without any possibility of recovering it. A simplified registration framework therefore applies, known as the 'one-stop-scheme' or 'one-stop-shop'.[12] Under this simplified scheme, suppliers may, as an alternative to registering in all the Member States in which they have private consumers, register and obtain a VAT identification number in one single Member State ('Member State of identification') in which all their VAT obligations related to their electronically supplied services to EU private consumers will be centralised. The system is optional and multiple registrations are always possible. In practice, if they opt for the one-stop-scheme, all the procedures they need to attend to (registration, payment and reporting) will be handled through the tax administration that they have selected, which will also give them guidance on how to meet their obligations. This single registration model therefore makes it possible for suppliers of electronically supplied services to engage into cross-border transactions with EU consumers without the need for a fiscal representative or any physical presence in the EU. The Member State of identification allocates the VAT revenue to the Member State of consumption and audits the foreign supplier.[13] At the moment, the one-stop-scheme is only available for business-to-consumer supplies made by non-EU suppliers to EU consumers because (1) supplies to non-EU customers are not subject to EU VAT, (2) business-to-business supplies are subject to reverse charging, suppressing the need for the supplier to register in the country of their business customers (see above), and (3) until 2015, business-to-consumer intra-community supplies are subject to the origin principle, ie to taxation in the country of the supplier, so that the multiple registration issue does not arise. The one-stop-scheme will also be available to EU suppliers as of 2015, when intra-Community supplies of electronic services to private consumers will be taxed at destination.

3. Critical assessment of reverse charging in business-to-business supplies

Reverse charging effectively reduces suppliers' compliance burden by shifting the liability to assess and remit the correct amount of tax to business customers, who are registered for VAT purposes and comply with their tax obligations on a self-assessment basis via their periodic returns. It also reduces administrative costs for the tax administrations that do not have to handle a large number of registrations for a limited number of taxable supplies on their territory.

by a taxable person not established within the territory of the Member State.' Art 44 refers to the supply of services to taxable persons.

11 Intra-Community supplies of electronically supplied services to private consumers are taxed at origin until 2015. As of 2015, they will also be taxed at destination.

12 Arts 357–69 of the VAT Directive. Council Regulation (EC) 792/2002, temporarily amending Regulation (EEC) 218/92 on administrative co-operation in the field of indirect taxation (VAT) and subsequently included in Regulation (EC) 1798/2003, introduces additional measures necessary for the registering for VAT purposes of online suppliers not established within the EU and for distributing VAT receipts to the Member States in which the services are actually used.

13 As noted above, the destination principle will also apply to these supplies as of 2015, and the one-stop-scheme will then also be available to EU suppliers for their intra-Community supplies.

A *first* and well-known hurdle, however, is the potential interruption that reverse charging creates in the VAT chain. Reverse charging indeed suspends suppliers' VAT liability in all transactions preceding the retail stage and therefore more or less transforms the VAT into a retail sales tax as found in most US states and some Canadian provinces.[14] This is regrettable because a fundamental rationale behind the fractioned collection of VAT (multi-staged tax) as compared to a retail stage tax (single-staged tax) is its relative 'self-enforcement' potential. Downstream firms in the VAT tax chain are indeed less likely to default on VAT charged to them by their suppliers (which they eventually recover by way of credit or refund) than on VAT levied at the retail stage only and directly payable to the tax administration. In other words, the incentive which intermediate suppliers have in the multi-stage VAT system is suppressed by the reverse charge mechanism.

Second, the application of reverse charging for certain supplies and not for others (ie only for business-to-business supplies of electronic services) in practice means that businesses need to handle, within one accountancy system, (1) invoices for *purchases* issued on a reverse charge basis, (2) invoices issued for *sales* on which reverse charging applies and, (3) invoices issued for *sales* where reverse charging does not apply. This inevitably results in an increased compliance burden and cost.

Third, for suppliers of electronically supplied services, the main problem with reverse charging is the question whether it is actually possible for them to rely on this mechanism at all. A positive answer to that question indeed requires that suppliers determine with certainty the status (business) and location (in another jurisdiction) of their customers. Otherwise, on the one hand, there is a risk that private consumers will claim business status in order to benefit from zero-rated exports. On the other hand, assessing the cross-border nature of the supply is essential because only cross-border supplies (even to a business customer) may give rise to a zero-rated supply.

In practice, however, while these identification and location requirements already result in a substantial compliance burden for suppliers of 'conventional' services,[15] they prove barely implementable in a digital context.

On the question of status identification, the EU VAT Directive foresees that a supplier may refuse to treat a customer as a business client in the absence of a valid VAT identification number or 'any other proof', and unless 'he has information to the contrary'.[16] No criteria for

14 Sijbren Cnossen, 'VAT Coordination in the European Union: It's the break in the audit trail, stupid!', Congress of the International Institute of Public Finance (IIPF), Maastricht, The Netherlands, 22–25 August 2008.

15 See I Lejeune, E Cortvriend and D Accorsi, 'Implementing Measures Relating to EU Place-of-Supply Rules: Are Business Issues Solved and Certainty Provided?' (2011) 22 *International VAT Monitor* 144.

16 Art 18 of Council Regulation 282/2011 of 15 March 2011 laying down implementing measures for Directive (EC) 2006/112 on the common system of value added tax [2011] OJ L77/1 (Council Regulation 282/2011) reads as follows: 'Unless he has information to the contrary, the supplier 1. may regard a customer established within the Community as a taxable person: (a) where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name and address in accordance with Art 31 of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax; (b) where the customer has not yet received an individual VAT identification number, but informs the supplier that he has applied for it and the supplier obtains any other proof which demonstrates that the customer is a taxable person or a non-taxable legal person required to be identified for VAT purposes and 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. 2. Unless he has information to the contrary, the supplier may regard a

the interpretation of 'any other proof' or 'information' are offered, however, resulting in legal uncertainty. Moreover, in a digital environment where transactions take place 24/7, in a quasi-instantaneous way, an absolute prerequisite is that relevant information be available on a real-time basis, which may be the case where a customer provides a valid EU VAT number (which can be verified through the VIES system[17]), but not where he provides a non-EU VAT number, where 'other proofs' are provided or where 'information' may be available (again without any indication of what these two concepts are referring to). It should furthermore be noted that denying a customer the benefit of being treated as a business client (ie refusing the benefit of a zero-rated supply) may have adverse 'commercial' consequences for the supplier, who is therefore put in a particularly delicate position in the absence of a readily verifiable VAT number. For example, it is a difficult decision for an EU supplier of computer-aided design software to simply refuse the benefit of a zero-rated supply to a Kenyan architecture firm, because he is not able to verify the VAT information provided by the Kenyan customer at the moment of the transaction (which can take place 24/7, and should normally be completed almost instantaneously).

On the question of customer location, in the simplest scenario (ie customers located in a single jurisdiction), suppliers must identify the place of establishment or usual residence of their customers.[18] For that purpose, they must rely on information received from them (self-identification), but should then verify that information by *normal commercial security measures such as those relating to identity or payment checks.*[19] In more complicated (but quite common) situations, where a supply is made to customers established in several countries, verification obligations are even more challenging. In cases where the supply is made to a fixed establishment of the customer located in another jurisdiction that is receiving the service and using it for its

customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him. 3. 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 under Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory; (b) where the customer does not possess that certificate, if the supplier has the VAT number, or a similar number attributed to the customer by the country of establishment and used to identify businesses or 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.'

17 The VAT Information Exchange System (VIES) is an electronic platform where information relating to the VAT registration (ie the validity of VAT numbers) of companies registered in the EU is available. Under the VIES, suppliers are also requested to report intra-Community supplies of each buyer (along with their VAT identification number) and the buyer has to report its intra-Community acquisitions, allowing for cross-checking.

18 ie place of taxation under Art 44 of the VAT Directive.

19 Art 20 of Council Regulation 282/2011: 'Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable person, 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.'

own needs, the supply is indeed deemed to take place there.[20] Beyond the question of the associated costs, legal certainty is not ensured because the concept of fixed establishment itself (which is defined as

> any establishment other than the place where the taxable person has established his business characterized by a certain 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 the services which it supplies, respectively[21])

may be interpreted differently by each Member State.[22] More generally, the question remains open how suppliers providing electronic services are at all able to determine whether a fixed establishment has 'a sufficient degree of permanence and a suitable structure in terms of human and technical resources to receive and use the service' or whether it acquires a given supply for its own need or is acquiring (or paying) the supply for mere organisational reasons within the company, and therefore whether it should effectively benefit from a zero-rated supply under reverse charging. For example, an online supplier providing market reports or statistics should be able to determine whether the company acquiring his services is able to, and is effectively going to, use his services for its own needs, and is not simply acting as paymaster within a group. In a digital context, this requirement can hardly be satisfied. Finally, let us note the lack of guidelines as to how suppliers should store the information on which they have based their assessment, as well as the format and the period during which this information must be retained.[23]

Accordingly, while reverse charging effectively suppresses the need to proceed to multiple registrations, deciding whether or not it may be relied upon implies extremely burdensome verifications in a digital environment, which substantially reduces the overall efficiency of the system.

In conclusion, reverse charging, first, affects the self-enforcement potential of the VAT system; second, is difficult to manage for suppliers from an accountancy perspective; and, third, relies on the overly simplistic assumption that online suppliers are able to identify and locate their customers on a real time basis, which is admittedly not the case under the current EU VAT Directive provisions, at least not with a sufficient degree of legal certainty.

4. Critical assessment of the one-stop-scheme in business-to-consumer supplies

As discussed above, reverse charging is not an option for business-to-consumer supplies. In these cases, the full compliance burden (correct assessment and remittance of the tax in each

20 Art 21 of Council Regulation 282/2011: 'Where a supply of services to a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and the taxable person is established in more than one country, that supply shall be taxable in the country where that taxable person has established his business. However, where the service is provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs. Where the taxable person does not have a place of establishment of a business or a fixed establishment, the supply shall be taxable at his permanent address or usual residence.'

21 Art 11 of Council Regulation 282/2011.

22 Lejeune, Cortvriend and Accorsi (n 15) 147.

23 *Ibid*.

jurisdiction where a supplier has customers) therefore seems unavoidable. In that context, the one-stop-scheme allows suppliers to declare, in a single return, and in a single Member State of identification, all supplies made to EU private consumers in a given period. At the moment, it is only available to non-EU suppliers, as intra-Community business-to-consumer supplies are taxed at origin, which by design removes the multiple registration issue (and supplies to consumers not residing in the EU do not bear EU VAT[24]). But, as noted above, intra-Community business-to-consumer supplies of electronically supplied services will also be taxed at destination as of 2015, and the one-stop-scheme will then also be available to EU suppliers.

A real advantage of the one-stop-scheme is that it allows online suppliers to register once in the EU, have just one VAT number, and centralise their filing obligations in one jurisdiction. The Member State of identification is in charge of redistributing the tax revenue to the Member States of consumption.

However, a *first* weakness is that suppliers must always pay VAT upon submission of their returns, as no credit is available under that procedure.[25] Accordingly, suppliers relying on the one-stop-scheme must in all cases recover any refundable input VAT from each State where it was paid, and may not benefit from the traditional EU invoice credit mechanism. While this does not result in a net tax loss, it constitutes a real disadvantage in terms of cash flow.

Second, enforcing the one-stop-scheme remains a difficult exercise in a digital context where transactions may be concluded in complete anonymity. At the end of 2011, 453 businesses had registered under the one-stop-scheme, most of them in the UK (207), the Netherlands (83), Luxembourg (65), Germany (36), Ireland (25) and Italy (14).[26] This is a relatively low figure in view of the millions of suppliers that are supplying online. The problem is that it is impossible to identify supplies made to EU consumers. As a consequence, many foreign suppliers are likely to fail to register and declare their supplies without any real possibility for tax administrations to control and sanction them.[27] Beyond the potential loss of revenue for States, the relative impunity of non-registered suppliers also results in a disadvantageous position for compliant operators.

Third, the administrative burden is again non-negligible. Suppliers have to submit periodic (quarterly) VAT returns, whether or not electronically supplied services have effectively been rendered in that period.[28] In addition, and this is where the real difficulty lies, periodic returns must show, per Member State of consumption (where the VAT is due), the total value (exclusive of VAT) of supplies of electronic services effected in the relevant period, as well as the total amount of VAT due.[29] In other words, suppliers must mention in their periodic returns the

24 Nevertheless, a VAT (or any other type of consumption taxes) might have to be collected in the jurisdiction of consumption.

25 Art 368 of the VAT Directive reads as follows: 'The non-established taxable person making use of this special scheme may not deduct VAT pursuant to Article 168 of this Directive. Notwithstanding Art 1(1) of Directive 86/560/EEC, the taxable person in question shall be refunded in accordance with the said Directive. Articles 2(2) and (3) and Article 4(2) of Directive 86/560/EEC shall not apply to refunds relating to electronic services covered by this special scheme.'

26 There are only 8 registrations in France, 5 in Sweden, 3 in Denmark, 2 in Spain, 1 in Belgium, Bulgaria, Cyprus, Greece and Malta, and 0 in Austria, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Portugal, Romania and Slovakia. (Figures communicated by the UK Treasury, March 2012.)

27 Online domestic supplies may also be easily concealed, but this paper (and the EU VAT Directive) deals only with cross-border transactions.

28 Art 364 of the EU VAT Directive.

29 *Ibid*, Art 365.

applicable amount of tax for each supply, calculated in accordance with the rate scheme applicable in each Member State of consumption. Hence, as is the case with the reverse charge mechanism, the one-stop-scheme suppresses the need for multiple registrations in the EU but again leaves suppliers with the obligation to identify and locate their customers in order to take the right tax decisions. In a digital context, this proves an even more delicate and burdensome obligation for private consumers than for business customers.

Concerning status, as discussed above, suppliers may consider customers as private consumers where they have not been communicated with a VAT registration number or 'any other proofs' or have 'information to the contrary'. As already noted, this provision is not readily implementable with full legal certainty and in a timely fashion. It may furthermore involve delicate 'commercial' decisions from the side of the supplier. Concerning the location of private consumers, self-identification verified by suppliers is also the rule. In the absence of 'official' information such as that which may be found through the VIES on the basis of a valid EU VAT number, verifications must again be made on the basis of 'normal commercial security measures such as those relating to identity or payment checks'.[30] However, suppliers do not always have access to payment details (eg when the transaction passes through intermediaries such as Paypal). Another issue is that it remains unclear to us what the EU legislator means by 'identity checks' that could be performed by the supplier of electronically supplied services to private consumers, be it from a legal, commercial or timing perspective.

Additional verification is furthermore necessary where the consumer is established in more than one country or has his permanent address in one country and his usual residence in another. In that case, the supplier must determine the 'place that best ensures taxation at the place of actual consumption',[31] which information is unlikely to be available to the suppliers of electronically supplied services to private consumers. For example, an online supplier cannot determine whether a consumer will listen to the music or watch the movies he has downloaded from his principal or secondary residence.

Finally, the 'use and enjoyment' clause allows EU suppliers to consider that supplies made within their territory or outside the EU will, respectively, be taxed outside the EU or within their territory if this is where they are effectively 'used and enjoyed'.[32] We do not see how this clause could ever apply in a digital context.[33]

Thus a major problem with the one-stop-scheme, once again, is the task of identifying and locating customers for the purpose of correctly using the scheme.[34] In addition, even supposing that satisfying these successive requirements is possible, compliance costs are likely to exceed the benefit of the transaction.

30 Art 23(2) of Council Regulation 282/2011.

31 *Ibid*, Art 24(2).

32 As of 1 January 2015, this exception will also apply to services supplied to EU consumers by foreign (ie non-EU) suppliers. Broadly, the 'use and enjoyment' clause is therefore an exception to the wide use of proxies to define the place of consumption rather than 'real consumption tests'.

33 See Marie Lamensch, 'Unsuitable EU VAT Place of Supply Rules for Electronic Services: Proposal for an Alternative Approach' (2012) 4 *World Tax Journal* 77.

34 At the moment, these far-reaching obligations concern only foreign suppliers, given that intra-Community supplies to private consumers are currently still taxed at origin (but, as mentioned above, taxation at destination will also apply to EU e-suppliers as of 2015 and the one-stop-scheme will then also be available to them).

In conclusion, the ability to make a single registration under the one-stop-scheme, first, results in a cash flow disadvantage in view of the inability to apply a credit; second, proves difficult to enforce, which may result in competition distortions for compliant suppliers; and, third, does not relieve suppliers from the preliminary and substantial burden of identifying and locating their consumers on a transaction basis.

5. Compliance with the OECD 1998 recommendations on e-commerce?

The provisions of the EU VAT Directive on the collection of taxes on electronically supplied services, in force since 2003, were modelled on widely acknowledged OECD recommendations adopted in 1998 and supplemented by a series of implementing guidelines released between 2000 and 2003 (together referred to as 'the OECD recommendations').[35] In view of the shortcomings identified above, this section discusses whether the EU provisions are effectively in line with the OECD recommendations, and whether there is any acknowledgement of/willingness to address their shortcomings.

The OECD recommendations promote a general reliance on reverse charging in business-to-business supplies and the use of simplified registration frameworks in business-to-consumer supplies, which is also the twofold approach adopted by the EU.[36] However, concerning business-to-consumer supplies, an important nuance is that the OECD recommendations merely consider the use of simplified registration frameworks as an 'interim measure'.[37] As a matter of fact, the OECD recommendations conclude that: 'In the medium term, technology-based options … offer genuine potential' and state that

> [m]ore detailed examination of this potential, and how best governments can support and utilise it, both to facilitate compliance and simplification, is an important field of further work which the [OECD] recommends that it should undertake with urgency in 2001. The [OECD] recognises that achieving this is a dynamic process as it would require certain changes in the existing and evolving systems, both in the public and private sectors.[38]

35 Broadly, the OECD recommendations on the consumption taxation of online supplies consist of the so-called 1998 'Ottawa Framework' (Electronic Commerce: Taxation Framework Conditions, A Report by the Committee on Fiscal Affairs, as presented to Ministers at the OECD Ministerial Conference, 'A Borderless World: Realising the Potential of Electronic Commerce', 8 October 1998), and implementation guidelines released by the Committee on Fiscal Affairs (CFA) and the specialised Technical Advisory Groups between 2000 and 2003 (available at www.oecd.org).

36 With the nuance that the OECD reports also suggest making use of registration thresholds which have not been implemented in the EU. But the EU VAT Directive provides for a special scheme for all small and medium sized enterprises (ie not specific to online suppliers), under which businesses whose turnover does not exceed a certain threshold may be exempt from registration obligations. This special scheme is, however, only available to small and medium sized businesses in the Member State where they are established (and taking into account the turnover generated in this Member State only). See Case C-97/09 *Schmelz v Finanzamt Waldviertel* [2010] ECR I-0000, in which the Court had to decide whether the difference in treatment of taxable persons that is linked to the place of establishment of that person was not contrary to the principle of non-discrimination, freedom of establishment, freedom of services or any other fundamental rights under the Treaty. See also the Opinion of AG Kokott, delivered on 17 June 2010, in particular p 5.

37 Consumption Tax Aspects of Electronic Commerce: A Report from Working Party n° 9 on Consumption Taxes to the Committee on Fiscal Affairs, www.oecd.org/dataoecd/37/19/2673667.pdf ('2001 Report') p 17; 2003 Report (n 4) 14.

38 2001 Report, *ibid*, 8. This is also highlighted in the 'principle of flexibility' which is identified by the OECD as one of the key taxation principles to be observed in relation to the taxation of e-commerce, and is defined as follows: 'The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.' Ottawa Framework (n 35) 4.

Thereby, the OECD endorsed the conclusions drawn by its Technology TAG (technical advisory group) in a 2000 report:

> Competitive business models on the Internet are built upon the premise that similarly priced competition is only 'one click' away[39] … Successfully implementing a viable consumption tax collection model will require harnessing of the same technologies that businesses are adopting for their electronic commerce initiatives. Inherent in this is the need to link collection mechanisms with the underlying business models to maximise the return on the necessary investment for both business and government.[40]

The EU legislator seems to have missed this nuance when, in 2002, it claimed to have become 'the first significant tax jurisdiction in the world to develop and implement a simplified framework for consumption taxes on e-commerce in accordance with the principles agreed within the framework of the Organisation for Economic Co-operation and Development (OECD)'.[41]

In its 2011 communication on the future of VAT, the European Commission held that it 'remains convinced that, in a VAT system based on taxation at destination, a one-stop-scheme is a crucial instrument to facilitate access to the single market, in particular for SMEs'.[42] As of 2015, the one-stop-scheme will be available for other sectors (ie telecommunications and broadcasting services), but the question of customer location has still not been addressed (see below).

As to business-to-business supplies, the OECD considers that reverse charging constitutes a system that 'has proven feasible, effective, and carries a low compliance and administrative burden'. Both the OECD and the EU therefore basically ignore suppliers' difficulty identifying and locating customers as essential prerequisites for relying on this mechanism. Precisely as regards that delicate question, the OECD broadly considers that, in both business-to-consumer and business-to-business supplies, it 'should be based on customer self-identification, supported by a range of other criteria', which is also the approach of the EU VAT Directive. But the OECD again nuances that: 'It will be important to monitor the application of these recommendations as technology develops and the means of determining customer location improve',[43] which does not seem to be, and never seems to have been, the objective of the EU legislator.

Surprisingly, even at the level of the OECD, very little progress has been made on that question. Solutions based on Internet Provider (IP) number and credit card indicia were initially investigated, but eventually rejected even as interim (and 'less than perfect') arrangements.[44] Reasons include, on the one hand, the limited reliability of IP numbers,[45] as single worldwide access points for AOL users and corporate aggregators, use of anonymisers and potential for spoofing are thwarting any attempts to locate online customers, in addition to the possible manipulation of the location information. There is also significant reluctance on the

39 Tax and e-commerce @ OECD (Report of the Technology TAG, December 2000) ('Technology TAG Report') p 20.
40 *Ibid*, p 4.
41 Press release IP/02/673, 'VAT: Commission Welcomes Council Adoption of Rules for Application of VAT to Electronically Delivered Services', 7 May 2002.
42 Communication from the Commission to the European Parliament, the Council and European Economic and Social Committee on the future of VAT, 'Towards a simpler, more robust and efficient VAT system tailored to the single market', COM(2011) 851 final, p 7.
43 2003 Report (n 4) 20.
44 2001 Report (n 37) 14.
45 *Ibid*, 13.

part of businesses to implement such systems due to concerns regarding the lack of commercial necessity and limited utility, as well as the potential development of new IP addresses systems (ie from IP4 to IP6) which would require different IP tracking systems, together with high implementation costs and potential for disruption of service in cases of unclear results.[46] On the other hand, payment details were also considered to be inaccurate as evidence of jurisdiction/residence.[47] As discussed above, this is however one of the elements that must be taken into account under the VAT Directive for the purpose of confirming customers' self-identification.

According to the OECD Technology TAG, the most promising route would be the use of digital certificates. Discussions have stopped there, however. In 2006, the first draft of International VAT/GST Guidelines (still in progress)[48] again concluded:

- in relation to business-to-consumer, that: 'In the medium term, technology-based options offer much potential to support new methods of tax collection. Member countries are expressly committed to further detailed examination of this potential to agree on how it can best be supported and developed', but that 'In the interim, where countries consider it necessary, for example because of the potential for distortion of competition or significant present or future revenue loss, a registration system … should be considered to ensure the collection of tax on B2C transactions'[49], and
- that reverse charging should apply to business-to-business supplies.[50]

In an updated version of these guidelines, which deals only with business-to-business supplies (released for public consultation in February 2010),[51] reverse charging is still recommended, but again without guidance as to how customers should be identified and located for the purpose of using it.[52] In fact, the 2010 draft guidelines mostly rely on the existence of a 'business agreement' on the basis of which the supplier should be able to find the relevant information to fulfil his tax obligations.[53] They do not offer any guidance in the absence of such agreement. In addition, the 2010 draft guidelines are subject to the important caveats that the supplies are legitimate and have economic substance, and that they are made between separate entities with single locations only,[54] therefore unfortunately leaving aside most of the delicate situations with which online suppliers may be confronted.[55]

46 This aspect was clearly highlighted in the Technology TAG Report (n 39) 6. A last reason for us to reject IP tracking as a possible solution, but that is not considered by the OECD, is the fact that it would constitute an exception to the general use of proxies for defining the place of supply for the purpose of levying consumption taxes.

47 2001 Report (n 37) 13.

48 OECD, 'International VAT/GST Guidelines' (February 2006), www.oecd.org/dataoecd/16/36/36177871.pdf.

49 *Ibid*, Chapter III C, pts 15–17.

50 *Ibid*, Chapter III C, pt 12.

51 OECD, 'International VAT/GST Guidelines', 'International Trade in Services and Intangibles', 'Public Consultation on Draft Guidelines for Customer Location' (from 1 February to 30 June 2010) ('2010 draft guidelines'), www.oecd.org/dataoecd/19/63/44559751.pdf.

52 For a description of and commentary on the 2010 draft Guidelines, see Marie Lamensch, 'OECD Draft Guidelines on VAT/GST on Cross-Border Services' (2010) 21 *International VAT Monitor* 271.

53 OECD (n 48) 8 ('Guidelines n° 3').

54 *Ibid*, 6.

55 See Lamensch (n 52).

More than 10 years after the first OECD recommendations on the consumption taxation of e-commerce were released, the time has come, first, to acknowledge the important drawbacks that still need to be addressed in business-to-business supplies and, second, to step away from the 'interim' and clearly unsatisfactory approach to business-to-consumer supplies which, beyond the fact that it does not ensure an efficient collection of revenue for States, results in legal uncertainty and a substantial compliance burden for suppliers. The question is whether the EU should engage alone or whether the OECD should take the lead and coordinate actions in view of the global and borderless nature of the issue, building on the acknowledged authority it has gained in the field of direct taxes.[56] In any case, the EU has a role to play in fostering discussions and must work at reaching an agreement at the level of the OECD, as was the case with the adoption of the first OECD recommendations on e-commerce.[57]

6. Current (non)-developments

In its 2010 'Green Paper on the future of VAT', the European Commission merely noted that the implementation of EU VAT rules to the supply of electronic services to EU consumers by foreign suppliers is 'particularly reliant on voluntary compliance by non-EU suppliers'[58] and broadly recommended (a) *encouraging tax authorities to cooperate on VAT at international level*, and (b) *seeking ways of collecting VAT from private consumers, for example by checking online payments.*[59]

The first proposal remains rather broad and vague as to the exact measures that could or should be taken at the international level. The second implies voluntary compliance, partly relying on self-assessment by online consumers (which is not a very realistic option), sanctioned on the basis of some sort of global administrative presence online which would track online payments. This raises important questions in terms of both technical feasibility and privacy protection and, moreover, takes an *a posteriori* approach which is not appropriate in a digital context where it is hardly possible to keep track of all transactions.[60] It is also questionable that the European Commission seems to be concerned more with the risk of fraud, rather than with the difficult position of suppliers in the implementation of the current rules. Surprisingly, in its December 2011 communication on the future of VAT, following up on the Green Paper and listing 'the priority areas for further action in the coming years',[61] the

56 In recent decades, the OECD, through its Committee on Fiscal Affairs, has managed to present itself as an informal yet efficient 'world tax organisation', which has prompted a series of reforms resulting in effective tax cooperation between States. On that topic see Arthur J Cockfield, 'The Rise of the OECD as Informal "World Tax Organization" through National Responses to E-Commerce Tax Challenges' (2006) 8 *Yale Journal of Law and Technology* 136.

57 At that time, the main motivation from the EU perspective was to restore the competitive position of EU suppliers by ensuring that supplies made by non-EU suppliers to EU customers would bear EU VAT as is the case with supplies made by EU suppliers to EU customers, and that supplies made by EU suppliers to non-EU customers would not bear EU VAT.

58 European Commission, Green Paper on the Future of VAT, 'Towards a Simpler, More Robust and Efficient VAT System' COM(2010) 695 final 12.

59 *Ibid.*

60 In that sense, see Richard T Ainsworth, 'Technology Can Solve MTIC Fraud: VLN, RTvat, D-Vat Certification' (2011) 22 *International VAT Monitor* 154. As stated by the author, 'fraud must be prevented (before the fact), not pursued (after the fact). In the digital world, everything evaporates when pursued.'

61 European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT: 'Towards a Simpler, More Robust and Efficient VAT Aystem Tailored to the Single Market', COM(2011) 851 final 5.

European Commission does not even mention electronically supplied services anymore.

At the same time, while the EU Commission seeks to complete a Digital Single Market by 2020,[62] it does not consider the possible VAT obstacles to trade, such as inefficient collection mechanisms in an intangible environment.[63] It is clear, however, that these inefficiencies constitute a major obstacle to making the digital market a reality,[64] and that they should be tackled accordingly.

Finally, as noted above, the one-stop-scheme will be available as of 2015, first, to EU suppliers in their intra-Community supplies of electronically supplied services (which will also be taxed at destination as of 2015) and, second, to suppliers of telecommunications and broadcasting services provided to private consumers residing in the EU, irrespective of their place of establishment (also taxed at destination as of 2015). The draft proposal recently released by the European Commission to implement these changes unfortunately does not address the question of customer location, merely noting that 'measures … related to the determination of the location of the customer will be proposed by the Commission at a later stage'.[65]

7. Proposals for further discussion

This paper has identified several flaws in the use of reverse charging and the one-stop-scheme for the collection of VAT on electronically supplied services in the EU. This section seeks to suggest possible solutions to what, in our view, constitutes the most important difficulty, and one that is common to both mechanisms: identifying and locating customers for the purpose of collecting the tax in accordance with the destination principle in an environment where, on the one hand, the concept of distance has become blurred and online suppliers may consequently

62 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'A Digital Agenda for Europe', COM(2010) 0245 final. The 'Digital Single Market' is part of the 'Digital Agenda for Europe' strategy, which is one of the seven flagship initiatives of the Europe 2020 Strategy. The Europe 2020 Strategy aims to exit the crisis and prepare the EU economy for the challenges of the next decade. Europe 2020 sets out a vision to achieve high levels of employment, a low carbon economy, productivity and social cohesion, to be implemented through concrete actions at the EU and national levels. In that context, the Digital Single Market project defines the key enabling role that information and communications technologies will have to play for the EU to meet its objectives for 2020 ('A Digital Agenda for Europe', p 3). The Digital Agenda is built upon wide consultations, particularly inputs from the *Digital Competitiveness Report 2009*, COM(2009) 390; the Commission's 2009 public consultation on future ICT priorities; the Conclusions of the TTE Council of December 2009, the Europe 2020 consultation and strategy; and the *ICT Industry Partnership Contribution to the Spanish Presidency Digital Europe Strategy*, the own-initiative report of the European Parliament on *2015.eu* and the Declaration agreed at the informal Ministerial meeting in Granada in April 2010. These are all available at http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm.

63 In its Communication 'A Digital Agenda for Europe' (n 62), it actually only makes reference to VAT Directive provisions related to e-invoicing, aimed at ensuring equal treatment for e-invoicing with paper invoices (p 11); there is nothing on the current challenges faced by businesses in terms of collecting VAT in a digital environment.

64 There is not a single reference to it in the 2011 Digital Agenda Annual Report (http://ec.europa.eu/information_society/digital-agenda/documents/dae_annual_report_2011.pdf), nor in the 2010 European Council Conclusions on A Digital Agenda for Europe (3017th Transport, Telecommunications and Energy Council meeting Brussels, 31 May 2010).

65 Draft Proposal for a Council Regulation amending Implementing Regulation 282/2011 as regards the special schemes for non-established taxable persons supplying telecommunications services, broadcasting services or electronic services to non-taxable persons (January 2011), http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/com_2012_2_en.pdf.

benefit from a global customer base, and, on the other hand, transactions may be conducted in complete anonymity.

Switching to origin-based taxation, which would—by design—avoid this difficulty, can hardly be considered. Several proposals were made in the past[66] with a view to implementing an origin-based VAT in the EU,[67] but no satisfactory solution was ever proposed to address the main drawback of this alternative jurisdiction rule (ie an adequate compensation mechanism so as to ensure that revenue would accrue to the jurisdiction of consumption). And recently, the European Commission announced that it would remove the objective to head towards an origin-based VAT ('the definitive system') from the VAT Directive.[68] The solution, therefore, lies in making the destination principle *workable* in a digital context. In that respect, while the EU VAT system has been in place for more than 40 years, it is striking that it still relies on the same collection model, largely depending on suppliers. Until recently, this could be seen as inevitable because only suppliers were in a position to gather the necessary information so as to take the right tax decisions (based on the nature of the supply, the price, and the identity of the consumer with whom they used to have physical contact).[69] Assessment and collection of the tax by the supply side was therefore usually considered the best alternative, and moreover a reasonable and relatively easy task to handle. This is no longer the case with digital supplies.

Against this background, the following paragraphs sketch three proposals for further discussion. The first two rely on the know-your-customer (KYC) information collected by financial institutions, and the third builds on current developments in the area of online identification for e-government services.

Proposals 1 and 2: using KYC data collected by financial institutions

Financial institutions must perform so-called KYC verifications to identify their clients and ascertain relevant information pertinent to doing financial business with them, with a view to

66 See in particular 'export-rating' by Cnossen (Sijbren Cnossen, 'Is the VAT's Sixth Directive Becoming an Anachronism?' [1983] *European Taxation* 434); 'VIVAT' by Keen and Smith (M Keen and S Smith, 'The Future of Value Added Tax in the European Union' (1996) 23 *Economic Policy* 375; M Keen and S Smith, 'Viva VIVAT!' (2000) 7 *International Tax and Public Finance* 741); 'CVAT' by Varsano and elaborated by McLure (R Varsano, 'Subnational Taxation and the Treatment of Interstate Trade in Brazil: Problems and a Proposed Solution' in SJ Burki and G Reary (eds), *Decentralisation and Accountability of the Public Sector: Proceedings of the World Bank Annual Bank Conference on Development in Latin America and the Caribbean* 339; CE McLure, 'Implementing Subnational VATs on International Trade: The Compensating VAT (CVAT)' (2000) 7 *International Tax and Public Finance* 723).

67 Switching to origin-based taxation was a historical objective of the EU Member States because a destination-based system requires border tax adjustments, which are difficult to implement in an area without frontiers such as the Internal Market. The destination-based VAT system that has been in use for more than 40 years was therefore initially meant to be transitional.

68 See European Commission Press Release IP/11/1508, 'Future VAT System: Pro-Business, Pro-Growth'. At the moment, Arts 402 ff of the VAT Directive still require that the Commission present a report every four years to the European Parliament and the Council, *inter alia* on the operation of the transitional arrangements for taxing trade between Member States, and that the report be accompanied, where appropriate, by proposals concerning the definitive arrangements.

69 Still, the administrative burden for businesses related to their VAT obligations accounted for 60% of the total burden measured in the EU Action Program for Reducing Administrative Burdens (European Commission, 'Action Program for Reducing Administrative Burdens in the EU, Sectoral Reduction Plans and 2009 Actions, Measurement Studies' COM(2009) 544). According to the industry, this makes the EU a less attractive place to invest. This finding was one of the drivers of the European Commission's 2010 Green Paper on the Future of VAT (n 58). See also BusinessEurope Position Paper of 20 October 2009 on a partnership for a fair and efficient VAT system.

preventing, *inter alia*, identity theft, fraud, money laundering and terrorism. A basic requirement is that financial institutions verify the identity of any customer opening an account, on the basis of identity cards (IDs) for natural persons and by-laws for legal persons. Such information, as compulsorily collected by financial institutions, could be usefully relied upon to streamline the collection of taxes on digital supplies

- by having financial institutions acting as tax collectors (Proposal 1); or
- by making the relevant KYC information available to suppliers (Proposal 2).

Proposal 1

The RTvat project,[70] which is aimed at curbing missing trader types of fraud, suggests eliminating the possibility of suppliers receiving VAT from their customers (and eventually disappearing with it, or claiming credit without first remitting the tax due), by organising the collection of the tax at the level of banks.

Virtually all digital supplies are paid for by electronic means.[71] Electronic payment is therefore an essential complement to e-commerce. Transposed to the digital supply sector, the collection of VAT at the level of the banks in charge of organising online payments, as suggested under the RTvat project, would remove unimplementable collection obligations from online suppliers' shoulders, and at last take account of the specifics of the e-marketplace. For that purpose, the existing online payment schemes could be coupled with the appropriate software which would extract the relevant data collected by banks in accordance with KYC regulations, as follows.

- When the customer enters his credit card details in the 'secure payment area' in order to proceed to payment (often using a token or similar device), his bank identifies him (status and location) with certainty, based on the data provided upon opening the account, that were verified as is required under the KYC regulations.[72]
- The supplier enters the transaction price, exclusive of tax, in the payment system. A software program then calculates the related amount of VAT that is due, based on the status and location data that were collected by the bank upon the account being opened.[73]
- The customer makes one single payment (price including tax), and the bank transfers only the net price to the supplier, retains the VAT, and wires it to the competent VAT au-

70 For information on the RTvat project see www.rtvat.eu.

71 Marc Bacchetta, Patrick Low, Aaditya Mattoo, Ludger Schuknect, Hannu Wager and Madelon Wehrens, 'Electronic Commerce and the Role of the WTO' (1998) 2 *WTO Special Studies* 8.

72 This is where our proposal differs from the RTvat. The RTvat proposal derives the necessary information for splitting up payments from suppliers' business records, and relies on a 'Tax Authority Settlement System'. This is, in our view, the weakness of the proposal. Also in that sense, see Ainsworth (n 60).

73 In the EU, electronically supplied services must be subject to the standard tax rate, in accordance with Art 98 of the VAT Directive, which provides: '1. Member States may apply either one or two reduced rates. 2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III. The reduced rates shall not apply to the services referred to in point (k) of Article 56(1)' (Art 56(1)(k) refers to 'electronically supplied services').

thorities. Reverse charging becomes unnecessary. Importantly, payments to suppliers are coupled with payment of the VAT due to the tax authorities.

As long as the payment is made by electronic means, any kind of payment device or system may be used, including intermediary payments systems like Paypal, because suppliers do not need to check customers' credit cards details as is the case under the current system. Intermediaries simply channel the information. Likewise, the use of foreign credit cards would not create distortions either, because a bank issuing a credit card knows when the customer is a non-resident, and only this information is relevant for applying the correct tax rate. The tax is paid at the moment of the transaction, and in a completely transparent way, which also has the advantage of reducing risks of fraud. Finally, tax authorities may proceed to VAT refunds on the same day as they receive the related VAT payment, which also results in an advantage in terms of cash flow for suppliers.

This is not the first time that financial institutions would be required to collect taxes (eg withholding taxes, inheritance taxes, stamp duties, taxes on savings, and potentially financial transaction tax in the future). Moreover, their intervention in this case would be minimal because the system would be automated, based on existing online payment schemes coupled with the adequate software program using information that already needs to be collected in accordance with KYC regulations. As there are many fewer banks than online suppliers, enforcement would be easier to monitor (also because banks are less likely to take the risk of concealing a transaction). In addition, suppliers would still be required to declare their online sales through the VIES system, allowing for cross-checking.

However, implementation costs may not be ignored, although only banks should integrate the appropriate identification software, and not each online supplier. In addition, costs would be minimal because a security system is already in place for online transactions, which would simply have to be coupled with the appropriate software. Maintenance costs are, however, to be considered. Another weak point is that the system only works with compliant suppliers. Fraudsters can avoid the tax by asking their customers to pay by bank transfer. But such fraud is already possible now. At least the proposed system relieves *bona fide* suppliers and makes it impossible for consumers to commit fraud without the complicity of the supplier. In line with the initial objective of the RTvat project, it also avoids missing trader types of fraud because suppliers do not collect VAT anymore, and are entitled to VAT refunds only once VAT has been paid on their onward supplies.

Proposal 2

The second proposal explores solutions for making the relevant KYC information available to suppliers within the framework of the current collection model.

Under the current EU VAT Directive provisions, suppliers are encouraged to cross-check location information given by their customers with payment details (ie with the location of the issuing bank). As discussed, this method is not appropriate, first, because it requires 'manual' transaction-based verifications, second, because payment details are not always representative of the residence of a customer who may have accounts in several countries, and, third, are not always available (eg Paypal). Alternatively, suppliers could rely on the KYC information collected by financial institutions to correctly assess the amount of tax due, as follows.

- The customer entering the secured payment area is identified by his bank, and the applicable VAT is calculated using KYC information, in the same way as under Proposal 1.
- The supplier collects the tax together with the sale price, as under the current collection scheme. The major difference is that the calculating software (operated by the bank, together with the online payment system) also indicates the status and location of the customer (and only these data), which enables the supplier either to proceed to a zero-rated supply if the customer is a business (this time having full certainty that the customer is effectively entitled to zero-rating), or to collect the tax and remit it to the competent tax administration if the customer is a private consumer.
- The supplier has no further obligation as regards business-to-business supplies (except from reporting the sale in case of an intra-Community supply). In contrast, concerning business-to-consumer supplies, while the supplier may easily fill in the single tax return in his Member State of identification when the consumer is residing in the EU (in accordance with the one-stop-scheme), he is still required to satisfy a potentially high number of different remitting obligations in relation to his non-EU consumers, with the improvement, however, that he is now able to determine the jurisdictions having taxing rights over his supplies with certainty. The multiple jurisdictions issue will be addressed below.

The advantage of Proposal 2 is that suppliers remain fully-fledged taxable persons (ie assessment and collection agents), but have access to reliable information in a timely fashion. Proposal 2, however, requires a strict control of the information provided to the supplier, ie only the status and establishment/residence of the customer, in order to guarantee customers' privacy protection.

Proposal 3: identity device as source of information

Many EU countries offer electronic IDs.[74] Citizens are becoming accustomed to them and are beginning to enjoy the benefits they offer, such as obtaining official documents from their national administration directly from their computers (eg birth certificate, household composition), or filing their individual tax returns.

The EU is currently working at developing a European eID Interoperability Platform which will 'allow citizens to establish new e-relations across borders, just by presenting their national eID' (the 'STORK project').[75] The objective of the STORK project is not to replace existing na-

74 The EU BIOP@SS project (Europe's largest chip reader research project) reveals that there are 380 million IDs in circulation in 27 EU Member States (see www.biopass.eu). Finland was the first country to issue eID tokens. Since then Austria, Belgium, Italy, Estonia and Sweden have followed suit. In Finland, Belgium, Italy Estonia, Germany, Spain and France, the State issues eID tokens. In Austria, both the State and private organisations issue them (Amir Hayat and Thomas Rössler, 'Proposed Framework for an Interoperable Electronic Identity Management System' (2006) 18 *Proceedings of the EGOV06-International Conference on e-Government* 179). Hayat and Rössler also make reference to an informal working group, InteropEID, composed of members from several EU Member States, which is also working on a software solution addressing eID interoperability issues (www.comune.grosseto.it/interopEID); and to FIDIS (future of identity in the information society), another important project aimed at developing a deeper understanding of how identities and identity management should be handled in the future European information society (www.fidis.net).

75 See https://www.eid-stork.eu/index.php?option=com_frontpage&Itemid=1 Before STORK, several projects were funded by the EU for the concrete implementation of a pan European eID concept: the eEurope Smart Card (eESC)

tional infrastructures, but rather to take what is already available and 'connect all the various authentication methods with transparency, in such a way that citizens will be able to present their certified personal data to foreign administrations just with their national IDs'.[76] In practice, the STORK platform identifies a user who is in a session with a service provider, and sends his data to this service. Importantly, whilst the service provider may request various data items, the user always controls the data to be sent. His explicit consent is always required before his data can be sent to the service provider.[77]

The STORK project concerns only government services (eg start a company, get a tax refund, obtain copies of a diploma). But the idea of ascertaining data such as identity and residence using a national ID device could also work in the case of online commercial transactions, including for legal persons (who could use a similar ID), as follows.

- Upon completion of the online transaction, the customer uses his electronic identity device (through an ID reader or token) to communicate relevant information to his supplier (ie status, place of residence/establishment and applicable tax rate[78]). The customer is required to give his explicit consent to the data being disclosed to the supplier.
- Private consumers pay the total amount (price including tax) while business customers pay the price net of tax and eventually proceed to payment on a reverse charge basis (but in the meantime, suppliers have the certainty that the customer was entitled to zero-rating).
- The supplier has no further obligation as regards business-to-business supplies, except for reporting the sale through the VIES in cases of intra-Community supply. In business-to-consumer supplies, he is able to easily fill in a tax return in his Member State of identification under the one-stop-scheme, on the basis of the reliable information received as regards the consumer's jurisdiction.

Under this system, the flow of information should be strictly defined (ie only include status, residence data and applicable tax rate in the home jurisdiction), and no trace of online purchases made by a customer should be left on the electronic identity device, in order to ensure the protection of the customer's privacy. In the same fashion, suppliers should not be able to use the data received for reasons alien to the transaction. For that purpose, systems such as the 'unique identifier' are already used for e-government services in Austria,[79] under which a unique identifier is used and stored for each transaction in a given sector (eg health, tax) in such a way that

Charter (http://ec.europa.eu/idabc/en/document/4484/5584.html), the GUIDE project (Government User IDentity for Europe, http://cordis.europa.eu/search/index.cfm?fuseaction=proj.document&PJ_RCN=6526790), and the Modinis program (Modinis Identity Management Initiative, http://ec.europa.eu/information_society/eeurope/2005/all_about/modinis/index_en.htm).

76 https://www.eid-stork.eu/index.php?option=com_content&task=view&id=186.

77 *Ibid.*

78 As mentioned above (n 73), electronically supplied services are mandatorily subject to the standard VAT rate in each Member State.

79 Hayat and Rössler (n 74) 6, referring to Republik Österreich, 'Verordnung des Bundeskanzlers, mit der staatliche Tätigkeitsbereiche für Zwecke der Identifikation in E-Government-Kommunikationen abgegrenzt waren (E-Government-Bereichsabgrenzungsverordnung – E-Gov-BerAbgrV)' StF: BGBl II Nr 289/2004, www.ris.bka.gv.at.

no cross-linking is possible.[80] Discussion of the merits and shortcomings of this system is beyond the scope of this paper. But the Austrian example shows that technology is currently being used by governments to facilitate their relations with citizens and to ensure protection of the latter's privacy. The same could be done to streamline online suppliers' VAT obligations, and in view of the current shortcomings of the system, this would at least be worth further investigation.

The advantage of Proposal 3 is that suppliers remain the taxable persons, but are finally able to satisfy their tax obligations on the basis of reliable and easily accessible information. A limitation is that while such a system could be developed among the EU Member States within a reasonable time frame, it is unlikely to expand beyond the EU's frontiers in the short term.

Proposals 2 and 3: a satisfying remittance scheme

In Proposals 2 and 3 (ie where the supplier remains the tax collector), once the question of tax assessment is settled, suppliers still need to remit the tax to as many foreign administrations as they have customers established in different jurisdictions, in accordance with local rules and requirements. In the case of supplies to taxable persons, reverse charging suppresses the remittance burden. For supplies to consumers residing in the EU, the one-stop-scheme greatly simplifies the process. But for supplies to consumers not established in the EU, suppliers are left with the obligation to liaise with as many foreign tax administrations and requirements as they have consumers with residence in a different jurisdiction (outside of the EU), which is a major obstacle to giving concrete expression to one of the traditionally acknowledged advantages of the internet, ie opening new opportunities for suppliers by broadening their customer base to a global scale. In these cases, the question may be raised whether EU tax administrations might not centralise and remit VAT to foreign (non-EU) tax administrations on behalf of 'their' suppliers, under condition of reciprocity, in the same way as they would do if they were elected as Member States of identification within the framework of the one-stop-scheme. In practice, an EU supplier providing electronic services to consumers not established in the EU (eg in Singapore, Lebanon, Canada) would centralise his declarations relating to a given taxable period into one single return and remit the related amount of tax due to his national tax administration. The national tax administration would then be in charge of remitting the tax on behalf of the supplier to the competent foreign tax authorities, provided bilateral (or multilateral) agreements have been signed with these jurisdictions.

A requirement that national administrations redistribute collected tax revenue may sound utterly unrealistic. The concept, however, lies at the heart of the EU one-stop-scheme system, and could perhaps be broadened to foreign States under condition of reciprocity. In that respect, tax administrations are, in our view, better skilled and equipped than suppliers, in particular small and medium sized structures. In addition, as they would be confronted with the difficulties existing with the tax administrations of certain countries, this could even result in the adoption of best practices and harmonised remittance requirements among tax admin-

80 Hayat and Rössler (n 74) 6. See also Peter Schartner, 'Unique Domain-Specific Citizen Identification for E-Government Applications' (Sixth International Conference on Digital Society, 2012), which also discusses unlinkable (and unique) identifiers, and makes a proposal that differs slightly from the Austrian system.

istrations (which would be useful for suppliers when the one-step-scheme does not apply; ie for supplies other than elecronic supplies).

Admittedly, however, beyond the question of whether EU administrations would ever be keen on taking over suppliers' remittance obligations and treating with foreign tax administrations (ie in States with which they are not engaged in any process of political or economic integration, as is the case in the EU), another question is whether suppliers' liability towards foreign tax administrations can be limited once they have proceeded to remitting the tax to their national tax administration.

8. Conclusions

Although modelled on widely acknowledged OECD recommendations, the EU VAT collection mechanisms available to suppliers of electronically supplied services do not offer an appropriate framework. On the one hand, these specific mechanisms present inherent weaknesses. Reverse charging runs the risk of affecting the 'self-enforcement' potential of the VAT system and is difficult for suppliers to handle from a purely technical/accountancy point of view. The one-stop-scheme still imposes non-negligible reporting obligations and does not allow for crediting input tax. On the other hand, in both cases, suppliers are required, as a prerequisite, to identify and locate their customers in order to make correct use of the specific schemes available to them, and this is where the most severe difficulties lie. These compliance obligations indeed prove extremely difficult to satisfy in a digital context where, inherent in the business model, supply takes place 24/7, almost instantaneously, and without any personal contact between the parties. In spite of these shortcomings, the EU provisions are in line with the OECD recommendations, although the international organisation has clearly prompted its Member States to further investigate, as a priority, technology-based collection mechanisms. This is unfortunately a way in which the EU does not yet seem to be engaging, not even in the current initiatives for reforming the EU VAT system and completing a Digital Single Market by 2020. As a consequence, in the EU, online suppliers (acting as unpaid tax collectors for States) are left with the burden of applying fundamentally inappropriate rules in order to comply with their VAT obligations.

This paper sought to sketch three possible solutions that could be worth investigating for a workable system of collecting VAT on digital supplies in the EU. The first two rely on the KYC information collected by banks coupled with the appropriate software (in the first, financial institutions take the role of tax collectors; in the second, suppliers remain tax collectors but benefit from reliable information in a timely fashion). The third suggests taking advantage of current developments in the e-government sector. All three could, hopefully, at least constitute an interesting basis for further discussion.[81]

81 The author welcomes any comments or suggestions regarding these three (or other) alternative solutions; she may be contacted at marie.lamensch@vub.ac.be.