

# The Problematic Combination of EU Harmonized and Domestic Legislation regarding VAT Platform Liability

**The EU harmonized VAT e-commerce rules applying as of 1 July 2021 have far-reaching consequences, particularly for the liability of platforms. In addition, some Member States recently adopted domestic liability regimes for platforms which can be differentiated into three models, and it appears that these regimes will remain in place after 1 July 2021. In this article, the combination of EU harmonized and domestic legislation with respect to VAT platform liability is explored. In the author's view, some domestic liability regimes are not proportionate and go further than necessary to reach the intended aim and the combination of EU harmonized and domestic legislation regarding VAT platform liability is problematic.**

## 1. Introduction

On 1 July 2021, a major change took place with regard to the VAT rules for B2C e-commerce sales of goods in the European Union. The new rules have far-reaching consequences for platforms as, in certain situations, they will be deemed to supply the goods to the consumer instead of the real supplier. This has far-reaching consequences, particularly in terms of liability. Some Member States (Austria, France, Germany and Italy) also have national liability regimes for platforms which are likely to remain in place after 1 July 2021. These regimes differ from one Member State to another. The harmonized EU VAT rules for e-commerce<sup>1</sup> already entail far-reaching consequences regarding, among others, the liability for the VAT due.<sup>2</sup> If, in addition, different national liability regimes (continue

to) apply, the consequences for platforms will be even more extreme. In this article, the author discusses this pre-occupying issue in more details. For this purpose, it is important to first describe the platform liability under the EU harmonized rules (section 2.). This section discusses the deemed supplier provision in section 2.1., the reliance of platforms on information of suppliers that might be incorrect in section 2.2. and the platform liability in section 2.3. The other consequences of the new VAT e-commerce rules for platforms and entrepreneurs trading via platforms, including the special information obligations that will apply, will not be dealt with.<sup>3</sup> In section 3., the author examines the national liability regimes and the differences between them. The domestic liability regimes can be divided into three different models, i.e. the Austrian model (section 3.1.), the UK model (section 3.2.), and the German model (section 3.3.). In section 3. these models are compared with each other and with the EU harmonized rules (sections 3.4. and 3.5.). Finally, a conclusion and recommendations are given in section 4.

## 2. Platform Liability under EU Harmonized Rules

In a number of situations,<sup>4</sup> a platform is deemed to supply underlying services instead of the actual supplier. When an independent entrepreneur offers and trades goods or services via a platform in his own name and for his own account, the VAT Directive (2006/112) contains two provisions (which are fictions created for VAT purposes) that ensure that the platform is deemed to perform the relevant activity.<sup>5</sup> On the one hand, there is article 9a of the VAT Implementing Regulation, which applies to electronic services and, on the other, article 14a of the VAT Directive, which applies to certain distance sales or domestic sales of goods. Unless the presumption of article 9a of the VAT

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1. These rules are mainly regulated by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347 (2006), Primary Sources IBFD [hereinafter VAT Directive]; Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L77 (2011), Primary Sources IBFD [hereinafter VAT Implementing Regulation].  
2. Many bottlenecks have already been identified in the literature, see, e.g., M.M.W.D. Merckx, *The Wizard of OSS: effective collection of VAT in cross-border e-commerce*, NL Fiscaal, pp. 70-71 (2020), available at [https://www.nlfiscaal.nl/fiscanet/pf.nsf/files/oratie\\_merkx.pdf/\\$file/oratie\\_merkx.pdf?openelement](https://www.nlfiscaal.nl/fiscanet/pf.nsf/files/oratie_merkx.pdf/$file/oratie_merkx.pdf?openelement) (accessed 26 Aug. 2021); M. Lamensch, *Adoption of the e-commerce VAT package: the road ahead is still a rocky one*, 27 EC Tax Review 4, pp. 186-195 (2018); M. Lamensch, *Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?*, 29 Intl. VAT Monitor 2 (2018), Journal Articles & Opinion Pieces IBFD.

3. For more information, see (for a short description) M.M.W.D. Merckx, *New VAT Rules for E-Commerce: The Final Countdown Has Begun*, 29 EC Tax Review 4, pp. 197-205 (2020); and (for an explanation in more detail) European Commission, *Explanatory Notes on VAT e-commerce rules* (Sept. 2020), available at [https://ec.europa.eu/taxation\\_customs/system/files/2020-12/vatecommerceexplanatory\\_28102020\\_en.pdf](https://ec.europa.eu/taxation_customs/system/files/2020-12/vatecommerceexplanatory_28102020_en.pdf) (accessed 26 Aug. 2021).  
4. I.e. (i) the provider is not self-employed, (ii) the platform provides the service in its own name and for its own account, (iii) the platform acts as a commission agent (in its own name, but on behalf of the provider), (iv) the fiction of article 9a VAT Implementing Regulation or article 14a VAT Directive is applicable.  
5. Vereniging voor Belastingwetenschap, *Fiscale aspecten van de Deeleconomie – Rapport van de Commissie Deeleconomie [Fiscal Aspects of the Sharing Economy - Report of the Commission for the Sharing Economy]*, Geschriften van de Vereniging voor Belastingwetenschap 261, p. 74 (2021) [hereinafter Rapport Commissie Deeleconomie].

Implementing Regulation can be rebutted, the first fiction stipulates that:

[f]or the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.

The second fiction, i.e. the deemed supplier provision included in article 14a of the VAT Directive, has been introduced because, according to the European Commission, it was necessary to further involve platforms in the VAT collection on the sales that they facilitate as the national joint and several liability<sup>6</sup> provisions could not ensure efficient and effective VAT collection.<sup>7</sup> Therefore, as of 1 July 2021, new obligations for platforms apply, such as the liability to collect VAT.

In this article, the author focuses on the deemed supplier provision of article 14a of the VAT Directive in section 2.1. Platforms will have new obligations and responsibilities and will be dependent on information from underlying suppliers. This information may be incorrect, but even then, in principle, the responsibility for the VAT due lies with the platform. This is discussed in more detail in section 2.2., while in section 2.3., the author takes a closer look at what the liability of platforms under the EU harmonized rules means.

## 2.1. The deemed supplier provision

The deemed supplier provision of article 14a of the VAT Directive determines that in certain cases platforms are deemed to supply goods to the consumer instead of the actual supplier for VAT purposes. A platform is also deemed to have received the goods from that supplier. The transport of the goods is always attributed to the supply by the platform to the consumer, as a result of which this supply qualifies as a distance sale.<sup>8</sup>

6. Joint and several liability means that a claimant can pursue an obligation against any party as if they were jointly liable. Subsequently, the defendants are responsible for sorting out their respective share of liability and payment. See A. Larson, *Negligence and Tort Law*, Expert-Law (8 May 2018), available at [https://www.expertlaw.com/library/personal\\_injury/negligence.html](https://www.expertlaw.com/library/personal_injury/negligence.html) (accessed 16 July 2021). For more information on a full VAT/GST liability regime and on variations of a liability regime that do not impose a full liability, see OECD, *The role of digital platforms in the collection of VAT/GST on online sales*, secs. 2.2 and 2.3 (OECD 2019), available at <http://www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf> (accessed 16 July 2021).

7. See Council Directive 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, Preamble, para. 7, OJ L348 (2017), Primary Sources IBFD.

8. For more information on the new VAT e-commerce rules regarding platforms, see M.M.W.D., Merckx & A.D.M. Janssen, *Nieuwe btw-e-commerce regels per 1 juli 2021 en de btw-positie van platforms* [New VAT e-commerce rules as of 1 July 2021 and the VAT position of platforms], BTW-bulletin 9 (2021). For more information on the new VAT rules in general, see (for a short description) Merckx, *supra* n. 3; and (for an explanation in more detail) European Commission, *supra* n. 3.

### 2.1.1. Facilitating

For the application of the deemed supplier provision, it is required that the platform facilitates the sale between the supplier and the consumer. Article 5b of the VAT Implementing Regulation defines the concept of facilitation as follows:

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.

The article further provides that there is no question of facilitation when a platform: (i) is not (in)directly involved in determining one of the general conditions under which the delivery of goods takes place; (ii) is not (in)directly involved in granting approval to invoice the customer for the payment made; and (iii) is not (in)directly involved in the order or delivery of the goods. According to the non-binding Explanatory Notes, the definition of “general conditions” covers the conditions for the supplier and the buyer to use the platform or website. These include the conditions for maintaining an account on the platform<sup>9</sup> which facilitating platforms are likely to comply with. Escaping the deemed supplier provision will then no longer be possible. Nevertheless, in view of the legal text, general conditions are more likely to be thought of as conditions relating to the delivery of goods or the payment for these goods. Finally, platforms that only process payments (payment service providers),<sup>10</sup> advertise goods or redirect or transfer the customer to other electronic interfaces where goods are offered for sale, without further intervention in the supply, are excluded from the deemed supplier provision.<sup>11</sup>

### 2.1.2. Application of the deemed supplier provision

When facilitation occurs, and a platform falls under the deemed supplier provision, this provision applies in the following two situations as stated in article 14a of the VAT Directive:

- where a platform facilitates distance sales of goods from third countries or third territories with an intrinsic value not exceeding EUR 150, regardless of where the supplier is established; and
- where a platform facilitates intra-Community distance sales of goods and local supplies to private individuals by entrepreneurs established outside the European Union.

The consequence of applying the deemed supplier provision in these two situations is that the platform is responsible for declaring and paying the VAT that becomes due at the moment of acceptance of the payment by the underlying supplier. This is regulated in article 66a of the VAT Directive and article 41a of the VAT Implementing Reg-

9. See European Commission, *supra* n. 3, at p. 18.

10. New VAT rules on the provision of information will apply to these payment service providers from 2024. See Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers, OJ L62/7 (2020), Primary Source IBFD.

11. Merckx & Janssen, *supra* n. 8.

ulation. The latter article determines that the moment of acceptance of the payment is the time when the payment confirmation, the payment authorization message or a commitment for payment from the customer is received by or on behalf of the supplier selling goods through the platform, whichever is the earliest.

### 2.1.3. Fraudulent application of import arrangements

In the first situation listed in section 2.1.2, when sales of goods originating from outside the European Union are facilitated by a platform, an import and a supply take place in the European Union. A platform can use the import scheme (Import One-Stop Shop, IOSS) to declare the (import) VAT due on these sales.<sup>12</sup> An exemption on import with the right to deduct input VAT can be obtained based on article 143(1)(ca) of the VAT Directive if a special IOSS VAT identification number is issued.<sup>13</sup> Often, the platform will have to provide this special number to the importer since it need not be the platform that imports the goods from outside the European Union.<sup>14</sup> It has often been pointed out in the literature that a platform needs to make sound agreements on this with a reliable party because of the risk of VAT numbers being hijacked under the import regime.<sup>15</sup>

### 2.2. Incorrect information

As mentioned before, the consequence of the application of the deemed supplier provision is that the platform is responsible for declaring and paying the VAT due. In order to determine the correct VAT treatment of a transaction, a platform may rely on information provided by the supplier and/or the customer. Although not explicitly stated in the first situation listed in section 2.1.2., it is likely that in both situations in which the deemed supplier provision applies the platform is only responsible for the payment of VAT where the supplier is a taxable person. The definition of distance sales of goods imported from third territories or third countries refers to the supplier (article 14(4) of the VAT Directive). For VAT purposes, this is always a taxable person. For the application of the deemed supplier provision, it is also required that the customer is a private individual or a person treated as such. The platform may assume that the supplier is a business and the customer a private person, unless the platform has information to the contrary. This is laid down in article 5d of the VAT Implementing Regulation. What matters is whether or not a VAT number is provided. The platform must check the status of the supplier. With regard to the customer, the platform may assume that if no VAT number or comparable tax number is provided, it is a private customer, unless of course the platform has information to the contrary.<sup>16</sup> Subsequently, the information received by a plat-

form may be incorrect. In such situations, article 5c of the VAT Implementing Regulation stipulates that a platform is not responsible for the payment of additional VAT if, due to incorrect information, too little VAT has been paid, where the platform can prove that it did not know and could not have known that such information was incorrect. The platform must take sufficient measures to collect information from the actual supplier in order to fulfil its obligations. The platform will have to elaborate this in the commercial relationship with the supplier. If the supplier continuously fails to comply with the agreements made to provide information, the platform must take the necessary action (notifying or blocking the seller).<sup>17</sup>

### 2.3. Liability

Platform liability means that a platform is primarily liable as a deemed supplier for the (underpaid) VAT, whereas the underlying supplier is no longer liable. If the platform is not responsible, the underpaid VAT may still be collected from the actual supplier. Pursuant to article 205 of the VAT Directive, Member States may introduce a joint and several liability regime. Such a liability regime, with which a Member State under article 205 of the VAT Directive can designate a platform as jointly and severally liable for the payment of VAT, may not go so far as to make that platform liable without any fault on its part. This was ruled by the Court of Justice of the European Union in the *Vlaamse Oliemaatschappij* case.<sup>18</sup> In addition, article 201 of the VAT Directive allows Member States to designate a platform as the person liable for payment of the import VAT. Import VAT is due when the facilitating platform does not have an IOSS registration because it decided not to register or could not register because the platform did not find a tax representative.<sup>19</sup> Subsequently, the collection of import VAT might be facilitated by special arrangements for declaration and payment of import VAT (article 369y to 369zb of the VAT Directive). However, a platform can only use these special arrangements when the imported goods are not subject to excise duty and the Member State of importation is also the final destination. When this special arrangement applies, article 369z of the VAT Directive determines that:

the person for whom the goods are destined shall be liable for the payment of the VAT;

but

the person presenting the goods to customs within the territory of the Community shall collect the VAT from the person for whom the goods are destined and effect the payment of such VAT.

In that case, a Member State might consider to hold the platform liable for the payment of import VAT. The

12. For more information on the import scheme, see European Commission, *supra* n. 3, at sec. 4.2, pp. 54-78.

13. For more information on the special IOSS VAT identification number, see European Commission, *supra* n. 3, at sec. 4.2.6, p. 57.

14. For more information on the new VAT e-commerce rules regarding platforms, see Merckx & Janssen, *supra* n. 8.

15. See, for example, Lamensch, *supra* n. 2.

16. European Commission, *supra* n. 3, at p. 26.

17. European Commission, *supra* n. 3, at pp. 24-26 and p. 75. For more information on the new VAT e-commerce rules regarding platforms, see Merckx & Janssen, *supra* n. 8. For more information on the new VAT rules in general, see Merckx, *supra* n. 3, at pp. 197-205.

18. BE: ECJ, 21 Dec. 2011, Case C-499/10, *Vlaamse Oliemaatschappij v. F.O.D. Financiën*, Case Law IBFD (accessed 2 Aug. 2021).

19. For more information on the import scheme, see European Commission, *supra* n. 3, pp. 54-78.

Explanatory Notes show that at least one Member State decided to do so.<sup>20</sup>

### 3. Different National Models to Hold Platforms Liable

While the impact of the EU harmonized VAT rules on platforms is already significant, as discussed in section 2., it should also be kept in mind that Member States may adopt further provisions to ensure the collection of VAT that may translate in another batch of obligations for platforms. As a matter of fact, in accordance with article 205 of the VAT Directive:

... Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.<sup>21</sup>

When applying domestic legislation implementing this provision, the tax authority must be able to prove that a taxable person knows or should have known of the fraudulent activities of the co-contractor.<sup>22</sup> This measure was considered as insufficient to address fraud in the field of e-commerce<sup>23</sup> and, as a result, the European Commission introduced the deemed supplier provision for platforms.

Under the EU harmonized deeming provision, a platform may become *primarily* liable as the deemed supplier whereas the underlying supplier is no longer liable. The EU harmonized deeming provision and the option to adopt anti-fraud measures now coexist, and several Member States have already implemented their own domestic liability regimes. The domestic liability regimes can be divided into three different models, i.e. the Austrian model discussed in section 3.1., the UK<sup>24</sup> model discussed in section 3.2., and the German model discussed in section 3.3. Subsequently, these models are compared with each other and with the EU harmonized rules in sections 3.4. and 3.5. The analysis<sup>25</sup> aims to distinguish the advan-

tages and disadvantages of the platform liability under domestic VAT legislation and the overall burden potentially arising from the combined application of the EU harmonized and national rules.<sup>26</sup> Some of the domestic liability regimes use the terms marketplace and operator rather than the term platform. In this section, both terms are used interchangeably.<sup>27</sup>

#### 3.1. Austrian model

In Austria, platform liability is linked to the information obligations of platforms. Platforms are obliged to keep records of transactions to non-taxable persons, which they have facilitated through their platform<sup>28</sup> for ten years.<sup>29</sup> The Austrian tax authority uses this information to determine whether VAT has been declared correctly. Additionally, platforms are held liable if they have not established with sufficient care that the supplier is fulfilling its VAT obligations.<sup>30</sup> The Austrian platform liability rules only apply to turnover achieved after 31 December 2019.<sup>31</sup>

Italy has adopted a similar regime (linking the information obligations of platforms to the platform liability).<sup>32</sup>

#### 3.2. UK model

Under UK law, an online marketplace is defined as a website or any other means by which information is made available over the Internet and through which persons other than the operator can offer goods for sale (whether or not the operator also does so). An operator, in relation

time when platforms become liable and how liability can be avoided. However, these differences are also due to the fact that in one case there is a primary liability and in the other a secondary liability. Therefore, these aspects are not part of the analysis. For more information about these topics, see, for example, Bal, *supra* n. 24; A.M. Bal, *Managing EU VAT Risks for Platform Business Models*, 72 Bull. Intl. Taxn. 4a/Special Issue, p. 7 (2018), Journal Articles & Opinion Pieces IBFD (accessed 3 Aug. 2021); H-M. Grambeck, *Electronic Marketplaces May Be Held Liable for German VAT – New Rules Entered into Effect on 1 January 2019*, 30 Intl. VAT Monitor 1, pp. 7-10 (2019), Journal Articles & Opinion Pieces IBFD (accessed 3 Aug. 2021); Van der Hel-van Dijk & Griffioen, *supra* n. 24.

20. European Commission, *supra* n. 3, pp. 97-99. (The Explanatory Notes do not mention it but this Member State is France.)

21. UK: ECJ, 11 May 2006, Case C-384/04, *Commissioners of Customs and Excise H.M. Attorney-General v. Federation of Technological Industries and 53 others*, Case Law IBFD (accessed 2 Aug. 2021); *Vlaamse Olie- maatschappij* (C-499/10). See also I. Lejeune, S. Kotanidis & E. Cortvriend, *Joint and Several Liability Relating to Intra-Community Acquisitions*, 20 Intl. VAT Monitor 5, p.365 (2009), Journal Articles & Opinion Pieces IBFD (accessed 3 Aug. 2021).

22. See *Vlaamse Olie maatschappij* (C-499/10); *Federation of Technological Industries and others* (C-384/04); see European Commission, *Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud*, COM(260), pp. 14-15 (2004); see also L. Lúðvíksson, *VAT Frauds in the European Union: The Reverse Charge Mechanism, Joint and Several Liability and the "Knowledge Test"*, p. 17 (Master thesis in European and International Tax Law, Lund University School of Economics and Management 2012).

23. Council Directive 2017/2455, Preamble, para. 7.

24. As of 1 January 2021, the United Kingdom is no longer part of the European Union (Brexit). However, the domestic liability regime of the United Kingdom was implemented before the Brexit and is, therefore, included in the analysis. For more information on the domestic liability regimes in Germany and the United Kingdom, see also E.C.J.M. van der Hel-van Dijk & M.A. Griffioen, *Online Platforms: A Marketplace for Tax Fraud?*, 47 *Intertax* 4, pp. 391-401, at p. 399 (2019); A.M. Bal, *Germany: New VAT Compliance Obligations for Online Platforms*, 28 *EC Tax Rev.* 2 (2019).

25. This analysis covers what is considered to be a platform and the scope of the platform liability. There are also differences with respect to the

26. Such a comparison is not new in literature on VAT e-commerce and the obligations for platforms. Scarcella, for example, did a comparative analysis of the legislations adopted in Australia, Germany and the United Kingdom, and of the EU VAT e-commerce package, and aims at individuating the main benefits and limits of such new provisions; see L. Scarcella, *E-commerce and effective VAT/GST enforcement: Can online platforms play a valuable role?*, Computer Law & Security Review: The International Journal of Technology Law and Practice, pp. 1-15 (2019). Also, Bal researched the new VAT compliance obligations for platforms in Germany and compared these special rules on liability and record-keeping obligations of online platforms with the rules adopted in the European Union and in the United Kingdom; see Bal, *supra* n. 24.

27. This section contains unofficial translations of foreign legislations.

28. AT: Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994), art. 18(11), zuletzt geändert durch das Bundesgesetz BGBl I 663/1994, 819/1994 [Federal Law on the Taxation of Business Transactions (VAT Act 1994), amended 2019], (NR: GP XVIII RV 1715 AB 1823 S. 172. BR: AB 4861 S. 589.) [hereinafter UStG 1994], available at <https://www.jusline.at/gesetz/ustg/gesamt> (accessed 16 July 2021).

29. Art. 18(12) UStG 1994.

30. Art. 27(1) UStG 1994.

31. Art. 28(47) UStG 1994.

32. Italy - *Urgent measures for economic growth – details on e-commerce measures* (11 July 2019), News IBFD (accessed 3 Aug. 2021); Italy - *E-commerce measures – implementing rules issued* (07 Aug. 2019), News IBFD (accessed 3 Aug. 2021). See, for more information, Italy - *Reporting obligations for e-commerce platforms – clarifications published* (22 Jan. 2020), News IBFD (accessed 3 Aug. 2021).

to an online marketplace, is defined as the person who controls access to, and the contents of, the online marketplace.<sup>33</sup> The operator is liable for the VAT due by a (taxable) person<sup>34</sup> in respect of all taxable supplies of goods made by that (taxable) person through the online marketplace in the relevant period.<sup>35</sup> It appears from the Guidance Note<sup>36</sup> that platforms thus are liable for:

(i) Any future VAT that a UK business selling goods via the online marketplace fails to account for once they have been notified by HMRC.

and

(ii) Any VAT that an overseas business selling goods via the online marketplace fails to account for where that online marketplace knew or should have known that that business should be registered for VAT in the UK.

Furthermore, the operator is liable within the relevant period.<sup>37</sup> When a UK business is involved, the liability period starts when the operator has been given a liability notice, which HMRC will issue when they have established that a UK business is non-compliant.<sup>38</sup> In that case, the platform liability starts from that moment and ends with the day on which the platform secures compliance from the supplier or removes it from its online marketplace. In contrast, when a non-UK business is involved, the liability period starts with the day on which the operator first knew or should have known that the supplier was in breach of a registration requirement and ends when the supplier ceases to be in breach of the registration requirement. It also appears from the Guidance Note<sup>39</sup> that a platform is granted a period of delay to avoid liability. The duration of this period also differs, depending on whether the supplier is a UK business or a non-UK business. In the case of a UK-business, the platform normally has 30 days to avoid liability, which can be established in two manners: by contacting and securing the compliance of the business, or by removing the business from its website. When the platform does not take any action during this period, it will be held jointly and severally liable for the future unpaid VAT, which will be calculated based on the unpaid VAT from the day after the date of HMRC's notice. However, in the case of a non-UK business, a platform must ensure, within a period of 60 days of knowing, that the unregistered non-UK business can no longer sell goods to UK consumers through the website of the platform. If the non-UK business is still allowed to sell its goods through the website of the platform after the

60-day period, the platform can be held jointly and severally liable for the unpaid VAT.

The domestic liability regime of France, which has been in force since 1 January 2020, is comparable to the liability regime of the United Kingdom. The details of the French liability regime can be found in the document from the Directorate-General for Public Finance.<sup>40</sup> In short, the French tax authority has the right to alert a platform when a supplier, who supplies goods or services through that platform to non-taxable persons, is presumed to be liable for VAT in France but failed to make a declaration and/or did not pay the VAT due.<sup>41</sup> Subsequently, the platform must ensure within one month that the supplier complies with its obligations. If the supplier after that month still has not fulfilled its obligations, the French tax authority has the right to issue an official notification to the platform. Then the platform must take additional measures within one month to make the supplier compliant with French law, or the platform must exclude the supplier from using the platform in order to avoid being held jointly and severally liable for the unpaid VAT. The French rules are, therefore, less far-reaching than the UK liability rules.

### 3.3. German model

In December 2018, Germany adopted special rules on the liability of platforms for unpaid German VAT.<sup>42</sup> These rules are implemented in the German VAT Act<sup>43</sup> and apply as of 1 January 2019.<sup>44</sup> The German VAT Act defines an online marketplace as a website or any other instrument through which information is made available over the Internet and which enables a third party, other than the operator of the marketplace, to carry out transactions.<sup>45</sup> Additionally, an operator of an online marketplace is defined as anyone who maintains an electronic marketplace and enables third parties to carry out transactions through this marketplace.<sup>46</sup> The operator is liable for the unpaid VAT on supplies which has been legally established through the marketplace irrespective of the location of the supplier and the platform or the type of

33. UK: Value Added Tax Act, An Act to consolidate the enactments relating to value added tax, including certain enactments relating to VAT tribunals, 1994, art. 77B(9), ch. 23 [hereinafter VAT Act 1994], available at <https://www.legislation.gov.uk/ukpga/1994/23/contents> (accessed 16 July 2021).

34. Art. 77B(4) VAT Act 1994 does not use the word "taxable person" but the abbreviation "P", which is clarified in art. 77B(1a) VAT Act 1994 as "a person (P) who makes taxable supplies of goods through an online marketplace...".

35. Art. 77B(5) and art. 77BA(4) VAT Act 1994.

36. HMRC, *VAT: Extending Joint and Several Liability for Online Marketplaces and Displaying VAT Numbers Online – Guidance Note* (22 Nov. 2017).

37. Art. 77B(5-8) and art. 77BA(4-6) VAT Act 1994.

38. See HMRC, *supra* n. 36.

39. *Id.*

40. Direction Générale des Finances Publiques, *TVA – Régimes d'imposition et obligations déclaratives et comptables – Redevable de la taxe – Livraisons de biens et prestations de services - Solidarité de paiement de l'opérateur de plateforme en ligne*, Extrait du Bulletin Officiel des Finances Publiques-Impôts, BOI-TVA-DECLA-10-10-30-20-20200323 (23 Mar. 2020).

41. FR: Code général des impôts, CGI, Modifié par LOI n° 2019-1479 du 28 décembre 2019 - art. 182, Version en vigueur depuis le 01 janvier 2020, arts. 283bis and 293A, available at <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069577/> (accessed 16 July 2021).

42. DE: VAT Act (Umsatzsteuergesetz in der Fassung der Bekanntmachung), para. 52e (21 Feb. 2005). For a complete analysis of these rules, see Grambeck, *supra* n. 25, at p. 7. See also Bal, *supra* n. 24, at p.114; and Van der Hel-van Dijk & Griffioen, *supra* n. 24, at p. 399.

43. DE: VAT Act (Umsatzsteuergesetz), p. 386 (21 Feb. 2005), available at [https://www.gesetze-im-internet.de/ustg\\_1980/BjNR119530979.html](https://www.gesetze-im-internet.de/ustg_1980/BjNR119530979.html), [hereinafter German VAT Act] (accessed 16 July 2021).

44. The rules adopted in December 2018 basically consist of two elements: (i) record-keeping obligations for operators of electronic marketplaces; and (ii) liability for traders. Only the second element is discussed in this section. For more information on the record-keeping obligations for operators of electronic marketplace in Germany, see Grambeck, *supra* n. 25, at sec. 2.1.

45. Art. 25e(5) German VAT Act.

46. Art. 25e(6) German VAT Act.

the supply. Furthermore, the platform liability also applies when, for example, a third-country seller is involved in the transaction.<sup>47</sup> If the supplier does not fulfil his tax obligations or does not fulfil them to a significant extent, the tax authority must inform the operator if other measures do not promise immediate success. After receipt of the notification, the operator shall be held liable for the unpaid VAT, provided that the legal transaction underlying the transaction was concluded after receipt of the notification. However, a claim against the operator shall not be made if the operator proves within a period of time set by the German tax authority that the supplier can no longer offer goods through the online marketplace.<sup>48</sup> The operator shall not be held liable when it submits a certificate from the taxable person or electronic confirmation from the Federal Central Tax Office which shows that the supplier is in possession of a VAT registration.<sup>49</sup> However, this exception does not apply if the operator was aware or should have been aware, according to the due diligence obligation of a prudent businessperson, that the supplier did not or not fully comply with this VAT obligation. Furthermore, if the seller is a non-taxable person, the operator shall not be held liable if it has met its recordkeeping obligations. Also, in this situation, the exception does not apply when it can be assumed, based on the type, quantity or amount of the turnover achieved, that the operator was aware or should have been aware, based on the due diligence of a prudent businessperson, that the turnover was generated within the framework of an enterprise. In contrary to the aims of the EU VAT e-commerce package, under the German model, platforms must check if their European sellers have a regular VAT registration in Germany. A consequence, for example, is that a Dutch seller could use the One-Stop Shop (OSS) return to report German distance sales of goods but would still require a non-resident VAT registration in Germany in order to provide the proof necessary (for the platform) of their German tax identification number registration certificate from a tax authority in Germany.<sup>50</sup>

### 3.4. Comparative analysis of the models

A first notable difference between the three models is the fact that the Austrian model links the platform liability to the information obligations, whereas the UK and German model implement a social responsibility for platforms to secure compliance of the underlying suppliers. However, the UK and German models also differ in many respects. For example, it seems that the UK and German definitions of an online marketplace and its operator are much broader than the EU harmonized definition of a platform as they include all websites through which a third party can offer goods for sale and carry out transactions.<sup>51</sup> The UK and German rules differ with respect to the definition of the operator. The German liability rules seem to go further than the UK rules because, under German VAT

47. Art. 25e(1) German VAT Act.  
 48. Art. 25e(4) German VAT Act.  
 49. Art. 25e(2)-(3) German VAT Act.  
 50. Arts. 25e and 22f(1) German VAT Act.  
 51. See also Bal, *supra* n. 24, at p. 117.

law, an operator must also enable third parties to carry out a transaction through its marketplace. This is somewhat similar to the EU concept of facilitating, which seems to be missing in the UK rules.

With respect to the scope of the platform liability, another notable difference is that the three models implement a secondary liability, whereas the EU harmonized rules establish a primary liability. Under EU harmonized rules, a platform is deemed to be the supplier of the goods, also known as primary liability. Such fiction is not apparent from the three models. All three models implement a secondary liability, which means that the platform will be liable for unpaid VAT by the supplier if the supplier does not fulfil its obligations.<sup>52</sup> It is also interesting that in the United Kingdom the Value Added Tax Act determines that a platform is liable for any future unpaid VAT when a UK business is non-compliant with UK law and for already unpaid VAT when a non-UK business is concerned. Another notable difference is that, where both the European Union and the United Kingdom differentiate between the importation of goods versus intra-Community sales of goods and UK businesses versus overseas businesses, respectively, the German law states that a platform is liable irrespective of the location of the supplier and the platform or the type of the supply.

### 3.5. Combination of EU harmonized and domestic legislations: Is it justified?

The domestic liability rules should, in all likelihood, still apply to situations that are not covered by the EU harmonized rules after 1 July 2021.<sup>53</sup> How does the combination work? The EU deeming provision is implemented because domestic liability regimes were not enough. Is there still a justification for Member States to apply a domestic liability regime after the platform liability rule enters into force as of 1 July 2021 or should Member States end these regimes? Grambeck, for example, argues that when the EU rules take legal effect on 1 July 2021, liability rules such as that currently in place in Germany are not needed any more.<sup>54</sup> Additionally, Grambeck holds that:

having this in mind, traders and operators of marketplaces may well argue that the current German approach is unreasonable by creating a great burden in a scenario that will look much different in ... time.<sup>55</sup>

Therefore, the crucial question is, in the author's opinion, whether it makes sense from a proportionality perspective (the impact of the rules on platforms) to maintain the domestic liability regimes after 1 July 2021. The author can understand, to a certain extent, that some Member States have implemented domestic liability regimes themselves. However, the author agrees with Van der Hel-van Dijk and Griffioen that if all Member States introduce their

52. *Id.*, at p. 119.  
 53. *Id.*  
 54. H.-M. Grambeck, *supra* n. 25, at p. 10.  
 55. *Id.*

own domestic liability systems, it becomes more challenging to know which platform is liable and for what.<sup>56</sup>

Lúðvíksson also describes some advantages and shortcomings of joint and several liability.<sup>57</sup> Lúðvíksson notes that implementing joint and several liability is undoubtedly a simple way and can work well in the fight against VAT fraud,<sup>58</sup> but that it must be set up with clear rules in order to comply with general principles of EU law, in particular the principles of legal certainty, transparency and proportionality. Provisions implementing joint and several liability may not go further than necessary to reach the intended aim.<sup>59</sup> Besides, Lúðvíksson mentions that, when a liability regime uses the concept of “the knowledge test” (in order to be held jointly and severally liable, a platform must know or should have known about VAT fraud), it is up to the national courts to interpret this concept, which creates interpretation problems and uncertainty issues.<sup>60</sup> Interestingly, De la Feria notes that introducing third-party liability as a measure in the fight against (VAT) fraud is, because of its design, not successful in tackling (VAT) fraud per se, but merely capable of minimizing the revenue costs of (VAT) fraud.<sup>61</sup> Combined with the aforementioned remarks of Lúðvíksson, Van der Hel-van Dijk and Griffioen, this makes the author wonder whether the liability of platforms under domestic VAT legislation (and even under EU law) does not go further than necessary.

In general, the author concludes that from a proportionality perspective, not meeting information obligations should not result in full secondary platform liability. It is, in the author’s view, not proportionate to require that platforms fulfil their information obligations under the threat of a full liability for unpaid VAT. Instead, when a platform fails to meet the information obligation or the information is incorrect, the platform should get a penalty or fine that is proportional to its failure. Implementing a social responsibility for platforms to secure compliance of the underlying supplier is, in the author’s opinion, acceptable to a certain extent. However, the various models of domestic liability regimes should not differ, and it must be clear for platforms when they are liable and for what. In that respect, Bal understands that the scope of the German provisions is broader than, for example, the EU or UK provisions:

the legislator wants to close all potential future loopholes that could arise if the wording was very narrow and to cover all future (yet unknown) technological developments.<sup>62</sup>

However, Bal notes that certain broadly drafted provisions could also create much uncertainty. The author agrees with Bal<sup>63</sup> that it cannot be ruled out that some taxable persons may accidentally fall within the scope of

the German provision, whereas this provision was not originally intended for them. Bal even concludes that the fact that the German rules differ in scope from the EU harmonized rules shows:

that the European Commission’s objective to establish a balanced and uniform regulatory framework for online platforms is not likely to be achieved.<sup>64</sup>

Additionally, the provision permitting a platform to eliminate its liability must be clear. However, the German provision regarding the avoidance of platform liability can create risks for non-taxable sellers. Quoting Bal:

What if a platform operator incorrectly classifies a seller as a taxable person? The seller will not be able to provide a certificate since he is not registered for VAT purposes. If a platform does not receive a certificate, it will not be able to apply the provision permitting it to eliminate its liability for unpaid VAT of the seller. Thus, the only way for the platform to eliminate any potential liability will be to exclude the seller from the online marketplace completely.<sup>65</sup>

The European Commission has even sent a letter of formal notice to Germany and requested that Germany withdraws the legal changes affecting European businesses selling goods online to German consumers.<sup>66</sup> The European Commission considers the fact that platform liability can be avoided only if the platform produces a certificate from the German tax authority (which the German tax authority has provided to the business selling goods on the electronic platform) as:

an inefficient and disproportionate measure that hinders the free access of EU businesses to the German market in violation of EU Law.

Furthermore, the European Commission notes that:

this measure comes as EU Member States have already agreed on common and more efficient measures to combat VAT fraud ... The obligations put on the marketplace operators to avoid the joint and several liability go beyond what is provided for by the EU rules and are at odds with the goals of the Digital Single Market Strategy for Europe.<sup>67</sup>

Additionally, the author agrees with Grambeck that there is already doubt as to whether non-domestic or even non-EU platforms will be aware of the domestic liability regimes, which raises questions as to whether EU tax authorities can effectively enforce VAT law in case of fraudulent traders.<sup>68</sup>

56. Van der Hel-van Dijk & Griffioen, *supra* n. 24, at p. 399. See also Lúðvíksson, *supra* n. 22, at p. 23.

57. Lúðvíksson, *supra* n. 22, at pp. 22-23.

58. *Id.*, at p. 38.

59. *Id.*, at p. 22.

60. *Id.*, at p. 23. See also R. de la Feria, *Tax Fraud and Selective Law Enforcement*, *Journal of Law and Society*, pp. 20-21 (2020).

61. De la Feria, *supra* n. 60, at p. 19.

62. Bal, *supra* n. 24, at p. 117.

63. *Id.*

64. *Id.*, at p. 119.

65. *Id.*

66. *European Union/Germany - EU Outlines Key Decisions in October Infringements Package* (11 Oct. 2019), News Tax Analysts (accessed 3 Aug. 2021).

67. European Commission, *October infringements package: key decisions* (10 Oct. 2019). The European Commission stated that if Germany does not act within the next two months (after 10 October 2019), the Commission may send a reasoned opinion to the German authorities. The infringement procedure of the European Commission is still ongoing (INFR(2019)4080, 10/10/2019, INF-19-5950), available at [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/index.cfm?lang\\_code=EN&typeOfSearch=false&active\\_only=0&noncom=0&r\\_dossier=INFR%282019%294080&decision\\_date\\_from=30%2F09%2F2019&decision\\_date\\_to=17%2F07%2F2021&EM=DE&DG=TAXUD&title=&submit=Search](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=INFR%282019%294080&decision_date_from=30%2F09%2F2019&decision_date_to=17%2F07%2F2021&EM=DE&DG=TAXUD&title=&submit=Search) (accessed 17 July 2021).

68. Grambeck, *supra* n. 25, at p. 9.

Finally, it is interesting to mention that the Dutch *Commissie Deeconomie* (commission for the sharing economy, hereinafter Dutch commission) has written a report on the fiscal aspects of the sharing and gig economy and has, among other things, paid attention to the liability of platforms.<sup>69</sup> The Dutch commission is of the opinion that Member States should not apply a liability regime/model too easily, because the VAT due is then shifted to the platform. The Dutch commission indicates that a withholding model with sufficient certainty for a platform about the VAT amount to be withheld is preferred by platforms over a liability model.<sup>70</sup> In the case of a liability model, there is uncertainty for a platform as to whether it can recover the VAT due from the underlying supplier, whereas in the case of a withholding model, the VAT due can be deducted directly from the fee that a platform must pay to the provider.<sup>71</sup> If, however, a liability regime is adopted, the Dutch commission prefers the UK model. According to the Dutch commission, this model should then be combined with a regulation for the platform to actively provide information to the national tax authorities,<sup>72</sup> so that the non-compliance of suppliers can be established. The Dutch commission indicates that a platform must be given time to remedy the situation found,<sup>73</sup> and that the platform can only be held liable if it fails to remedy the situation within that time, with liability only applying to the future. The Dutch commission also recommends that the Dutch tax authorities, in the event of the exclusion of a provider from a certain platform, should immediately inform all other platforms known to them of the identity of the removed supplier, and that attention should be paid to the fact that suppliers may act under different identities.<sup>74</sup> The author is of the opinion that this advice also applies to all other national tax authorities to the extent applicable. In addition, according to the Dutch commission, a liability scheme must comply with the neutrality principle<sup>75</sup> and the principle of legal cer-

tainty,<sup>76</sup> and it must be simple and flexible.<sup>77</sup> The Dutch commission does note, however, that national tax authorities must continue to track down non-compliant taxable persons.<sup>78</sup> Subsequently, the Dutch commission considers the Austrian model less desirable, as the liability is linked to the information obligations and, in the Dutch commission's opinion, imposing liability when information is lacking to a limited extent may be disproportionate. A fine depending on the extent to which a platform fails to comply with the information obligations and the degree of its culpability is, in the Dutch commission's opinion, more appropriate.<sup>79</sup> With regard to the German model, the Dutch commission suggests that such a model contributes to a certain extent towards the tax authorities gaining more knowledge of the providers, but that this model results in a considerable administrative burden, which may not outweigh the aim of ensuring greater compliance with tax legislation.<sup>80</sup> Finally, the Dutch commission states that holding a platform liable when it knew or should have known that a supplier (taxable person) was not meeting its tax obligations leads to time-consuming procedures and uncertainty for both the platform and the national tax authority. Moreover, the business models of the various types of platforms differ considerably, as a result of which many platforms do not have information with which they could have established that tax obligations exist.<sup>81</sup>

#### 4. Conclusions and Policy Recommendations

EU harmonized rules concerning platforms are likely to apply in combination with joint and several liability rules adopted by several Member States. It appears that the recently adopted national liability regimes will indeed remain in place. It should be acknowledged that when, in theory, all Member States introduce their own domestic liability regimes, the burden on platforms would become so great that it would seem impossible for them to be compliant. In the author's view, there may be sufficient ground for implementing a joint and several liability based on the social responsibility model that the United Kingdom and France have implemented because this model is based on the cooperation with platforms. Still, it should be clear which platforms can be held liable, for which transactions and under what circumstances. Also, the author would advise to give platforms time to avoid being held liable and first alert a platform before sending an official notification, like the French domestic liability regime. In addition, it is important to clarify when and for what platforms are liable and to prevent as much as possible that platforms accidentally fall within the scope of the domestic liability regulations. If a platform has not taken measures after

69. Rapport Commissie Deeconomie, *supra* n. 5.

70. *Id.*, at p. 191.

71. *Id.*, at pp. 191-192.

72. For more information on this regulation, see Rapport Commissie Deeconomie, *supra* n. 5, at sec. 7.3.4., where it discusses, among other things: (1) the OECD report (OECD, *Model Rules for Reporting by Platform Operator with respect to Sellers in the Sharing and Gig Economy* (OECD 2020)); and (2) the DAC7 proposal from the European Commission (Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2020) 314 final (15 July 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0314> [hereinafter Commission's DAC7 Proposal] (accessed 16 July 2021)). Meanwhile (between publication of the Rapport Commissie Deeconomie and this article), the DAC7 Directive has been adopted, Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L104 (2021).

73. Rapport Commissie Deeconomie, *supra* n. 5, at p. 192. See also OECD, *The Sharing and Gig Economy: Effective Taxation of Platform Sellers: Forum on Tax Administration*, p. 64 (OECD 2019) [hereinafter OECD (2019)].

74. Rapport Commissie Deeconomie, *supra* n. 5, at p. 192.

75. A liability regime must treat platforms with a similar role equally and, in addition, the liability regime must apply irrespective of a platform's place of establishment; see OECD (2019), *supra* n. 73, at p. 65. See also Rapport Commissie Deeconomie, *supra* n. 5, at p. 193.

76. A platform must be able to clearly determine whether a liability regime applies to it, what measures must then be taken and, finally, when providers must be removed from the platform; see OECD (2019), *supra* n. 73, at p. 65. See also Rapport Commissie Deeconomie, *supra* n. 5, at p. 193.

77. Rapport Commissie Deeconomie, *supra* n. 5, at p. 193.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*, at p. 194.



it has been given time to do so, and has received an official notification, the author believes that it is justified to hold a platform liable for unpaid VAT. Suppose a platform knows that the supplier is not fulfilling its obligations but does not take measures against that supplier after being officially warned. In that case, the platform is, as it were, facilitating fraud and, therefore, in the author's opinion, it is justified that the platform is held liable. In contrast, the author argues that domestic liability regimes such as the Austrian model are not proportionate because certain rules go further than necessary to reach the intended aim.

The German model creates much uncertainty for platforms. Therefore, the author suggests removing the requirement of submitting a certificate to avoid being held liable. In general, the author holds that if the Member States continue to apply certain liability rules, the domestic rules on platform liability should be linked to the EU harmonized rules. And even in that case, the author strongly suggests removing the full liability rule when a platform fails to meet its information obligations and, instead, imposing a fine dependent on the extent to which the platform fails to comply with the information obligations and the degree of its culpability is. Moreover, the author argues that joint and several liability should not be linked to information obligations.

From the combination of EU harmonized and domestic legislation, extra burdens will arise for platforms in general. The fact is, however, that the business models of the various types of platforms differ considerably. As a result, platforms that have sufficient insurance in place against liability for fraud or non-compliance of the under-

lying supplier will receive less impact than platforms that must set up new processes/procedures.

Time will tell if Member States will keep their domestic liability rules in situations that are not covered by the EU harmonized rules and if other Member States will introduce such domestic liability rules. However, it is clear that the combination of EU harmonized rules and domestic legislation on VAT platform liability is problematic and that the burden on platforms would become unbearable when all Member States introduce their own domestic liability regimes. Accordingly, the author advises the European Commission and the Member States to look at the consequences of this problematic combination. Even when platforms are willing to contribute to the fight against VAT fraud, they should not bear such enormous burdens whilst the cooperation between the Member States and the cooperation with the European Commission is lacking and when alternatives are conceivable, such as technological solutions<sup>82</sup> or a withholding model (as suggested by the Dutch commission for the sharing economy<sup>83</sup>).

- .....
82. See, for example, R.T. Ainsworth, M. Alwohaibi & M. Cheetham, *VATCoin: Can a Crypto Tax Currency Prevent VAT Fraud?*, 84 *Tax Notes International* (2016); R.T. Ainsworth & B. Madzharova, *Real-Time Collection of the Value Added Tax: Some Business and Legal Implications*, Boston University School of Law Working Paper 12-51 (2012); M. Lamensch, *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform* (IBFD 2016), Books IBFD (accessed 3 Aug. 2021); M. Lamensch & M. Saraswat, *From Clicks to Compliance: A Data Conduit to Collect VAT*, 28 *Intl. VAT Monitor* 5, pp. 368-374 (2017), *Journal Articles & Opinion Pieces IBFD* (accessed 3 Aug. 2021); M. Merkk, *VAT and Blockchain: Challenges and Opportunities Ahead*, 28 *EC Tax Review* 2, pp. 83-89, sec. 2 (2019).
83. Rapport Commissie Deeleconomie, *supra* n. 5.