Mehrwertsteuer in der digitalen Wirtschaft

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Preface

This thesis was written during my years at the University of Mannheim and at Ernst and Young. I am in debt to many persons for their remarkable support. Listing all of them would exceed the reasonable length of a preface.

First and foremost, I wish to thank Professor Dr. Christoph Spengel for supervising my thesis. He has given me extraordinary freedom and trust to explore and research the issues I identified. Further thanks are appropriate to him and Professor Dr. Ulrich Schreiber for assessing this work. For academic support, I also want to thank all the professors of the Faculty of Business for their input during lectures and doctoral seminars. Moreover, I wish to thank the professors of the EANOVAT network, both for their personal input and for the tremendous opportunity to meet equally interested PhD students dealing with indirect tax issues around the globe.

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Finally, I want to thank my friends and family for their relentless mental support, both while writing this thesis and throughout life. My parents Marianne and Thomas always have my back, supporting me in every way they possibly can. And last, but definitely not least, my highest appreciation goes to my girlfriend Katja. Your brilliant mind, warm-hearted affection and unconditional love helped me to finish this thesis.

Nußloch, March 2021 *Florian S. Zawodsky*

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Index of Abbreviations

AbgÄG	Abgabenänderungsgesetz
AO	Abgabenordnung
B2B	Business to Business
B2C	Business to Consumer
B2G	Business to Government
BBC	British Broadcasting Corporation
BEPA	Base Erosion and Profit Allocation
BEPS	Base Erosion and Profit Shifting
BGBl	Bundesgesetzblatt (Federal Gazette)
BMF	Bundesministerium der Finanzen (Federal Republic of Germany)
BMF	Bundesministerium für Finanzen (Republic of Austria)
BZSt	Bundeszentralamt für Steuern
CASE	Center for Social and Economic Research
CDU	Christlich Demokratische Union Deutschlands
CFA	Committee on Fiscal Affairs (of the OECD)
CJEU	Court of Justice of the European Union

CMR	Convention Relative au Contrat de Transport International de Marchandises par la Route
COM	European Commission
CSU	Christlich-Soziale Union in Bayern e. V.
DDP	Delivery Duty Paid
Drs	Drucksache
DST	Digital Services Tax
DVO	Durchführungsverordnung
EC	European Communities
ECA	European Court of Auditors
ECLI	European Case Law Identifier
ECOFIN	Economic and Financial Affairs Council
e-commerce	Electronic Commerce/elektronischer Handel
ECR	European Court Records
EEC	European Economic Community
EFT	Electronic Fund Transfer
EU	European Union/Europäische Union
EuGH	Gerichtshof der Europäischen Union
EWR	Europäischer Wirtschaftsraum
EXW	ex-works
FBA	Fulfillment by Amazon
G20	Group of Twenty

GST	Goods and Services Tax
HM	Her Majesty's (Revenue and Customs)
HR	House of Representatives Bill
IBFD	International Bureau of Fiscal Documentation
ICC	International Chamber of Commerce
IDW	Institut der Wirtschaftsprüfer in Deutschland e. V
ifo	Leibniz-Institut für Wirtschaftsforschung an der Universität München e. V.
ifst	Institut Finanzen und Steuern e.V.
IP	Internet Protocol
JSL	Joint and Several Liability
JStG	Jahressteuergesetz
LVCR	Low Value Consignment Relief
MIAS	Mehrwertsteuer-Informationsaustauschsystem
MOSS	Mini-One-Stop-Shop
MS	Member State(s)
MTIC	Missing Trader Intra-Community (Fraud)
MwSt	Mehrwertsteuer
MwStDVO	Mehrwerststeuer-Durchführungsverordnung
MwStSystRL	Mehrwertsteuersystemrichtlinie
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union

RefE	Referentenentwurf
RegE	Regierungsentwurf
RGBl	Reichsgesetzblatt (Gazette of the German Empire)
RL	Richtlinie
S	Senate Bill
SB	Senate Bill
SCOTUS	Supreme Court of the United States
SDP	Signifcant Digital Presence
SPD	Sozialdemokratische Partei Deutschlands
SPM	Split Payment Mechanism
SSRN	Social Science Research Network
TAG	Technical Advisory Group
TAXUD	Directorate-General for Taxation and Customs Union (European Commission)
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
US	Unites States (of America)/Vereinigte Staaten (von Amerika)
US Const	The Constitution of the United States
USA	Vereinigte Staaten von Amerika
USB	Universal Serial Bus
UStG	Umsatzsteuergesetz
USt-Id	Umsatzsteuer-Identifikationsnummer

UStV	Umsatzsteuerverordnung
VAT	Value Added Tax
VATA	Value Added Tax Act
VIES	VAT Information Exchange System
WP	Working Party
ZEW	Leibniz-Zentrum für Europäische Wirtschaftsforschung

1 Introduction

Taxation takes a part of freedom in order to give another part of freedom. Taxes are a necessary and inevitable measure for society. Over the last century, Value Added Tax (VAT) – a tax, levied at every stage of consumption, with the right to deduct input tax – has unarguably established itself as an accepted part in the wide array of taxes levied around the globe. It is intended to tax individual consumption. While mundane consumption was relatively straightforward to observe a century ago, the consumption process in the digital era is often complex, cross-border and non-tangible. This complexity necessitates interdisciplinary research to identify whether, to what extent and how tax should be applied in the digital economy.

While fundamentals of VAT are globally agreed upon – unlike the current environment for direct taxes – the application of VAT in the digital economy is a green field. With such a setting, the exaction of VAT in certain circumstances is debatable from both equitable and feasibility points of view. On top of such issues, enforcement is not up to speed. Every year, the Commission of the European Union reports on the so called VAT gap – the difference between the amount of VAT collected and total tax liability under the law.[1] The reported numbers are alarming. The unacceptable

[1] CASE, *Study and Reports on the VAT Gap in the EU-28 Member States: 2019 Final Report: TAXUD/2015/CC/131* (2019).

downsides include not only tremendous revenues losses, but also deficiencies regarding tax fairness and tax morale. Combining these two facts leads to the overarching goal of this thesis: identifying and preventing VAT revenue shortfalls from the digital economy. All chapters contribute to the attainment of this goal.

In order to achieve this aim, this thesis analytically tackles different pressing issues in exaction and enforcement of VAT. This requires doctrinal legal research, taking into consideration wider economic implications.

The first part of the thesis identifies issues which are allegedly new because of their dependence on highly digitalised business models. These topics are challenging from both a theoretical and a practical perspective. This justifies devoting a chapter to "free" services and a chapter to the sharing economy. The focus of this part lies in identifying whether the digital economy leads to a circumvention of VAT revenues which would have occurred in a non-digital economy. This can easily be presumed, as often done in the literature. Regarding "free" services – meaning not directly paid by monetary consideration – the question is whether consumers of "free" services, such as online search engines, compensate the seller of the services through personal data. In the sharing economy, where individuals provide services to other individuals, it is questionable whether and where VAT should come due. Legal and economic perspectives are brought together in an interdisciplinary approach to come up with qualitative solutions. These establish the fundamental cornerstones designing a tax applicable to these parts of the digital economy.

The second part of the thesis moves from the broader exaction question to the narrower enforcement question. It starts with a comprehensive analysis of a groundbreaking judgment of the Supreme Court of the United States on the collection requirements for out-of-state sellers. Such a comparative perspective helps under-

standing the fundamentals of consumption taxation and enforcement thereof, even for multi-stage taxes as VAT. Building on that, two descriptive chapters contribute to the new strand of joint and several liability (JSL) literature in two different jurisdictions. Such a mechanism is now used by several jurisdictions, leading to a situation where digital marketplaces become liable for unpaid VAT when the actual sellers do not fulfil their VAT duties. Both chapters are among the first to elaborate on the issue in their respective jurisdiction. The last chapter of this part combines gained knowledge, identified and analysed drawbacks of implemented legislation and sets out a framework for more targeted measures. The structure and the goal of the thesis are graphically illustrated in the following figure.

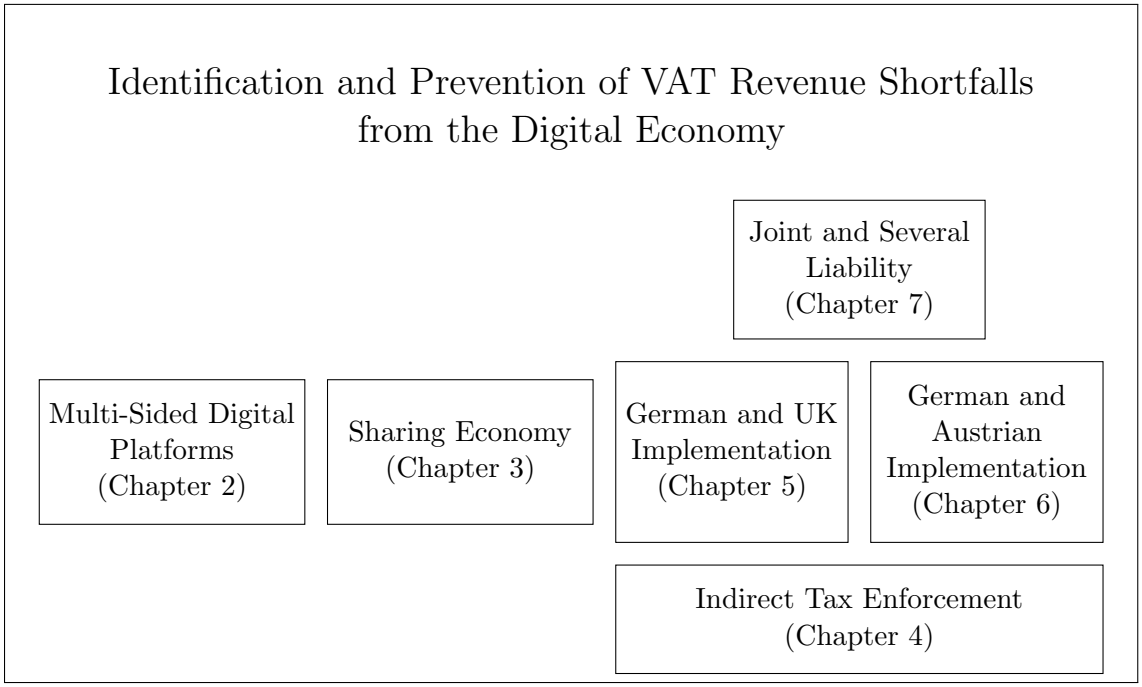

Figure 1.1: Structure of the thesis

Chapter	Title	Status and Co-Authors	Own Contribution
2	Value Added Taxation on Multi-Sided Digital Platforms	published in British Tax Review (2018) 63(5) 606	• Identification of the topic of increased usage of "free" electronic services • Literature review and identification of a lack of the economic perspective • Legal discussion with reference to EU law and jurisprudence • Illuminations of economic implications of the legal conclusions • Identification of a discrepancy between consumption and consumption expenses
3	Consumption Taxation in the Sharing Economy	prepared for a submission	• Identification of the pressure points in the sharing economy from a consumption tax perspective • Depiction of the current treatment of sharing actions • Analysis of the economic impact of sharing actions • Evaluation of the existing solutions • Development of a more targeted solution
4	South Dakota v. Wayfair, Inc.	published in Steuer und Wirtschaft (2019) 96(1) 64 *with* Christina Mair	• Identification of the relevance of the topic from a non-US perspective • Elaboration of the procedural questions of the case • Depiction of Sales and Use Tax background • Demarcation from the old precedent • Implications on international taxation
5	Die deutsche Plattformhaftung im Vergleich zum Vereinigten Königreich	published in Umsatz-Steuerberater (2018) 19(9) 269 *with* Robert C Prätzler	• Identification of the topic through new legislation • First literature contribution on application of the German rules • Elaboration of the UK rules • Comparison of the legal designs • Assessment of the and criticism on the design
6	Die umsatzsteuerliche Plattformhaftung in Österreich im Vergleich zu ihrem deutschen Pendant	published in Steuer- und WirtschaftsKartei (2020) 95(1) 4 *with* Ingrid Rattinger	• First literature contribution on application of the Austrian rules • Re-evaluation of the German rules • Literature review on the German rules • Comparison of the legal designs • Evaluation of the Austrian rules
7	Value Added Tax Enforcement in the Era of E-Commerce	prepared for a submission	• Development of enforcement problems in e-commerce • Elaboration of the theoretical framework of consumption taxation • Identification of existing measures in the VAT Directive • Execution and assessment of a case study • Development of a more targeted solution

Table 1.2: Chapter overview with publication status and own contributions

The single chapters are composed as follows.

Chapter 2 analyses the currently common business model of completely disregarding monetary compensation from individuals for supposedly "free" electronic services.[2] Such services are used by billions of users every day, for instance by utilising a search engine on the internet. This examination centres on these service-supplying platforms that have non-neutral pricing strategies. A large body of literature exists on the question whether "free" services are taxable transactions for VAT purposes according to the current legislation in the European Union. While the legal literature focuses on the question of whether a barter transaction is taking place through the use of free-of-charge services, this chapter contributes through an economic perspective, carving out an answer to the question of whether additional consumption taxation in such situations is necessary or not.

Chapter 3 touches on the VAT treatment of consumers in the sharing economy.[3] The sharing economy is understood as online platforms enabling individual consumers to share their consumption with others. Ride sharing or accommodation sharing platforms are the most pressing examples. An intense review reveals that media outcries against internet giants are not justified. However, criticism against outdated rules is valid, as occasional sharers are commonly exempt from consumption taxation in the European Union. The chapter explores whether the time to disregard consumption taxation for sharers should be over. The chapter closes with a contribution to the existing literature through a solution which balances out revenue needs and

[2] This chapter has been published by the British Tax Review in 2018, Florian S Zawodsky, 'Value Added Taxation in the Digital Economy' (2018) 63(5) British Tax Review 606. It is published with kind permission of Sweet & Maxwell. It has been presented at the 6th EANOVAT PhD Seminar on Value Added Tax and other indirect taxes in Louvain-la-Neuve in 2018.

[3] This chapter has been presented at the Brown Bag Seminar at the University of Mannheim in 2018.

the practicality of solutions to the identified problem.

Chapter 4 broadens the scope in several dimensions and works as an introduction to the second part of the thesis.[4] It is nested in a single-stage Sales Tax environment and provides a comparison to a VAT system. The chapter's intention is to lay out the implications of the pivotal *Wayfair*[5] judgment by the Supreme Court of the United States. It complements the literature with a VAT perspective. The judgment's importance is highlighted not only by its worldwide implications, since states in the United States are now able to tax consumption within their jurisdiction without a physical presence of the supplier. The importance from a legal point of view comes with the court's reassessment of its own, long-standing, jurisprudence. That industry-shaping precedent was overruled by the court on the grounds that the old interpretation was unsound and incorrect. The *raison d'être* for this chapter in this thesis lies in the analysis of its implications. The judgment is a clear statement that the law has to adapt to new developments. The chapter summarizes the main content of the decision, shows its effect on interstate and international trade and analyses its implications on the worldwide taxation of the digital economy. It paves the way for the final three chapters of the thesis, which deal with enforcement of VAT in the field of cross-border e-commerce.

The last three chapters of this thesis focus on digital platforms and enforcement of VAT. While Chapter 4 was on enforcement in general, the last chapters deal with a specific measure in VAT enforcement, namely JSL. The measure makes digital

4 This chapter is joint work with Christina Mair and has been published by Steuer und Wirtschaft in 2019, Christina Mair and Florian S Zawodsky, 'South Dakota v. Wayfair, Inc. – Urteilsbesprechung und Analyse der Auswirkungen des Urteils auf die internationale Besteuerung' (2019) 96(1) Steuer und Wirtschaft 64. It is published with kind permission of the Dr. Otto Schmidt Verlag.

5 *South Dakota v Wayfair, Inc* No 17–494 (Supreme Court of the United States 2018).

marketplaces liable for unpaid VAT of marketplace sellers. Chapter 5 examines the 2019 introduced German JSL statute.[6] Its mechanics are analysed in a descriptive manner and compared with the statute in the United Kingdom, which was the first adopter of the mechanism in the e-commerce space. The chapter contributes to the fulfilment of this thesis' goal by connecting theoretical problems to practical implementations. Chapter 6 applies the same methodology and compares the German statute after first experiences in the real world to the Austrian statute. An international comparison alters the understanding of the underlying problems while contributing to the practical application. The Austrian statute has been applicable since the beginning of 2020.[7] Even though the German and Austrian statutes have the same general design, there are technical differences the analysis of which benefits the thesis. These chapters form the footing needed for the analytical approach used in Chapter 7.

Chapter 7 abstracts initially from precise norms and looks at the mechanism of JSL in general to ascertain lawful enforcement.[8] VAT fraud remains a broad and unsolved problem, especially with online sellers who are unwilling to fulfil their VAT duties and simply do not levy VAT. After carving out the global consensus on the theoretical fundamentals of cross-border consumption taxation, enforcement

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6 This chapter is joint work with Robert C Prätzler and has been published by Umsatz-Steuerberater 2018, Robert C Prätzler and Florian S Zawodsky, 'Umsatzsteuerliche Plattformhaftung – Deutschland schließt in Sachen Betrugsbekämpfung zum Vereinigten Königreich auf' (2018) 19(9) Umsatz-Steuerberater 269. It is published with kind permission of the Dr. Otto Schmidt Verlag.

7 This chapter is joint work with Ingird Rattinger and has been published by Steuer- und WirtschaftsKartei 2019, Ingrid Rattinger and Florian S Zawodsky, 'Die umsatzsteuerliche Plattformhaftung in Österreich' (2020) 95(1) Steuer- und WirtschaftsKartei 4. It is published with kind permission of the Linde Verlag Ges.m.b.H.

8 This chapter has been presented at the at the 9th doctoral seminar on international and EU tax law at the University of Groningen in 2019.

is identified as the most pressing issue. Sadly, innovative collection mechanisms are not used at a large scale. In a desperate need for the taxation of established suppliers located outside of national boundaries, governments follow the approach of reterritorialising. This last chapter analyses the German national implementation of JSL in the light of jurisprudence of the Court of Justice of the European Union. A case study on undervalued parcels is executed. As reported, too many sellers purposefully undervalue their parcels to decrease or even fully evade their tax payments. This type of fraud causes negative revenue consequences and also attacks tax morale of other taxpayers. Both the court's standing jurisprudence and the German national implementation are unable to prevent this very kind of fraud.

Chapter 8 finally puts the findings into context and draws conclusions in order to fulfil the overarching goal of the thesis.

2 Value Added Taxation on Multi-Sided Digital Platforms

2.1 Introduction

The digital economy is not new to anyone's agenda.[1] However, an established and accepted definition is missing. The OECD, as the major player in international tax policy, has had a tendency in the past to fuel the fire of this lack of common understanding. Its conclusion that the digital economy is increasingly becoming

[1] The Organisation for Economic Co-operation and Development (OECD) has devoted one of the 15 action points of the Base Erosion and Profit Shifting (BEPS) project entirely to the digital economy: OECD/G20, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report: OECD/G20 Base Erosion and Profit Shifting Project* (2015)(hereinafter: *Action 1 - 2015 Final Report*). Its work continues through the Inclusive Framework on BEPS: OECD/G20, *Inclusive Framework on BEPS: Progress Report July 2016-June 2017* (2017) 16 and OECD/G20, *Inclusive Framework on BEPS: Progress Report July 2017-June 2018* (2018) 11 (hereinafter: *Interim Report 2018*). In 2014 the European Union (EU) nominated an expert group, European Commission, *Commission Expert Group on Taxation of the Digital Economy: Report* (2014) and amongst manifold activity in the area, the European Commission has proposed two directives which are aimed directly at the digital economy. One directive with interim solutions: Proposal for a Council Directive of 21 March 2018 on laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final (European Commission) and one with long-term solutions: Proposal for a Council Directive of 21 March 2018 on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final (European Commission).

the economy itself might be true[2]; however, this conclusion does not help when analysing whether or not the traditional tax system, which stems from the League of Nations in the 1920s, is adequate for this new economy. Additionally, the OECD's new mantra of taxing profits where value creation occurs is imprecise and criticised in the literature.[3] Conflating taxation of the digital economy and its value creation is likely to deteriorate into a debate without substance. Without a precise analysis of inherent problems, any policy is doomed to fail.

Inaccurate public perceptions of the "mysterious" digital economy lead to dangerous political initiatives.[4] In addition, the media and politicians appear to view solid research findings[5] out of their context.[6] Instead of blaming multinationals, the legislators are responsible for creating highly attractive tax jurisdictions. Other reasons, such as specific tax rulings for low direct tax payments, also arguably contribute to a feeling of ill will against such companies.[7] According to media reports, the German Ministry of Finance is discussing internally whether or not "digitals" contribute

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2 OECD/G20, *Action 1 - 2015 Final Report* (n 1) 11, fn 1.

3 Amongst others Wolfgang Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy' (2018) 72(4/5) Bulletin for International Taxation 278 or Marcel Olbert and Christoph Spengel, 'International Taxation in the Digital Economy: Challenge Accepted?' (2017) 9(1) World Tax Journal 3.

4 Bruno Le Maire and others, Political Statement - Joint Initiative on the Taxation of Companies Operating in the Digital Economy (8 September 2017) and CDU, CSU and SPD, *Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land* (2018).

5 Christoph Spengel and others, 'Steuerlicher Digitalisierungsindex 2017: Die steuerliche Standortattraktivität für digitale Geschäftsmodelle im internationalen Vergleich' (2017) 71(25) Der Betrieb 1397.

6 CDU, CSU and SPD (n 4) line 181 naming Google, Apple, Facebook and Amazon.

7 See for instance the Apple state aid case: Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2017) 5605), (European Commission).

their fair share to public goods.[8] Accordingly, the German position on the matter is nebulous. Germany also recently suggested the idea of a global minimum tax.[9] Other states, such as the United Kingdom, are more inclined to take action.[10] Chancellor of the Exchequer Hammond stated that:

> The best way to tax international companies is through international agreements, but the time for talking is coming to an end and the stalling has to stop.[11]

The most recent substantiated milestone in the mammoth task of taxing the digital economy is the OECD's latest interim report.[12] It provides important progress on the way to adequate tax policy, in particular by narrowing the problem in eventual categorisation by reference to value creation concepts.[13] Previously, business models formed the starting point when ascertaining those changes in tax legislation which were of most pressing need.[14] In dealing with the mystery which surrounds the digital

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8 Ruth Berschens, Martin Greive, and Hildebrand J, Zweifel an der Digitalsteuer, 'Handelsblatt' (6 September 2018) 7, Cerstin Gammelin, Konfusion um Digitalsteuer, 'Süddeutsche Zeitung' (6 September 2018) 17; and Manfred Schäfers, Geinitz, and Christian, Scholz bekennt sich trotz interener Kritik zur Digitalsteuer, 'Frankfurter Allgemeine Zeitung' (6 September 2018) 19. Also press release of the conference of German Finance Ministers 2018, Finanzministerkonferenz, Jahreskonferenz 2018 der Finanzministerinnen und Finanzminister der Länder in Goslar: Besteuerung der digitalen Wirtschaft (25 May 2018) 6.

9 Amongst others W Mussler and Manfred Schäfers, Digitalsteuer-Diskussion dreht sich im Kreis, 'Frankfurter Allgemeine Zeitung' (7 November 2018) 16.

10 Giovanni Tria, Italian Minister for Economic Affairs and Finance stated at the Economic and Financial Affairs Council (ECOFIN) meeting (Meeting No 3646) on 6 November 2018 that Italy plans to put its digital service tax into effect if no agreement in the ECOFIN can be reached by the end of the year 2018. Also, at that meeting, Nadia Calviño, Spanish Minister for the Economy and Enterprise, stated that Spain adopted a draft law to implement a digital services tax which is absolutely in line with the European Commission's proposals.

11 Hannah Boland, Hammond's 'digital tax' will damage British tech startups, industry warns, 'The Telegraph Online' (1 October 2018).

12 OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* (2018).

13 OECD/G20, *Interim Report 2018* (n 12) 43.

14 OECD/G20, *Action 1 - 2015 Final Report* (n 1) 51.

economy, the OECD's latest report is a huge step forward.

Although the debate on the digital economy still focuses mostly on direct taxation,[15] value added taxation (VAT) is also included in the debate as far as the fight for fair taxation and the fight for allocation of tax revenue are concerned.[16] The most common way in the world of taxing consumption by individuals is put to a test. A thorough analysis of the consumption process in the digital economy is so far missing from the literature. Insights derived from such an analysis would provide the necessary background from which to draw conclusions. The fact that the digital economy is omnipresent in daily life does not mean that there is any understanding of the changes that have occurred since the pre-internet era. In a rapidly changing economy, it is prone to debate if the way in which people consume is also subject to changes. Accordingly, whether or not the traditional VAT model is appropriate for new modes of consumption in the internet era is a question which calls for an answer.

The structure of this chapter is as follows. Section 2 analyses the OECD's value creation concepts from a VAT perspective and emphasises where consumption taxation issues occur in this categorisation. This section also includes a discussion of what constitutes the cornerstones of business platforms. Section 3 ties the findings to the literature and the debate concerning whether or not "free" services are taxable transactions according to the VAT Directive.[17] This section includes an extension of the literature debate around barter transactions by way of a discussion as to whether

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15 OECD/G20, *Action 1 - 2015 Final Report* (n 1) 13, places the emphasis of VAT challenges on the VAT collection, particularly where private consumers from suppliers abroad acquire goods, services and intangibles.

16 For the latter, the acronym BEPA (Base Erosion and Profit Allocation) may be used. The OECD also recognises this new development, OECD/G20, *Interim Report 2018* (n 12) 18-19.

17 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union).

or not a payment in "free" services takes place through third-party consideration. After the legal conclusion, the question of whether "free" services should be taxed forms the centre of the analysis in section 4. The chapter sets out a detailed analysis of the value chain and provides insights with regard to the expenses associated with "free" services. Here, it is pointed out when a taxation of "free" services is necessary. Section section 5 concludes and answers the question of whether VAT is ready for the digital economy.

2.2 The Digital Economy from a VAT Perspective

2.2.1 Three Value Creation Concepts

While the focus of the digital economy is certainly upon such issues as the artificial avoidance of permanent establishments, transfer pricing methods and other base erosion and profit shifting activities, the treatment of VAT is rather lacklustre. This approach, specifically that VAT is a tax on consumers which has nothing to do with business behaviour, might, however, be too narrow. A wide range of literature on the incidence of taxation has shown that a particular tax burden may not be as evident as might at first appear.[18] VAT provides a textbook example for consideration in the literature concerning the incidence of tax.[19] A thorough understanding of the

[18] As a recent example, see Clemens Fuest, Andreas Peichl, and Sebastian Siegloch, 'Do Higher Corporate Taxes Reduce Wages? Micro Evidence from Germany' (2018) 108(2) The American Economic Review 393, who show that, workers in Germany bear one-half of the total corporate tax burden.

[19] Franz W Wagner and Stefan Weber, 'Wird die Umsatzsteuer überwälzt? Eine empirische Studie der Preispolitik im deutschen Hotelgewerbe' (2016) 68(4) Schmalenbachs Zeitschrift für betriebswirtschaftliche Forschung 401, for a simple study on how a decrease of the VAT rate effects prices for hotel rooms.

consumption process in the digital economy is of pivotal importance in relation to fairness of taxation generally and, obviously, consumption taxes in particular. Then, taxation can be framed into statutes according to the legislative will. If this understanding is missing, imbalances and distortions may occur. These imbalances and distortions might also occur if old statutes are not fit for new economic activity, supposedly such as the activity in the digital economy. On top of this, the role of VAT as a major source of revenue in a state's budget is undeniable.[20] With a partly self-enforcing mechanism and taxation at destination,[21] VAT already incorporates those elements demanded in the public debate. These factors provide clear and sufficient reason to afford VAT the attention it deserves.

A thorough analysis of the OECD's latest interim report on the tax challenges of the digital economy, shows that the categorisation of value creation concepts stands out. As value added tax supposedly taxes value added, a connection to value creation is obvious.[22] Nevertheless, the use of both as synonyms is flawed.[23] Where exactly the differences between them may lie is a challenging theoretical question, albeit outside the scope of this chapter. Nevertheless, maybe it is exactly this impossible task of comparing one defined concept (value added) with one undefined concept (value creation) that helps to define the concept of value creation.

In the cosmos of value creation, value added and consumption, accuracy in wording is indispensable. As the concepts of consumption and value added have more

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20 Schön (n 3) 286.

21 Schön (n 3) 286.

22 For criticism of the term "value creation", Johannes Becker and Joachim Englisch, 'Taxing Where Value is Created: What's "User Involvement" Got to Do With It?' (2019) 47(2) Intertax 161, 162 and fn 16 thereof with further references.

23 Obviously, labour costs are one difference between value added and value creation.

history and theoretical foundation than the concept of value creation the former offer important theoretical insights. Both have been developing in the same way since, at least, the last century. The actual treatment of each in the real world ties consumption to value added. To our knowledge, no better way of measuring and taxing consumption has been established so far. Further, and apparently without much need for legal justification and fostered by a lack of alternatives, monetary consideration generally leads to value added for supplied goods or services. If actually no adding of value takes place, that is, through a very low price, the input deduction system automatically adapts the VAT burden. In contrast, if no monetary consideration flows – or is easily observed – the question arises whether value added has occurred. On theoretical grounds, consumption can deviate from value added. It is evident that, if two different parties both buy a copy of the same book, the value of consumption could be the same. Even if this consumption could only be grasped in a theoretical way and was not capable of expression in monetary terms. However, the opposite could be argued by stating that a consumer who has paid less than the other consumer has consumed less. Here, the discrepancies are clear. Current legislation accepts the fact that a consumer can make a good deal by buying cheaper than another consumer.[24] In making such a good deal, the consumer also saves VAT. In the digital economy, it appears that there are new possibilities and opportunities to make good deals. internet giants offer more "free" services than ever before. These might constitute good deals for consumers. This chapter elaborates on the question of whether old principles lead to sound results if applied to the digital economy.

[24] Ursula Slapio, 'Anwendungsbereich der Mindestbemessungsgrundlage (§ 10 Abs. 5 i.V.m. Abs. 4 UStG)' (2012) 63(11) Umsatzsteuer-Rundschau 429, concerning the example of a picture and a mistaken assumption with regard to the degree of familiarity of the painter.

The Inclusive Framework on BEPS – the OECD's subgroup dealing with the digital economy – differentiates between three concepts of value creation.[25] This categorisation has its roots in the 1980s and since the end of the 1990s Stabell and Fjeldstad stand out as the main advocates of this categorisation.[26] The three concepts are labelled value chain, value network and value shop.

2.2.1.1 Value chain and value shop

The value chain is rather traditional and used in business models where value creation occurs in a linear production process, that is, in a vertically integrated manufacturing business.[27] Certainly not without problems, this value creation logic does require less attention. Even though the real world adapts to the new possibilities of creating value, the logic remains the same. Consumers and taxable persons do not necessarily find themselves in a different setting. In addition, the value shop, described as a value creation through the marshalling of resources, that is, hardware and software as well as specialised knowledge to resolve consumer problems and demands, is not an overwhelmingly new concept.[28] Neither has its frequency particularly increased.

2.2.1.2 Value network

In contrast to the value chain and the value shop stands the value network. While this concept is also not brand new,[29] it epitomises the change from a mass production

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25 OECD/G20, *Interim Report 2018* (n 12) 35.

26 Charles B Stabell and Øystein D Fjeldstad, 'Configuring value for competitive advantage: On chains, shops, and networks' (1998) 19(5) Strategic Management Journal 413.

27 OECD/G20, *Interim Report 2018* (n 12) 35.

28 OECD/G20, *Interim Report 2018* (n 12) 36.

29 Becker and Englisch (n 22) 167.

of goods to a mass production of services.[30] This appraisal by the OECD calls initially for an analysis of whether or not taxation through VAT is fit for this change in the direction of services. Even without any further understanding of the value network, the taxation of services in the service decade is worth thinking about. In comparison to goods, services are of a fundamentally different nature and suppliers can perform services without any (taxable) inputs.[31] While this has always been the case, the possibilities for providing a service have increased tremendously with the use of the internet. This is not just because of the small marginal costs, which have increased the potential for many more services than before,[32] but also, and more fundamentally, because of the use of immaterial rights. New technologies open up previously unthinkable possibilities to exploit rights, such as the right to watch someone's online behaviour. The question whether any of these services falls within the definition of the consumption that VAT is supposed to capture, is up for debate. While bricks-and-mortar stores may have tracked the behaviour of their consumers for years, such activities are probably too cost intensive and not targeted enough.[33] The internet can truly transform such rights in to valuable assets, thereby completely changing the picture.

The value network relies on a mediating technology in order to link users (taxable persons and final consumers) of the platform who are interested in engaging in a

30 OECD/G20, *Interim Report 2018* (n 12) 36.

31 de Michelis di Slonghello, Isabella and Luca Bolognini, An introduction to the Right to Monetize (RTM) (Istituto ItaliaNoper la Privacy e la Valorizzazione dei Data ed, 2018) 4, take the view, that all credit should be apportioned to the users and they create all value.

32 Joachim Englisch, ‘‚Kostenlose‘ Online-Dienstleistungen: Tauschähnlicher Umsatz?’ (2017) 66(21-22) Umsatzsteuer-Rundschau 875.

33 Becker and Englisch (n 22) 162, mention the change from merely auxiliary activities to core elements of such activities in business models.

transaction.[34] The final transactions may be transactions with tangible goods, often described as e-commerce, or further services. These final transactions need not take place directly on platforms. This chapter focuses on these platforms in particular, which earn their profits through intermediation in a broad way and do not focus on the intermediation of one single service or good.

Two further characteristics need also to be mentioned. Platforms making use of value network value creation logic benefit from indirect network externalities, meaning that both user groups are necessary and increase the value/value creation of the platform.[35] Further, many platforms nowadays make use of non-neutral pricing models. This feature allows them to charge users less than a cost-compensating price (or more than). Framed another way, one user group can subsidise the use of another user group. This also justifies the need to focus on the value network more closely and to leave the value chain and the value shop value creation concept to further research. Both of the last-mentioned concepts work mainly with two transacting partners. The value network needs at least three players.

This chapter assumes that platforms use the value creation concept of a value network. The platforms' value creation concept is transferrable into a heavily used business model.[36] While some platforms directly facilitate a certain service, for example, Airbnb facilitating housing services through its platform or Uber facilitating transportation services, other platforms work as huge online billboards. Search engines, for example, do not foster one single service or one final good. A link between their activity and transactions might be observable although this is not necessarily the case.

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34 OECD/G20, *Interim Report 2018* (n 12) 38.

35 Becker and Englisch (n 22) 166.

36 See, for example, the social networks.

As far as products sold in bricks-and-mortar stores are concerned, search engines do not receive a provision for their services. This makes their real-world impact indirect and interesting for the purposes of theoretical research.

2.2.2 The Business Model of Service Platforms

Service platforms may be further divided into: 1. those platforms directly earning a commission if a transaction occurs on their platform; and 2. platforms earning their profits through general advertising, as a social network presumably does. The latter category is the focus of this chapter. How the pricing model between the platform and the advertising company works exactly, is of minor importance.

A rudimentary explanation of the actual business of these service-providing platforms is needed before a thorough VAT analysis can be made, and conclusions drawn. So far, it was has pointed out that three players take part in the platform business model. These three players are the platform itself, a company advertising and desiring to sell a final product, and a final consumer. In this chapter, it is hypothesised that both the platform and the company advertising are taxable persons and that the final consumer is not a taxable person. Additionally, it is assumed that both taxable persons are profit-maximising firms for the purposes of further analysis. Both the consumer and the company advertising are users of the platform.

Starting with the evident points, the company advertising wants to sell its product to the final consumer. In contrast, the platform has a quite uncommon product. The platform cannot sell its product to anyone in the same way as a can of soda or a haircut can be sold. The platform sells access and advertisement opportunities to its users (both consumers and companies) – in VAT terms, plain and simple – services. Having two possible payers opens up the opportunity to make use of the

above-mentioned non-neutral pricing strategy characteristic.

In comparing the platform and the company advertising (with regard to their profit possibilities), it is evident that the company needs to charge a certain minimum price for its product (assuming for the sake of simplicity that only one product is in its portfolio). Even though a non-profit maximising price may be possible temporarily, in the long term, the prices charged need to be higher than zero and above a break-even threshold. Otherwise, the company would be unable to avoid insolvency in the future. By contracting with only one party, no other party is able to subsidise the final consumer. All profits necessarily need to come from one side. In contrast, the platform does not need to charge a minimum price from one party. In order to avoid insolvency, other parties, such as the company advertising, pay a higher price, thereby subsidising the final consumer side. To avoid insolvency, the break-even threshold needs to be reached by combining all payments received, no matter where they come from. This model has become a quasi-gold standard on the internet. Final consumers can now invariably enjoy services on the internet free of any monetary charge. The clearest examples are social networks and search engines.

The fact that no monetary payment takes place has led to the common layperson's expression that these services are paid for by final users with their data. Instead of paying with money, final consumers supposedly pay with their data/rights.[37] This situation leads to legal ambiguity in many fields of the law.[38] The "paying-with-data-

[37] Nevada Melan and Sebastian Pfeiffer, 'Bezahlen mit Rechten, nicht mit Daten: Weitere offene Fragen zur Umsatzsteuerpflicht „kostenloser" Internetdienste und Smartphone-Apps' (2017) 55 Deutsches Steuerrecht 1072, 1073, point out that the matter in dispute is not the data but the right to utilise data.

[38] David R Dietsch, 'Umsatzsteuerpflicht von kostenlosen sozialen Netzwerken' (2017) 5(21) Mehrwertsteuerrecht 868, 874, argues that internet companies deliberately use transactions, which are subject to interpretation.

idea" has been brought into the VAT world and has accordingly been discussed. At first glance, when it is considered that the fundamental principle of VAT is that it is a general tax on consumption which is exactly proportional to the price of the goods and services,[39] a taxation of data/rights could seem appropriate. On second thought, when combined with the above-mentioned, it is questionable if value is added through the electronic service provided by the platform to the final consumer. Referring to the above-mentioned book example, it is debatable whether the consumer of "free" services simply makes a good deal, as is the case with the cheap book. The next section explores these thoughts further.

2.3 Taxation of "Free" Services

Commonly referred to as "free" services, the practice of a platform not charging a consumer monetary consideration by using a non-neutral pricing strategy, has led to extensive discussion amongst VAT experts. According to the VAT Directive it is questionable whether the use of a "free" service is a taxable transaction. This section reviews the debate on the question of whether or not "free" services constitute barter transactions. Additionally, the question of whether third-party consideration is relevant is set out.

[39] Case 475/03 *Banca popolare di Cremona Soc coop arl v Agenzia Entrate Ufficio Cremona* [2006] ECR I–9373 at [21].

2.3.1 VAT Directive

The literature debate started with a civil court judgment by a German court.[40] The court ruled that consent to use data given by final consumers constitutes a contract to use the electronic services offered and that a barter relationship between platform and consumer was established.[41] A debate in the tax world began in 2015 and continues. The German-speaking VAT literature discusses in great detail whether or not such services are taxable transactions according to the VAT Directive. No clear outcome to the discussion is evident. The VAT Directive and the corresponding Court of Justice of the European Union (CJEU) jurisprudence do not give clear answers.[42] Unfortunately, the CJEU did not have to deal with the question. As the

40 *Urteil zur Wirksamkeit der Klauseln in Google-Nutzungsbedingungen und Datenschutzerklärung* 15 O 402/12 vom 19 November 2013 (Landgericht Berlin).

41 Peter Bräutigam, 'Das Nutzungsverhältnis bei sozialen Netzwerken Zivilrechtlicher Austausch von IT-Leistung gegen personenbezogene Daten' (2012) 15(10) MultiMedia und Recht 635.

42 Advocates who see the "free" services as taxable transactions are: Nevada Melan and Bertram Wecke, 'Umsatzsteuerpflicht von „kostenlosen" Internetdiensten und Smartphone-Apps' (2015) 53(41) Deutsches Steuerrecht 2267 and Nevada Melan and Bertram Wecke, 'Einzelfragen der Umsatzsteuerpflicht kostenloser Internetdienste und Smartphone-Apps' (2015) 43(51-52) Deutsches Steuerrecht 2811; Sebastian Pfeiffer, 'VAT on "Free" Electronic Services?' (2016) 27(3) International VAT Monitor 158; and Tina Ehrke-Rabel and Sebastian Pfeiffer, 'Umsatzsteuerbarer Leistungsaustausch durch „entgeltlose" digitale Dienstleistungen: Gratis-Dienste und Apps können der Umsatzsteuer unterliegen!' (2017) 92(20) Steuer- und WirtschaftsKartei 532. Advocates against this view are: Hans-Martin Grambeck, 'Auf elektronischem Wege erbrachte Dienstleistungen: Eine neue Großbaustelle im Umsatzsteuerrecht' (2016) 70(52) NWB - Steuer- und Wirtschaftsrecht 3931; Nicole Looks and Benjamin Bergau, 'Tauschähnlicher Umsatz mit Nutzerdaten – Kein Stück vom Kuchen' (2016) 4(21) Mehrwertsteuerrecht 864; Dietmar Aigner and others, 'Digitale Leistungen ohne Geldzahlung im Internet: Unterliegen Gratis-Dienste und Apps der Umsatzsteuer?' (2017) 92(6) Steuer- und WirtschaftsKartei 349 and Englisch, '‚Kostenlose' Online-Dienstleistungen: Tauschähnlicher Umsatz?' (n 32). Open: Rolf-R Radeisen, 'Zum Vorliegen von „auf elektronischem Weg erbrachten sonstigen Leistungen" beim Bereitstellen einer Datenbank („Suchmaschine") im Internet' (2016) 4(21) Mehrwertsteuerrecht 875; and Patric Schwarz, 'Werden Privatpersonen durch das Dulden einer Datenverwertung im digitalen Sektor wirtschaftlich tätig?' (2017) 66(20) Umsatzsteuer-Rundschau 782.

CJEU does not answer hypothetical questions,[43] a national tax authority would have to start taxing "free" services.

Briefly, the question posed is: are "free" services taxable transactions according to Article 2(1)(c) VAT Directive? Currently, no tax authority has shown clear signs that they have any intention of taxing these services.[44] Apart from this legal classification, the true interest in answering this question is evident. Notwithstanding the true intellectual attraction of this question there are the enormous amounts of revenue which stand behind the answer to it.[45] It might be for this very reason that the debate – so far – has focused on the question of whether a barter transaction has taken place. If a barter transaction were to be found to have taken place, platforms would face VAT payments – maybe for the past, but certainly for the future. Interestingly, the debate has only scratched the surface of third-party consideration, which would lead to the result that the initial VAT burden would fall on companies advertising on platforms. This result would not satisfy the implicit demands made by the media to make the internet giants pay.

2.3.1.1 Barter Transactions

The VAT Directive does not provide much help in trying to answer the question of whether or not a barter transaction has taken place. Apart from the requirement "for consideration", the other requirements of a taxable transaction are clearly met. Hence,

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43 Joined Cases 131/13, 163/13 and 164/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' MariaNoPreviti vof and Turbucom BV and Turbucom Mobile Phone's BV v Staatssecretaris van Financiën* ECLI:EU:C:2014:2455 at [21].

44 Joachim Englisch, '§ 17 Umsatzsteuer' in Klaus Tipke and Joachim Lang (eds), *Steuerrecht* (Otto Schmidt KG 2018) and Holger Stadie, 'Tauschvorgänge und Umsatzsteuer' (2009) 58(21) Umsatzsteuer-Rundschau 745.

45 Looks and Bergau (n 42).

if the consent given to the platform by the final consumers does form consideration then a barter transaction has taken place.

The definition of consideration in particular in Article 73 VAT Directive might be said not to assist in answering the question. It states that

> the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.[46]

While this has proven to be a more or less sound basis for monetary consideration, the extension of its application to non-monetary data or the right to utilise data is arguably asking too much.[47]

As no money flows between platforms and final consumers, monetary consideration is outside the scope of the VAT Directive. However, consideration could be established in kind, such as in a barter transaction. Even without direct regulations in the VAT Directive,[48] the CJEU has acknowledged in several judgments[49] that consideration

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46 Art 73 VAT Directive.

47 Several Articles in the VAT Directive use wording which suggests an understanding of consideration in only monetary terms: VAT Directive, art 1(2) ("price"), art 66(b) ("payment") and art 64(1) ("payments"). Stadie (n 44) 747, also sees this question as having not yet been directly asked of the CJEU. Australia's goods and services tax law contains sections which at least in part state what consideration includes: A New Tax System (Goods and Services Tax) 1999, No 55 (Commonwealth of Australia) sec 9-15, and sec 9-17, titled "Certain payments and other things not consideration". UK law explicitly differentiates between consideration in money and consideration not consisting of money: Value Added Tax Act 1994, 1993 c 23 (United Kingdom) sec 19(3) and (4).

48 In contrast, since 1921 German VAT law has explicitly set out rules for barter transactions: §3(12) and §10(2) sent 2 Umsatzsteuergesetz, BGBl. I 2005, 386 (Bundesrepublik Deutschland); Stadie (n 44) 747, fn 21.

49 Case 154/80 *Staatssecretaris van Financiën v Association coopérative "Coöperatieve Aardappelenbewaarplaats GA"* [1981] ECR I–445 at [10] stating that consideration "is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange"; Case 230/87 *Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise* [1988] ECR I–6335 at [18] stating that "the taxable amount is the sum of the monetary consideration and of the value

is not limited to monetary terms. On the other hand, there are arguments against this jurisprudence, which view barter transactions as outside the scope of the VAT Directive.[50] Nevertheless, if the question is refined to read: "are 'free' services barter transactions?", it becomes evident that, even though it is accepted that consideration in kind is within the scope of the VAT Directive, a "free" service does not necessarily need to be considered as a barter transaction. If barter transactions are not within the scope of the VAT Directive, a taxation of "free" services is evidently impossible.

Applying CJEU jurisprudence of in-kind transactions to final consumers' consent to utilise data is not a promising avenue. The task of linking the decided cases to the present question on the right to utilise data is not achievable without heavy speculation. Arguments exist on both sides. The fact that the amount of consideration is too uncertain could hinder taxation.[51] This might not fulfil the CJEU's requirement

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of the service provided by the retailer which consists in applying the inducement to procure the services of another person or in rewarding that person for those services"; Case 33/93 *Empire Stores Ltd v Commissioners of Customs and Excise* [1994] ECR I–2329 at [12] stating that consideration "may consist in a provision of services"; Case 330/95 *Goldsmiths (Jewellers) Ltd v Commissioners of Customs & Excise* [1997] ECR I–3801 at [25] stating that "[a] distinction of the kind made by the legislation at issue discourages traders from entering into barter contracts, although such contracts are not, in financial or commercial terms, in any way different from transactions in which the consideration is expressed in money"; Case 380/99 *Bertelsmann AG v Finanzamt Wiedenbrück* [2001] ECR I–5163 at [17] stating that "according to settled case law, the consideration for a supply of goods may consist of a supply of services, and so constitute the taxable amount"; Case 549/11 *Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — grad Burgas pri Tsentralnoupravlenie na Natsionalnata agentsia za prihodite v Orfey Balgaria EOOD* ECLI:EU:C:2012:832 at [35] reiterating the *Goldsmiths* (n 49) decision; Case 283/12 *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralnoupravlenie na Natsionalna agentsia za prihodite* ECLI:EU:C:2013:599 at [38] reiterating the *Bertelsmann* (n 49) decision.

50 Stadie (n 44) 475, as an advocate of such an understanding of the law; stating that the taxation of barter transactions is against the legislative goals of (German) VAT. Also David Hummel, 'Entgelt als Bemessungsgrundlage im Umsatzsteuerrecht' (2015) 64(6) Umsatzsteuer-Rundschau 213. Walter Tiedtke, 'Toilettengroschen, werthaltige Abfälle, tauschähnliche Umsätze und die Telefonseelsorge' (2009) 58(19) Umsatzsteuer-Rundschau 447, states that barter transactions should only be peripherally considered.

51 Case 16/93 *R J Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] ECR I–743; Case 16/00 *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* [2001] ECR I–6663.

of a direct link.[52] However, certainty is not a defined concept. The question boils down to a weighing up of arguments, which can only be done by the CJEU. No one from outside the CJEU would have the competence to decide on the this subject, no matter how convincing the arguments. In accordance with Englisch, such a decision should not be left in the hands of courts, but instead parliaments should act to decide on the matter.[53]

2.3.1.2 Third-Party Consideration

Another strand of CJEU jurisprudence may give an answer to the question of taxability of "free" services. As will be shown below, such "free" services might not be free at all, but instead might be paid for by a third party.[54] This would also fulfil the requirement of consideration.

While the legal literature has focused more on barter transactions, an in depth discussion of third-party consideration has not yet taken place.[55] Even though many authors recognise that nothing comes for free,[56] the relevant research adheres to the fact that consumers must pay for something directly in order for Friedman's theory of "there is no such thing as a free lunch" to hold.[57] Accordingly, authors put much

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52 Pfeiffer (n 42) fn 9.

53 Englisch, '‚Kostenlose' Online-Dienstleistungen: Tauschähnlicher Umsatz?' (n 32) 885.

54 Case 18/92 *Chaussures Bally SA v Belgian State, Minister for Finance* [1993] ECR I–2871, as an early third-party consideration judgment.

55 Englisch, '‚Kostenlose' Online-Dienstleistungen: Tauschähnlicher Umsatz?' (n 32) 880.

56 Hans-Martin Grambeck, 'Keine Umsatzsteuerpflicht bei kostenlosen Internetdiensten und Smartphone- Apps: Erwiderung auf den Beitrag von Melan/Wecke DStR 2015, 2267' (2016) 54(35) Deutsches Steuerrecht 2026 or Melan and Wecke, 'Einzelfragen der Umsatzsteuerpflicht kostenloser Internetdienste und Smartphone-Apps' (n 42).

57 Likely influenced by the CJEU's requirement of a direct link: *Aardappelenbewaarplaats* (n 49) at [12].

effort into the search for consideration paid by the consumer directly to the platform. Other stages are often only touched upon in side notes. Descriptions of payments for "free" services during other stages do not take place. Whether such payments fulfil the CJEU's requirement of a direct link,[58] is certainly up for debate. However, in many cases, the CJEU has determined that economic reality predominates over legal contracts.[59] Further, the legal framework might be too narrow.

Running parallel to the strand of CJEU jurisprudence regarding barter transactions is a small strand of jurisprudence dealing with third-party consideration. In particular, the case of *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd and Baxi Group Ltd*[60] offers interesting insights and connections to "free" services. This case dealt with a business promotion point-based reward scheme whereby consumers collected points, which could be redeemed for goods and services from a redeemer without an (extra) payment by the consumers. Obviously, in such a case, the consumers pay no monetary consideration to the redeemer company. In *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise*[61] it was held that as an individual consumer who collects and an individual consumer who does not collect points each pay the same price to retailers for their bought goods and services, no increased price can be assumed without clear evidence. The fundamentals of the *Loyalty Management and Baxi Group* judgment have wide implications. It is not only that such schemes are used more and more in EU countries

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58 Pfeiffer (n 42) fn 9.

59 See for example, Case 185/01 *Auto Lease Holland BV v Bundesamt für Finanzen* [2003] ECR I–73 at [26].

60 Joined Cases 53/09, 55/09 ECLI:EU:C:2009:144.

61 Case 48/97 *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise* [1999] ECR I–2323 at [31].

to tie consumers to certain stores, but also that the CJEU's understanding of "free" in this sense is demonstrated.

In a nutshell, three players exist: a retailer, a redeemer and a consumer.[62] The consumer buys products from the retailer and in addition receives reward points, which can be redeemed at the redeemer for perceived "free" gifts. The retailer pays a fee to the redeemer of the "gift" which is, from a VAT perspective, the pivotal issue in the scheme. The next question is whether this fee is paid for the services provided by the redeemer, inclusive of the service to supply goods to consumers, or if this fee is in fact third-party consideration with regard to the transaction between the consumer and the redeemer. In other words: did the retailer pay for the consumer's "gift"? Note that this question could also be asked: did the consumer pay – in any other way – for the "gifts"? If so, third-party consideration would be redundant.

In its judgment, the CJEU started with a reiteration of the principle of VAT as a "general tax on consumption exactly proportional to the price of the goods and services".[63] In addition, before dealing with the case itself, the court recalled that consideration of economic realities is a fundamental criterion for the application of the common system of VAT. It cited the case *Auto Lease Holland BV v Bundesamt für Finanzen*[64] where the court ruled that fuel bought by a lessee of a vehicle under a fuel financing agreement with the lessor is in fact a supply to the lessee. Following on from this, the court in *Loyalty Management and Baxi Group* emphasised that – despite the legal arrangements – the economic reality was that loyalty reward schemes were

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62 Joined Cases 53/09, 55/09 *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd and Baxi Group Ltd* ECLI:EU:C:2009:144 at [19]-[27].

63 *Loyalty Management and Baxi Group* (n 62) at [38].

64 Case 185/01 [2003] ECR I–73.

supplied by the redeemers to the consumers.[65] Further, the transaction of supplying loyalty rewards is subject to VAT. Again, the court emphasised economic substance as being more important than legal ownership. The court established whether those transactions had been carried out for consideration. In order to see this criterion as fulfilled, a direct link between the goods or services provided and the consideration received is necessary.[66] Whether or not this direct link is established is without question pivotal, both in *Loyalty Management and Baxi Group* and in relation to the question of "free" services.

In assessing the criterion of a direct link, the court recognised that the amount paid to the redeemer does not differ from the amount a customer would have to pay if they wanted to buy the goods or services without any loyalty points. Hence, the CJEU pointed out that no reduced price is paid to the redeemer.[67] Further, the court held that the sale of goods or services giving rise to reward points, on the one hand, and the supply of goods or services in exchange for those points, on the other hand, are two separate transactions.[68] In the end, the court followed the Commission's view that even though a direct link needs to be established between the supply of the good or service and consideration, the consideration does not necessarily need to come from the party receiving the good or service.[69] Without much more justification, the CJEU held that the rewards were not "free" as could have been assumed. Summarising, a different party pays the consideration; the actual receiver of the supply does not

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65 *Loyalty Management and Baxi Group* (n 62) at [42].

66 Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] ECR I–1443 at [12].

67 *Kuwait Petroleum* (n 61).

68 *Loyalty Management and Baxi Group* (n 62) at [54]-[55].

69 *Loyalty Management and Baxi Group* (n 62) at [56].

pay any consideration. The next section will focus solely on the businesses from an economic perspective and without taking the CJEU's requirements in to account.

2.3.2 Legal Conclusion

Arriving at a legal conclusion to the question of whether "free" services are taxable according to the VAT Directive is a challenging task. In past case law dealing with in-kind consideration, the CJEU always had the possibility of pricing the questionable "right", which could be the consideration in a "free" service supply, by reference to the difference between a retail price and a lower price actually paid.[70] In "free" services, neither a lower price paid,[71] nor a retail price for most kinds of services is easily observable. As the respective costs that could help in finding a retail price can be dealt with in several ways, a fixed retail price can be highly debatable and depends upon the intentions of those who fix such a price. Therefore a "difference-method" of pricing a right is no longer suitable. This unsuitability might just be the trigger needed for the CJEU to conclude that a barter transaction is not established, or in other words, that a direct link is missing.

A similar judgment presses for third-party consideration. As someone has to pay for the "free" services, a positive premature conclusion appears easy. This would lead to the judgment that "free" services are paid for with third-party consideration by the company advertising. However, it is questionable whether a direct link between a "free" service and some undefined consideration at the other "end" of the platform is sufficient for the CJEU.[72] It would simply be factored into the price of the

[70] *Naturally Yours Cosmetics* (n 49).

[71] Mathematically, obviously, the price lies at zero.

[72] Whether the legal relationship requested by *Tolsma v Inspecteur der Omzetbelasting* (n 51) at [14]

advertisement and would be very hard to observe, if it were to be observable at all. As stated, no retail price for the "free" service exists and the third-party consideration would not be expressed in monetary terms throughout the chain of all transactions. Whether this is a necessary requirement is up for debate.[73] Further, it could prevent the affirmation of third-party consideration that the legal contract of the good or service occurs after the usage of the platform – in the future.

Such a judgment would work as a precedent for every transaction performed for consideration below "normal" commercial values. It would close the opportunity for consumers to make a good deal. Returning to the above-mentioned book example, any supply under the "true" value would be subject to debate. In any transaction under the "true" value, consideration might not be simply the (low) monetary consideration actually paid, but also any form of artificial right or obligation, such as the right or obligation to walk through the bookshop. All justified by the "nothing-comes-for-free" argument. If this concept is strictly applied, results suggest odd outcomes. VAT would not be neutral in the sense that a good deal was influenced by VAT. Even if a good deal was made, VAT on the consideration of the "true" value would be due, thereby reducing the amounts saved by the consumer.[74] Further, accepting third-party consideration would lead to an odd result concerning the tax burden. It would place the right to deduct input VAT, if the other requirements are met,

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and *Serebryannay vek* (n 49) at [37] is established is arguable and goes back to the categorisation of the transaction between consumer and platform.

73 *Aardappelenbewaarplaats* (n 49) at [13]. Note that the CJEU requires that the consideration must be capable of being expressed in money, not that it actually is expressed in money.

74 A similar conclusion can be drawn from the jurisprudence concerning subsidies, whereby a subsidy (for consumers) leads to VAT and all other subsidies (that is, to taxable persons) do not lead to VAT payments: Case 84/00 *Office des produits wallons ASBL v Belgian State* [2001] ECR I–9115 at [18].

in the hands of the consumers of the "free" service. Economically, in most cases, a forfeiture of the right would occur and the initial burden would be placed on the company advertising.

The rest of this chapter sheds light on the question of whether – economically – a case of third-party consideration is appropriate in the use of the "free" services; or, in other words: whether someone already pays for the "free" services. A description of the whole value chain in the platform model is required. Legal constraints are set aside. A different perspective allows for a different approach to tackle the problem. Especially, the fact that the third-party consideration can be valued differently in different scenarios is set aside.[75] In the analysis set out below, the absolute amount of the third-party consideration does not play a role. It is simply treated as a variable in an equation. This circumvents the critical issue of how much the "free" service is worth; for the purposes of this further analysis the amount of consideration provided for the "free" service is disregarded.

The following analysis is not intended to be an addition to the legal assessment but more a single standing economic analysis. This follows the courts' jurisprudence that economically comparable situations should be treated in the same way.[76] If the legal conclusion deviates too much from the economic conclusion, new rules or new jurisprudence are necessary.

2.4 Necessity of Value Added Tax revenue in "Free" Services

[75] The famous question: what is the value of our data?

[76] *Goldsmiths* (n 49) at [23].

2.4.1 Consideration in Value Networks

In focusing on consideration, differences between traditional value chains and value networks become evident. In a traditional value chain, consideration consists only of one part, labelled hereinafter as C_1. This part shall be defined as everything the supplier expects in exchange for their supply. Again, this part is a variable and not a fixed amount; its value in monetary terms is irrelevant. C_1 should, however, cover costs and expenses and include a chosen profit; the platform – at least to some degree – arbitrarily picks this amount. This consideration usually flows between the supplier and the buyer. In a value network, theoretically, the monetary consideration paid by the company advertising to the platform consists of two parts. First, the consideration for the advertisement service C_1 and, secondly, the consideration for the "free" electronic service between the final consumer and the platform, labelled as C_2.[77] Both parts flow between the platform and the company advertising, and final consumers do not pay consideration directly to the platform. C_2 shall be defined in the very same way as C_1.

This shows that there is economically no need for the final consumer to pay for the "free" service with data or rights. The company advertising pays C_2. Again, the pricing model is irrelevant and it makes no difference whether the company transfers many micro payments or pays all the consideration for the platform's service in one payment. Irrespective of the assessment whether the legal requirements – under current jurisprudence – categorise C_2 as third-party consideration,[78] the economic

[77] For the sake of simplicity, C_1 and C_2 reflect the respective sums of all consideration of all transactions between the respective persons. This helps in so far as the number of transactions between different players does not necessarily need to be the same number.

[78] Case 149/01 *Commissioners of Customs & Excise v First Choice Holidays plc* ECLI:EU:C:2003:358, *Loyalty Management and Baxi Group* (n 62). Accepting that third-party consideration would

impact of C_2 is initially borne by the company advertising as a normal cost of doing business. To this end, an additional value added taxation of free services is not necessary.

Such a setting has tremendous benefits, as it solves the valuation problem of rights.[79] Even without knowing the "true" value of C_2, a taxation of this consideration takes place. In an open formulation, the market prices the debatable consideration.[80] As C_2 is unobservable, it is not possible to judge whether this pricing is appropriate. Nevertheless, it is generally accepted.

2.4.2 Transaction between Platform and Company Advertising

As C_2 is consideration between two taxable persons, no VAT burden becomes due from this transaction. The paying company will claim an input deduction in order to reach neutrality. Therefore, simply stating that the company advertising pays C_2 is not reflecting the full economic picture. From a government's perspective, less VAT is collected than in a situation where the final consumer would have paid C_2.

However, the company advertising bears advertising expenses, equaling $C_1 + C_2$. The platform's revenues become the company advertising's expenses.[81] This company, as a profit maximising company, then desires to shift these expenses to its

result in the company advertising being unable to deduct input VAT of C_2. Additionally, the total consideration ($C_1 + C_2$) would have to be split and valued. Both are issues which – on their own – could prevent one from concluding that a third-party consideration exists.

79 Dietsch (n 38) 871–874, with approaches on how to come up with a value for the debatable consideration.

80 Ajay Gupta, 'Taxing the New Gig Economy' (2018) 72(4a) Bulletin for International Taxation 1, with an example of how the market prices supplies.

81 Joseph J Spengler, 'Vertical Integration and Antitrust Policy' (1950) 58(4) Journal of Political Economy 347, who finds that the final consumer price is higher if firms are not vertically integrated.

consumers. The question whether this shift is possible is decisive for the assessment of the question whether "free" services should be taxable transactions.

So far, this is not (yet) a genuine question of tax incidence, as no VAT burden has occurred so far. It is simply a question of the shift of expenses. If the shift takes place, C_2 eventually leads to VAT payments and no necessity to (additionally) tax "free" services is evident. If the shift does not take place and the company advertising cannot collect VAT from C_2 during their future supply, additional taxation is appropriate.

2.4.3 Transaction between Taxable Person and Final Consumer

2.4.3.1 Preliminary Thoughts

As a first thought, companies should only undertake advertising activity if this activity nets profits. If the company *ex ante* expects losses the commercial activity should not be undertaken. This means that the expected profits through the advertising activity must be bigger than the total sum of C_1 and C_2. If this is the case, the company advertising is able to shift the full consideration to the final consumer in the price of the good or service. Evidently, shifting C_1 and C_2 to the final consumers leads to final VAT payments and true VAT burdens. Additionally, the consideration in the final transaction consists, for a profit-maximising company, of a third part (C_3), because not only a shift of expenses takes place: by definition, the profit-maximising company also desires to make a profit.

Hence, if the shifting works fully, there is no apparent need to tax the "free" services. The question of whether VAT is supposed to tax consumption or consumption expenditure in that case eventually leads to the same answer. Discrepancies are only

temporary.[82] As soon as the sale of the final product to the consumer (who also used the free service) takes place, the consumer's consumption of the "free" service is translated into their expenditure.

This simplification has several caveats. It implicitly assumes that the final consumer both consumes the electronic service and the final product sold by the company advertising. This is not necessarily the case. There might be both consumers of the "free" electronic service who do not buy the advertised final product and buyers of the final product who do not make use of the "free" electronic service. In addition to the time discrepancies, further personal discrepancies deserve consideration. In other words, one consumer has consumption expenditure for another consumer's consumption.

Concerning "fair" prices, this situation might not be desirable. The total sum of C_1 and C_2 is shifted into the total sum of consideration of final products sold. Theoretically, non-users of the "free" services subsidise the use of the "free" services by also paying a share of C_2. They obviously also pay C_1; however, these are straight advertisement expenses which occur in every advertisement activity and are therefore outside the scope of this chapter. No one has complained, at least so far, about the fact that not all consumers of a brand see all advertisements of that brand but the consumers do still all pay – albeit minimally – through their purchase for every advertisement. Even though this might be regarded as unfair pricing, from a VAT perspective this is not a pivotal issue. In a theoretical setting, it would be "fairer" if the "free" services were paid directly; however, the company is free to set its prices as it sees fit. Theoretically, consumers are also in the same position. They can choose

[82] Pfeiffer (n 42) 8.

to buy products which consist of a "purer" form of consideration instead of products which subsidise other products.

Another caveat might be that the advertising company is not able to shift the burden of C_2 to its consumers. As the impacts of advertisements are very difficult to measure, a sophisticated impact assessment of the advertising activity is even more difficult to obtain. Even with new technology, it is difficult to measure whether an advertisement influences a consumer of a "free" service to buy a certain product in three weeks time in a bricks-and-mortar store. This impossibility of measuring the effects of advertisements precisely is seen as a reason to describe the situation, where advertising is not revenue maximising for the company advertising. Such a situation might occur when a business does not follow up on whether or not advertisement activities are reflected in sales or if businesses have no other option than to advertise on search engines or social networks which have a monopoly on the market. For example, internet start-ups might be *de facto* forced to be present on the established platforms. For them, advertising activity might not be revenue maximising and they willingly accept the burden of C_2. Even without the certainty of profit maximisation, companies use platforms as their main advertisement channel in a broad fashion. The next section analyses the literature concerning the effects of advertisements on price and output levels.[83]

[83] John F Due, 'Toward a General Theory of Sales Tax Incidence' (1953) 67(2) Quarterly Journal of Economics 253.

2.4.4 The Shifting of Advertisement Costs

2.4.4.1 Price

Price appears to be one way of shifting C_2 to final consumers. It is not possible to ascertain, on pure theoretical grounds, how final consumer prices react to advertising costs.[84] Arguments and models in favour of both decreasing and increasing prices exist. Prices might increase because of the persuasive aspects and the product differentiation effects of advertising.[85] Prices might also decrease because of the provision of information[86] about products and alternatives in the market which therefore allow consumers to economise on search efforts and to locate low-priced sellers more readily. Also plain and simple economies of scale might be realised through increased sales due to advertising.[87] In a theoretic model, it is argued that the introduction of price advertising need not have the same effect across all firms and in particular, price advertising need not reduce the mean price or its variation across firms.[88] Empirical support is necessary in order to assess the substantial general impacts of advertising. The following paragraph reflects, partly, the literature and establishes connections with the present question of advertisement expenses on platforms.

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84 Joan Robinson and Neil H Borden, 'The Economic Effects of Advertising' (1942) 9(35) Economica 294. See also in connection to this finding, that prices for fuel in *Kuwait Petroleum* (n 61) did not vary depending on whether or not vouchers where accepted, at [31]. This is a clear indication that not all business expenses necessarily alter prices.

85 Lee Benham, 'The Effect of Advertising on the Price of Eyeglasses' (1972) 15(2) The Journal of Law & Economics 337.

86 Phillip Nelson, 'Advertising as Information' (1974) 82(4) Journal of Political Economy 729.

87 Benham (n 85).

88 Steven Salop and Joseph Stiglitz, 'Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion' (1977) 44(3) The Review of Economic Studies 493; Ferdinand Rauch, 'Advertising expenditure and consumer prices' (2013) 31(4) International Journal of Industrial Organization 331.

First results, from the 1940s, suggest that advertised brands were found to sell at higher prices.[89] In contrast, a study from the 1960s found that the distribution of final consumer prices depended upon the extent of consumer knowledge concerning the location of sales outlets and prices and also upon the cost of the time and transportation required to purchase the item. This study found that final consumer prices generally decreased as the extent of knowledge increased, which is tightly connected to advertising.[90] These earlier studies made use mostly of markets for a product in which advertising was prohibited and markets for the same product in which advertising was allowed. This is not particularly the case with advertisements on platforms, however, the economic impacts are the same. It does not make a difference if advertising is prohibited or not, or if simply the possibility of advertising was missing due to the lack of the required technology. The possibility of advertisements on platforms is equivalent to the abolition of a prohibition on the advertisement. In essence, the empirical studies estimate if and by how much the economies resulting from information provided through advertising are offset by the costs of advertising and by product differentiation. One study used such a scenario for the price of eyeglasses in the 1970s.[91] The author found that the theoretical emphasis on the costs of advertising is misplaced. Prices were found to be substantially lower for eyeglasses in states which allowed advertising.[92] Also in the 1970s another study found that prescription prices were 5.2 per cent lower on average in states permitting

89 Benham (n 85) fn 2.

90 Benham (n 85) 338; George J Stigler, 'The Economics of Information' (1961) 69(3) Journal of Political Economy 213.

91 Benham (n 85).

92 Benham (n 85) 344, stating that the estimates of eyeglass prices alone suggest that advertising restrictions in this market increase the prices paid by 25 per cent to more than 100 per cent.

advertising of prescription prices than in states prohibiting such advertising.[93] Prices of optometric examinations were found to be 16 per cent higher in states that banned optometric and optician price advertising.[94] In the 1980s a strike of daily newspapers in New York City was used for a natural experiment, as it greatly diminished the availability of advertisements concerning food prices. The study is in line with prior research and contributes with estimates at different points in time. Results suggest that the newspaper strike resulted in increased prices for observed food initially, though at the end of the strike, prices declined.[95] Late in the 1990s, a natural experiment with the ban on liquor was conducted. Results indicate that, after the abolition of the ban, advertising stores cut prices of products that they advertised. Prices of other products did not change in price.[96] The authors of these studies describe the view that the standard lesson in textbooks on the subject is that advertising causes prices to be lower.[97]

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93 John F Cady, *Restricted advertising and competition: The case of retail drugs* (American Enterprise Institute for Public Policy Research 1976).

94 Roger Feldman and James W Begun, 'The Effects of Advertising Lessons from Optometry' (1978) 13 The Journal of Human Resources 247. Later also John E Kwoka, 'Advertising and the Price and Quality of Optometric Services' (1984) 74(1) The American Economic Review 211, 216, with results suggesting a price decline over 20 per cent.

95 Amihai Glazer, 'Advertising, Information, and Prices - A Case Study' (1981) 19(4) Economic Inquiry 661.

96 Jeffrey Milyo and Joel Waldfogel, 'The Effect of Price Advertising on Prices: Evidence in the Wake of 44 Liquormart' (1999) 89(5) The American Economic Review 1081.

97 Milyo and Waldfogel (n 96) 1082.

2.4.4.2 Output levels

One single parameter is evidently not enough in order to understand how advertising works.[98] Even with a decreased price through the advertisement on the platform, a shift of C_2 to the consumer can take place. This follows the logic that C_2 is a total sum. As long as suppliers supply more final goods or services and the sum of C_2 is engrossed, the shift can take place. If the results from the last paragraphs are accepted and advertising leads to a decrease in prices, demand must increase, as otherwise advertising would be a loss-making activity for taxable persons.[99] One study argued that the "presumptive case" should be that advertising works by raising marginal consumers' willingness to pay for a brand.[100] Hence, a simple price comparison between pre- and post-product prices after advertising on platforms is insufficient. A comparison of profits is necessary in order to find out if a shift took place.

2.4.4.3 Interim conclusion on the shifting of advertisement expenses

As with the legal question, arriving at a final answer on who bears the advertisement costs is not easy. Empirical studies could theoretically estimate whether a shift of C_2 to the final consumer takes place. It is suggested that a study which may lead to an answer might examine businesses starting to advertise on an internet platform and similar businesses which do not advertise on an internet platform. Whether such a

98 Tülin Erdem, Michael P Keane, and Baohong Sun, 'The impact of advertising on consumer price sensitivity in experience goods markets' (2008) 6(2) Quantitative Marketing and Economics 139.

99 Gary S Becker and Kevin M Murphy, 'A Simple Theory of Advertising as a Good or Bad' (1993) 108(4) Quarterly Journal of Economics 941, agreeing with Erdem, Keane, and Sun (n 98) 172.

100 Becker and Murphy (n 99).

study is necessary and delivers enough proof is certainly up for debate. The initial thought that advertising is profitable and therefore value creating could also be adhered to. This could already suffice to conclude that a shift of advertising expenses takes place. Nevertheless, the case could be made that advertising is not profit maximising and not value adding, though companies cannot escape the economic pressure to engage in advertising on platforms.

2.4.4.4 Consequences for Value Added Tax

Whether the shift of advertising expenses takes place or not, is unclear, both scenarios need further consideration. The decisive VAT question is whether C_2 eventually leads to a final VAT burden. In other words, can taxable persons shift C_2 to final consumers? Answering this question is not a straightforward comparison of two variables. As both are unknown, further research to contain the bandwidths in which both variables can lie is necessary.

First, a measurement of the shift is required. Followed by a comparison of this measurement with C_2 can take place. The shift could be regarded as complete if products sold by the company advertising match C_2. Technically, the shift of C_2 to a final consumer took place and an attached VAT burden became final. However, this point of view would disregard all those products sold by the company irrespective of their advertisement on the platform. Therefore – from a theoretical point of view – the difference in sold products before and after an advertisement campaign on a platform would have to be considered. Then, a differentiation of value added not due to the platform from other value added through the company would be possible. Accordingly, a comparison of this independent value added through the "free" service in the final product sold and C_2 is a reasonable undertaking. If this amount exactly

matches C_2 the shift should be regarded as perfect. Observing this situation would lead to the conclusion that no additional VAT is necessary, as the final consumers simply pay "their" VAT at another end, with another transaction.

In the case of "over-shifting", one should hesitate to speak of over-taxation. It seems both fair and reasonable to attribute any additional value added to the activity of the company advertising. This does not pose a problem to the VAT system.

If the shift does not work perfectly – expressed mathematically as a number smaller than the measure of the shift in relation to C_2 – then some part of the VAT payable on C_2 would remain untaxed. In this case, under-taxation occurs. The value added through the "free" services is destroyed before a VAT burden arises. If the company advertising – either shareholders or employees – "suffers" this destroyed value, a legislative change appears necessary. This result is economically always the case if a supply without value added happens. As this is not the ordinary case in the common business world, this situation has not received much consideration in the past. Economically, this is equal to a subsidy to the platforms by the companies advertising on platforms.

As under-taxation is not a desirable situation – even if only theoretically derived – legislative precautions seem appropriate. Justifying under-taxation would mean bending the law as it stands.

2.4.4.5 Taxing "Free" Services

In the spirit of taking legislative action, scholars started searching for justification for a further taxation of "free" services. Two lights shine on this. From one side, the fiscal desire to have a broader tax base is evident. From another side, the action could also be an attempt to compensate/counter under-taxation. When under-taxation

actually occurs in the value chain of platforms, such action is justified.

Accordingly, action should aim at erasing this under-taxation. A service in the digital economy should have the same VAT burden as any other service. However, the task of clearing any under-taxation is *de facto* impossible. While a precise estimation of the amount of under-taxation is missing, the countermeasure needs to be exactly the same amount. This can obviously only be a theoretical goal. Nevertheless, the measure should strive for this kind of impact in the real world.

No matter on which legal grounds a further taxation of "free" services may be justified, the genuine question of incidence would occur.[101] Incidence asks the question: what is the effect of a tax change on utility levels of all individuals in the economy?[102]

The ways of attacking possible under-taxation through the taxation of barter transactions or third-party consideration described in this section are not appropriate. The incidence chain of both ways reflects this conclusion.

In adopting barter transactions, VAT payments would occur in the transaction between the consumer and the platform in the "free" service. The platform would have to levy VAT and would initially have to carry the burden. In comparison to the current situation, with no incidental price change, this would lead to expenses being incurred by the platform. It would be naïve to believe that platforms would bear this burden benevolently. Platforms would try to shift this burden to their users. Normal incidence insights apply, and supply and demand elasticities in the market for advertisements would matter. Generally, the burden of the tax will be borne by

[101] Due, 'Toward a General Theory of Sales Tax Incidence' (n 83) 254.

[102] Kyle Rozema, 'Tax Incidence in a Vertical Supply Chain: Evidence from Cigarette Wholesale Prices' (2018) 71(3) National Tax Journal 427.

the economic agents least able to change their behaviour in response to the tax.[103] As it is very difficult to curtail the "free" service for the user, it is reasonable to believe that companies advertising would have to bear the burden. It is simply easier to charge a higher price than to justify why a certain function on a platform will not be usable free of charge anymore. Hence, the platform, with an oligopoly market power, would probably be able to shift "its" VAT burden to the company advertising.[104] In the relationship between the company advertising and the final consumer, it is not clear if a shift of the VAT burden to the final consumers is successful. This is a question of the supply and demand elasticities for the final products sold and competition in the market and market power among firms, which differ between the respective products. Empirical research finds a general sharing of the burden between the producing players – in this case (the platform and) the company advertising – and consumers.[105]

Accepting third-party consideration, the company advertising would lose part of its VAT input deduction and hence carry the economic burden of the transaction. As the final consumer would receive the full input right for C_2, the right would be worthless. Since: final consumers as non-taxable persons are not able to deduct VAT. The incidence chain would therefore be shorter, as the platform is not involved. The same insights as above apply. It would be up to further research to determine who actually bears the burden of the additional VAT. The additional VAT will most likely

103 Rozema (n 102) 427.

104 Deborah Schanz and Michael Sixt, 'Betroffene Geschäftsmodelle des EU-Richtlinienvorschlags zur Digitalsteuer' (2018) 56(38) Deutsches Steuerrecht 1985, with the same assessment for the planned digital services tax. The author implicitly assumes that the platform has a right to deduct its input VAT completely due to the taxable transaction with the company advertising.

105 Rozema (n 102) 428 with further references.

lead to a higher price of the final products sold.

Both paths to an additional taxation of "free" services, described above, lead to over-taxation and are ill targeted. First, it is arguable whether under-taxation truly exists. Secondly, a well-targeted measure should match this unknown amount of under-taxation exactly. Again, aligning the VAT burden of services in the digital economy with the VAT burden outside of this economy should be the goal. Whether barter transactions and third-party consideration fulfil the latter requirement is highly unlikely. It is more likely that they increase the VAT burden of services in the digital economy extensively. The reasons for doing so are not apparent.

2.5 Summary and Concluding Remarks

The digital economy gives rise to interesting and challenging questions from a pure VAT perspective. One of these questions is whether "free" services, which are presumably used by everyone nowadays, are taxable transactions. This chapter has placed emphasis on the question of whether third-party consideration is relevant. Previously, the common expression that consumers pay with their data, has led to an extensive literature debate about barter transactions. The chapter shows that – disregarding legal classifications – answering the question of whether "free" services should be taxed requires looking at the economic impacts of "free" services. Therefore, the true questions are: who really bears the expenses of the "free" services and does a final VAT burden evolve out of them?

From a theoretical viewpoint, the argument has been made that advertising activity on platforms is a value adding activity. Hence, economically, third-party consideration is relevant and no under-taxation occurs. Therefore, no countermeasures

against under-taxation are necessary.

Nevertheless, the literature discusses countermeasures for an unproven problem in detail. From a purely theoretical perspective, it seems odd that only barter transactions have given rise to questions. Third-party consideration deserves close contemplation. Countermeasures against potential under-taxation seem to be ill targeted and merely conceal the fiscal will to have a broader tax base. As they should be compensating the unknown under-taxation, it is to be doubted if this really is the goal of such measures. The incidence question could not be answered before implementation. An *a priori* assessment is not possible. Therefore, additional taxation of "free" services could burden taxable persons – as implicitly intended by advocates of additional taxation – or, it could over-tax consumers. Both of these outcomes are not the proper goal of VAT. Hence, the relentless search for further tax revenues seems inadequate in this field of VAT.

Legal and economic results appear to travel in the same direction. While the economic point of view leads to the result that no change to the actual treatment of "free" services is necessary, the legal assessment leads to the conclusion that the CJEU's past jurisprudence prevents the additional taxation of "free" services. Additionally (and not discussed in this chapter), a new precedent to tax rights could potentially influence many other related questions.[106]

The digital economy has increased the discrepancy between consumption and consumption expenses. However, this discrepancy is merely temporary. The scope of VAT is not as personal as it was before. Consumption expenses do occur, as shown

[106] Out of many, *Beschluss (EuGH-Vorlage) zur umsatzsteuerrechtlichen Behandlung einer teilweise durch EU-Beihilfen subventionierten Lieferung* XI R 5/17 vom 13 Juni 2018 (Bundesfinanzhof) with the question of whether a delivery commitment fulfils the requirement of consideration.

in this chapter, either indirectly through the actual consumers or through other consumers who buy final products. Whether such a setting fulfils the requirement of a direct link is questionable. Therefore, the CJEU has valid arguments to deny both a barter transaction and third-party liability. Platforms have led to a situation where someone else can pay for the consumption by a person or a whole group of persons. The beneficiaries of the "free" services need not be the actual paying consumers. Such a form of consumption, especially in this broad fashion, is certainly not possible outside of the digital economy. However, free television works essentially with the same value creation concept and there are neither media outcries nor VAT literature targeting this issue. This is not a reason to support the view that the *status quo* is the best way of dealing with the situation, but rather a reason to reconsider the concept of value added. The fact that consumption becomes more and more indirect as someone else pays for this consumption gives rise to discussions from a VAT perspective. Yet, no VAT principle hinders such an economy from taking place. If sceptics feel uncomfortable with a VAT system whereby consumption and consumption expenses do not match on a personal and time level, they are free to propose a system whereby personal consumption is measured differently and a tax is levied accordingly.

3 Consumption Taxation in the Sharing Economy

3.1 Introduction

The sharing economy is still a new phenomenon, especially from a tax perspective. Even though similar characteristics are observable in other areas,[1] the widespread use of internet platforms led to a jump to unseen levels.[2] Without a clear definition, the sharing economy circles somewhere in the orbit of the digital economy.[3] With growing market shares and broad public perception, calls for fair tax treatment

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1 Denise Cheng, Is sharing really caring? A nuanced introduction to the peer economy: Policy Primer (2014); Jordan M Barry and Paul L Caron, 'Tax Regulation, Transportation Innovation, and the Sharing Economy' (2015) 82(1) The University of Chicago Law Review Dialogue 69, 70, mentioning public mass transportation, also Russel Belk, 'Sharing' (2010) 36(5) Journal of Consumer Research 715.

2 Statista lists 44.8 million sharing economy users in 2016, with an estimate of 86.5 million for 2021.

3 Wolfram Scheffler and Christina Mair, 'Einschaltung von Online-Vermittlungsplattformen – Eine Analyse anhand der Behandlungvon Übernachtungsleistungen im deutschen Steuerrecht' (2018) 3(1) Spektrum der Steuerwissenschaften und des Außenwirtschaftsrechts 37, correctly state that the digital economy not only fosters digital activity. For the definition of the European Commission of the "collaborative economy", see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy* (COM(2016) 356 final, 2016) 3. Also on the problem of a missing definition, Aleksandra Bal, 'Managing EU VAT Risks for Platform Business Models' (2018) 72(4a/Special Issue) Bulletin for International Taxation fn 1. Giorgio Beretta, 'VAT and the Sharing Economy' (2018) 10(3) World Tax Journal 3.

emerge.[4]

At first glance, it is difficult to pinpoint the problem. The media and public generally bash internet giants concerning their low corporate tax payments.[5] However, voices precisely tackling value added tax (VAT) norms are gentle. Additionally, connected fields such as labour law or consumer protection also raise discussions.[6] This chapter transfers the widespread perception that internet giants are favoured against traditional companies in the VAT context, often evolving among comparable persons such as licensed taxi drivers.

In this vein, the issues of private use of assets from a VAT perspective are revived and identified as the problem. The sharing economy reverses the common focal point,[7] though, as formerly private assets are brought into a business sphere. Such an allocation is possible – with the German VAT law as a reference – from a usage of at least 10 per cent for VAT purposes at the time of the supply.[8] However, such an allocation necessarily needs to take place at the time of the supply – later – when a non-single use asset is in use, such a decision can basically neither be made nor

4 For an United Kingdom (UK) example, see Sharing economy shows up outdated tax rules, 'Financial Times (online)' (3 January 2017).

5 Simon Bowers, Uber's main UK business paid only £411,000 in tax last year, 'The Guardian (online)' (10 October 2016). Carrie Brandon Elliot, 'Taxation of the Sharing Economy: Recurring Issues' (2018) 72(4a) Bulletin for International Taxation 1 with insights on Uber's tax structure.

6 Evelyne Terryn, 'The sharing economy in Belgium – a case for regulation?' (2016) 2(1) Journal of European Consumer and Market Law 45. See also O'Connor, Sarah, Uber loses in appeal of key employment rights case, 'Financial Times (online)' (10 November 2017) for the ongoing labour law debate.

7 The perspective is critical from the states' point of view, as it does make a difference, whether a business car is used for one single private trip or a private car is used for one single business trip. While regimes for the first situation exist, see for instance sec. 15.23 Umsatzsteuer-Anwendungserlass, BGBl. I 2010, 846 (Bundesrepublik Deutschland), special regimes for minimal business use are not common practice.

8 See § 15 (1) sent 2 Umsatzsteuergesetz, BGBl. I 2005, 386 (Bundesrepublik Deutschland).

changed.

This chapter gives an analysis of the pivotal issues for consumption taxation in the most common business model used by internet giants.[9] On general terms, it is argued that old rules are insufficient for new economic circumstances, especially from a tax fairness perspective.[10] However, it is evident that some established regimes in related areas are either a disruptive thread to the still developing economy,[11] or lack a sufficient degree of tax fairness among individuals who follow alike business activities. In a thorough analysis, the chapter closely depicts why other mechanisms currently used in the VAT Directive[12] or proposed through the Organisation for Economic Co-operation and Development (OECD) throughout the Base Erosion and Profit Shifting Project (BEPS) are incapable to adequately tackle the problem.[13] The minor collection improvements of VAT proposed in Action 1 of the BEPS project are not precise and far enough for an adequate taxation of the sharing economy.[14] In 2019, the Global Forum on VAT issued a further deliverable on the role of digital platforms

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9 For similar approaches see Giorgio Beretta, 'Taxation of Individuals in the Sharing Economy' (2017) 45(1) Intertax 2 or Ivo Grlica, 'How the Sharing Economy Is Challenging the EU VAT System' (2017) 28(2) International VAT Monitor 124. For an extensive analysis of current direct taxation rules and reform options, see Thomas Fetzer and others, 'Besteuerungskonzepte für die Sharing Economy: Aktuelle Regelungen und Reformoptionen' (2020) 97(2) Steuer und Wirtschaft 106.

10 Shu-Yi Oei and Diane M Ring, 'Can Sharing Be Taxed?' (2016) 93(4) Washington University Law Review 989, on the question whether rules are necessary.

11 Ajay Gupta, 'Taxing the New Gig Economy' (2018) 72(4a) Bulletin for International Taxation 1, 3, with a neat example of how taxation in the sharing economy may lead to distortions and a misallocation of resources.

12 The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union)(hereinafter: VAT Directive).

13 OECD/G20, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report: OECD/G20 Base Erosion and Profit Shifting Project* (2015) (hereinafter: *Action 1 - 2015 Final Report*), followed by OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* (2018) (hereinafter: *Interim Report 2018*). The final report was originally announced for publication in 2020, however the publication has been postponed to mid 2021.

14 OECD/G20, *Action 1 - 2015 Final Report* (n 13) 120-29.

in the collection of VAT/GST on online sales, explicitly stating that Working Party 9 has decided to develop work in the area of the sharing economy as a separate work stream.[15] Further, also the concept of a digital services tax (DST) is analysed in order to find a solution.[16] As the proposal partially also targets revenues resulting from the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users,[17] a discussion from a VAT perspective is necessary. The chapter then proposes a new approach on known pillars in other fields of taxation. The solution satisfies the demands of the general principle of taxation value added in value added tax and does not violate the principle through a gross basis taxation. This action does not intend to put an additional burden on the sharing economy; its purpose is to level the burden with traditional transactions and align the treatment of such with the general demand to tax all consumption. Additionally, the proposed solution tries to balance all interests and puts special emphasis on feasibility and enforceability.

This chapter identifies consumption tax issues in connection to the sharing economy.[18] The structure of the chapter is as follows. Section 2 starts with a depiction of the standard business model in the sharing economy. A legal assessment of sharing

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15 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales: As presented for consideration at the fifth meeting of the Global Forum on VAT* (2019) no 26.

16 Proposal for a Council Directive of 21 March 2018 on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final (European Commission) (hereinafter: Digital Services Tax Proposal).

17 Digital Services Tax Proposal art 3(1)(b).

18 See Grlica (n 9) with a *de lege lata* assessment. A sophisticated analysis of the standard business model shows that transactions between individuals are the pivotal part of the sharing economy. The main purpose of this chapter lies in the development of a tax regime fit for the sharing economy. The VAT Directive is taken as a the reference legal framework.

income in accordance to the VAT Directive follows. Section 3 explores the economic consequences of this assessment and points out where pivotal points of consumption taxation lie in the sharing economy. The author reflects possibilities to level the playing field in section 4 in the spectrum of known VAT rules. In order to bring coherence back into consumption taxation, a combination of provisions of the VAT Directive and provisions for the taxation of permanent establishments is proposed in section 5. Section 6 draws conclusions and summarises findings.

3.2 The Sharing Economy

3.2.1 The Business Model

Several business models exist in the sharing economy.[19] However, in this chapter, the focus solely lies on the specific business model described in this section. Instead of sharing themselves, the big players in the sharing economy have outsourced the main economic activity.[20] Their economic activity lies in the supply of a multi-sided platform, which works as a marketplace.[21] Individuals do the real sharing activity. Sharing, in this chapter, is the propagation of consumption from one to another individual person. This definition excludes businesses from the actual sharing activity,

[19] A dominant business model is used by subsidiary companies of the car industry. In this business model, the cars are owned my companies, not by individuals. This business model is disregarded in the rest of the chapter, as it merely extends and digitalises the car rental industry.

[20] Especially Uber has shown intentions to act on their own in recent times. This chapter focuses on the actions with intermediation character.

[21] Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990 with early insights on two-sided markets.

as these generally lack the option to consume.[22]

Sharing transactions occur, due to the use of the internet, in a much higher frequency, than they used to occur decades ago. New digital possibilities are thereby directly attacking the issues which hindered sharing for centuries. Two main characteristics of platforms are decisive on two-sided markets.[23] First, the interaction of two sets of agents interacting through the platform and second the interdependence between the parties.[24] This applies smoothly to platforms like Airbnb, Uber and alike. These platforms match and connect individuals and neither party will be interested in a platform if the other party is not. As shown later, platforms that facilitate solely the resale of goods, such as eBay, are not inherently dangerous to the current system of consumption taxation in the European Union (EU).

Multi-sided platforms are an integral part of the sharing economy as without them, sharing would not be able to flourish in the way it was. In economic terms, platforms lead to a drastic reduction of the transaction costs.[25] They essentially make up for the economy in the term sharing economy.[26]

To build on the accepted terminology of platforms, the platform has different kinds of users. Two of them are of interest in this paper.[27] First, individuals using a

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22 Consumption is understood to mean final consumption by households, see OECD, *International VAT/GST Guidelines* (2017) no 1.2.

23 Marc Rysman, 'The Economics of Two-Sided Markets' (2009) 23(3) Journal of Economic Perspectives 125.

24 See also OECD/G20, *Interim Report 2018* (n 13) 28.

25 Justus Haucap, 'Die Chancen der Sharing Economy und ihre möglichen Risiken und Nebenwirkungen' (2015) 95(2) Wirtschaftsdienst 91.

26 Is sharing really caring? A nuanced introduction to the peer economy: Policy Primer (n 1) who mentions that individuals, institutions and entities have adopted the term to refer loosely to any socially networked system. She uses the term "peer economy companies".

27 For example, an advertiser also fulfils the role of a user.

service offered by other individuals, i.e. a person who gets driven by an Uber driver; and second, an individual offering services through a multi-sided platform, i.e. the driver who drives someone.

However, to be able to distinguish both users, the person offering his or her assets (i.e. a condominium) or intangibles (i.e. the ability to drive) shall be called sharer in the following. This leaves a setting of three players; namely the platform, the sharer and the user. The user consumes a service within the original idea of a consumption tax. He or she is by assumption a non-taxable person.[28] Among the different transactions taking place between all three players, the transaction between the sharer and the user is of most interest.

3.2.2 Occasional Sharers

While users are to some extend a homogeneous group – after setting the assumption of not fulfilling the status of a taxable person – sharers can differ a lot in the real word. Starting with one-time sharers who decide that sharing is nothing for them after one single transaction, others earn their living with "sharing". Even though people who make an extensive use of sharing possibilities should fall out of the definition of sharing (they constitute regular business), they exist. As data of the actual sharers belongs to the respective platforms, no scientifically resilient statement on actual businesses engaged on these platforms and abuse them simply as a marketing channel is possible. As a consequence, not all sharers are in the focus of this chapter.

In trying to separate sharers who might be advantaged or disadvantaged in

[28] If the user were a taxable person, economically, no VAT would come due up to this point, as an input deduction would be possible.

their sharing activity compared to regular businesses, it seems reasonable to exclude business "sharers".[29] Such an approach is minted by fairness issues. No need for special rules for such business "sharers" is apparent. Regular VAT rules – as applied to every other taxable person are just as adequate as for any other business. In contrast, occasional sharers are from a state's perspective in an intermediate range where a balance between efficient tax collection and tax revenues is a difficult task. On one hand side there stands a regular VAT treatment which seems over-excessive for genuine consumers who share part of their consumption; on the other hand side there stands a potentially large foregoing of tax revenue. In addition, tax fairness must not be forgotten.

Therefore, occasional sharers, who share in a non-excessive manner, are at the centre for the following analysis. This might be a student with a car using a free afternoon to earn some side money driving for Uber, or a family going on vacation and subletting their home while they are overseas to increase their budget for the vacation. This group is in the focus of the analysis as these sharers would be over-excessively burdened by regular VAT norms. They are endangered of a taxation of their provided outgoing services without the right to deduct VAT on their input supplies or services. This would be a violation of the fundamental principle in the VAT Directive. Also, such a disruption to the business model does not seem desirable. The excluded second group consists of individuals or even companies, which use the platforms in a way, which cannot be characterized as occasional use anymore. They "share" with such a high turnover, that the idea of sharing is undermined. Business "sharers" abuse the platforms as their additional, or sole, marketing channel.

[29] Beretta, 'Taxation of Individuals in the Sharing Economy' (n 9) 5, with the adequate terminology of "conundrum" between business and personal.

The next subsection focusses on genuine consumers who decide to share their consumption and shows that such sharers are currently excluded – in the first place – from the VAT cosmos. However, the fact that no VAT is levied on their transactions not at all leads to a situation where they are completely unaffected by VAT.

3.2.3 Current Consumption Taxation in the Sharing Economy

Literature on the correct treatment of sharing income in several jurisdictions already exists.[30] The application of these national rules is not this chapter's purpose. Accordingly, the question if sharers are taxable persons in the meaning of the VAT Directive is out of scope. The VAT Committee's opinion that sharers are indeed taxable persons is therefore accepted.[31] Additional support, to go down this road, gives the principle of a general consumption tax. As this principle aims at the consumption itself, it is premature to neglect an impact assessment of the tax consequences of the sharing economy for this very reason. As will be shown later in the economic analysis, this course of action is justified.

To sum up, jurisdictions commonly do not envisage broad exemptions for sharing income concerning direct taxation. However, for VAT purposes, special schemes for small enterprises or registration thresholds are often relevant and lead to a situation

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30 Beretta, 'Taxation of Individuals in the Sharing Economy' (n 9) with several jurisdictions. Scheffler and Mair (n 3) and Heinz Kußmaul and Florian Kloster, 'Sharing Economy: Versteuerung der privaten Wohnraum(unter)vermietung im Zwielicht?' (2016) 55(22) Deutsches Steuerrecht 1280, for Germany.

31 Value Added Tax Committee, *Working Paper No. 878: VAT treatment of the sharing economy* (2015) 7. With a discussion Beretta, 'VAT and the Sharing Economy' (n 3) 12, 20, 25. With the statement that it's "almost impossible to escape the taxable person definition", see Brandon Elliot (n 5) 2. Grlica (n 9) sees sharers as taxable persons as "somewhat excessive".

whereby occasional sharers are mostly unburdened by VAT.[32] This treatment pays respect to the premise that occasional sharers are not interested in technicalities of taxation. Special schemes or thresholds also balance the states' need for tax revenue with enforcement costs. It is evident that minimal turnover correlates with minimal tax revenue. Most special regimes for small businesses stem from the last century. Facts and circumstances have changed and business opportunities from small or even micro businesses have increased tremendously.

Thresholds and special schemes lead to a huge potential gap in VAT revenues and a strong ill will of regular taxed individuals, implicitly calling for fairness in VAT.[33] Therefore, the next section analyses if it is worthwhile to spend time on further elaboration or if the current treatment of commonly excluding sharers from VAT obligations is a sustainable treatment of the sharing economy.

3.3 Consumption in Sharing Transactions

3.3.1 Exempting Sharing Revenues

Despite the exclusion of business "sharers",[34] the following analysis also holds for such sharers who illegally neglect their VAT obligations. While occasional sharers are

[32] See Fabiola Annacondia, 'VAT Registration Thresholds in Europe' (2017) 28(6) International VAT Monitor 474.

[33] This gap is outside the VAT gap calculated by CASE, see CASE, *Study and Reports on the VAT Gap in the EU-28 Member States: 2019 Final Report: TAXUD/2015/CC/131* (2019). Their VAT gap does only include VAT from house to households. Household to household transactions are not included. See also Beretta, 'Taxation of Individuals in the Sharing Economy' (n 9) 3, who mentions that sharing earnings are in fact rarely reported, rarely controlled by tax authorities and, quite inevitably, even more rarely taxed.

[34] The analysis consequently disregards compliant sharers.

commonly legally exempt from VAT, it is highly likely that some business "sharers" illegally claim an exemption from VAT. From an economic perspective, no difference in the tax revenue consequences is to be noted.

Exempting through a special scheme has two evident economic benefits. First, both taxable persons and tax administrations save most filing and enforcement costs. Second, the sharer has increased revenues compared to a taxable person. This is under the assumption that the sharer can charge the same price as a taxable person. Bringing the sharer in the position to pocket what taxable persons would have to transfer to the treasury.[35] This idea reflects the fact, that consumers are interested in the final price, and have no reason to differentiate between net and gross prices. There is simply no need for consumers to differentiate. This translates to increased revenue potential of small enterprises up to the gross price taxable persons charge.[36] If no quality difference exists, there is no need for sharers to give consumers a large share of their surplus.

Illegally exempting sharing transactions obviously also leads to saved compliance and enforcement costs. Certainly, this is not positive. In addition, much state resources are bound in the chase of such taxpayers, most likely often without netting substantial revenue. However, business sharers are also in the position to pocket what actually is supposed to be VAT and legally needs to go to the treasury. Under the assumption that these sharers neglect all VAT obligations, they also do not make use of the right to deduct input VAT. In total, their illegal behaviour is economically equivalent to the exemption of small enterprises.

The consequences of this *de facto* large exclusion of the sharing economy call for

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35 Notwithstanding the fact that these higher revenues are generally taxed with income taxation.

36 Scheffler and Mair (n 3) 46.

further discussion. In the standard business model, the full consideration the user pays is almost fully attributable to the sharer-user transaction, as the platform only charges a relatively small fee from the sharer.[37] Hence, even though the platforms like Airbnb or Uber catch all the media attention, the sharers are the workhorses of the sharing economy.[38] Therefore, close attention on the sharer-user transaction is necessary.

As a starting point, an advantage of small enterprises and sharers illegally claiming an exemption stands out.[39] By assumption, they charge the same price and can pocket what taxable persons would have to transfer to the treasurer.[40] This seems like an evident distortion of the market. However, this is only the revenue side. In a holistic evaluation of the issue, the expense side/prior transaction to the sharing activity deserves consideration too. On this end, the depicted occasional sharers have encountered expenses accompanied by VAT. While a regular taxable person is able to deduct input VAT, sharers with exempt revenues are not. Accordingly, the taxable person has no initial VAT burden, but the small enterprise respectively the illegally exempt sharer, have initial burdens.

Therefore, an elaboration on the economic consequences of sharing from a consumption taxation perspective seems justified. Simple secondary – or goods platforms

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37 The depiction does not include fees paid by the user. According to its homepage, Airbnb charges sharers a 3 per cent fee. Ubers fees are less evident and not fix, due to various special offers for sharers. They seem to be around 25 per cent, see Ridester (online), last accessed 07.12.2020.

38 Brandon Elliot (n 5) 1, mentions that the sharers receive 85 per cent of the transaction value.

39 See for example Michael Keen and Jack Mintz, 'The optimal threshold for a value-added tax' (2004) 88(3-4) Journal of Public Economics 559, who also conjecture this for small enterprises. Also Beretta, 'VAT and the Sharing Economy' (n 3) 19. Also Vanessa Houlder, Airbnb's edge on room prices depends on tax advantages, 'Financial Times (online)' (2 January 2017) completely disregarding further stages. More realistic, Scheffler and Mair (n 3) 42.

40 Loosening this assumption would lead to a split of the theoretical VAT between sharer and user. This would not change insights. Scheffler and Mair (n 3) 42, using the same assumptions.

– lead to insights, which are helpful in analysing the herein focussed service providing platforms. The following analysis primarily points out the problems around the value of consumption in the sharing economy.

3.3.2 Consumption of Previous Stages

From the outset, it shall be reminded that VAT attempts to tax consumption. One must not lose grip on this final goal of the tax. As a starting point, consumption is the full value paid by the recipient, exclusive of VAT. While consumption is easy to observe in situations where monetary consideration is given at the last stage of consumption, it is not always the case that consumption of the previous stage is that obvious. From a VAT point of view, it is pivotal that consumption can be netted with previous consumption in the same value chain, as the collection mechanism of VAT intends, if double taxation shall be avoided.

No practical issues occur if a good is simply traded for profits by taxable persons. As a trader knows both the amount paid and the amount received from the succeeding stage, both can easily be netted and the collection of VAT according to the value added at this stage can smoothly take place. If more than one asset is used and a service is supplied, previous consumption is harder to figure out on a transactional level. However, such a precise analysis is often not necessary, as taxable persons are not taxed on a transactional level. It fully suffices to net VAT paid with received VAT from customers to fulfil VAT obligations in a monthly or quarterly tax return. If assets are used only partly in the course of a business of a taxable person, VAT is commonly partly deductible. Special provisions for special assets such as cars exist presumably in every VAT regime.

However, the sharing economy comes from a different direction. If occasional

sharers were to be taxed, regular procedures would be highly disruptive to the business model. The previous stage was – as the consumer was supposed to be the final consumer – meant to be the final stage of consumption. However, when this stage ends up not being the final stage, previous consumption is hard to pin down. Before analysing a feasible way to collect VAT in the sharing economy, the question needs to be answered, when taxing – instead of exempting – the sharing economy is worthwhile. The idea is developed in a staggered approach.

3.3.3 Goods Platforms

Pivotal for the theoretical understanding of the mechanics of consumption taxation in the way of VAT, the sharing economy is partly a secondary market for goods. The sale of a good to a final consumer is from a consumption tax perspective a transfer of consumption. While previously the seller was treated as the consumer, the acquired right to deduct input VAT – as he or she makes the sale – erases the seller's consumption as well as the tax burden going along with this consumption.

eBay is a perfect example of a digital secondary market, as it focuses on goods. It is a predecessor of the sharing economy, as the business model is very similar.[41] As shown in the next subsection, the sharing economy extends the business model of goods platforms.

In a secondary market, already sold goods are re-sold again. Consequently, consumers already paid consumption tax for this supply. In retrospective, the whole consumption process is finished and tax was paid according to the letter of the law. With this insight, it is clear that a taxation of a re-sold good, without the right

[41] See Beretta, 'VAT and the Sharing Economy' (n 3) 4.

to deduct input this previous tax burden would be double taxation. Consumption would be overestimated. To this end, VAT only works as a consumption tax without a cascading effect if consumption of the previous stage is known and deducted from the succeeding stage.

With a further stage, the original buyer is relieved from his or her payment for the good and his or her tax burden. As the amount he or she receives for the re-sold good is between seller and buyer, its relation to the last stage is fully flexible. The seller might get more, less, or exactly the price he or she paid for the specific good. Technically speaking, he or she is relieved by the share of the secondary market price to the original price. Consequently, the secondary market buyer takes this burden and economically pays the consumption tax in the respective share. This leads to the following economic conclusion for pure secondary markets: with the re-supply of a good, the seller is relieved by the proportion of the price received to the price paid. A transfer of the tax burden takes place; the buyer does not simply acquire the good, he or she also acquires a consumption tax burden. This economical diagnosis pushes the debate if eBay sellers are taxable persons, to the question if these sellers generate substantial profits.[42] If sellers on eBay sell for i.e. half of the price they originally paid, consumption is shifted in the same proportion and so is the tax burden coming with the respective good. Tax collection would not increase tax revenues.

Applying VAT rules to secondary markets would lead to unjustified tax revenue.

[42] See two decisions by the Federal Fiscal Court in Germany *Urteil zur Unternehmereigenschaft beim Verkauf von Gegenständen über "ebay" - Auslegung der Klageschrift* V R 2/11 vom 24 Juni 2012 (Bundesfinanzhof) and *Urteil zur Umsatzsteuerbarkeit des Verkaufs von mindestens 140 Pelzmänteln auf der Handelsplattform "eBay" durch eine Finanzdienstleisterin* XI R 43/13 vom 12 August 2015 (Bundesfinanzhof), dealing with the question whether activity on eBay leads to the status of a taxable person. Both decisions do not consider whether the sellers make substantial profits. From an economic perspective, the discussion is unsatisfying as double taxation is accepted.

Former final consumers had – by definition – at the beginning of the consumption process no intention pass on their consumption. Their decision to do so is taken after the commencement of consumption; and too late to assign the good to a business activity for VAT purposes. Furthermore, other requirements of a business activity would necessarily need to be fulfilled. Hence, a later fetched VAT input deduction for a – here depicted sharer – is not possible. The VAT payment at the time of the purchase of the seller can not be altered through a filing of a VAT return later on. With this assessment for the input transaction for sellers in secondary markets, it seems reasonable to keep special schemes or registration thresholds for sellers on goods platforms. Framed otherwise in a chronological timeline, they encounter a VAT burden at the purchase and get partly relieved of that burden with their sale on a secondary market. Levying VAT at their output sale would – through the fundamental right of input deduction – demand that input deductions would be allowed. However, this decision can not be made for the past. This would lead to a second taxation, at a further stage – just as in ordinary VAT transactions – however, without the right to deduct input VAT.

3.3.4 Service Platforms

Coming from these insights, the transfer to service platforms is not far. Service platforms unlike goods platforms do not just facilitate the re-supply of goods but mainly the supply of services. An illustrative example is an Uber ride, where the user consumes – solely in a theoretical depiction - two different supplies. First, the supply of the car as a traditional good (by some tiny little share of its useful life) and second the supply of the driver's transportation service. A transfer of ownership rights does certainly not take place, though, economically, the user, to some extent,

uses the car as if he would be the owner.[43] Legally, only a single supply takes place, it is not a composite supply. To some part, insights of a secondary market will also hold for the sharing economy.[44] Again, from a consumption taxation perspective, both goods and services economically give consumption possibilities. Insights for goods remain applicable and work as a starting point.

Again, for the theoretical depiction, the supply of a sharing activity is split into its different parts.

Services are different in nature and need a further depiction. From a consumption taxation point of view, they deviate insofar from goods – for non-good producing individuals – as their value is immaterial and creatable without expenses accompanied by consumption taxation.[45] This becomes evident in the Airbnb case. The sharer bears expenses for the good he or she uses in course of the sharing action by paying his or her condominium. In contrast, the service he or she provides are possible without expenses accompanied by consumption taxation occurring for the act of subletting accommodation while on vacation.

With the integration of services into secondary markets, the insights that consumption taxation is solely shifted to a further consumer is not valid anymore. Presuming that no substantial gains by individuals who do not professionally engage in trade arise, is not pressing anymore. In the majority of cases, revenues in the depicted sharing transactions are "substantial" for sharers, from the view of individuals.[46]

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43 Art 14 VAT Directive.

44 See Gupta (n 11) 3, who also refers to the fact, that capital rather than labour constitutes the overwhelming portion of the resource(s) being shared.

45 Grlica (n 9) 1, speaks of idle resources.

46 The data from Air DNA (online) shows an average price of €70 per night per stay in Berlin, Germany, accessed 28.02.2018.

If these "substantial" revenues[47] reflect new consumption instead or simply shifted consumption, thresholds and special schemes might need to be seen in a different light. This is the pivotal point of this chapter.

The comparison of a hotel and a sharer evidently underpins the aforementioned. In a rudimentary setting, the hotel incurs expenses for the premises and expenses for its employees. On the revenue side of the hotel, the final price of the room reflects all these expenses plus a self-selected profit. Consumption taxation comes due on the final price and the taxable person makes an input tax deduction on the expenses for the premises. In total, a taxation of the last stage of consumption minus the previous stages takes place, as intended by the collection mechanism of VAT.

In the same vein, the sharer also incurs expenses for the "premises". From an economic viewpoint, these expenses come with consumption tax attached. Also in the Airbnb case, where the sharer's monthly rent to his or her property owner is *de jure* exempt. It is irrelevant for an economic analysis in this case, if member states make use of the possibility to exempt long-term rents frowm VAT,[48] as this exemption leads to higher expenses at the property owner's level (another stage earlier). This cascading effect leads to an implicit tax burden for the sharer through the charged rent, as the property owner wants to be relieved by the sharer from his or her consumption tax burden. A transfer of this burden takes place and eventually the rent will include the burden of VAT of the previous stage, even though it is *de jure* exempt.[49] This observation holds for all acquired goods or services by the sharer;

47 "Substantial" is obviously a subjective judgment. However, the alternative – refraining to share – nets revenues of zero.

48 Art 135l VAT Directive.

49 Hans-Hermann Heidner, '§ 4 Nr. 12' in Johann Bunjes (ed), *Umsatzsteuergesetz* (CHBeck 2017).

i.e. ancillary costs such as a cleaner or the energy bill. All these costs are passed on to the user, as done in secondary markets.

However, the service also consists of a – smaller or bigger – portion of imputed costs coming with no attached consumption tax, for example the time the sharer devotes in his sharing activity. This service is genuinely a second component which does not follow the passing through idea of a secondary market. It is comparable to any other service, just as a nanny or a dog walker. Apart from minor and negligible real costs, the service consists only of imputed costs which are not accompanied by actual VAT or a VAT burden through a cascading effect. Therefore, the idea of a consumption tax on the final consumption is only reflected in the transferred goods. Consumption taxation on the service part is currently not captured in the sharing economy.

3.3.5 Value Added

Comparing the economic outcomes of the transactions of sharers and hotels reveals that a part of final consumption in the sharing economy remains untaxed. This insight does not necessarily lead to the conclusion that special schemes or registration thresholds are inadequate for sharers. The fundamental principle of VAT as a tax on consumption is not fully satisfied, as only the re-supply of goods leads to a transfer of the tax burden to the user, who enjoys the sharing activity. Taxation of this consumption takes place. However, with the service part, a violation of the fundamental principle of a tax on general consumption takes place. The supply of the service in the sharing action remains untaxed.

Neither current law nor any enforcement efforts address this problem. Instead, both the special scheme for small businesses and the broad toleration of illegal

behaviour accept this outcome. For the special scheme for small enterprises, this contrasts the wording of Article 281 VAT Directive permitting member states to use simplified procedures dependent on the condition that they do not lead to a reduction of VAT. While a simplified scheme must allow for possibilities to bypass the general system, it is also evident, that the wording aims at substantial amounts of VAT. This might be the case for traditional small consulting businesses. However, the digital decade offers new collection possibilities. Accordingly, a revaluation if enforcement costs exceed revenues is necessary.

This section has shown that special schemes and registration thresholds are not unproblematic from a tax fairness point. Regardless of the sharer's intentions, a challenge for consumption taxation takes place. Sharers might likely be good persons with honourable, socio-economic motivation; however, their actions inarguably bring an imbalance to the market. This imbalance might be the actual trigger for the ill-will the sharing companies receive. From an economic perspective, sharing either has the same revenue consequences as, or is indeed plainly and simply VAT fraud.[50] It should be an active decision of the legislators to exempt these revenues from VAT, not a historic provision.

Since a couple of years, the economic environment has drastically changed. The special scheme for small enterprises does not seem adequate anymore for the sharing economy.[51] Additionally, sharers illegally using the exemption receive a benefit they should not receive. They benefit from the disguise and the enforcement issues coming with it. The next section explores options if the forgone tax revenue can be levied in

[50] See Michael Keen and Stephen Smith, 'VAT Fraud and Evasion: What Do We Know and What Can Be Done?' (2006) 59(4) National Tax Journal 861, for an overview of possibilities of VAT fraud and evasion.

[51] Certainly, this does not ask for a complete abolishment of the special scheme for small enterprises.

an effective way. If this question can be answered in the affirmative, special schemes or thresholds could be abolished for sharing income.

3.4 Taxing Consumption in the Sharing Economy

Up to this point, the actual consumption in the sharing economy turns out to be the decisive challenge for the EU VAT system. Presumably, no one exactly knows the consumption in a single sharing transaction, not even the sharers themselves. It is simply unobservable by what proportion a sharer uses formerly fully private goods for his or her sharing activity (i.e. bed, fridge, towels) and shifts the tax burden to the user and by what proportion a service is delivered which does not shift a consumption tax burden. Therefore, true first hand consumption in the sharing economy is merely a theoretical value. This section depicts available options in order to tax the sharing economy.

3.4.1 VAT Directive

An intuitive solution might be to apply existing law to sharers. Obviously with the intention to achieve a reasonably high compliance rate. In this vein, instead of applying the special scheme for small enterprises, an exclusion of sharers from the special scheme or registration thresholds would be consistent.[52] Somehow, this solution to the problem is the lowest hanging fruit. However, it is evident, that this solution is highly inefficient and obviously impracticable. While it theoretically aims at the correct taxation, according to the letter of the law, leeway in calculating

[52] Australia follows this approach for Uber drivers.

the consumption on the previous stage exits. If sharers were treated as taxable persons, each input for the sharing activity would be in need to be assigned to the taxable activity. Just starting with a shared flat, this would easily exceed a reasonable amount of work. Basically, it would include every item in the flat. Just for the sake of the argument, if the flat would be shared for half of the its useful lifetime, an input deduction for every item would be necessary. This would call – just for starters – for VAT receipts for each item. This likely seems unreasonable. Further, the amount of necessary resources both at taxpayer and authority level seem excessive. Theoretically, each item deducted for the sharing activity would have to be audited, as done in the normal course of a tax audit.

Applying regular rules would nevertheless pay respect to the avoiding-distortions-in-competition argument.[53] It would level the playing field and sharers (on platforms) would face neither advantages nor disadvantages.[54] Further, it pays respect to the argument that, taken together, all revenues of all sharers of a platform would easily exceed any threshold for VAT simplifications.[55] With the arguable perspective that sharers perform their sharing activity not to the user but to the sharing company – which then performs the service to the user – special schemes or registrations thresholds would be out of scope and no normal rules would necessarily have to be followed.[56]

However, this solution seems very costly. Especially for sharers with little sharing

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53 Value Added Tax Committee (n 31) 7, 10.

54 Value Added Tax Committee (n 31) 7, and European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy* (n 3) 15.

55 See Grlica (n 9) 8, who uses the terminology one "sharing economic company".

56 See also subsection 4.2.

activity,[57] the normal rules are quite burdensome for perceived non non-taxable persons. Sharers would be in need to know their tax obligations and would be obligated to apply them with a certain level of diligence. Bureaucracy costs are likely to outweigh the actual tax revenues. This option carries huge downsides.[58] Additionally, it would bring a huge setback in the attractiveness of this new and developing economy.[59] This point seems pivotal. Obviously, lawmakers could put sharers in the "normal" position to claim all their inputs for an input VAT deduction. From a legal viewpoint, this would be nothing but coherent. This solution is not conceptually unsatisfying.

For sharers wrongfully claiming an exemption, the debate appears to be different. It is solely the lack of enforcement leading to smaller VAT revenues. It is not a conceptual debate; taxation of such services does not give room for discussion. The tax burden going along with these services is a legal claim of the state. Nevertheless, it is obvious that traditional enforcement mechanisms do not lead to sufficient tax compliance in connection to the sharing activity. Therefore, a new way to enforce VAT of such transactions is necessary.

Also, other special schemes, like the special scheme for travel agents[60] or the special margin scheme[61], do not clear the picture. Neither of them would circumvent

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57 Fetzer and others (n 9) use the terminology "home-sharer" for sharers with little sharing activity.

58 Fetzer and others (n 9) appropriately recognize that for sharers (as used in this chapter) a deduction for income tax purposes can be legally prohibited. The same legal consequence can hold for consumption tax purposes.

59 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy* (n 3) 2.

60 Arts 306-10 VAT Directive.

61 Arts 312-25 VAT Directive.

the problem of knowing consumption of the previous stage in the sharing activity. Evidently, the normal VAT system with a self-declaration of the value added is not feasible in the sharing economy. This is not a unique feature to the sharing economy, as every other service provider can also under-report revenues. However, professionals have other mechanisms implicitly leading them to (more or less) correct record keeping, sharers have very little to lose as their activity does not finance their living. From states' perspectives, millions of small individual payments would lead to an even bigger attack on the VAT system as its taking place currently.

Hence, existing legal possibilities in the VAT Directive offer no satisfying solution. Simply preserving old rules to this new kind of economy is not adequate. Better options exist.

3.4.2 Deemed Supplier

A new and promising concept amended the VAT Directive by the end of 2017 for distant sales of goods.[62] Coming from a slightly different context, the intentions of these new provisions are still applicable in the context of the sharing economy. Amongst other legal acts, a directive introduces a new Article 14a into the VAT Directive, effective from 2021. This article fictitiously includes the platform in the supply chain when goods are bought through a platform and imported into the jurisdiction of a member state.[63] Other jurisdictions follow a similar approach.[64]

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62 See Council Directive (EU) 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, OJ L348/7 (European Union) (hereinafter: e-commerce Directive).

63 Art 2(2)1 e-commerce Directive.

64 Treasury Laws Amendment (GST Low Value Goods) Act 2017, No 77 (Commonwealth of Australia).

Through this mechanism, the platform is obligated not just to apply with VAT laws themselves, but also to make sure that all goods suppliers trading through this platform comply with EU VAT law.[65]

After an extensive observation period of international legislators, member states have finally found a way to apply their will to platforms.[66] Before, platforms were able to refrain from all pressing tax problems in connection to their traders, by arguing that they were not responsible for other taxpayers' tax obligations.[67] Certainly true, times will change from 2021 on, when the platforms are fictitiously involved in the VAT chain.

Extending this treatment to the sharing economy is leaving the main issue unsolved. If the platforms were fictitiously included in the value chain, the obligation to levy VAT would be taken care of; however, the consumption of the previous stage – identified as the main theoretical issue – is still nebulous. Even with all good intentions, the platform does not know how much value a sharer creates. As pointed out extensively, this consumption is unknown in most of the cases. However, the immense size of the sharing economy demands for a practicable solution. A solution in balance between no taxation and no double taxation.

Simply making the platform liable pays tremendous disrespect to the fundamental idea of consumption taxation through a VAT. With no further rules, VAT would

65 Up to the amount of €150.

66 In the context of e-commerce, also other ways have now been found, for example through a third-party liability. See for the UK: Max Schofield and Rita de la Feria, 'Finance Act 2016: Section 123 VAT: Representatives and security; Section 124 VAT: Joint and several liability of operators of online marketplaces' (2016) 61(5) British Tax Review 604, for Germany Matthias Luther, 'Die neue Haftung für Online-Marktplätze' (2018) 71(33) Der Betrieb 1942.

67 VAT fraud by Chinese traders on amazon is often mentioned in the press, see amongst others Massimo Bognanni and Volker Votsmeier, Tatort Amazon, 'Handelsblatt' (6 December 2016) 18.

de facto be transformed into a sales tax. This step could certainly be done, though, again, better options are available.

3.4.3 Digital Services Tax

In 2018, the EU put up a proposal of a digital services tax (DST). Based on Article 113 TFEU[68], the DST is a tax on certain digital revenues, attempting to compensate the lack of power of corporate tax rules in the digital economy.[69] The outcome of this initiative is far away from assessable; however, the discussion about the proposal is huge. The proposal for the directive explicitly notes that the DST targets revenues resulting from the supply of certain digital services characterized by user value creation.[70] The scope of the targeted revenues are services consisting in the making available to users of multi-sided digital interface, which allows users to find other users to interact with them, also referred to as "intermediation services".[71]

With the insights of the last section, the inclusion of platforms intermediating the supply of goods and services as depicted above is highly questionable. As Article 3 Digital Service Tax Proposal directive refers to revenues resulting from the provision of certain activities of the platforms, a connection to the revenues of the sharers is possible. Evidently, adding up all sharers revenues and taking out the platform provider's fee equals the revenues of the platform provider. Therefore, a calculation of

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68 Consolidated version of the Treaty on the Functioning of the European Union, OJ L326/47 (European Union).

69 Digital Services Tax Proposal 3.

70 Digital Services Tax Proposal 7. For the debate around value creation see Johannes Becker and Joachim Englisch, 'Taxing Where Value is Created: What's "User Involvement" Got to Do With It?' (2019) 47(2) Intertax 161.

71 Art 3(1)(a) and (b) Digital Services Tax Proposal.

the DST can also take place by applying a specific tax rate to the sharers' revenues. In this light, it economically works as a sales tax without input deduction.

Obviously, no intention to capture consumption through the sharing economy is observable in this approach. This might be explainable by the fact that the debate of the DST comes from a direct taxation perspective. Nevertheless, it remains unanswered why new ways and means are necessary, when a tax aiming at value already exists.[72] In addition to the general BEPS debate, it is not just corporate taxes not ending up with the ("right") treasurer, but also VAT revenues from individuals. It is not evident why the digital economy only deserves consideration from a direct tax perspective.

A DST might arguably capture value creation, it is no precise (counter)measure, though. As elaborated above, revenues are unable to tell how much consumption occurred. The expense side is pivotal in capturing value creation. This point is somehow unaddressed. Therefore, the DST for revenues from multi-sided digital platforms is excessive and not adequate for the sharing economy.

3.5 Proposed Solution

Existing approaches are inadequate – single standing – to capture the true problem in the sharing economy. Finding a practicable solution to the discussed problems is far away from easy. Before attempting this brave journey, developing a framework is necessary.

[72] Wolfgang Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy' (2018) 72(4/5) Bulletin for International Taxation 278, 286.

Apart from acting in bounds of the general accepted principles of VAT,[73] further boundaries exist. If new "economies" like the sharing economy evolve, it is the people demanding and making use of it. It might also be some companies benefiting from it, but eventually, it is the people asking for this new form of transacting. Hence, legislators should act in the will of the people and help this activity to flourish.[74] However, states need a certain amount of financial resources – also defined by the people. To satisfy these needs, taxation is inevitable. With a new economy, new transactions occur. If old transactions occur with a lower frequency, financial needs of governments are harder to meet. It appears legitimate to adapt taxation in the most minimalistic way necessary to the sharing economy.[75] Further, taxation must net revenues. The taxation of the sharing economy shall neither hurt nor lead to additional revenue possibilities. It is simply an act of bringing coherence back into the VAT system. Accordingly, a combination of existing mechanisms is proposed. The proposed solution focusses on the taxpayer and on the problem of taxing consumption.

3.5.1 Taxpayer

First, the need for a manageable way to collect VAT is necessary. It is evident, that neither sharer nor user should be engaged in the actual payment of the tax. As stated above, the value of consumption is the decisive point. Consumption is, especially for a platform, hard to observe. Further, sharers - defined as previously non-taxable

73 OECD, *VAT/GST Guidelines* (n 22) 1.12.

74 See also Roberta A Kaplan and Michael L Nadler, 'Airbnb: A Case Study in Occupancy Regulation and Taxation' (2014) 82(1) University of Chicago Law Review Online 103, 115.

75 Kußmaul and Kloster (n 30) also acknowledge, that the state has a legitimate interest in tax revenues from the sharing economy.

persons, do not calculate their profits or value added such as actual taxable persons do.

The obligation to remit taxes should be with the platforms.[76] Yet, there is no need to punish them with excessive bureaucracy. Airbnb for instance has shown some effort in collecting taxes and other duties on behalf of the hosts.[77] This procedure is reasonable, leading to a level playing field as all hosts pay the respective taxes and non-compliance is almost impossible. Authorities can theoretically obtain data from Airbnb and smoothly audit the processes implemented to ensure the tax collection. While the need for collection at the platform seems reasonable and operable, the long list of taxes and duties, reported by Airbnb, collected to this point is deceptive. Mainly occupancy and "tourist taxes" are collected and transferred to the local authorities on behalf of the hosts.

The take away point from the collection of other taxes and duties is that the platforms are the most feasible player to collect VAT in the sharing economy. This cannot surprise, as what they do for themselves – cutting out their fee – is the same thing as collecting a tax, except for a different creditor.

The shift of the tax paying obligation could work through the idea of the new Article 14a VAT Directive, with the so called deemed supplier approach.[78] Through this mechanism, economically and VAT wise, the transaction between the sharer and

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[76] See Fetzer and others (n 9) who propose a similar solution to the problem for income tax purposes. However, the focus is different in this chapter. In this chapter, only previous intended final consumption is depicted, not "sharing" with the intention to shift final consumption.

[77] Airbnb lists more than 50 jurisdictions, 11 of them non-US states, see Airbnb (online), last accessed 07.12.2020.

[78] See also art 9a(1) Council Implementation Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L77/1 (European Union). With further details, Bal, 'Managing EU VAT Risks for Platform Business Models' (n 3).

the platform would be a zero-sum game. With such legislation, the platform would be the supplying actor and the end where final VAT would have to be transferred to the treasury. Even after having identified the taxpayer, the problem of the right amount of new consumption in the sharing activity is hard to address.

3.5.2 Consumption

With the depicted taxpayer in mind, a solution to the mystery around the right amount of consumption is necessary. Based on an established technical mechanism, an option to determine the consumption contributed by sharers on a minimalistic set of inputs is proposed.

A solution to the problem could lie in the final report on the challenges of the digital economy of the OECD/G20 BEPS project. The "modified deemed profit method" is an empirical presumption used in the context of income attribution to permanent establishments. The idea is to apply a ratio of presumed expenses to the non-resident enterprise's revenue derived from transactions concluded with in-country customers.[79]

The essence of this idea is transferable to the sharing economy.[80] The income side is the comfortable part, as platforms exactly know what each single sharer collects, since it is the basis for their own fees.[81] The previous consumption needs to be further elaborated on. If consumption on the previous stage could be estimated, final

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79 OECD/G20, *Action 1 - 2015 Final Report* (n 13) 112-13.

80 The concept also works with fixed profits and varying expenses. See for instance, the tax reform in the United States of America An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, H.R. 1 (United States of America) sec 14201.

81 Gupta (n 11) 3, also acknowledges that gross receipts of each participant can be definitely determined.

consumption could eventually be netted with this estimation. Through this process non-taxation of services is avoided and already taxed goods are not double-taxed.

3.5.3 Previous Consumption

A cost-based estimation of the previous consumption seems appealing. Through a simplified calculation previous consumption is set equal to the sharer's former consumption of tangible inputs such as a flat. Additionally, a further fixed percentage for minor expenses seems reasonable. This result is the approximation of untaxed consumption (exclusive of VAT) and a taxation of this amount appears to be appropriate and justified. On the final stage, a feasible way of finding these costs in a *pro rata* approach is necessary.

For housing platforms, imputed costs per square meter could be used. Platforms would be required to collect minimal amounts of data of the premises of their sharers.[82] This data, combined with average square meter prices of the sublet condominium/house, leads to an estimate of the costs. With the intention to keep the sharers efforts to a minimum, the collected data should be reduced to the address and the size of the sublet room. This data is sufficient to use rent indices to approximate the sharers' expenses. The calculation of the value added is then a mere technicality. Depending on the accuracy demanded by the legislator, the design of the data collection differs. Obviously, with further information in order to determine the rent/opportunity costs, a better picture of the previous consumption appears.

[82] This could be done in the same way as in the context of e-commerce. The EU adopted the Commission's proposals which make platforms liable for VAT of their sellers, e-commerce Directive implementing art 14a into the VAT Directive with effect from 01.01.2021. This seems like a promising mechanism to apply pressure to platforms.

A similar procedure works for Uber. Again, the "plant and equipment" in form of the car is the main driver of expenses. Instead of rent indices, cost estimates of cars by other recognized institutions could be used. In the German case, the largest automotive association, Allgemeine Deutsche Automobil-Club e.V., maintains a database with the estimated costs of over 9,000 cars.[83] With certain assumptions, such as the usage time of the car, fixed costs like insurances, costs for reasonable maintenance, gas costs, and depreciation, are factored in. At the end a cost estimate per kilometre is given. This could be used in the same manner as in the housing case. Uber already knows the distance covered and the type of car. Hence, expenses could be deducted, and the residual would equal the consumption of the previous stage of the sharing action.

3.5.4 Summary and Technical Details

The proposed solution is a combination of the deemed supplier approach and a deemed previous consumption based on expenses on goods. Through these two mechanisms, both the conceptual and the practical challenges of the sharing economy concerning VAT can be solved. In detail, the platform would be the taxpayer, which would be achieved through the deemed supplier approach. VAT would be collected in the transaction from the platform to the user. The transaction of the sharer to the platform would be zero-rated, hence the platform would retain an input deduction. This input deduction would be done according to a deemed previous consumption.

The expressed thoughts should be merely seen as a first idea, constituting a framework. It is up to a political debate how precise previous consumption needs to

[83] See Autokosten Datenbank (online).

be approximated. The clear-cut message from this section is that an approximation is necessary, possibly, through a cost-based estimation of the value added through the service in the sharing activity.

The possibility to opt out of this proposed solution should be used cautiously, as it provokes inefficiencies in enforcement. Since benevolent VAT payers with extensive input VAT deductions should not be disadvantaged if their true business is sharing, a revenue threshold which has to be reached could be introduced in order to opt out of this scheme.

In conclusion, taxation based on estimates always leaves a bad taste. There is a possibility that the true consumption, is under- or overestimated. However, such an estimation is closer to the real consumption than the current treatment.

3.6 Conclusions and Policy Recommendations

The platforms in the sharing economy have found a handy way to outsource unwanted tax payments. Real consumption possibilities are not offered by internet giants; individual sharers offer consumption to other users. To some extent, this is an update of the franchise idea. A shift of business activity does not only occur from multinationals to national or regional branches; it occurs directly to individuals, creating micro-entrepreneurs. However, their activity is very often not a full-time job. Instead such activity is often done in leisure time. Common income and consumption taxation systems mostly exclude sharing activity from taxation. This used to be reasonable in terms of tax revenues.

This chapter has shown that the sharing economy is one step ahead of legislators. The rules on platform business models are outdated, unenforceable and lead to an unspecified tax gap. Registration thresholds and special schemes in consumption taxation stem from times of a different economic background. Moreover, this chapter has underlined which transactions are problematic from a consumption taxation perspective. In the most minimalistic way, a solution was proposed. A deemed supplier approach was necessary in order to have the platform as the taxpayer. Further, an estimation of the consumption by the sharer through the sharing economy is necessary. Here, the concept of deemed expenses is borrowed and applied to the context. It is certainly up to a political debate how precise value added needs to be estimated.

In the light of recent initiatives, the pillars of the proposed solution are identified as the best possible way to capture consumption – which goes untaxed now – and undermines the fundamental principle of VAT. Desperate deeds like the DST are conceptually not able to solve the identified problem. "Value creation" is taxed only

indirectly and no respect to different facts and circumstances of sharers is paid. Certainly, tax revenue can be altered with this new kind of tax, however other major problems like the scope, exemptions or tax planning emerge. From an academic perspective, such a tax is unsatisfying. In modernizing the VAT Directive, the scope is clear and sharer's taxation is simply levelled with taxation of others providing very similar services. It seems unlikely that VAT on sharing transactions is excessive, leading to a stark reduction of sharing. However, with millions of transactions, VAT revenues from the sharing economy should not be negligible.

The digital economy has brought unseen potential to new business models. It is time for legislators to use creative ways of taxation and enforcement. Taxation in the sharing economy has been neglected for too long. Taxing this new economy properly from a VAT standpoint leads to the conclusion, that levying consumption taxes on sharing transactions is not an act of arbitrary regulation; it is an act of restoring full neutrality in VAT systems. Legislators have started talking about taxation of the digital economy. Concerning VAT, the sharing economy offers room for improvement.

4 South Dakota v. Wayfair, Inc.

4.1 Sales und Use Tax System in den USA und bisherige Rechtsprechung

Die US-amerikanische *Sales Tax* ist eine Verbrauchsteuer auf Verkäufe an Endkonsumenten.[1] Anders als im Recht der Europäischen Union (EU) gibt es im amerikanischen Recht keine mit der MwStSystRL[2] vergleichbaren verbindlichen Regelungen zur Harmonisierung der Steuer.[3] Vielmehr liegt die *Sales Tax* im Kompetenzbereich der einzelnen Bundesstaaten.[4] Somit kann jeder Bundesstaat die zu besteuernden Trans-

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1 Walter Hellerstein, 'State Sales Tax Reform in the United States: The Streamlined Sales Tax Project' (2005) 59(5) Bulletin for International Taxation 170, 171; Andreas Striegel, *Grundlagen des US-amerikanischen Steuerrechts* (2nd edn, Erich Schmidt 2013) 277; Robert F van Brederode, 'Introduction to the US State Sales and Use Taxes' (2007) 18(5) International VAT Monitor 270.

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union)(nachfolgend: MwStSystRL).

3 Zwar besteht ein sog. „Streamlined Sales and Use Tax Agreement". Die Regelungen des Agreements sind jedoch nicht verbindlich, vgl. Streamlined Sales Tax Governing Board, Inc, Streamlined Sales and Use Tax Agreement (2002).

4 Jörg-Dietrich Kramer (Hrsg.), *Grundzüge des US-amerikanischen Steuerrechts* (Poeschel 1990) 44; Jörg Kroschel, *Die Federal Income Tax der Vereinigten Staaten von Amerika* (IDW-Verlag 2000) 211; Annemarie Mennel und Jutta Förster (eds), *Steuern in Europa, Amerika und Asien* (NWB 2017) Länderteil USA, Rz. 300-04.

aktionen und die anzuwendenden Steuersätze selbst bestimmen.[5] Die *Sales Tax* ist daher keine allgemeine, sondern eine spezielle Verbrauchsteuer auf bestimmte Güter und Dienstleistungen.[6] 45 von 50 Bundesstaaten und der District of Columbia erheben derzeit *Sales Taxes*.[7] Die Steuersätze variieren zwischen 2,9 Prozent und 7,25 Prozent.[8] Daraus resultiert ein lebhafter Steuerwettbewerb zwischen den Bundesstaaten, da die Unterschiede in den Steuersätzen Kunden dazu veranlassen, größere Einkäufe in Bundesstaaten mit niedrigen Steuersätzen zu tätigen.[9] Der Steuerwettbewerb beeinflusst dementsprechend auch Standortentscheidungen auf Unternehmensebene,[10] insbesondere bei den weitestgehend einer Besteuerung unterliegenden Lieferungen.[11]

Grundsätzlich erfolgt im Rahmen der *Sales Tax* in den Vereinigten Staaten von

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5 In einem Sondervotum zum Urteil wird beispielsweise aufgezeigt, dass der Bundesstaat Illinois die Schokoriegel Twix und Snickers aufgrund deren Inhaltsstoffe unterschiedlich besteuert, vgl. *South Dakota v Wayfair, Inc* No 17–494 (Supreme Court of the United States 2018) Roberts dissenting, 6.

6 Sie ist weitestgehend losgelöst von einem dem Unionsrecht vergleichbaren Grundsatz der steuerlichen Neutralität, vgl. Richtlinie 2006/112/EG des Rates über das gemeinsame Mehrwertsteuersystem, Abl. L 347/1 (Europäische Union) Erwägungsgrund Nr. 7 (nachfolgend: MwStSystRL) und Rechtssache 481/98 *Commission of the European Communities v French Republic* [2001] ECR I–3369, Rz. 23.

7 Hellerstein, 'State Sales Tax Reform in the United States: The Streamlined Sales Tax Project' (n 1); Tax Foundation, State and Local Sales Tax Rates (2018) 1.

8 State and Local Sales Tax Rates (n 7) 3. Die ggf. zusätzlich anfallenden Local *Sales Taxes* werden hierbei nicht mit einbezogen. Nur die als „NOMAD" bekannten Bundesstaaten New Hampshire, Oregon, Montana, Alaska und Delaware erheben keine *Sales Tax*.

9 David R Agrawal, 'The Tax Gradient: Do Local Sales Taxes Reduce Tax Differentials at State Borders?' [2013] SSRN Electronic Journal; David R Agrawal, 'Games within borders: Are geographically differentiated taxes optimal?' (2012) 19(4) International Tax and Public Finance 574; Randolph Beard, Paula A Gant, und Richard P Saba, 'Border-Crossing Sales, Tax Avoidance, and State Tax Policies: An Application to Alcohol' (1997) 64(1) Southern Economic Journal 293; Susan Chandler, The Sales Tax Sidestep, 'Chicago Tribune' (20 Juli 2008).

10 Tax Foundation, Location Matters: The state tax costs of doing business (2015); Martin Thomsen, Robert Ullmann, und Christoph Watrin, The Impact of Taxes on Location Decisions, 'University of Illinois Symposium on Tax Research XIII' (2013); Peter Wilson, in Alberto Giovannini (Hrsg.), *Studies in International Taxation* (University of Chicago Press 1996).

11 Vergleichbar mit den Standortentscheidungen von Unternehmen in Grenznähe.

Amerika (USA) eine Verbrauchsbesteuerung nach dem Bestimmungslandprinzip. Um dieses umzusetzen, ist bei Lieferungen innerhalb eines Bundesstaats der Verkäufer grundsätzlich zum Einbehalt und zur Abführung der *Sales Tax* an die zuständige(n) Behörde(n) verpflichtet. Beim Export aus einem Bundesstaat (z.B. Versand an einen Kunden in einem anderen Bundesstaat) ist der Verkäufer jedoch nur dann zum Einbehalt und zur Abführung der Steuer verpflichtet, wenn er im Absatzstaat über einen wesentlichen Anknüpfungspunkt (*substantial nexus*) verfügt. Nach bisheriger Rechtsprechung (*Bellas Hess*[12] und *Quill*[13]) ist dies der Fall, wenn der Verkäufer im Absatzstaat eine physische Präsenz unterhält. Ist dies nicht der Fall, dürfen die Bundesstaaten den Verkäufer beim Versandhandel zwischen Bundesstaaten nicht verpflichten, die *Sales Tax* einzubehalten und abzuführen. Dies führt zu einer Lücke in der indirekten Verbrauchsbesteuerung.

Um diese Lücke zu schließen, wurde die als direkte Verbrauchsteuer erhobene *Use Tax* eingeführt.[14] Die *Use Tax* ergänzt die *Sales Tax* und fällt grundsätzlich nur dann an, wenn die *Sales Tax* nicht erhoben wurde, z.B. weil der Verkäufer in dem jeweiligen Staat über keinen wesentlichen Anknüpfungspunkt verfügt.[15] In diesem Fall ist der Kunde dazu verpflichtet, die Steuer an die zuständige(n) Behörde(n) im Absatzstaat abzuführen. Der *Supreme Court of the United States* (nachfolgend

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12 *National Bellas Hess v Department of Revenue of Illinois* [1967] 386 US 753 (Supreme Court of the United States).

13 *Quill Corp v North Dakota* [1992] 504 US 298 (Supreme Court of the United States).

14 John F Due, *State Sales Tax Administration* (Public Administration Service 1963) 201-03; van Brederode (n 1) 271.

15 Die Trennung zwischen *Use* und *Sales Tax* ist in den Bundesstaaten uneinheitlich und führt auch in Fachkreisen zu viel Verwirrung. Da historisch die *Sales Tax* als intrastaatliche Steuer konzipiert wurde, dreht sich die Kernfrage der *Wayfair*-Entscheidung um die Abführung der *Use Tax*.

Supreme Court) spricht von komplementären Besteuerungsregimen.[16]

Sofern die Erhebung der *Use Tax* durch Einbehalt und Abführung der Steuer durch den Verkäufer erfolgt, ist die Erhebung der Steuer weitestgehend sichergestellt. Sind jedoch aufgrund mangelnder Verpflichtung des Verkäufers zum Einbehalt und zur Abführung der *Sales Tax* die Kunden zur Entrichtung der *Use Tax* verpflichtet, hängt die Abführung der Steuer stark von der Steuerehrlichkeit des einzelnen Kunden ab. Eine solche Umkehr der Steuerschuldnerschaft ist im EU-System nicht in dieser Breite anzutreffen. Erwartungsgemäß ist die Befolgungsrate in den Fällen, in denen der US-Kunde zur Abführung der Steuer verpflichtet ist, mit circa 4 Prozent sehr gering.[17] Um eine effiziente Steuererhebung zu gewährleisten, hat South Dakota ein Gesetz erlassen, nach dem für die Verpflichtung des liefernden Verkäufers zum Einbehalt und zur Abführung der *Use Tax* im Absatzstaat (hier South Dakota) ein physischer Anknüpfungspunkt nicht erforderlich ist, sondern auf einen sogenannten *economic nexus* abstellt. Nach diesem Gesetz kann ein wesentlicher Anknüpfungspunkt auch dann vorliegen, wenn das Unternehmen bestimmte Schwellenwerte in South Dakota überschreitet. Die Anforderungen an das Vorliegen eines wesentlichen Anknüpfungspunkts im Absatzstaat wurden somit durch das Gesetz reduziert, wodurch die Verpflichtung der Verkäufer zum Einbehalt und zur Abführung der *Use Tax* deutlich ausgeweitet wurde.[18] Bereits bei Erlass des Gesetzes war offenkundig, dass dieses

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16 *Wayfair* (n 5) Opinion of the Court 2. So auch Hellerstein, 'State Sales Tax Reform in the United States: The Streamlined Sales Tax Project' (n 1) 172.

17 Reuven S Avi-Yonah, The International Implications of Wayfair, 'Tax Notes International' (9 Juli 2018) 161; United States Government Accountability Office, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs: GAO-18-114 (2017) 5; Minnesota House of Representatives, Use Tax Collection on Income Tax Returns in Other States (2015) 7; van Brederode (n 1) 274.

18 Kommt der Verkäufer dieser Verpflichtung nicht nach, ist weiterhin der Endabnehmer zur Abführung der *Use Tax* verpflichtet, vgl. An Act to provide for the collection of sales taxes from certain remote

Gesetz einer (höchst)richterlichen Prüfung unterzogen werden muss. Mit dem Urteil *Wayfair*[19] vom 21.06.2018 hat der *Supreme Court* dieses Gesetz als konform mit der Bundesverfassung erklärt und mit seiner bisherigen Rechtsprechung gebrochen. Eine Analyse dieses Urteils wird in Abschnitt 2 vorgenommen. Zunächst wird das von South Dakota erlassene Gesetz dargestellt. Nach einer Erläuterung des Verfahrenswegs wird erörtert, ob der *Supreme Court* die für die Entscheidung zuständige Instanz darstellt. Anschließend wird die Entscheidung des *Supreme Courts* und deren weitreichende Wirkung beschrieben. Auch auf die angebrachte Kritik der dissentierenden Minderheit wird eingegangen. Abschnitt 3 befasst sich mit den Auswirkungen des Urteils auf den zwischen(bundes)staatlichen und internationalen Handel. Neben den Auswirkungen für Unternehmen mit Fernverkäufen in die und innerhalb der USA wird aufgezeigt, welche Verfahrensvereinfachungen für die neu geschaffene Situation genutzt werden könnten. Daneben wird gezeigt, inwiefern sich durch das Urteil Implikationen für die Diskussion über die Einführung einer signifikanten digitalen Präsenz ergeben.

4.2 Neuer Präzedenzfall South Dakota v. Wayfair, Inc.

sellers, to establish certain Legislative findings, and to declare an emergency, S.B. 106 (South Dakota) Sec. 7.

[19] *Wayfair* (n 5).

4.2.1 In Frage stehende gesetzliche Vorschrift in South Dakota

Im Jahr 2016 verabschiedete der Bundesstaat South Dakota ein Gesetz, nach dem Verkäufer zum Einbehalt und zur Abführung der *Sales Tax* verpflichtet werden, auch wenn sie in South Dakota (Absatzstaat) nicht über einen physischen Anknüpfungspunkt (*physical presence*) verfügen.[20] Die Verpflichtung wird nach dem Gesetz dann begründet, wenn Verkäufer eine der folgenden zwei Bedingungen im vorangegangenen Kalenderjahr erfüllt haben oder im aktuellen Kalenderjahr erfüllen.

1. Die Bruttoumsätze aus dem Verkauf von materiellen Gütern, elektronisch vertriebenen Produkten oder Dienstleistungen in den Rechtsraum von South Dakota überschreiten den Schwellenwert von 100.000 $ oder
2. der Verkäufer wickelt mindestens 200 Verkäufe von materiellen Gütern, elektronisch vertriebenen Produkten oder Dienstleistungen im Rechtsraum von South Dakota ab.

In der Gesetzesbegründung wird u.a. ausgeführt, dass dieser Schritt notwendig sei, um eine effiziente Erhebung der *Sales* und *Use Tax* zu erreichen. Der Konflikt mit der bisher geltenden Rechtsprechung des *Supreme Courts* wird im Gesetz offen angesprochen. Der *Supreme Court* wird dazu aufgefordert, seine bisher aufgestellte Doktrin zu überdenken. Die mangelnde Einbindung der Versandhändler in die Steuererhebung führe in South Dakota zu einer erheblichen Erosion der Steuereinnahmen. South

[20] An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency) (South Dakota), nahm Richter Kennedys Sondervotum zum Urteil *Direct Marketing Association, Petitioner v Barbara Brohl, Executive Director, Colorado Department of Revenue* No 13–1032 (Supreme Court of the United States 2015) in dem er offen dazu aufruft, dass ein geeigneter Fall gefunden werden soll, um die bisherige Rechtsprechung anzugreifen, zum Anlass, dieses Gesetz zu erlassen. Die *Opinion of the Court* in der *Wayfair*-Entscheidung wurde daraufhin ebenfalls von Richter Kennedy verfasst. Nach dieser Entscheidung, die als eine der wichtigsten Entscheidungen in den letzten Jahrzehnten angesehen wird, ist Richter Kennedy nun zurückgetreten.

Dakota sei für die Finanzierung staatlicher und kommunaler Leistungen in besonderer Weise vom Aufkommen der *Sales* bzw. *Use Tax* abhängig, da der Bundesstaat keine Einkommensteuer erhebt.[21]

4.2.2 Gang des Verfahrens

Kurz nach Verabschiedung des Gesetzes begann das *Department of Revenue* von South Dakota die Verkäufer durch schriftliche Mitteilung über die Neuregelungen zu informieren und sie zur Registrierung aufzufordern. Sie wurden davon in Kenntnis gesetzt, dass eine Zuwiderhandlung ein Feststellungsurteil (*declaratory judgment*) zur Folge haben kann. Auch die Unternehmen Wayfair Inc., Overstock.com Inc. und Newegg Inc. erhielten solche Mitteilungen. Sie kamen der Aufforderung zur Registrierung nicht nach. South Dakota ersuchte daraufhin das Bezirksgericht (*Circuit Court*) um ein Feststellungsurteil. Dieses sollte bestätigen, dass die Regelungen des Gesetzes zulässig und anwendbar sind. Außerdem strebte South Dakota eine gerichtliche Verfügung an, die die Händler zur Registrierung verpflichtet.[22]

Die Unternehmen ersuchten daraufhin ein summarisches Urteil (*summary judgment*), da sie das Gesetz für verfassungswidrig erachteten. Das Bezirksgericht urteilte in seinem summarischen Urteil für die Beklagten (Wayfair Inc., Overstock. com Inc. und Newegg Inc.). Dadurch wurde die tatsächliche Vollziehung des Gesetzes bis zur Feststellung der Verfassungsmäßigkeit ausgesetzt.[23] Begründet wurde die

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[21] An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency, Sec. 1, Sec, 8 (1) und (2). Circa 60 Prozent der Geldmittel des Bundesstaates stammen aus den *Sales/Use Tax*-Einnahmen, vgl. *Wayfair* (n 5) Opinion of the Court 2-3.

[22] *Wayfair* (n 5) Opinion of the Court 4.

[23] An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain

Entscheidung damit, dass das Bezirksgericht zu pflichtgemäßem Handeln verpflichtet ist (*duty bound*) und sich daher nicht über die vom *Supreme Court* entwickelten Rechtsprechungsgrundsätze (*precedent*)[24] hinwegsetzen darf. Der *Circuit Court* sei ungeachtet geänderter Zeiten, die klar andere Ausgänge suggerieren, nicht in der Lage, die Rechtsprechungsgrundsätze des *Supreme Courts* zu ändern (*overrule*).[25]

Nach Verkündung des summarischen Urteils rief South Dakota den *Supreme Court of the State of South Dakota* an. Auch dieses Gericht verwies darauf, dass ungeachtet der überzeugenden Argumente in Bezug auf die Vorzüge einer geänderten Rechtslage, nach wie vor *Quill* der Präzedenzfall sei, nach dessen Grundsätzen dieser Fall zu beurteilen sei, und, dass es nur dem *Supreme Court of the United States* möglich sei, die von ihm aufgestellten Rechtsprechungsgrundsätze zu ändern.[26] Daraufhin stellte South Dakota einen Antrag auf erneute Prüfung des Falls (*certiorari*) beim *Supreme Court of the United States*.[27] Dieser bewilligte den Antrag.

4.2.3 Zuständigkeit des Supreme Courts

Es ist fraglich, ob der *Supreme Court* tatsächlich die für diese Entscheidung zuständige Instanz darstellt.[28] Grundsätzlich steht allein dem Kongress[29] als gesetzgebende Ge-

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Legislative findings, and to declare an emergency, Sec. 3 und Sec. 8 (10).

24 Siehe hierzu Unterabschnitt 2.3.

25 *Order Granting Defendants' Motion for Summary Judgment* 32CIV16-00009 (Circuit Court of County of Hughes 2017) Nr. 5.

26 *Wayfair* (n 5) Opinion of the Court 4.

27 § 1254 (1) United States Code Title 28, Judiciary and Judicial Procedure (United States).

28 Kritiker des Urteils berufen sich v.a. auf die fehlende Zuständigkeit des Kongresses. Hierzu Unter-Unterabschnitt 2.4.2.

29 Der Kongress hat zwei Kammern: Senat und Repräsentantenhaus. Ein Bundesgesetz tritt nur dann in Kraft, wenn es von Senat und Repräsentantenhaus wortgleich mit einfacher Mehrheit verabschiedet

walt das Recht zu, den Handel mit fremden Ländern und zwischen den Bundesstaaten zu regeln.[30] Diese Regelung wird vom *Supreme Court* in der *Wayfair*-Entscheidung auch nicht in Frage gestellt. Allerdings führt der *Supreme Court* an, dass bereits seit der Entscheidung *Southern Pacific Co v Arizona* aus dem Jahr 1945 anerkannt sei, dass der Kongress die tatsächliche Befugnis, Gesetze der Bundesstaaten einzuschränken, den Gerichten überlassen hat.[31] Nach Ansicht des *Supreme Courts* sei es zudem unvereinbar mit der Rolle des *Supreme Courts*, den Kongress anzurufen, damit sich dieser mit Angelegenheiten befasst, die auf einer falschen Entscheidung des *Supreme Courts* beruhen. Der *Supreme Court* habe daher im Fall *Wayfair* das Recht, die Entscheidung selbst zu treffen.[32]

Da sich die US-amerikanische Rechtsordnung an bereits ergangener Rechtsprechung zu vergleichbaren Sachverhalten (*common law*) orientiert,[33] kommt dem Richterspruch grundsätzlich ein höherer Stellenwert zu als in der deutschen Rechtsordnung. Die Entscheidung *South Dakota v. Wayfair* des *Supreme Courts* stellt daher

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wird und danach vom Präsidenten unterzeichnet wird, vgl. Art. 1, Sec. 1 The Constitution of the Unites States, (United States of America)(nachfolgend: US Const.); Peter Hay, *Law of the United States: An overview* (4th edn, Helbing & Lichtenhahn 2016) 20-23; Floyd M Riddick, *The United States Congress; Organization and Procedure* (National Capital Publishers 1949) 18; Donald A Ritchie, *The U.S. Congress: A very short introduction* (2nd edn, Oxford University Press 2016) XV.

30 Vgl. Art. 1, Sec. 8, Clause 3 US Const. Vertieft zur föderalen und bundesstaatlichen Zuständigkeit beim zwischenstaatlichen Handel vgl. Ernst Freund, *Das öffentliche Recht der Gegenwart - Vereinigte Staaten von Amerika* (Mohr, 1911) 27-31; Arthur Taylor von Mehren und Peter L Murray, *Das Recht in den Vereinigten Staaten von Amerika: Eine Einführung* (Xenomoi 2008) 145-55.

31 *Wayfair* (n 5) Opinion of the Court 5.

32 Zu den Gründen, aus denen vier der neun Richter den Kongress für zuständig erachten (weitreichender Einfluss auf den E-Commerce, besondere Gründe für das Abweichen vom *stare decisis*-Grundsatz, keine Dringlichkeit des Falles) vgl. *Wayfair* (n 5) Roberts dissenting 5.

33 Edward Allan Farnsworth und Steve Sheppard (eds), *An introduction to the legal system of the United States* (4th edn, Oxford University Press 2010) 37; Peter Hay, *US-Amerikanisches Recht* (7th edn, CHBeck und Helbing & Lichtenhahn 2019) 7; Mehren und Murray (n 30) 8-9, 53-57.

einen neuen Rechtsprechungsgrundsatz dar, der alle anderen Gerichte bindet.[34] Alle Bundesstaaten und Steuerpflichtigen können sich somit auf die Grundsätze dieses Urteils berufen.

Dem Kongress steht grundsätzlich die Möglichkeit offen, die Entscheidung des *Supreme Court* durch gesetzliche Regelungen zu überlagern.[35] Der Kongress hat jedoch bisher nicht von der Möglichkeit Gebrauch gemacht, über die Einbindung der (Online-)Versandhändler in die Steuererhebung zu entscheiden. Ihm lagen diesbezüglich drei gleich gelagerte Gesetzentwürfe vor.[36] Ob der Kongress nun aktiv wird, ist offen.[37] Vorteil einer Entscheidung durch den Kongress wäre, dass eine einheitliche Regelung für alle Bundesstaaten geschaffen würde. Die Einführung zahlreicher verschiedener Regelungen auf Bundesstaatenebene führt zu einer unübersichtlichen

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34 Im Gegensatz dazu § 325 Abs. 1 Zivilprozessordnung, BGBl. I 2005, 3202 (Bundesrepublik Deutschland) der die Wirkung eines Urteils nur für betroffene Parteien und Personen vorsieht.

35 *Prudential Ins Co v Benjamin* [1946] 328 US 408 (Supreme Court of the United States). In der Vergangenheit hat der Kongress bereits Entscheidungen des *Supreme Courts* durch gesetzliche Regelungen nachträglich überlagert, die er als zu starke Begünstigung der Bundesstaaten angehen hat, vgl. Interstate Income Act of 1959, Public Law 86-272 (United States of America). Mit diesem Gesetz wurde es den Bundesstaaten verboten, die Gewinne eines Unternehmens aus dem Verkauf von Waren zu besteuern, wenn das Unternehmen die Produkte zwar an Kunden innerhalb eines Bundesstaats verkauft hat, aber die Ware von außerhalb des Bundesstaats versandt hat und die Bestellungen außerhalb des Bundesstaats angenommen hat. Die Grundsätze der *Supreme Court*-Entscheidung *Northwestern States Portland Cement Co v Minnesota* [1959] 358 US 450 (Supreme Court of the United States) verloren damit an Wirkung.

36 Marketplace Fairness Act 2017, S. 976 (United States of America) vom 27.04.2017; Remote Transactions Partity Act 2017, H.R. 2193 (United States of America) vom 27.04.2017 und No Regulation Without Representation 2017, H.R. 2887 (United States of America) vom 12.06.2017. Eine Übersicht zu Gesetzesentwürfen, die darauf abzielen, die *Quill*-Entscheidung zu verwerfen und dem Kongress bereits vorlagen, findet sich in Brief of Amicus Curiae of Brief of Four United States Senators as Amici Curiae in Support of Petitioner and two United States Representatives in Support of the Petition (No 17-494, 2017) Addendum.

37 In einem Brief of *amici curiae* beklagten sechs Kongressabgeordnete die schwerfällige Entscheidungsfindung im US-Kongress und sprachen sich für die Annahme der Petition für einen *writ of certiorari* aus, Brief of Amicus Curiae of Brief of Four United States Senators as Amici Curiae in Support of Petitioner and two United States Representatives in Support of the Petition (n 36) 4.

Rechtslage für Verkäufer, wodurch die Befolgung dieser Regelungen erschwert wird.[38]

4.2.4 Entscheidung des Supreme Courts

4.2.4.1 Das Urteil

Der *Supreme Court* hat das Gesetz von South Dakota für verfassungskonform erklärt. Die Entscheidung erging mit einer knappen 5-4 Mehrheit.[39] Das in vorheriger Rechtsprechung aufgestellte Erfordernis einer physischen Präsenz eines Unternehmens im Absatzstaat zur Begründung der Verpflichtung zum Einbehalt und zur Abführung der *Sales Tax* sei „schlecht fundiert und unrichtig".[40] Die Rechtsprechungsgrundsätze, die auf den Urteilen *Bellas Hess* und *Quill* beruhen, wurden somit verworfen. Folglich muss die *Sales Tax* beim Versandhandel künftig auch dann vom Verkäufer als Steuerschuldner einbehalten werden, wenn dieser keine physische Präsenz in South Dakota unterhält, aber die im Gesetz verlangten Erfordernisse erfüllt.[41] Ein wesentlicher Anknüpfungspunkt im Absatzstaat kann insbesondere auch dann vorliegen, wenn das Unternehmen bestimmte Schwellenwerte im jeweiligen Bundesstaat überschreitet. Eine detailliertere Erklärung, wie der wesentliche Anknüpfungspunkt zu definieren ist, hat der *Supreme Court* nicht vorgenommen.

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38 Paul Jones und Jad Chamseddine, States Should Act With Care Following Wayfair, 'State Tax Notes' (2 Juli 2018) 63.

39 Zu beachten ist jedoch, dass vier der neun Richter des *Supreme Court* dem *Wayfair*-Urteil nicht zugestimmt haben. Diese vier Richter haben nicht den Inhalt der Entscheidung in Frage gestellt, sondern dargelegt, dass sie der Ansicht sind, dass die Zuständigkeit für diese Entscheidung nicht dem *Supreme Court*, sondern dem Kongress obliegt. Vgl. hierzu Unter-Unterabschnitt 2.4.2.

40 *Wayfair* (n 5) Opinion of the Court 22.

41 Dies lässt sich aus dem Präzedenzfall *Complete Auto Transit, Inc v Brady* [1977] 430 US 274 (Supreme Court of the United States) ableiten, der für die Begründung eines *nexus* in einem Bundesstaat allein darauf abstellt, ob ein wesentlicher Anknüpfungspunkt vorliegt.

Die Urteilsbegründung führt zahlreiche Punkte für den Richtungswechsel an. Zunächst wird ausgeführt, dass die *Quill*-Entscheidung an sich bereits fehlerhaft war. Denn bereits in der Entscheidung selbst wird ausgeführt, dass ein Unternehmen nicht notwendigerweise eine physische Präsenz in einem Bundesstaat benötigt, um eine Verbindung zum Absatzstaat zu begründen. In Ermangelung anderer Gründe hatten drei Richter in *Quill* ihre Entscheidung, an den Grundsätzen von *Bellas Hess* festzuhalten, allein auf dem Grundsatz von *stare decisis*[42] aufgebaut.[43] Zudem sind die Entscheidungen, die in den Rechtssachen *Quill* und *Bellas Hess* getroffen wurden, nicht mehr zeitgemäß. Beide Urteile wurden gefällt, bevor sich das Internet und damit einhergehend der E-Commerce verbreitet hatten. Im Jahr 1992 (Entscheidungsjahr *Quill*) hatten weniger als 2 Prozent der US-Bürger Zugang zum Internet; heutzutage liegt die Zahl bei 89 Prozent.[44]

Des Weiteren wird die Abkehr von den bisherigen Rechtsprechungsgrundsätzen damit begründet, dass die Entscheidungen *Quill* und *Bellas Hess* zu Marktverzerrungen führen. Insbesondere führt das Abstellen auf eine physische Präsenz zu einer Steuerbegünstigung für Unternehmen, die über keine physische Präsenz im Absatzstaat verfügen, sondern ihre Geschäfte über Online-Bestellungen mit anschließendem Versand in den Absatzstaat abwickeln. Diese Unternehmen haben dadurch

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42 Nach *stare decisis* dürfen Grundsätze aus vergangenen Urteilen nur dann verworfen werden, wenn signifikante Unterschiede der zu beurteilenden Sachverhalte vorliegen, vgl. Saul Brenner und Harold J Spaeth, *Stare indecisis: The alteration of precedent on the Supreme Court, 1946-1992* (Cambridge University Press 1995) 1; Daniel H Chamberlain, *The doctrine of stare decisis; Its reasons and its extent* (Baker, Voorhis & Co 1885) 5; Hay, *US-Amerikanisches Recht* (n 33) 7; Randy J Kozel, *Settled versus right: A theory of precedent* (Cambridge University Press 2017) 2; Rudolf Laun, *Stare Decisis: The Fundamentals and Significance of Anglo-Saxon Case Law* (2nd edn, Otto Meissners Verlag, 1947) X.

43 *Quill* (n 13) Opinion of *Scalia* 319; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 7.

44 Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 8.

einen Wettbewerbsvorteil.[45] Daraus resultiert ein Anreiz, physische Präsenzen im Absatzstaat zu vermeiden. Im Urteil wird angeführt, dass beispielsweise ein Unternehmen, das Bestände in einem Lagerhaus in einem Bundesstaat unterhält, die Steuer einbehalten und abführen muss, wohingegen ein Verkäufer mit weitreichender Internetpräsenz nicht in die Steuererhebung einbezogen wird, obwohl er ggf. die gleichen und u.U. wesentlich mehr Waren verkauft. Würde man an *Quill* und *Bellas Hess* festhalten, würde man wesentliche virtuelle Verbindungen zu einem Absatzstaat außer Acht lassen.[46]

Da auch Versandhändler ohne physische Präsenz im Absatzstaat verschiedene Leistungen des Absatzstaats in Anspruch nehmen (z.B. funktionierende Marktbedingungen, Bankensystem zur Abwicklung der Zahlungen), die unerlässlich für den Erfolg der Versandhändler sind, sollen die Versandhändler auch zu deren Finanzierung durch Abführung der Steuer beitragen. Außerdem beschränkt das Abstellen auf eine physische Präsenz das Recht der Bundesstaaten, Steuern zu erheben, sehr stark. Dem *Supreme Court* lagen bereits Anträge von 41 Bundesstaaten und dem District of Columbia vor, die *Quill*-Entscheidung und somit das Erfordernis einer physischen Präsenz zu verwerfen.[47]

Das in der *Quill*-Entscheidung angeführte Argument, dass die Verpflichtung zum Einbehalt und zur Abführung der *Sales Tax* an (unter Beachtung der ggf. zusätzlich anfallenden lokalen *Sales Taxes*) tausende verschiedene Steuerbehörden bei Versandhändlern, die über keinen physischen Anknüpfungspunkt im Absatzstaat

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45 Liran Einav et al. 'Sales Taxes and Internet Commerce' (2014) 104(1) American Economic Review 1.

46 *Wayfair* (n 5) Opinion of the Court 14-15.

47 *Wayfair* (n 5) Opinion of the Court 16.

verfügen, eine unzulässige Belastung des zwischenstaatlichen Handels darstelle, ist heute nicht mehr haltbar. Die Befolgungskosten sind durch Einführung des Internets weitestgehend unabhängig davon, ob ein Unternehmen eine physische Präsenz in einem Bundesstaat hat. Kleine Unternehmen mit physischen Präsenzen in mehreren Bundesstaaten sind durch die Verpflichtung zum Einbehalt und zur Abführung der *Sales Tax* jedoch stärker belastet als ein großer Online-Versand-Händler.[48]

Der *Supreme Court* gesteht zwar ein, dass die Gefahr besteht, dass Start-Ups und kleine Unternehmen, die geringe Umsätze in vielen verschiedenen Bundesstaaten erzielen, durch die Neuregelung benachteiligt werden. Allerdings sei der Zugriff von Verkäufern auf durch den Staat finanzierte Steuersoftware vorhanden, die die Abwicklung der *Sales Tax* erleichtert.[49] Zudem besteht die Möglichkeit, dass der Kongress Erleichterungen für diese Unternehmen schafft, sofern er dies für nötig erachtet. Zu beachten ist auch, dass z.B. im Fall von South Dakota Start-Ups und kleine Unternehmen durch die Mindestschwellen, die zur Anwendung der Regelung überschritten werden müssen, aus dem Anwendungsbereich des Gesetzes ausgenommen werden.

Das *Wayfair*-Urteil wird in vielen Bundesstaaten positiv gesehen, da die Finanzierung der Bundesstaaten in hohem Maße von den Einnahmen aus der *Sales/Use Tax* abhängt.[50] Die Steuerausfälle, die auf das Erfordernis einer physischen Präsenz zurückzuführen sind, werden insgesamt auf 8-33 Mrd. $ geschätzt.[51] Allein South

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48 *Wayfair* (n 5) Opinion of the Court 12.

49 Insbesondere die Mitglieder des Streamlined Sales and Use Tax Agreement (hierzu Unter-Unterabschnitt 3.2.2) greifen bereits auf entsprechende Software zurück. Hierzu ausführlich Richard Thompson Ainsworth, 'Technology Can Solve MTIC Fraud – VLN, RTvat, D-VAT certification' (2011) 22(3) International VAT Monitor 153, 159.

50 The International Implications of Wayfair (n 17); Robert Goulder, Parlez-Vous Wayfair? Foreign Lessons on Taxing Remote Sales, 'Tax Notes International' (16 Juli 2018).

51 States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs: GAO-18-114 (n 17) 11; *Wayfair* (n 5) Opinion of the Court 2.

Dakota beklagt Steuermindereinnahmen von jährlich zwischen 48 und 58 Mio. $.[52] Es ist daher zu erwarten, dass zahlreiche weitere Bundesstaaten Gesetze, die dem Inhalt des Gesetzes von South Dakota entsprechen, erlassen werden. Da sich der *Supreme Court* nicht explizit dazu geäußert hat, in welchen Fällen ein „wesentlicher Anknüpfungspunkt" vorliegt, ist zu erwarten, dass Bundesstaaten, die eine entsprechende Regelung schaffen wollen, sich am Gesetzeswortlaut der Regelung von South Dakota orientieren werden. Denn die Verfassungsmäßigkeit wurde nur für das spezielle Gesetz von South Dakota bestätigt.[53] Regelungen von Bundesstaaten, die vom Gesetz in South Dakota abweichen, müssen gegebenenfalls erst einer gerichtlichen Überprüfung standhalten. Ob eine bundesstaatenübergreifende einheitliche Regelung durch den Kongress erfolgt, bleibt abzuwarten.[54]

4.2.4.2 Kritik am Urteil (dissenting votes)

Vier der neun Richter des *Supreme Courts* äußerten in einem abweichenden Sondervotum (*dissenting votes*) starke Kritik an der Entscheidung. Sie argumentieren damit, dass der *Supreme Court* bereits in der *Quill*-Entscheidung die Möglichkeit hatte, seine Rechtsprechungsgrundsätze zu ändern und sich gegen eine Änderung entschieden hat. Da der Sachverhalt *South Dakota v. Wayfair* nicht wesentlich von den bisher entschiedenen Fällen abweicht, sei auch hier kein Grund für eine Rechtsprechungsänderung gegeben.[55] Die vier Richter gestehen zwar ein, dass, wie im Urteil dargestellt, bereits der Fall *Bellas Hess* falsch entschieden wurde. Insbesondere

52 *Wayfair* (n 5) Opinion of the Court 2.

53 States Should Act With Care Following Wayfair (n 38).

54 Hierzu Unterabschnitt 3.2.

55 *Wayfair* (n 5) Roberts dissenting 1.

stimmen sie dem im Urteil angeführten Grund zu, dass der E-Commerce sich zu einem wesentlichen Bestandteil der Wirtschaft entwickelt hat und die *physical presence rule* den Besonderheiten des E-Commerce nicht Rechnung trägt. Sie nehmen jedoch gerade die weitreichende Bedeutung des E-Commerce für die Wirtschaft zum Anlass, die Zuständigkeit des *Supreme Courts* für diese Entscheidung zu verneinen. Nach ihrer Ansicht sei nicht der *Supreme Court* berechtigt über eine Veränderung von Besteuerungsprinzipien, die das Potential hat den E-Commerce zu beeinflussen, zu entscheiden, sondern nur der Kongress. Bereits in der *Quill*-Entscheidung wurde das Festhalten an den bisherigen Rechtsprechungsgrundsätzen damit begründet, dass der Kongress nicht nur qualifizierter, sondern auch die zuständige Instanz für diese Entscheidung sei. Denn nur dem Kongress stehe das Recht zu, Regelungen, die den zwischenstaatlichen Handel beeinflussen, zu treffen.

Dass diese Ansicht zahlreiche Unterstützer findet wird v.a. dadurch deutlich, dass sich bereits im Rahmen des Verfahrens zahlreiche *amici curiae*[56] geäußert haben, die die Beklagten unterstützten und sich gegen eine Abkehr von den bisherigen Rechtsprechungsgrundsätzen aussprachen.[57] In nahezu allen *brief of amici curiae*, die die Beklagten unterstützen, wird damit argumentiert, dass der *Supreme Court* für diese Entscheidung nicht die zuständige Instanz darstelle.[58] Daneben führen die

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[56] *Amici curiae* (wörtl. „Freunde des Gerichts“) sind Dritte, die nicht selbst am Prozess beteiligt sind. In *Brief of Amici Curiae* können diese Dritten Stellungnahmen abgeben, die entweder den Kläger oder den Beklagten unterstützen oder neutral sind. Zum Inhalt dieser Stellungnahmen vgl. Unterabschnitt 3.3.

[57] Insgesamt wurden während des Verfahrens rund 60 Stellungnahmen von *amici curiae* abgegeben. Dass davon circa 30 die Kläger, aber auch cicra 30 die Beklagten unterstützen zeigt, dass die Entscheidung, die der *Supreme Court* getroffen hat, nicht unumstritten ist.

[58] U. a. Brief of Amici Curiae of National Taxpayers Union Foundation in Support of Respondents (No 17-494, 2017); Brief of Amici Curiae of Netchoice in Support of Respondents (No 17-494, 2017); Respondents' Brief in Opposition to Petition (No 17-494, 2017); Brief of Amici Curiae Representative Robert W. Goodlatte et al. in Opposition to the Petition (No 17-494, 2017); Brief

amici curiae u.a. an, dass ein *nexus*, der nicht auf eine physische Präsenz abstelle, den zwischenstaatlichen Handel in unzulässiger Weise behindern würde,[59] dass der Vertrauensschutz das Festhalten an den bisherigen Rechtsprechungsgrundsätzen gebiete[60] und, dass die Befolgungskosten, die aus der Rechtsprechungsänderung resultieren, nicht vernachlässigt werden dürfen.[61]

Auch nach Ende des Verfahrens wird Kritik am Urteil geübt.[62] Mehrere US-Senatoren haben einen „Stop Taxing Our Potential Act"[63] ins Leben gerufen, der das *Wayfair*-Urteil verdrängen soll. Ziel ist es, an der bisherigen Regelung (Erfordernis einer physischen Präsenz, um eine Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* zu begründen) festzuhalten.[64] Des Weiteren führen Kritiker an, dass die Steuermehreinnahmen hinter den Erwartungen zurückbleiben werden. Grund dafür ist, dass bereits jetzt zahlreiche Händler (z.B. auch Amazon) in allen Bundesstaaten die geforderten Steuern abführen, selbst wenn sie dort über keine physische Präsenz verfügen.

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of Amicus Curiae of American Catalog Mailers Association Supporting Respondents (No 17-494, 2017); Brief of Americans for Tax Reform as Amicus Curiae in Support of the Respondents (No 17-494, 2018); Brief of Chris Cox, Former Member of Congress, and Netchoice as Amici Curiae in Support of Respondents, 'No 17-494' (2018).

59 Vgl. Brief of Amici Curiae of Netchoice in Support of Respondents (n 58); Respondents' Brief in Opposition to Petition (n 58).

60 Vgl. Brief of Amicus Curiae of American Catalog Mailers Association Supporting Respondents (n 58).

61 Brief of the American Academy of Attorney as Amicus Curiae in Support of Respondents (No 17-494, 2017); Brief of Amicus Curiae Online Merchants Guild in Support of Respondents (No 17-494, 2018).

62 In verschiedenen Stellungnahmen zum Verfahren unterstützten circa 30 Parteien das Vorhaben von South Dakota. Circa ebenso viele haben sich jedoch gegen die Verfassungskonformität des Gesetzes von South Dakota ausgesprochen.

63 Stop Taxing Our Potential Act of 2018, S. 3180 (United States of America) vom 28.08.2018.

64 Stop Taxing Our Potential Act of 2018 Sec. 2 (a).

4.3 Auswirkungen des Urteils auf die internationale Besteuerung

4.3.1 Auswirkungen für Unternehmen mit Versandhandel in die USA und innerhalb der USA zwischen Bundesstaaten

Die Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* findet auch auf Unternehmen Anwendung, die außerhalb der USA ansässig sind und steuerpflichtige Umsätze in den USA tätigen.[65] Die Änderung der Rechtsprechung hat daher nicht nur Auswirkungen auf die Besteuerung des Handels zwischen Bundesstaaten innerhalb der USA (zwischenstaatlicher Handel). Auch Unternehmen aus Europa mit Versandhandelsgeschäft in die USA sind von der neuen Regelung betroffen (internationaler Handel).

Grundsätzlich sind die Fragen, die sich für Verkäufer in der EU stellen, vergleichbar mit Fragen, mit denen sich Händler in den USA beschäftigen mussten, als die EU die Mehrwertbesteuerung für auf elektronischem Weg erbrachte sonstige Leistungen dahingehend geändert hat, dass Drittland-Anbieter zur Abführung der Steuer auf digitale Dienstleistungen im Ansässigkeitsstaat des Kunden verpflichtet sind. Es stellt sich daher für Verkäufer aus der EU die Frage, ob sie sich für Zwecke der *Use Tax* in allen US-Bundesstaaten registrieren müssen, in denen sie Kunden beliefern. Dieselbe Frage stellt sich auch für Verkäufer, die in den USA ansässig sind und Lieferungen in andere Bundesstaaten ausführen.

Ist ein Unternehmen in einem Bundesstaat der USA ansässig und führt es

[65] William Hoke, Enforceability of Wayfair Decision On Foreign Companies Unclear, 'State Tax Notes' (2 Juni 2018) 74; States Should Act With Care Following Wayfair (n 38) 63.

Lieferungen an Kunden in anderen Bundesstaaten aus, so muss es künftig in jedem Absatzstaat die gesetzliche Lage überprüfen. Für Verkäufe in die Absatzstaaten, in denen ein physischer Anknüpfungspunkt vorhanden ist, muss sowohl vor als auch nach der *Wayfair*-Entscheidung die Steuer einbehalten und abgeführt werden. Allerdings ist nun zusätzlich festzustellen, ob der Absatzstaat für die Verpflichtung zur Erhebung und Abführung der *Use Tax* weiterhin auf eine physische Präsenz im Absatzstaat abstellt oder ob eine Regelung eingeführt wurde, die dem Gesetz von South Dakota entspricht und folglich ein wesentlicher Anknüpfungspunkt auch ohne physische Präsenz vorliegen kann. Ist dies der Fall, so ist zu prüfen, ob die Voraussetzungen, die an einen wesentlichen Anknüpfungspunkt im Absatzstaat gestellt werden (z.B. Überschreiten bestimmter Schwellenwerte), erfüllt sind. Sind die Voraussetzungen erfüllt, so muss sich der Unternehmer auch in diesem Absatzstaat steuerlich registrieren und die *Use Tax* auf Verkäufe an Kunden in diesem Absatzstaat einbehalten und an die zuständige Behörde abführen.

Für ausländische Unternehmer mit physischer Präsenz (z.B. Lager) in den USA gelten die obenstehenden Ausführungen entsprechend. Für Verkäufe in die Bundesstaaten, in denen ein physischer Anknüpfungspunkt besteht, muss die Steuer einbehalten und abgeführt werden. Bei Lieferung in Bundesstaaten, in denen keine physische Präsenz besteht, hängt die Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* davon ab, ob der Bundesstaat eine Regelung, die dem Gesetz von South Dakota entspricht, implementiert hat und ob die Voraussetzungen, die in dieser Regelung gestellt werden, erfüllt werden.

Eine Besonderheit ergibt sich daraus, dass der Begriff der physischen Präsenz in einigen Bundesstaaten sehr weit interpretiert wird. So können z.B. Lager, in denen ein Unternehmer seine Waren vorhält, auch dann eine physische Präsenz des

Unternehmers begründen, wenn der Unternehmer selbst keine Verfügungsmacht über das Lager hat. Ein Beispiel für diese Konstellation liefert der Fulfillment-Service von Amazon (FBA, Fulfillment by Amazon). Viele Händler, die nicht in den USA ansässig sind, nutzen diesen Service für ihre Geschäfte in den USA. Der ausländische Verkäufer sendet hierfür Bestände an eines der zahlreichen FBA-Zentren von Amazon in den USA, wo die Bestände anschließend eingelagert werden. Erhält der Verkäufer eine Bestellung von einem Kunden in den USA, wird diese durch Amazon abgewickelt. Die Abwicklung umfasst sowohl das Verpacken und Versenden des Produkts als auch die Vereinnahmung des Entgelts. Nach Abzug einer Servicegebühr leitet Amazon das Entgelt an den Verkäufer im Ausland weiter. Dadurch, dass die Ware des Verkäufers im Lager von Amazon in den USA eingelagert wird, liegt ein wesentlicher Anknüpfungspunkt (physische Präsenz) in den USA vor, weshalb sich ein Verkäufer, der sich des Fulfillment-Services von Amazon bedient, regelmäßig für Zwecke der *Use Tax* registrieren muss. Sollte er dieser Verpflichtung nicht nachkommen, kann der Bundesstaat ihn wegen der Nicht-Abführung der Steuer belangen und gegebenenfalls Strafgebühren und Zinsen festsetzen. Insbesondere können seine Bestände in den USA gepfändet werden. Daran ändert auch die *Wayfair*-Entscheidung nichts. Zu beachten ist jedoch, dass sich der Verkäufer aufgrund der Entscheidung nicht mehr nur in dem Bundesstaat steuerlich registrieren muss, in dem sich das Lager von Amazon bzw. sein eigenes Lager/physische Präsenz befindet. Er muss sich, sofern Bundesstaaten eine Regelung wie in South Dakota vorsehen, in allen Staaten registrieren, in die Waren an Kunden geliefert werden.

Auch ausländische Unternehmen, die Waren per Direktgeschäft in die USA verkaufen und versenden (internationaler Handel), ohne eine physische Präsenz zu unterhalten, müssen künftig in jedem Absatzstaat prüfen, ob sie zum Einbehalt

und zur Abführung der *Use Tax* verpflichtet sind. Sie sind nicht mehr aufgrund des Fehlens einer physischen Präsenz in den USA von der Steuererhebung ausgenommen. Vielmehr müssen sie in jedem Bundesstaat, in dem sie Kunden beliefern, überprüfen, ob eine gesetzliche Regelung wie in South Dakota eingeführt wurde und ob die Schwellenwerte, die für die Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* zu beachten sind, überschritten sind. Da jedoch nur wenige Unternehmen ihre Waren per Direktgeschäft in den USA absetzen, dürfte dieser Fall nur geringe praktische Relevanz haben.

4.3.2 Mögliche Lösungen zur Verfahrensvereinfachung

4.3.2.1 Streamlined Sales and Use Tax Agreement

Da die *Sales* und *Use Tax* im Kompetenzbereich der Bundesstaaten liegt,[66] unterscheiden sich die Regelungen bezüglich Bemessungsgrundlage, Steuersatz und Erhebung von Bundesstaat zu Bundesstaat.[67] Seit einigen Jahren ist jedoch in den USA das Bestreben zu beobachten, die Konsumbesteuerung zu reformieren und zu harmonisieren. Aufgrund dieses Bestrebens wurde im März 2000 das Streamlined Sales and Use Tax Projekt ins Leben gerufen. Mit dem Projekt wird das Ziel verfolgt, das über die Bundesstaaten fragmentierte System auf föderaler Ebene zu vereinheitlichen, um den Befolgungsaufwand v.a. für staatenübergreifend liefernde Unternehmen zu reduzieren.[68] So sollen z.B. einheitliche rechtliche Definitionen festgelegt werden

66 Kramer (n 4) 44; Kroschel (n 4) 211; Mennel und Förster (n 4) Länderteil USA, Rz. 300-04.

67 Ausführlich hierzu Hellerstein, 'State Sales Tax Reform in the United States: The Streamlined Sales Tax Project' (n 1) 173-74; Anna Zimmermann, 'Modelle zur Eindämmung des grenzüberschreitenden MwSt-Betrugs: Besteuerung auch grenzüberschreitender Leistungen' (2017) 66(15) Umsatzsteuer-Rundschau 580.

68 Streamlined Sales and Use Tax Agreement (n 3).

und Software entwickelt werden, die die Befolgung der steuerlichen Pflichten erleichtert. Im Laufe des Projekts wurde das Streamlined Sales and Use Tax Agreement ausgearbeitet, das im November 2002 geschlossen wurde.[69] Das Agreement beinhaltet verschiedene Regelungen zur Vereinheitlichung der Bemessungsgrundlage auf Ebene der *State* und *Local Taxes* sowie Definitionen und Regelungen zur Verwaltungsvereinfachung. So soll z.B. in jedem Bundesstaat eine einzige Behörde eingerichtet bzw. bestimmt werden, an die die Steuer entrichtet werden kann. So muss die Steuer nicht mehr an die vielen verschiedenen zuständigen Behörden innerhalb eines Bundesstaats abgeführt werden.[70]

Zu beachten ist jedoch, dass eine Teilnahme am Streamlined Sales and Use Tax Project für die Bundesstaaten nicht verpflichtend ist und, dass das Streamlined Sales and Use Tax Agreement grundsätzlich keinerlei Rechtsverbindlichkeit hat. Unterzeichnet ein Bundesstaat das Streamlined Sales and Use Tax Agreement, heißt das also nicht, dass die Regelungen im jeweiligen Bundesstaat sofort in Kraft treten. Nur wenn die Standards, die im Sales und Use Tax Agreement vereinbart wurden, tatsächlich in bundesstaatliches Recht umgesetzt werden, finden sie Anwendung.[71] Obwohl nahezu alle Staaten das Projekt unterstützen,[72] hatten zum Zeitpunkt der *Wayfair*-Entscheidung nur 24 (darunter South Dakota) der 45 *Sales* und *Use Tax* erhebenden Bundesstaaten ein Gesetz implementiert, das den Standards des Sales

69 Streamlined Sales and Use Tax Agreement (n 3).

70 Sec. 301 Streamlined Sales and Use Tax Agreement (n 3) in der Version vom 03.05.2018.

71 Hellerstein, 'State Sales Tax Reform in the United States: The Streamlined Sales Tax Project' (n 1) 175; van Brederode (n 1) 439.

72 Walter Hellerstein, 'Recent Developments in US Subnational State Taxation with International Implications' (2008) 62(2) Bulletin for International Taxation 77, 85; van Brederode (n 1) 438.

and Use Tax Agreements entspricht.[73] Diese Staaten repräsentieren circa 31 Prozent der Bevölkerung der USA. Einige sehr wichtige Bundesstaaten, wie z.B. California und New York unterstützen das Projekt bisher jedoch nicht.[74] Die Bereitschaft zumindest eines Teils der Bundesstaaten bei der Erhebung der *Sales* und *Use Tax* zusammenzuarbeiten, um diese zu vereinfachen, wird dennoch aus dem Streamlined Sales and Use Tax Agreement deutlich.

4.3.2.2 Einführung eines Mini-One-Stop-Shops

Für Unternehmen, die nur in einem Bundesstaat zum Einbehalt und zur Abführung der *Sales Tax* verpflichtet sind, sind die Befolgungskosten verhältnismäßig gering (1-3 Prozent der einbehaltenen Steuer).[75] Die Befolgungskosten steigen jedoch stark an, in je mehr Bundesstaaten ein Unternehmen die Verpflichtungen zu erfüllen hat.[76] Unter Beachtung der lokalen *Sales Taxes* (diese können in einigen Bundesstaaten zusätzlich zur *Sales Tax* auf Bundesstaatenebene erhoben werden) kann theoretisch eine Verpflichtung zur Abführung der *Sales Tax* an mehr als 10.000 Behörden entstehen.[77]

Die EU hat sich mit einem vergleichbaren Problem bereits beschäftigt. Dadurch, dass der Ort der Leistung für auf elektronischem Weg erbrachte sonstige Leistungen an den Ort verlagert wurde, an dem der nichtunternehmerische Leistungs-

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73 Charles McLure, 'US Supreme Court Overturns Quill (1992): Physical Presence Rule for State Sales Tax' (2019) 73(1) Bulletin for International Taxation 21.

74 Aleksandra Bal, 'Taxation of Digital Supplies in the European Union and United States – What Can They Learn from Each Other?' (2015) 55(6) European Taxation 245, 248.

75 Tax Foundation, State and Local Sales Taxes (New York, 1970).

76 van Brederode (n 1) 276.

77 *Wayfair* (n 5) Roberts dissenting 6.

empfänger seinen Wohnsitz, gewöhnlichen Aufenthalt oder Sitz hat, entstand das Problem, dass viele E-Commerce-Unternehmen verpflichtet waren, sich im Mitgliedstaat der Kundenansässigkeit umsatzsteuerlich zu registrieren und nach dortigem Verfahrensrecht Steuererklärungen einzureichen und Steuern abzuführen.[78] Um eine Registrierungspflicht in zahlreichen Mitgliedstaaten zu vermeiden, wurde das MOSS-System (Mini-One-Stop-Shop) implementiert. Registriert sich ein Unternehmer für das MOSS-System, kann er umfassende Auslandsregistrierungen vermeiden. Er kann die Steuererklärung für jeden EU-Staat gebündelt in seinem Ansässigkeitsstaat abgeben. Dieser übernimmt dann die Weiterleitung der Steuererklärung und der entrichteten Steuer an die Mitgliedstaaten der Leistungserbringung.[79] Zu beachten ist jedoch, dass das MOSS-System nur die Abgabe der Steuererklärungen sowie die Steuerzahlung erleichtert. Die Regelungen zu Aufzeichnungspflichten, Betriebsprüfungen, Datenzugriffen und zur Rechnungsstellung wurden nicht harmonisiert und müssen daher nach wie vor auf Basis der gesetzlichen Regelungen des jeweiligen Mitgliedstaats befolgt werden.[80] Insofern besteht auch beim MOSS-System noch Verbesserungspotenzial.

Im Hinblick auf die *Wayfair*-Entscheidung ist v.a. interessant, dass das MOSS-

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78 Andreas Erdbrügger, 'Änderung der EU-Umsatzsteuervorschriften für den E-Commerce ab 2019 bzw. 2021' (2018) 56(12) Deutsches Steuerrecht 593, 594.

79 Ulrike Höreth und Brigitte Stelzer, 'Stand der Steuergesetzgebung – Update zum 11.7.2014' (2014) 102(15) Deutsche Steuer-Zeitung 521, 526; Andy Ilsley, Ines Paucksch, und Jayant Rakhan, 'Die umsatzsteuerliche Behandlung elektronischer Dienstleistungen ab 1. 1. 2015' (2014) 2(8) Mehrwertsteuerrecht 259; Martina Ortmann-Babel, Andreas Bolik, und Daniel Zöller, 'Steuerliche Neuregelungen durch das „Kroatiengesetz"' (2014) 67(29) Der Betrieb 1570, 1571; Robert C Prätzler und Jürgen Stuber, 'Umsatzsteuer und E-Commerce – Bestandsaufnahme, Ausblick und Compliance' (2018) 73(10) Betriebs-Berater 536; Rolf-R Radeisen, 'Umsatzsteuer 2014/2015: Praxis zwischen Verwaltung und Gerichten' (2014) 57(1) Die Steuerberatung 8, 9; Christian Sterzinger, 'Ort der an einen Nichtunternehmer erbrachten elektronischen Dienstleistung' (2014) 15(7) Umsatz-Steuerberater 213, 215.

80 Erdbrügger (n 78) 595; Prätzler und Stuber (n 79) 537.

System ab 2021 auf den Versandhandel ausgedehnt werden soll.[81] Mit Wirkung zum 01.01.2021 wird die mitgliedstaatenbezogene Lieferschwelle, die bisher zwischen 35.000 € und 100.000 € liegt, durch eine einheitliche Schwelle von 10.000 € ersetzt.[82] Bei Überschreiten der Lieferschwelle verlagert sich der Ort der Lieferung an den Ort, an dem die Beförderung/Versendung endet. Das Absenken der Schwelle auf 10.000 € führt dazu, dass Unternehmer in Mitgliedstaaten schneller als bisher steuerpflichtig werden und sich daher in zahlreichen Staaten registrieren und die Steuer abführen müssten. Diese Entwicklung soll durch eine entsprechende Erweiterung des MOSS-Systems aufgefangen werden. Zu beachten ist, dass innerhalb der EU die Lieferschwelle, deren Überschreitung zur Verpflichtung zum Einbehalt und zur Abführung der Steuer im Absatzstaat führt, mit 10.000 € relativ gering ist. Die Mindestschwelle, die im Gesetz von South Dakota vorgesehen ist, liegt mit 100.000 $ (bzw. 200 Lieferungen) wesentlich höher. In diesem Hinblick ist Kritik Europas an der Entscheidung des *Supreme Courts* daher nicht zu erwarten.

Das Problem, das durch das MOSS-System gelöst werden soll, ist also vergleichbar mit dem Problem, das sich aufgrund des *Wayfair*-Urteils in den USA stellt. Es liegt darin, dass ein Verkäufer aufgrund steuerlicher Regelungen in zahlreichen (Bundes)Staaten zur Abführung von Steuern verpflichtet ist. Es ist daher denkbar, dass die USA ein System ähnlich dem des MOSS in der EU implementieren oder sich an Ausgestaltungen in der EU orientieren. Ein (ausländisches) Unternehmen mit Versandhandel innerhalb bzw. in die USA könnte dann alle im Gebiet der USA ausgeführten Lieferungen über eine einzige Anlaufstelle abwickeln. Die einstufige

[81] Art. 369b MwStSystRL.

[82] Art. 59 MwStSystRL. In Deutschland liegt die Schwelle derzeit bei 100.000 €, § 3c Abs. 3 Nr. 1 Umsatzsteuergesetz, BGBl. I 2005, 386 (Bundesrepublik Deutschland).

Erhebung[83] der *Use Tax* vereinfacht im Vergleich zum EU-MOSS das Verfahren erheblich, da es grundsätzlich zu keinen Vergütungsverfahren kommen kann. Die Einführung eines dem MOSS vergleichbaren Systems ist auch deshalb denkbar, da die USA bereits über technologische Möglichkeiten in Form von Steuersoftware verfügen, die die Umsetzung eines solchen Systems erheblich erleichtern.[84] Es bleibt abzuwarten, ob zur Verminderung des Verwaltungsaufwands die Koordination der *Use Tax* in den USA zumindest teilweise staatenübergreifend vorgenommen wird.[85]

4.3.3 Implikationen für die Besteuerung der digitalen Wirtschaft

Die Digitalisierung übt aufgrund sich verändernder Geschäftsmodelle starken Druck auf die internationalen Steuersysteme aus.[86] Am 21.03.2018 hat die EU-Kommission daher Lösungsvorschläge für die Besteuerung digitaler Geschäftstätigkeiten unterbreitet. Neben einer kurzfristigen Zwischenlösung (Digitalsteuer)[87] wird als langfristige Lösung die Einführung einer „signifikanten digitalen Präsenz“[88] vorgeschlagen. Eine

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83 Die Lieferung und sonstige Leistung an Unternehmer zum Zwecke der Verwendung im Produktionsverfahren, zum Zwecke der Veräußerung oder zur Weitergabe der Leistungen sind nicht steuerpflichtig. Daher kennt das US-Sales-Tax-System keinen Vorsteuerabzug. Es liegt eine sog. Einphasensteuer vor, vgl. Rüdiger Weimann und Fritz Lang (eds), *Umsatzsteuer - national und international: Kompakt-Kommentar* (3rd edn, Schäffer-Poeschel 2011) Länderanhang USA.

84 Zimmermann (n 67) 590.

85 States Should Act With Care Following Wayfair (n 38) 63.

86 Proposal for a Council Directive of 21 March 2018 on laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final (European Commission)(nachfolgend: SDP Vorschlag) 1.

87 Proposal for a Council Directive of 21 March 2018 on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final (European Commission) (nachfolgend DST Vorschlag). Ziel der kurzfristigen Lösung ist u.a. die Harmonisierung bereits unilateral eingeführter Maßnahmen, vgl. DST Vorschlag 4.

88 SDP Vorschlag.

signifikante digitale Präsenz soll dann begründet werden, wenn ein Unternehmen bestimmte Schwellenwerte in Bezug auf digitale Aktivitäten in einem Mitgliedstaat überschreitet.[89] Die vorgeschlagenen Vorschriften zur Herstellung eines steuerlichen Anknüpfungspunkts eines digitalen Unternehmens in einem Mitgliedstaat basieren dabei auf den Erträgen aus der Bereitstellung digitaler Dienstleistungen (>7 Mio. €), der Zahl der Nutzer digitaler Dienstleistungen (>100.000 Nutzer) oder der Zahl der Verträge über digitale Dienstleistungen (>3.000 Verträge) in einem Mitgliedstaat.

Die Ausgangslage bei der *Wayfair*-Entscheidung ist auf den ersten Blick eine andere. Zunächst betrifft die Entscheidung des *Supreme Courts* die Erhebung und Abführung einer Verbrauchsteuer (Sales/Use Tax). Der EU-Kommissionsvorschlag zielt auf die Ertragsbesteuerung ab. Außerdem dreht sich die *Wayfair*-Entscheidung vorrangig um den Versandhandel mit physischen Waren, während der Richtlinienvorschlag auf die Erbringung (rein) digitaler Dienstleistungen abstellt. Zudem beschäftigt sich der EU-Kommissionsvorschlag mit der Frage, ob überhaupt eine Besteuerung digitaler Dienstleistungen im Quellenstaat möglich ist, während die Besteuerung des Versandhandels dem Grunde nach in der *Wayfair*-Entscheidung nicht hinterfragt wurde. Es ging lediglich um die Erhebung der *Use Tax*. Daher sind die Konzepte *nexus* und Betriebsstätte nicht grundsätzlich gleichzusetzen.

Dennoch ist die steuerliche Kernfrage, die sowohl in der *Wayfair*-Entscheidung als auch im EU-Kommissionsvorschlag behandelt wird, wann ein „wesentlicher An-

[89] Adrian Cloer und Cosima Gerlach, 'Die „virtuelle Betriebstätte": Ein angemessenes Instrument zur Besteuerung der „digitalen Wirtschaft"?' (2018) 101(3) Finanz-Rundschau Ertragsteuerrecht 105; Wolfgang Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy' (2018) 72(4/5) Bulletin for International Taxation 278, 286-88; Christoph Spengel, 'Besteuerung der digitalen Wirtschaft – Europa einmal mehr auf dem falschen Weg' (2018) 71(15) Der Betrieb M4; Wissenschaftlicher Beirat beim Bundesministerium der Finanzen, *Stellungnahme zu den EU-Vorschlägen für eine Besteuerung der digitalen Wirtschaft* (2018).

knüpfungspunkt“ im Absatzstaat vorliegt, der entweder eine Besteuerung im Absatzstaat (EU-Kommissionsvorschlag) oder die Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* (*Wayfair*) rechtfertigt. So unterscheiden sich die *Wayfair*-Entscheidung und der EU-Kommissionsvorschlag zwar im Hinblick auf die Rechtsfolge. Allerdings beinhalten die Begründung der *Wayfair*-Entscheidung und die Stellungnahmen Dritter zur Streitfrage erkennbare Parallelen zu den Argumenten, die für die Begründung einer „signifikanten digitalen Präsenz“ im EU-Kommissionsvorschlag angebracht werden.[90] So argumentiert sowohl der *Supreme Court* als auch die EU-Kommission damit, dass die derzeitigen Vorschriften nicht mehr zeitgemäß sind, da der grenzüberschreitende (Online)Handel ohne physische Präsenz möglich ist.[91] Der Begriff der Betriebsstätte, der auf das Vorhandensein einer physischen Präsenz abstellt, wurde lange vor Verbreitung des Internets entwickelt.[92] Da 1992 weniger

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90 The International Implications of Wayfair (n 17) 63, Ryan Finley, Wayfair Decision Echoes Case for Digital PE Standard, ‘Tax Notes International’ (25 Juni 2018); Mindy Herzfeld, Digital Nexus in the EU and United States, ‘Tax Notes International’ (12 März 2018); Enforceability of Wayfair Decision On Foreign Companies Unclear (n 65) 11; Randall Jackson, From the Editor, ‘Tax Notes International’ (7 September 2018); Cathleen Phillips, From the Editor, ‘Tax Notes International’ (2 Juli 2018).

91 SDP Vorschlag 1; *Wayfair* (n 5) Opinion of the Court 9-10. Diese Aussage wird in verschiedenen Stellungnahmen unterstützt, vgl. u.a. Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 7; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 6; Brief of Multistate Tax Commission as Amicus Curiae in Support of Petitioner (No 17-494, 2018) 3-4; Brief of Law Professors and Economists as Amici Curiae in Support of Petitioner (No 17-494, 2018) 10.

92 Bereits in den 1920er Jahren beschäftigte sich die League of Nations mit der Betriebsstättendiskussion, s. WH Coates, ‘League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp’ (1924) 87(1) Journal of the Royal Statistical Society 99; seit 1935 ist der Betriebsstättenbegriff in § 12 Abgabenordnung, BGBl. I 2002, 3866 (Bundesrepublik Deutschland), und seit 1963 der bilaterale Betriebsstättenbegriff in Art. 5 OECD, Model Tax Convention on Income and on Capital (1963), verankert, vgl. Wolfram Scheffler et al. (Eds), *Die internationale Unternehmensbesteuerung im Wandel: Symposium für Otto H. Jacobs zum 65. Geburtstag* (CH Beck 2005) 31; Markus Peter, *Fortentwicklung des Betriebsstättenprinzips* (Lang 2002) 14, 16.

als 2 Prozent der US-Bürger Zugang zum Internet hatte[93] wurde auch die *Quill*-Entscheidung ohne Beachtung der Besonderheiten des E-Commerce gefällt. Im Jahr 2017 waren jedoch circa 92 Prozent der Händler im E-Commerce tätig[94] und 89 Prozent aller US-Bürger hat Zugang zum Internet.[95] Diese Entwicklung konnte weder bei der Entwicklung des Betriebsstättenbegriffs noch bei der *Quill*-Entscheidung erahnt werden.[96] Daher kommen sowohl die EU-Kommission als auch der *Supreme Court* zu dem Ergebnis, dass die bestehenden Besteuerungskonzepte an diese Entwicklung angepasst werden müssen.

In der *Wayfair*-Entscheidung und verschiedenen Stellungnahmen zur Streitfrage wird insbesondere ausgeführt, dass das Abstellen auf eine physische Präsenz für die Begründung zur Verpflichtung zum Einbehalt und zur Abführung der *Use Tax* in einem ungerechtfertigten Steuervorteil für Online-Händler resultiert.[97] Dieser Steuervorteil wird als „unfair" angesehen.[98] Auch auf EU-Ebene wird konstatiert, dass Unternehmen der digitalen Wirtschaft aufgrund der mangelnden Steuerpflicht im Quellenstaat auf Basis der derzeitigen Regelungen einen Steuervorteil erlangen

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93 Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 8.

94 Brief of the National Association of Wholesaler-Distributors as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 5. Ausführungen zur Entwicklung des E-Commerce finden sich in Brief of South Dakota Retailers Association as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 4-5.

95 Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 8.

96 Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 9.

97 *Wayfair* (n 5) Opinion of the Court 16; Arthur B Laffer und Donna Arduin, Pro-Growth Tax Reform and E-Fairness (2013); Brief of the National Association of Wholesaler-Distributors as Amicus Curiae in Support of Petitioner (n 94) 5-6; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 43) 5; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 91) 6; Brief of South Dakota Retailers Association as Amicus Curiae in Support of Petitioner (n 94) 6.

98 *Wayfair* (n 5) Opinion of the Court 16; Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 91) 2; Brief of International Council of Shopping Centers as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 24.

können.[99] Daraus wird gefolgert, dass die Notwendigkeit besteht, ein wirksames und „faires“ Steuersystem zu schaffen, das an das digitale Zeitalter angepasst ist.[100] Dem „Fairness-Gedanken“ wird daher in beiden Ausführungen hohes Gewicht beigemessen.

Der „Fairness-Gedanke“ in der Diskussion auf EU- und US-Ebene kommt auch dadurch zum Ausdruck, dass Alleingänge von Bundes-/Mitgliedstaaten unterbunden werden sollen. In den USA haben bereits zahlreiche Bundesstaaten (z.B. New York, Colorado, Massachusetts) Regelungen eingeführt, nach denen die Anforderungen, die an einen „wesentlichen Anknüpfungspunkt“ gestellt werden, reduziert werden.[101] auch im Hinblick auf die „signifikante digitale Präsenz“ war bereits eine Vielzahl unilateraler Maßnahmen zu beobachten. So haben z.B. Indien, Israel, Italien und Großbritannien bereits Vorschläge für unilaterale Maßnahmen veröffentlicht und z.T. bereits entsprechende Steuern eingeführt.[102] Zwar bringt die Souveränität der (Bundes)Staaten und der daraus resultierende Steuerwettbewerb durchaus Vorteile mit sich,[103] jedoch sollte auch der Steuerwettbewerb gewissen Regeln unterliegen,

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99 Daniel Fehling, ‘Die steuerlichen Herausforderungen bei der Digitalen Wirtschaft: Der OECD-Bericht zu Maßnahme 1 des BEPS-Aktionsplans’ (2014) 23(18) Internationales Steuerrecht 638, 639; Lorenz J Jarass und Gustav M Obermair, *Faire und effiziente Unternehmensbesteuerung: International geplante Maßnahmen und national umsetzbare Reformvorschläge gegen Gewinnverkürzung und Gewinnverlagerung* (MV-Wissenschaft 2015) 52; Holger Kahle und Marcel Wildermuth, ‘BEPS und agressive Steuerplanung: Ein Diskussionsbeitrag’ (2013) 6(7) Die Unternehmensbesteuerung 405, 405.

100 European Council, European Council meeting (19 October 2017) – Conclusions (EUCO 14/17, 2017) 8.

101 Eine Übersicht zu den einzelnen Regelungen findet sich in Brief of Tax Foundation as Amicus Curiae in Support of Petitioner (No 17-494, 2017) 5-12.

102 Florian Oppel, ‘Die neue diverted profits tax in Großbritannien – Unilaterale Alternative zu BEPS oder wahlkampfbedingter Schnellschuss?’ (2015) 24(10) Internationales Steuerrecht 333; ein Überblick zu den unilateralen Maßnahmen findet sich bei OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* (2018) 133-59.

103 Anja Bauer, *Steuerwettbewerb in der EU: Ein steuerlicher Belastungsvergleich zwischen Personengesellschaften, Kapitalgesellschaften und Genossenschaften* (Nomos 2011) 29; Barbara Dehne, *Ober- und Untergrenzen der Steuerbelastung in europäischer Sicht* (Schmidt 2004) 175; Clemens

um ein Marktversagen zu verhindern[104] und Rechtsunsicherheiten für Unternehmen zu vermeiden. Ziel des *Supreme Courts* und der EU-Kommission/OECD ist es daher, neue Mindeststandards zu etablieren, die die Konvergenz nationaler/bundesstaatlicher Praktiken erleichtern und so Rechtssicherheit für die Steuerpflichtigen herzustellen.[105]

Des Weiteren werden sowohl der EU-Kommissionsvorschlag als auch die *Wayfair*-Entscheidung damit begründet, dass durch die Anpassung der Besteuerungsprinzipien zukünftig Steuermindereinnahmen der Bundes-/Mitgliedstaaten verhindert werden sollen. In den USA werden die Steuermindereinnahmen, die auf das Abstellen auf eine physische Präsenz für die Begründung eines wesentlichen Anknüpfungspunkts zurückzuführen sind, auf circa 8-33 Mrd. $ geschätzt.[106] Die OECD konstatiert, dass

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Esser, *Internationaler Steuerwettbewerb: Vorteile und Gefahren* (ifst 2004); Nils Ingmar Schaper, *Steuerstaat im Wettbewerb: Internationaler Steuerwettbewerb und nationale Besteuerungsprinzipien als responsives System* (Nomos 2014) 43-49.

104 Tsilly Dagan, *International tax policy: Between competition and cooperation* (Cambridge University Press 2018) 216-21; Esser (n 103) 20; Walter Müller, *Funktionsfähiger Steuerwettbewerb: Zur Notwendigkeit, Ausgestaltung und Durchsetzung einer internationalen Steuerwettbewerbsordnung* (Metropolis 2004) 21. Hierbei können die Erkenntnisse des Nobelpreisträgers George A. Akerlof übertragen werden, der darlegte, dass es zu einem Marktversagen kommt, wenn der Preis, den Käufer für qualitativ hochwertige Güter zu zahlen bereit sind, unter dem Marktpreis liegt. Hochwertige Güter werden dann nicht mehr am Markt angeboten, was zu einem Marktversagen führt. Im Steuerwettbewerb schlägt sich dieser Gedanke wie folgt nieder: Schaffen Staaten zu generöse Steuersysteme, führt dies zur Steuerflucht und erodierenden Steueraufkommen in den Hochsteuerländern, woraus ein Haushaltsdefizit für Hochsteuerländer entstehen kann, George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) Quarterly Journal of Economics 488. Siehe auch den Beschluss des Bundesverfassungsgerichts zum „Gewerbesteuer-Mindesthebesatz", *Beschluss zur Gewährleistung des kommunalen Hebesatzrechts in Art 28 Abs 2 Satz 3 GG und Art 106 Abs 6 Satz 2 GG* 2 BvR 2185/04 vom 27 Januar 2010 (Bundesverfassungsgericht).

105 SDP Vorschlag 5-6; OECD/G20, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report: OECD/G20 Base Erosion and Profit Shifting Project* (2015) 6-7. Deutlich wird anhand des *Wayfair*-Urteils, dass sich die USA im konkreten Fall noch stärker in der originären Debatte um Mindeststandards befinden. Die aktuelle Debatte um die EU-Vorschläge stellt eher die Allokation des Substrats infrage, kurz BEPA (Base Erosion and Profit Allocation), OECD/G20, *Interim Report 2018* (n 102) 18-19.

106 States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs: GAO-18-114 (n 17) 11; *Wayfair* (n 5) Opinion of the Court 2.

aufgrund von Steuergestaltungen durch BEPS den Ländern jährlich Steuereinnahmen von 4-10 Prozent des weltweiten Körperschaftsteueraufkommens (100-240 Mrd. $) entgehen.[107] Diese Lücken sollen durch die Anpassung der Besteuerungsprinzipien geschlossen werden.

Ein Problem, das sowohl die EU-Kommission als auch der *Supreme Court* erkannt haben, besteht darin, dass die Anpassung der Besteuerungsprinzipien an die Gegebenheiten der digitalen Wirtschaft dazu führt, dass sich die Befolgungskosten für die Unternehmen erhöhen können, da sie in mehreren Mitglied-/Bundesstaaten steuerpflichtig werden bzw. zum Einbehalt und zur Abführung der Steuer verpflichtet sind.[108] Die Lösungsvorschläge sind weitestgehend vergleichbar. Zum einen wird damit argumentiert, dass durch die Digitalisierung Lösungen für Steuerpflichtige und die Steuerverwaltung geschaffen werden, die den Befolgungs- bzw. Verwaltungsaufwand reduzieren.[109] So bieten z.B. in den USA verschiedene Hersteller kostengünstige (oder z.T. kostenlose) Software an, die die Ermittlung und Abführung der *Sales/Use Tax* erleichtert und dadurch die Befolgungskosten reduziert.[110] Des Weiteren beinhalten sowohl der Kommissionsvorschlag als auch das in Frage stehende Gesetz von South Dakota Schwellenwerte, die für die Begründung eines wesentlichen Anknüpfungspunkts im Absatzstaat überschritten werden müssen.[111] war sind die Schwellenwerte in ihrer

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107 OECD/G20, *Inclusive Framework on BEPS: Progress Report July 2016-June 2017* (2017) 16.

108 SDP Vorschlag 9; *Wayfair* (n 5) Opinion of the Court 11-12.

109 SDP Vorschlag 1.

110 *Wayfair* (n 5) Opinion of the Court 21; Brief of Law Professors and Economists as Amici Curiae in Support of Petitioner (n 91) 2-3; Brief of the National Association of Certified Service Providers as Amici Curiae in Support of Neither Party (2017). Eine Übersicht zu verschiedenen Software-Anbietern findet sich in Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner (n 91) 19-22.

111 SDP Vorschlag Art. 4; An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency Sec 1.

absoluten Höhe nicht vergleichbar (Erträge innerhalb eines Mitgliedstaats > 7 Mio. € (EU) vs. Dienstleistungen im Wert von 100.000 $ (South Dakota); Verträge in einem Mitgliedstaat >3.000 (EU) vs. 200 Verkäufe (South Dakota)), die Grundidee ist jedoch dieselbe. Es ist dabei jeweils wichtig, dass die Schwellenwerte ausreichend hoch sind, damit kleine Unternehmen von der Anwendung der entsprechenden Regelung ausgeschlossen werden um eine unverhältnismäßige Belastung zu vermeiden.[112]

Bisher hält sich die Bereitschaft der USA, digitale Unternehmen zu besteuern, in Grenzen,[113] da eine entsprechende Steuer vorwiegend große US-Konzerne betreffen würde und von international anerkannten Besteuerungskonzepten abweicht.[114] Der internationalen Kritik an den Steuergestaltungen verschiedener US-Konzerne[115] begegneten sie partiell mit einer Steuerreform, die deren Besteuerung revolutioniert.[116] Es erfolgt eine Abkehr vom Welteinkommensprinzip hin zum Territorialitätsprinzip mit Dividendenfreistellung.[117] Neben der Steuersatzsenkung soll die Reform die Gestaltungen, die in der Vergangenheit zu sehr geringen Steuerquoten der US-Konzerne geführt haben, verhindern. Deutlich wird der nicht vorhandene Fokus der USA auf die digitale Wirtschaft jedoch dadurch, dass die US-Steuerreform nicht primär auf

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112 SDP Vorschlag 9; *Wayfair* (n 5) Opinion of the Court 19-22.

113 Steven Mnuchin, Secretary Mnuchin Statement On OECD's Digital Economy Taxation Report (16 März 2018).

114 Wayfair Decision Echoes Case for Digital PE Standard (n 90) 14; Digital Nexus in the EU and United States (n 90) 1029.

115 Hierzu Fehling (n 99) 639; Reimar Pinkernell, 'Ein Musterfall zur internationalen Steuerminimierung durch US-Konzerne' (2012) 89(4) Steuer und Wirtschaft 369; Lutz Richter und Stefanie Hontheim, 'Double Irish with a Dutch Sandwich: Pikante Steuergestaltung der US-Konzerne' (2013) 66(23) Der Betrieb 1260.

116 § 951A United States Code Title 26, Internal Revenue Code (United States).

117 Vgl. Friedrich Heinemann et al. 'Implications of the US Tax Reform for Transatlantic FDI' (2018) 53(2) Intereconomics 87, mit einer Wirkungsanalyse der Steuerreform auf transatlantische Direktinvestitionen.

Unternehmen der digitalen Wirtschaft abzielt. So wird z.B. bei der Hinzurechnungsbesteuerung auf Überrenditen und immaterielle Wirtschaftsgüter zurückgegriffen. Diese Charakteristika schließen zwar die Digitalwirtschaft mit ein, jedoch werden beispielsweise auch Pharmaunternehmen davon getroffen. Dies zeigt, dass die USA die Digitalwirtschaft über solch einen Mechanismus zu greifen versuchen und nicht über eine signifikante digitale Präsenz. Gepaart mit dem Grundtenor der Reform wird deutlich, dass einerseits die heimischen Unternehmen entlastet und andererseits deren Verortung in den USA gesichert werden soll. Die aktuellen Steuereinnahmen der Internet-Konzerne[118] müssen aus US-Sicht aufgrund der erheblichen Haushaltsbelastung, die aus der Reform resultiert, fest zur Refinanzierung eingeplant sein.[119] Eine Verlagerung des Substrats könnte zu immensen Haushaltsproblemen führen.

Insgesamt wird aus der *Wayfair*-Entscheidung jedoch ersichtlich, dass auch der *Supreme Court* erkannt hat, dass die Digitalisierung bestehende Besteuerungskonzepte in Frage stellt und diese gegebenenfalls angepasst werden müssen, um neuen Rahmenbedingungen Rechnung zu tragen.

[118] Insbesondere die Einnahmen durch Steuerzahlungen der sog. FANG-Konzerne (Facebook, Amazon, Netflix, Google).

[119] Die Steuerreform führt laut Schätzungen über einen Zeitraum von zehn Jahren zu Kosten und Mindereinnahmen von 1.456 Milliarden US-Dollar, vgl. Joint Committee on Taxation, Macroeconomic Analysis of the Conference Agreement for H.R. 1 (2017) 3.

5 Die deutsche Plattformhaftung im Vergleich zum Vereinigten Königreich

5.1 Ausgangssituation, Problemstellung und Zielsetzung des Kapitels

Der Handel über das Internet nimmt ungebremst zu.[1] Besonders das Geschäftsmodell, bei dem Käufer und Verkäufer über eine von einem Dritten betriebene digitale Plattform zu einander finden, erfreut sich reger Beliebtheit.[2] Leider deuten viele Anzeichen darauf hin, dass bei den über elektronische Marktplätze stattfindenden Geschäften in erheblichem Maße inländische Steuern nicht den gesetzlich vorgesehenen Weg in die Staatskasse finden.[3]

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[1] Statista prognostiziert für das Jahr 2018 Umsatz durch E-Commerce in Deutschland von 53,6 Mrd. €, 2017 lag dieser Wert noch bei 48,9 Mrd. €. Siehe auch House of Commons Committe of Public Accounts, *Tackling online VAT fraud and error: First Report of Session 2017–19: HC 312* (2017) 9 Nr. 1.

[2] OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* (2018) 43 (nachfolgend: *Interim Report 2018*), die von *value networks* und *multisided platforms* sprechen.

[3] Das Committee of Public Accounts des House of Commons im Vereinigten Königreich kommt beispielsweise zu diesem Schluss, unter anderem, durch selbst durgeführtes „mystery shopping", House of Commons Committe of Public Accounts, *Tackling online VAT fraud and error: First*

Das Problem der korrekten Erhebung und Abführung der Umsatzsteuer auf elektronischen Marktplätzen ist nicht neu und wird mittlerweile auch in der Tagespresse intensiv besprochen.[4] Oftmals sind Medienberichte hierbei ungenau, was als klares Indiz zu werten ist, dass das Problem der sprichwörtliche „Elefant im Raum“ ist.[5] Seine präzise Gestalt ist nur grob zu erahnen und vor allem seine Größe oftmals pure Spekulation.[6] Viele Zahlen um registrierte Händler oder versendete Pakete kursieren, jedoch mangelt es ganz offensichtlich an belastbarem Datenmaterial, um das Problem bzw. die Teilprobleme zu quantifizieren und einzuordnen.[7]

Teilweise der Natur der Sache geschuldet, erscheint es allerdings auch kaum möglich, die relevanten Zahlen zu validieren, sodass der Fokus dieses Kapitels auf

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Report of Session 2017–19: HC 312 (n 1) 3.

4 Martin Greive, Kampf gegen Steuerbetrug, ‘Handelsblatt’ (1 August 2018); Hendrik Wieduwilt, Online-Händler sollen für Steuerbetrüger haften; Digitalwirtschaft warnt Bundesregierung vor "schweren Belastungen" für die Branche, ‘Frankfurter Allgemeine Zeitung’ (1 August 2018) oder Cerstin Gammelin, Staat nimmt Amazon und Ebay in Haftung; Die Bundesregierung will die Betreiber von Online-Plattformen zur Kasse bitten: Sie sollen von 2019 an zahlen, wenn Verkäufer im Internet keine Umsatzsteuer entrichten, ‘Süddeutsche Zeitung’ (31 Juli 2018).

5 Christoph Schlautmann und Martin Greive, Kampf gegen Umsatzsteuerbetrug, Transatlantischer Steuerdissens, ‘Handelsblatt’ (10 August 2018).

6 Der Regierungsentwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, Drs. 19/4455 (Bundesregierung, Bundesrepublik Deutschland) (nachfolgend: RegE), erwähnt keine Haushaltsmehreinnahmen durch die Kassenjahre 2018-2022 aufgrund der umsatzsteuerlichen Maßnahmen, RegE 8. Benedikt Becker, Christian Ramthun, und Volker ter Haseborg, Ein Anschwärz-Button wäre das Richtige, ‘WirtschaftsWoche’ (1 Juni 2018) führen eine Schätzung von einer 1 Mrd. € Steuermehraufkommen an, die aus dem Bundesfinanzministerium stammt. Kampf gegen Umsatzsteuerbetrug, Transatlantischer Steuerdissens (n 5) 1, führen eine Expertenschätzung an „Experten schätzen den Schaden durch nicht gezahlte Einfuhrumsatzsteuer aus dem China-Onlinehandel EU-weit auf jährlich fünf Milliarden Euro an. In Deutschland dürfte durch Importe über Amazon und Ebay ein Schaden von 800 Millionen Euro entstehen – und der Direkthandel aus China ist darin noch nicht einmal enthalten.“

7 Auch der Bundesrechnungshof attackiert das Problem ohne quantitative Basis, siehe Bundesrechnungshof, *Abschließende Mitteilung an das Bundesministerium der Finanzen über die Prüfung Umsatzsteuerliche Behandlung des E-Commerce - Offline-Umsätze durch Internethändler aus dem Drittland* (2018).

den rechtstheoretischen Aspekten und deren Anwendung liegt.[8] Dabei dürfen die Ziele nicht aus den Augen verloren werden. Hierbei ist neben dem evidenten Ziel, die gesetzlichen Steueransprüche des Staates geltend zu machen, nicht zu vernachlässigen, dass Steuerbetrug zu erheblichen Marktverzerrungen führen kann, die unstrittig zu verhindern sind.[9]

Um dem Betrug Herr zu werden, muss grundsätzlich die Perspektive sehr breit gehalten werden. Zum einen sind neben Umsatzsteuerausfällen auf Warenlieferungen[10] auch Einfuhrumsatzsteuerausfälle[11] und Zollausfälle Teil des Problems. Zum anderen kann auch die Internationalität des Steuerbetrugs nicht vollkommen ausgeblendet werden, sodass nicht nur inländische Normen zu betrachten sind. Gelangen beispielsweise Waren über andere Mitgliedstaaten ohne nennenswerte Vorbelastung mit Einfuhrumsatzsteuer und Zöllen nach Deutschland, steht der deutsche Gesetzgeber vor einem völlig andersgearteten Problem, als wenn diese Waren auf direktem Wege ins Inland gelangen.

Vor diesem Hintergrund steht jeglicher Gesetzgeber vor einer Mammutaufgabe. Dieses Kapitel betrachtet einen Gesetzentwurf der deutschen Bundesregierung, wel-

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8 Für das Vereinigte Königreich existieren Schätzungen für das Jahr 2015-2016 von 1-1,5 Mrd. £. Die Schätzgrundlagen wurden von mehreren britischen Institutionen kritisiert, House of Commons Committe of Public Accounts, *Tackling online VAT fraud and error: First Report of Session 2017–19: HC 312* (n 1) 5, Nr. 1.

9 RegE 1 und Rita de La Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240 Abb. 2.

10 § 1 Abs. 1 Nr. 1 UStG i.V.m. § 3 UStG und §§ 13, 13a und 18 UStG.

11 § 1 Abs. 1 Nr. 1 UStG i.V.m. § 21 UStG. *Grambeck* und *Nesemann* sprechen davon, dass es kein Geheimnis sei, dass selbst Sendungen mit höheren Werten [als 22 €] beim Zoll in großer Zahl „durchrutschen", Hans-Martin Grambeck und Carsten Nesemann, 'Marktplatzhaftung - Haftungsregelung zulasten der Online-Marktplätze: JStG 2018 - Referentenentwurf' (2018) 6(12) Umsatzsteuer direkt digital 13.

cher am 01.08.2018 vorgelegt wurde.[12] Er wurde auch in dieser Form umgesetzt und durch das *„Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften“* verbindliches Recht in Deutschland.

Der Gesetzentwurf nutzt das Grundkonzept der Umsatzsteuer, um dem Steuerbetrug zu begegnen. Klar ersichtlich wird darauf abgestellt, dass aus wirtschaftlicher Perspektive Steuerausfälle auf vorherigen Stufen[13] „geheilt“ werden können, wenn der Letztverbrauch in voller Höhe ordnungsgemäß versteuert wird. So rücken Einfuhrungereimtheiten auf dem langen Weg aus Drittlandsgebieten nach Deutschland aus wirtschaftlicher Sicht in den Hintergrund. Obzwar eine Eintreibung der Steuerschuld am Ende der Kette im Wege der Haftung nichts am potenziellen juristischen Fehlverhalten ändert,[14] können die finanziellen Schäden der Staaten durch eine Plattformhaftung eingegrenzt werden.

Nicht entrichteter Zoll wird durch eine ordnungsgemäß der Umsatzsteuer unterworfene letzte Transaktion jedoch nicht „geheilt“. Ohne Frage stellt dies keine wünschenswerte Situation dar, jedoch ist das Problem vermutlich weniger akut als die fehlende Umsatzbesteuerung.[15] In anderen Bereichen spricht man in solchen Fällen von Zwischenlösungen. Somit stellt der Vorschlag der Bundesregierung einen ersten Aufschlag dar, um mindestens Teile der Umsatzsteuerausfälle einzudämmen.

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12 Referentenentwurf eines Gesetzes zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, (Bundesministerium der Finanzen, Bundesrepublik Deutschland).

13 Aus nicht oder zu niedrig festgesetzter Einfuhrumsatzsteuer auf Ebene des Verkäufers oder einem seiner Vorgänger in einer Lieferkette.

14 Im Gegensatz zum EU-Model, welches nicht den Haftungsmechanismus nutzt, sondern den Marktplatzbetreiber zum Steuerschuldner macht.

15 Zollsätze sind oftmals relativ niedrig oder sogar Nullsätze, auch wenn es einige relevante Ausnahmen gibt.

Diese Initiative ist grundsätzlich zu begrüßen. Der schieren Masse der Drittlandsware geschuldet, die tagtäglich vertrieben wird, ist der Gesetzentwurf ein Kompromissvorschlag, da das Problem akut ist und bereits zu lange unbedacht blieb.[16]

Dieses Kapitel stellt das Problem mit Waren aus dem Drittlandsgebiet dar und reißt Felder an, in denen akute Betrugsgefahr besteht. Daraufhin wird in Abschnitt 2 der vorgeschlagene Lösungsversuch des Problems der Bundesregierung näher beleuchtet.[17] Ebenso werden die im Vereinigten Königreich implementierten Normen in ihren Kernpunkten erläutert (Abschnitt 3) und beide nationalen Ausgestaltungen verglichen (Abschnitt 4). Zusätzlich liegt ein kritischer Fokus auf der deutschen Ausgestaltung (Abschnitt 5), verbunden mit einem Ausblick auf die in der Europäischen Union (EU) ab 2021 geltenden Vorschriften (Abschnitt 6). Das Kapitel schließt mit weiterführenden Überlegungen in Abschnitt 7.

5.2 Die deutsche Plattformhaftung

Einem ersten Gesetzesvorschlag zur Thematik aus dem Bundesministerium der Finanzen folgte am 01.08.2018 ein Regierungsentwurf. Das endgültige Gesetz wurde am 11.12.2018 ausgefertigt und verkündet. Die Haftung für Marktplatzbetreiber stellt den markantesten Teil des ansonsten „minimalinvasiv“ gehaltenen (ehemaligen) Jahressteuergesetzes 2018 dar.[18] Im Zuge des Regierungsentwurfs wurde der Name *„Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften“* ausgerufen, was den

16 Grambeck und Nesemann (n 11) 14, sehen den Vorschlag als „letzte Alternative”.

17 Siehe Kaptitel 7.4 mit einer Fallstudie dazu.

18 RefE. Zu einer ersten Einordnung Martina Ortmann-Babel und Andreas Bolik, ‘Das „Jahressteuergesetz 2018“’ (2018) 71(32) Der Betrieb 1876.

Fokus auf die hier besprochene Regelung betont.[19]

Die deutsche Plattformhaftung besteht aus zwei neuen Paragraphen, die in das Umsatzsteuergesetz eingeführt wurden. Zum einen regelt § 22f UStG bestimmte Pflichten für Betreiber eines elektronischen Marktplatzes (die auch auf Verkäufer auf den Marktplätzen ausstrahlen)[20]; zum anderen wird durch § 25e UStG eine Haftung der Betreiber für Umsatzsteuerschulden der Verkäufer beim Handel auf einem elektronischen Marktplatz ermöglicht.[21]

5.2.1 Pflichten der Betreiber eines elektronischen Marktplatzes

§ 22f UStG verpflichtet die Betreiber von elektronischen Marktplätzen, Transaktionen von Nutzern aufzuzeichnen, deren Umsätze in Deutschland umsatzsteuerpflichtige Lieferungen sein könnten. Dies soll der Finanzverwaltung die Möglichkeit bieten zu prüfen, ob der liefernde Unternehmer seine steuerlichen Pflichten erfüllt hat. Nach der Gesetzesbegründung verfüge der Betreiber auf Grund der Ausgestaltungen der Vertragsbeziehungen über die geforderten Angaben, und er sei derjenige, der es den Verkäufern ermögliche, entsprechende steuerpflichtige Umsätze zu erzielen.[22] Konkret sind nach Abs. 1 für jede Lieferung, die auf dem vom Betreiber bereitgestellten Marktplatz rechtlich begründet wird, und bei der die Warenbewegung entweder im Inland beginnt oder endet, folgende Informationen aufzuzeichnen:

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19 Zu einer ersten Einordnung der Aufzeichnungs- und Haftungsnormen siehe Grambeck und Nesemann (n 11).

20 So auch Matthias Luther, 'Die neue Haftung für Online-Marktplätze' (2018) 71(33) Der Betrieb 1942, 1942 und 1945.

21 Die Überschrift des Paragraphen mag man als sprachliche Ungenauigkeit abtun, da sich das Konfliktpotenzial nicht nur auf den Handel erstreckt. „Verkauf" wäre passender.

22 RegE 67.

- Der vollständige Name und die vollständige Anschrift des liefernden Unternehmers;
- die Steuernummer des liefernden Unternehmers und soweit vorhanden die Umsatzsteuer-Identifikationsnummer (USt-Id.);
- das Beginn- und Enddatum der Bescheinigung über die steuerliche Erfassung des liefernden Unternehmers;
- den Ort des Beginns der Beförderung oder Versendung sowie den Bestimmungsort; und
- den Zeitpunkt und die Höhe des Umsatzes.

§ 22f Abs. 1 Satz 2 u. 3 UStG regeln die „Bescheinigung über die steuerliche Erfassung“ des liefernden Unternehmers. Diese Bescheinigung ist vom liefernden Unternehmer bei seinem zuständigen Finanzamt zu beantragen,[23] längstens drei Jahre gültig und muss im Zeitpunkt der Lieferung gültig sein, damit der Betreiber seiner Pflicht nachgekommen ist.[24]

Der Passus, dass die Finanzverwaltung die Erteilung der Bescheinigung insbesondere versagen kann, wenn ein Unternehmer seinen steuerlichen Verpflichtungen nicht oder nicht in vollem Umfang nachgekommen ist und auch nicht zu erwarten ist, dass er diesen zukünftig nachkommen wird, fiel im RegE heraus.[25] Es ist unklar, inwiefern diese Streichung materielle Konsequenzen für die Versagung der Bescheinigung haben wird.[26]

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[23] § 22f Abs. 1 Satz 3 UStG. Für die meisten Drittlandsfälle ist das Finanzamt Berlin-Neukölln zuständig, siehe § 1 Abs. 2 Verordnung über die örtliche Zuständigkeit für die Umsatzsteuer im Ausland ansässiger Unternehmer – Umsatzsteuerzuständigkeitsverordnung, BGBl. I 2001, 3794 (Bundesrepublik Deutschland).

[24] § 22f Abs. 1 Satz 2 UStG.

[25] § 22f Abs. 1 Satz 4 UStG-RefE.

[26] Mit tiefer gehender Interpretation der Änderung, Luther (n 20) 1943.

Unternehmer ohne Wohnsitz oder gewöhnlichen Aufenthalt, Sitz oder Geschäftsleitung im Inland oder einem EU/EWR-Staat, haben spätestens mit Antragstellung einen Empfangsbevollmächtigen im Inland (§ 123 AO)[27] zu benennen.[28] Abweichend von § 123 Satz 1 AO soll die Benennung bereits bei Beantragung zu erfolgen haben, nicht erst auf Verlangen der Finanzbehörde. Dies soll sicherstellen, dass spätestens ab Beantragung der Bescheinigung Bescheide gegenüber den liefernden Unternehmern dem Empfangsbevollmächtigten zugestellt werden können. Der Betreiber des elektronischen Marktplatzes soll dann im Wege einer elektronischen Abfrage beim Bundeszentralamt für Steuern prüfen, ob die notwendige Bescheinigung für den Verkäufer erteilt wurde.[29] Gesetzestechnisch ist vorgesehen, dass der Unternehmer bei Beantragung der Bescheinigung automatisch einer Weitergabe der Daten an die Betreiber eines elektronischen Marktplatzes zustimmt.[30]

§ 22f Abs. 2 UStG sieht vor, welche Aufzeichnungspflichten die Betreiber zu beachten haben, wenn die Lieferungen über den elektronischen Marktplatz von Personen erbracht werden, die angegeben haben, dass diese Lieferungen nicht im Rahmen eines Unternehmens ausgeführt werden. In diesen Fällen soll zusätzlich das Geburtsdatum des Verkäufers aufgezeichnet werden.[31] Steueridentifikationsnummer bzw. USt-Id. sowie die Bescheinigung über die steuerliche Erfassung werden hingegen nicht mehr verlangt.[32] Die Marktplatzbetreiber haben die aufgezeichneten Daten über

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27 Abgabenordnung, BGBl. I 2002, 3866 (Bundesrepublik Deutschland).

28 § 22f Abs. 1 Satz 4 UStG. Luther sieht die Benennung des Empfangsbevollmächtigten als Voraussetzung für die Erteilung der Bescheinigung, Luther (n 20) 1943.

29 § 22f Abs. 1 Satz 6 UStG. Gem. § 27 Abs. 25 UStG wird dieses Verfahren nicht von Anfang an zur Verfügung stehen. Bis dahin ist die Bescheinigung in Papierform zu erteilen.

30 § 22f Abs. 1 Satz 7 UStG.

31 § 22f Abs. 2 Satz 2 UStG.

32 § 22f Abs. 2 Satz 1 UStG.

alle Verkäufer (Unternehmer, als auch Nichtunternehmer), auf Anfrage an das für sie zuständige Finanzamt zu übermitteln.[33] Die Gesetzesbegründung schweigt dazu, inwiefern die Finanzverwaltung die aufgezeichneten Informationen für weiterführende Zwecke verwenden wird.

5.2.2 Haftung beim Handel auf einem elektronischen Marktplatz

Der neue geschaffene Paragraph wurde im Abschnitt „Sonderregelungen“ angesiedelt und schließt unmittelbar an die Haftung für die schuldhaft nicht abgeführte Steuer in § 25d UStG an.

Mit der neuen Regelung wird eingeführt, dass der Betreiber eines elektronischen Marktplatzes für die nicht entrichtete Steuer aus der Lieferung eines Unternehmers, die auf dem von ihm bereitgestellten Marktplatz rechtlich begründet worden ist, haftet.[34] Die Gesetzesbegründung spricht von einer verschuldensunabhängigen Gefährdungshaftung.[35] Weiter wird in der Gesetzesbegründung ausdrücklich erwähnt, dass Betreiber von elektronischen Marktplätzen neben ihren eigenen Interessen, unter bestimmten Voraussetzungen, auch die Verantwortung für die aus ihrer Geschäftstätigkeit entstandene Umsatzsteuer zu übernehmen haben. Dies sei zur Sicherstellung der Umsatzbesteuerung erforderlich und läge im Interesse der Allgemeinheit.[36] Eine ähnliche Einstellung zur Thematik war aus den Medienberichten rund um die Finanzministerkonferenz am 24./25.05.2018 vernommen

[33] § 22f Abs. 3 UStG.

[34] § 25e Abs. 1 UStG.

[35] RegE 68. In der Gesetzesbegründung des RefE war das Wort „verschuldensunabhängig“ noch nicht enthalten.

[36] RegE 68.

worden.[37]

Der Betreiber kann der Haftung entgehen, wenn er die oben erwähnte Bescheinigung, bzw. eine elektronische Bestätigung nach § 22f Abs. 1 Satz 6 UStG vorlegt.[38] Im Vergleich zum Referentenentwurf zum verabschiedeten Gesetz wurde an dieser Stelle sprachlich umgestellt.[39] Als „Freifahrtschein" fungiert die Bescheinigung nicht. Hatte der Betreiber nämlich Kenntnis oder hätte er nach der Sorgfalt eines ordentlichen Kaufmanns Kenntnis haben müssen, dass der liefernde Unternehmer seinen steuerlichen Verpflichtungen nicht oder nicht im vollen Umfang nachkommt, wirkt die vorgelegte Bescheinigung nämlich nicht haftungsbefreiend.[40] Diese Kennenmüssen-Doktrin geht auf Rechtsprechung des Gerichtshofs der Europäischen Union (EuGH) zurück.[41]

Zusätzlich sieht der Gesetzesvorschlag eine Möglichkeit vor, wie der Betreiber die Haftung abwenden kann, wenn die Registrierung eines Verkäufers auf dem elektronischen Marktplatz nicht als Unternehmer erfolgt. In dieser Alternative kann unserem Verständnis nach keine Bescheinigung über die steuerliche Erfassung vorgelegt werden, und eine „Nichterfassungsbescheinigung"[42] kennt das Umsatzsteuerrecht in

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37 Jahreskonferenz 2018 der Finanzministerinnen und Finanzminister der Länder in Goslar: Besteuerung der digitalen Wirtschaft (25 Mai 2018) Nr. 6.

38 § 25e Abs. 2 Satz 1 UStG.

39 § 25e Abs. 2 UStG.

40 § 25e Abs. 2 Satz 2 UStG.

41 Siehe u.a. Verbundene Rechtssachen 131/13, 163/13 and 164/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' MariaNoPreviti vof and Turbucom BV and Turbucom Mobile Phone's BV v Staatssecretaris van Financiën* ECLI:EU:C:2014:2455.

42 Analog zur „Nichtveranlagungsbescheinigung" bei Kapitalerträgen, § 44a Abs. 2 Nr. 2 Einkommensteuergesetz, BGBl. I 2009, 3862 (Bundesrepublik Deutschland). Die Gesetzesbegründung führt weiterhin an, dass die Bescheinigung „vom Unternehmer" eine Haftung abwendet, RegE 69. Dies erscheint als redaktioneller Fehler, da auch im darauf folgenden Satz von Unternehmern gesprochen wird.

Deutschland nicht. Stattdessen muss der Betreiber seinen oben erläuterten Aufzeichnungspflichten nachkommen und nach Art, Menge und Höhe der erzielten Umsätze darf nicht davon auszugehen sein, dass Kenntnis darüber bestand oder nach der Sorgfalt eines ordentlichen Kaufmanns hätte bestehen müssen, dass die Umsätze im Rahmen eines Unternehmens erbracht wurden.[43]

Ungeachtet der beiden erläuterten Exkulpationsmöglichkeiten tritt die Haftung des Betreibers ein, wenn das Finanzamt den Betreiber durch eine Mitteilung darüber in Kenntnis setzt, dass der liefernde Unternehmer seinen steuerlichen Pflichten nicht oder nicht in wesentlichem Umfang nachkommt.[44] Diese Mitteilung steht dem Steuergeheimnis nicht entgegen, da es sich um ein Offenbarungsbefugnis gem. § 30 Abs. 4 Nr. 2 AO handelt. Die Mitteilung soll mit einer Frist versehen sein. Kann der Betreiber innerhalb dieser Frist nachweisen, dass der liefernde Unternehmer über seinen elektronischen Marktplatz keine Waren mehr anbieten kann, wird von einer Inanspruchnahme der Haftung abgesehen.[45] Ein entsprechendes Vorgehen ist für Lieferungen von nicht als Unternehmer registrierten Personen vorgesehen.[46]

Definiert werden elektronische Marktplätze sehr breit: als eine Website oder jedes andere Instrument, mit dessen Hilfe Informationen über das Internet zur Verfügung gestellt werden, die es einem Dritten, der nicht Betreiber des Marktplatzes ist, ermöglicht, Umsätze auszuführen.[47] Betreiber ist nach dem Gesetzeswortlaut derjenige, der einen elektronischen Marktplatz unterhält und es Dritten ermöglicht,

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43 § 25e Abs. 3 UStG.

44 § 25e Abs. 4 Satz 1 UStG.

45 § 25e Abs. 4 Satz 3 UStG.

46 § 25e Abs. 4 Satz 4 UStG.

47 § 25e Abs. 5 UStG. Mit Kritik dazu Luther (n 20) 1942.

auf diesem Marktplatz Umsätze auszuführen.[48] Örtlich zuständig für den Erlass des Haftungsbescheids ist das Finanzamt, das für die Besteuerung des liefernden Unternehmers zuständig ist.[49] Die Gesetzesbegründung führt aus, dass der Haftungsbescheid schriftlich erlassen werden muss und im pflichtgemäßen Ermessen des zuständigen Finanzamts steht. Die Haftung des Betreibers ist gegenüber Steuerschuldnerschaft grundsätzlich nachrangig. Jedoch kann, wenn der Steuerschuldner nicht ohne weiteres erreichbar ist, der Betreiber des elektronischen Marktplatzes in Ausübung des pflichtgemäßen Ermessens in Anspruch genommen werden. Dem Haftungsschuldner ist die Gelegenheit zu geben, sich zu den für die Entscheidung erheblichen Tatsachen zu äußern.[50]

5.2.3 Anwendungszeitraum

Grundsätzlich sind die beschriebenen Regelungen auf ab dem 01.01.2019 begründeten Rechtsgeschäfte anzuwenden. Jedoch gilt für die Haftungsnorm eine gewisse Schonfrist.[51] Sie gilt für Umsätze von Unternehmern ohne Sitz, Geschäftsleitung Wohnsitz oder gewöhnlichen Aufenthalt im Inland oder der EU/EWR ab dem 01.03.2019, für entsprechende Umsätze von Unternehmern aus dem Inland oder der EU/EWR ab dem 01.10.2019.[52] Die Aufzeichnungspflichten waren von der Schonfrist nicht betroffen, sodass die beschriebenen Aufzeichnungen ab dem 01.01.2019 zu führen waren. Da die Möglichkeit zur elektronischen Abfrage nicht rechtzeitig bis zum Jah-

48 § 25e Abs. 6 UStG.

49 § 25e Abs. 7 UStG.

50 RegE 70.

51 Art. 16 Abs. 3 RegE.

52 § 27 Abs. 25 Satz 4 UStG.

resende 2018 bereitstand, ist das Bundesministerium der Finanzen verpflichtet, den Beginn der Abfragemöglichkeit durch ein im Bundessteuerblatt zu veröffentlichendes Schreiben mitzuteilen.[53] Bis zur Einführung des elektronischen Abfrageverfahrens ist die Bescheinigung an die Verkäufer in Papierform zu erteilen.[54]

Ebenso durch BMF-Schreiben soll später festgelegt werden, ab welchem Kalenderjahr und ggf. in welchem Datenformat die geforderten Aufzeichnungen zu übermitteln sind.[55]

5.3 Die Regelungen im Vereinigten Königreich

Durch das EU-weit harmonisierte Mehrwertsteuersystem und Zollsystem ist es nicht verwunderlich, dass andere Mitgliedstaaten vor ähnlichen Problemen stehen. Die Regierung im Vereinigten Königreich ergriff im Rahmen des *Finance Act 2016* erstmals gesetzgeberisch die Initiative zur Bekämpfung des Mehrwertsteuerbetrugs im Online-Handel.[56] Auch diesen Normen war eine gewisse mediale Aufmerksamkeit vorausgegangen.[57] Verschärfungen erfolgten im *Finance Act 2018*.[58] Verortet sind die gesetzlichen Regelungen – wie im deutschen Umsatzsteuergesetz – nach der bereits

53 § 27 Abs. 25 Satz 1 UStG.

54 § 27 Abs. 25 Satz 2 UStG.

55 § 27 Abs. 25 Satz 2 UStG.

56 Sec. 124 Finance Act 2016, 2016 c 24 (United Kingdom) in Kraft seit dem 16.09.2016.

57 Exemplarisch Simon Tulett, Amazon and eBay 'liable' if they ignore VAT fraud, 'BBC News (online)' (1 November 2015) oder Simon Bowers, Amazon and eBay to be held liable for VAT fraud by sellers, 'The Guardian (online)' (16 März 2016).

58 Finance Act 2018, 2018 c 3 (United Kingdom) Sec. 30, in Kraft seit dem 16.03.2018. Siehe auch Aleksandra Bal, 'Managing EU VAT Risks for Platform Business Models' (2018) 72(4a/Special Issue) Bulletin for International Taxation 6.

2003 eingeführten Gefährdungshaftung für nicht abgeführte Steuer von Verkäufern.[59]

5.3.1 Einführung durch den Finance Act 2016

Kernelement der Regelung stellt Section 77B im dortigen Mehrwertsteuergesetz (Value Added Tax Act 1994, 1993 c 23 (United Kingdom), kurz VATA 1994) dar. Diese Regelung kodifiziert die Haftung von Betreibern von „Online-Marktplätzen". Zeitgleich wurde eingeführt, dass steuerpflichtige Personen ohne Anknüpfungspunkt im Vereinigten Königreich eine ansässige Person bestimmen müssen, die für die nicht ansässige Person agieren muss.[60] Mit beiden Maßnahmen adressierte man das Eintreibungsproblem außerhalb des eigenen Rechtsraums.[61]

Ursprünglich war vorgesehen, dass die Haftungsregelung zur Anwendung kommt, wenn eine nicht im Vereinigten Königreich ansässige Person Lieferungen über einen Online-Marktplatz ausführte, die Waren sich bei Lieferung oder bei Bezahlung im Vereinigten Königreich befanden und der Verkäufer mindestens einer Verpflichtung des dortigen Mehrwertsteuergesetzes nicht nachkam.[62] Das Erfordernis der Nichtansässigkeit wurde durch gesetzgeberische Nachbesserungsarbeiten 2018 gestrichen. Ähnlich der deutschen Regelung betrifft die britische Regelung aktuell sowohl ansässige als auch nichtansässige Unternehmer. Während der Wortlaut der Gesetzes-

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59 Siehe Sec. 18 Finance Act 2003, 2003 c 14 (United Kingdom) in Kraft seit dem 11.06.2003.

60 Sec. 123 Finance Act 2016.

61 Max Schofield und Rita de la Feria, 'Finance Act 2016: Section 123 VAT: Representatives and security; Section 124 VAT: Joint and several liability of operators of online marketplaces' (2016) 61(5) British Tax Review 604, 607.

62 Für die Definition von „nicht ansässig"wird auf Art. 10 Council Implementation Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L77/1 (European Union) verwiesen, Sec. 77B (10) Value Added Tax Act 1994, 1993 c 23 (United Kingdom).

norm nicht eindeutig auf Business to Conusmer-Geschäfte (B2C-Geschäfte) abstellt, wird aus weiterführender *Guidance* deutlich, dass eine derartige Beschränkung offenbar beabsichtigt ist.[63]

Im Gegensatz zur in Deutschland vorgeschlagenen Regelung waren die Betreiber des Online-Marktplatzes ursprünglich erst von der Regelung betroffen, wenn die *Commissioners* eine *Liability Notice* versenden.[64] Den deutschen Aufzeichnungspflichten vergleichbaren Pflichten entstehen aus dieser Norm weder Betreibern noch Verkäufern.

Auch nach den jüngsten Änderungen stellt die den Kern der Regelung dar. Diese *Notice* enthält die Aufforderung, dass Lieferungen einer bestimmten Person bis zu einem bestimmten Datum nicht mehr stattfinden dürfen, ersatzweise bis zu dem Datum an dem die *Notice* ausläuft.[65] Sollte der Handel dieser Person vom Betreiber nicht unterbunden werden, haftet er für alle Umsatzsteuerverbindlichkeiten dieser Person über diesen Online-Marktplatz, zeitlich auf den Anwendungszeitraum der *Notice* begrenzt.

Grundsätzlich besteht gesetzlich die Möglichkeit des *HM Revenue & Customs*[66], die Mehrwertsteuerschuld eines Betreibers, die ihm aufgrund der Haftungsnorm von einem Verkäufer zufällt *„to the best of their judgment* [der Commissioners]“

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63 HM Revenue & Customs, Businesses selling goods in the UK using online marketplaces (2016) 1 und HM Revenue & Customs, Guidance VAT: overseas businesses and joint and several liability for online marketplaces (2016) 3.

64 Sec. 77B (2) VATA 1994. Dem Wortlaut nach kann die Haftung auch ohne vorherige *Notice* erwachsen. *„The Commissioners may give [...] the operator a notice“*. Dem Vernehmen nach und bestätigt durch ein Policy Paper der Regierung, wird der Mechanismus jedoch erst durch die Notice angestoßen, sodass die Initiative von der Finanzverwaltung ausgeht, Guidance VAT: overseas businesses and joint and several liability for online marketplaces (n 63) 3. Dies wurde im Rahmen des *Finance Acts 2018* erweitert. § 25e Abs. 4 UStG sieht einen ähnlichen Mechanismus vor.

65 Sec. 77B (2) und (3) VATA 1994.

66 *Her Majesty's Revenue & Customs* ist die britische Finanzverwaltung.

zu schätzen.[67] Dies gilt auch für die Vergangenheit, wenn auch in fest geregeltem zeitlichem Rahmen.[68]

Definiert wird ein Online-Marktplatz als eine Website, oder jede andere Art, Informationen über das Internet bereitzustellen, durch die Personen, die nicht der Betreiber selbst sind, Lieferungen anbieten können. Es ist nicht schädlich, dass der Betreiber auch selbst Lieferungen anbietet. Der Betreiber ist definiert als die Person die den Zugriff und die Inhalte eines Online-Marktplatzes kontrolliert.[69] *Treasury* wird durch die gesetzliche Regelung mit umfangreichen Kompetenzen ausgestattet, durch Verwaltungsanweisungen beispielsweise zu erlassen, dass bestimmte Lieferungen so behandelt werden sollen, als wären sie im Rahmen eines Online-Marktplatzes getätigt worden.[70] Weiter können Verwaltungsanweisungen erlassen werden, die die zentralen Begriffe der Regelung konkretisieren.[71]

5.3.2 Verschärfung durch den Finance Act 2018

Im Rahmen des *Finance Act 2018* wurden neben den schon erwähnten kleineren Anpassungen zwei weitere Regelungen im Zusammenhang mit Online-Marktplätzen eingeführt. Erstens die Haftung für nicht im Vereinigten Königreich ansässige Unternehmer, die ihrer Registrierungspflicht nach Anhang 1A nicht nachkommen, Sec. 77BA VATA 1994; und zweitens eine Regelung zur Darstellung von USt-Id.[72]

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67 Sec. 77C (1) VATA 1994.

68 Schofield und de la Feria (n 61) 604-05.

69 Sec. 77B (9) VATA 1994.

70 Sec. 77B (11) VATA 1994.

71 Sec. 77B (12) VATA 1994.

72 Sec. 77BA und Sec. 77E VATA 1994.

Zu den bereits angesprochenen Anpassungen zählt die nicht unwesentliche Streichung des Tatbestandsmerkmals „nicht ansässig“, so dass die bisherige Haftungsnorm auch auf Umsätze von im Vereinigten Königreich ansässigen Verkäufern erweitert wurde, falls diese Waren aus dem Inland liefern.[73] Dies zielt vor allem auf bereits im Inland befindliche Waren in Warenlagern ab.

Als zusätzliche Haftungsnorm wurde im Rahmen des *Finance Acts 2018* eingeführt, dass eine Haftung des Marktplatzbetreibers eintritt, wenn ein Unternehmer Lieferungen über einen Online-Marktplatz tätigt, seinen Registrierungspflichten nicht nachkommt und der Betreiber des Online-Marktplatzes von dem Gesetzesverstoß wusste oder hätte wissen müssen.[74] Im Gegensatz zur oben erläuterten Norm – die weiterhin in Anwendung ist – sieht das Gesetz keine *Notice* im Rahmen dieser Haftungsnorm vor. Durch diese Norm erreicht man, dass auch der Marktplatzbetreiber die Initiative ergreift und proaktiv Verkäufer und deren umsatzsteuerlich relevante Informationen einer gewissen Prüfung unterzieht. Laut *Guidance* sollen die Marktplatzbetreiber prüfen, ob ein Händler nach den ihnen zugänglichen Informationen (Warenweg, Versandgeschwindigkeit, Vorhandensein britischer Abnehmer) zur Abführung britischer Umsatzsteuer verpflichtet ist, und diesen nach einer gültigen USt-Id. zu fragen.[75]

Weiter wurde eine neue Norm eingeführt, die den Betreiber dazu verpflichtet, die auf seinem Marktplatz dargestellten USt-Id. zu überprüfen.[76] Der Betreiber wird

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73 Sec. 38 (4)(b) *Finance Act 2018*. Die Streichung bereinigt einen potenziellen Verstoß gegen Art. 56 Consolidated version of the Treaty on the Functioning of the European Union, OJ L326/47 (European Union).

74 Sec. 77BA (1) VATA 1994. Vgl. § 25f Abs. 2 Satz 2 UStG.

75 HM Revenue & Customs, Guidance VAT: online marketplace seller checks (2018) 3-4.

76 Sec. 77E VATA 1994.

dazu verpflichtet, sowohl die USt-Id., die ihm von Unternehmern genannt werden als auch die USt-Id. die auf dem Online-Marktplatz dargestellt werden, auf Richtigkeit zu überprüfen.[77] Wird eine USt-Id. des Verkäufers zur Verfügung gestellt, muss sie grundsätzlich binnen zehn Tagen auch auf dem Marktplatz dargestellt werden; ist sie falsch, muss sie grundsätzlich binnen zehn Tagen gelöscht werden.

Das Vereinigte Königreich hat zusätzlich ab April 2018 eine flankierende Regelung für Unternehmen eingeführt, die für Verkäufer aus Drittlandsgebieten Waren in Großbritannien lagern, die an britische Kunden verkauft werden sollen (sog. *Fulfilment House Due Diligence Scheme*).[78] Die Regelung verpflichtet die entsprechenden Unternehmen, falls die gelagerten Waren sich nicht in einem besonderen zollrechtlichen Verfahren befinden und auch nicht bereits vorher in Großbritannien verkauft worden sind, Aufzeichnungen insbesondere über die umsatzsteuerliche Registrierung des Verkäufers oder die Befreiung von der Registrierungspflicht, dessen Name und Anschrift, Art und Umfang der Güter und Daten der Einfuhr vorzuhalten. Bei Verstößen können Geldstrafen festgesetzt werden.[79]

5.4 Kritischer Vergleich der Regelungen einschließlich des ab 2021 geltenden EU-Modells für Marktplätze

77 Vermutlich analog § 18e UStG.

78 Schofield und de la Feria (n 61) 607, zu älteren Regelungen zu *Fulfilment Houses* siehe HM Revenue & Customs, Guidance Apply for the Fulfilment House Due Diligence Scheme (Notice FH1) (2017).

79 Guidance Apply for the Fulfilment House Due Diligence Scheme (Notice FH1) (n 78).

5.4.1 Aufzeichnungspflicht

Wohl größter Unterschied zwischen den beiden Ausgestaltungen ist die in der deutschen Ausgestaltung vorgesehene Aufzeichnungspflicht.

Das britische Modell kommt in der ursprünglichen Form in der Praxis nur zur Anwendung, wenn ein Verkäufer eine steuerpflichtige Lieferung ausführt und seine umsatzsteuerlichen Pflichten nicht erfüllt. Solch ein Fehlverhalten kann von der Finanzverwaltung angemahnt werden, was dem Vernehmen nach der bisher gängige Weg war. Dadurch wird der Mechanismus in Gang gesetzt, der in einer Haftung des Betreibers enden kann. Von Aufzeichnungspflichten sieht die ursprüngliche britische Grundregelung vollkommen ab.[80] Abweichend hierzu sind im deutschen Modell verschuldensunabhängig Aufzeichnungen zu führen. Jede Transaktion – sei sie final von der Regelung betroffen oder nicht – muss potenziell aufgezeichnet werden. Einerseits um den Aufzeichnungspflichten des § 22f UStG nachzukommen und anderseits um der Finanzverwaltung nachweisen zu können, warum eine Transaktion nicht aufgezeichnet werden muss, beispielsweise, weil sie weder im Inland beginnt noch endet. Genaugenommen gehen die Aufzeichnungspflichten sogar über Fälle hinaus, die von der Haftung erfasst sein können, da nämlich alle im Inland endenden oder beginnenden Warenbewegungen aufzuzeichnen sind. Dies gilt dann auch für Fälle, in denen der Kunde wirksam zum Einführer und Schuldner der Einfuhrumsatzsteuer geworden ist, oder für den grenzüberschreitenden Verkehr in Form von Ausfuhrlieferungen in Drittlandsgbiet oder Versandhandelslieferungen im Sinne des § 3c UStG mit Steuerbarkeit im Bestimmungsland.

[80] Die jüngsten Änderungen im Rahmen des *Finance Act 2018* etablieren implizite Aufzeichnungspflichten, da sich der Betreiber verteidigen können sollte, wenn die Finanzverwaltung ihm vorhält, er hätte von einem Verstoß des Unternehmers wissen müssen.

Im Ergebnis wird das Geschäftsmodell der Plattformen auf nicht unerhebliche Art und Weise in Deutschland „verbürokratisiert". Die Aufzeichnungspflicht findet allgemein Anwendung und betrifft grundsätzlich jede Transaktion. Die britische Regelung wird hingegen erst durch ein Fehlverhalten ausgelöst. Informationen über ehrliche Steuerzahler gelangen dementsprechend nicht in die Hände der Finanzverwaltung.

Die deutsche Ausgestaltung ist insoweit durchaus kritisch zu sehen. Obwohl der Gedanke der vollständigen Überprüfung jeder Transaktion aus fiskalischer Sicht reizvoll klingen mag, erscheint er überbordend und im Rahmen der digitalen Möglichkeiten der Finanzverwaltung unrealistisch.[81]

Es ist zwar schlichtweg nicht möglich, abzuschätzen wie viel Prozent der Transaktionen von Betrügern ausgeführt werden, jedoch erscheint es uns ungerechtfertigt den – hoffentlich – überragenden Teil der ehrlichen Verkäufer mit den Aufzeichnungspflichten zu belasten.

Die britische Ausgestaltung, die entsprechende Aufzeichnungen nur von den *Fulfilment Houses* fordert, und ansonsten im Wesentlichen die USt-Id. der Verkäufer und ggf. ergänzende Prüfungshandlungen vorsieht, erscheint uns weitaus praxistauglicher. Sie betraut ehrliche Verkäufer und Marktplatzbetreiber mit geringeren zusätzlichen Pflichten.

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[81] Ferner wäre an das Übermaßverbot zu denken. Es leitet sich nach ständiger Rechtsprechung des Bundesverfassungsgerichts aus dem Rechtsstaatsprinzip ab. Es besagt, dass staatliche Eingriffe in den Rechtskreis der Bürger nur dann rechtmäßig sind, wenn sie geeignet, erforderlich und verhältnismäßig sind. In welchem Maße zusätzliche – im analogen Geschäftsleben nicht dokumentationsbedürftige Informationen – digitale Informationen für die Besteuerung notwendig sind, wäre an dieser Stelle ausufernd. Siehe dazu jedoch Thomas Fetzer et al. 'Besteuerungskonzepte für die Sharing Economy: Aktuelle Regelungen und Reformoptionen' (2020) 97(2) Steuer und Wirtschaft 106, 115.

5.4.2 Kennenmüssen-Doktrin

Die aus der EuGH-Rechtsprechung herrührende Kennenmüssen-Doktrin findet in beiden Ausgestaltungen Einzug.[82] In der deutschen Norm schränkt sie die Haftungsbefreiung der Bescheinigung ein,[83] in der britischen Regelung bewirkt sie die Haftung auch ohne vorherige *Notice* des *HM Revenue & Customs*.[84]

Trotz des sehr abstrakt gehaltenen Maßstabs kann man es den beiden Staaten nicht verübeln, ihn aufgenommen zu haben. Ohne ihn würde ein nicht unwesentlicher Block an EuGH-Rechtsprechung ignoriert. Er rührt aus den Bekämpfungsmaßnahmen der Mitgliedstaaten im Zusammenhang mit dem sog. umsatzsteuerlichen Karussellbetrug.[85]

Aus rechtsstaatlicher Sicht befindet sich der Fiskus bei der Dritthaftung in einem gefährlichen Gebiet.[86] Offensichtlich erscheint es aussichtsreich, einen weiteren Schuldner zu benennen, jedoch wird dadurch kein Problem gelöst. Vielmehr wird das Problem – das der Fiskus nicht zu lösen vermag – weitergegeben. Zusätzlich reduziert es den Druck auf Staaten geeignete Verhinderungsmaßnahmen zu veranlassen.[87]

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82 Schofield und de la Feria (n 61) 606, führen vorrangig Verbundene Rechtssachen 439/04, 440/04 *Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04)* [2006] ECR I–6161 an und sehen bereits ergangene EuGH-Rechtsprechung als ausreichende Rechtsgrundlage für eine Dritthaftung an.

83 § 25f Abs. 2 Satz 2 UStG.

84 Sec. 77BA VATA 1994.

85 Mit detaillierter Aufarbeitung der Entwicklung der Rechtsprechung, de La Feria (n 9) 257-61.

86 In Rechtssache 384/04 *Commissioners of Customs & Excise and Attorney General v Federation of Technological Industries and Others* [2006] ECR I–4191, Rz. 28, judizierte der EuGH, dass Mitgliedstaaten Maßnahmen erlassen dürfen, die zu einer gesamtschuldnerischen Haftung führen, siehe auch Art. 205 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union)(nachfolgend: MwStSystRL).

87 Siehe Schlussanträge des Generalanwalts Poiares Maduro zu Verbundene Rechtssachen 354/03, 355/03, 484/03 *Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03) v Commissioners of Customs & Excise* [2006] ECR I–483.

Ohne tiefer gehend in die Rechtsprechungshistorie einzusteigen, ist zu vermerken, dass das „Kennenmüssen“ ein unbestimmter Rechtsbegriff ist. Zu Recht fordert Luther Konkretisierungen zur deutschen Ausgestaltung im Umsatzsteuer-Anwendungserlass[88]. Jedoch mag bezweifelt werden, dass die deutsche Finanzverwaltung allzu großen Ehrgeiz an den Tag legen wird, die vom EuGH kontinuierlich weiterentwickelte abstrakte Doktrin mit konkreten Beispielen zu füllen.[89]

5.4.3 Einzelfallbetrachtung

Die deutsche Regelung zielt in der jetzigen Ausgestaltung auf einzelne Transaktionen ab. Dies wird unter anderem dadurch deutlich, dass für jede Transaktion Zeitpunkt und Höhe des Umsatzes aufgezeichnet werden muss.[90]

Die britische Regelung ist nicht derart feinkörnig. Sie zielt auf Personen und Steuerschulden in einem Zeitraum ab.[91] Dies erscheint uns zielgerichteter. In einem Massengeschäft wie dem Internethandel kann es nicht zielführend sein, jede Transaktion detailliert zu prüfen. Diese fiskalische Idealvorstellung ist fernab der sinnvoll umsetzbaren Realität. Es muss darum gehen, die „schwarzen Schafe“ unter den Verkäufern vom Markt zu verbannen, nicht den Betreiber für Einzelfälle in die Haftung zu nehmen, die durchaus aus Fehlern im Rahmen einer Transaktion entstehen können.[92]

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88 Umsatzsteuer-Anwendungserlass, BGBl. I 2010, 846 (Bundesrepublik Deutschland); Luther (n 20), 1946.

89 Ferner ist eine Verwaltungspraxis auch ungeeignet innerstaatliche Normen zu beheben, Rechtssache 151/94 *Commission of the European Communities v Grand Duchy of Luxembourg* [1995] ECR 3685, Rz. 18.

90 § 22f Abs. 1 Nr. 5 UStG.

91 Sec. 77B (1) und (5) VATA 1994.

92 Luther (n 20) 1945, spricht die Problematik an, dass steuerehrlichen Verkäufern bei Fehlern der

5.4.4 Zeitliche Anwendung der Haftung

Laut Berichten des *Committee of Public Accounts des House of Commons*[93] sind erste Erfahrungen mit den britischen Normen positiv. Marktplatzbetreiber reagieren prompt und unverzüglich auf *Notices* und verbannen dolose Händler von ihrem Marktplatz.[94]

So kam die Schätzmöglichkeit unserem Vernehmen nach bisher nicht zum Einsatz. Dennoch kann das *HM Revenue & Customs* auch rückwirkend Steuern schätzen und von Marktplatzbetreibern Steuerzahlungen verlangen. Dieses rechtlich bedenkliche Instrument scheint offenbar als Drohmechanismus gedacht, das seine Wirkung erreicht.

Echte Rückwirkung scheint ausgeschlossen zu sein: Rechtsstaatlich nicht weniger fraglich ist in diesem Punkt die deutsche Regelung. Sie schweigt komplett dazu, inwieweit beispielsweise zurückliegende Sachverhalte genutzt werden dürfen, um einem Händler die Bescheinigung zu verwehren. Eine echte Rückwirkung scheint immerhin seit dem RegE ausgeschlossen,[95] da eine Anwendungsnorm mit einer Schonfrist eingeführt wurde. Nicht ausgeschlossen sind jedoch zukünftige Rückwirkungen, also Haftungsbescheide für die Zeit nach der Schonfrist.

Ausschluss von Plattformen droht.

93 Das *Committee of Public Accounts* ist ein Ausschuss des *House of Commons*, der unteren Kammer im Vereinigten Königreich.

94 House of Commons Committe of Public Accounts, *Tackling online VAT fraud and error: First Report of Session 2017–19: HC 312* (n 1) 12, Nr. 13.

95 Anders als nach dem Wortlaut des RefE, der nicht auf den Zeitpunkt der Steuerentstehung für Lieferungen abstellte, Inkrafttreten nach Art. 16 RegE zum 01.01.2019, kein *lex specialis* in § 27 UStG.

5.4.5 Lieferungen von Nichtunternehmern und an solche

In der aktuellen Ausgestaltung gelten sowohl das britische Modell als auch das deutsche Modell unabhängig von der Ansässigkeit der Marktplatzbetreiber und unabhängig von der Ansässigkeit der Verkäufer. Die betroffenen Lieferungen sind ebenfalls relativ vergleichbar. Allerdings beschränkt sich die britische Regelung zumindest nach den Ausführungen in den *Guidances* in der Anwendung auf Umsätze an Nichtunternehmer, während die offene Ausgestaltung des deutschen Vorschlags alle Umsätze erfasst, bei denen der Verkäufer Steuerschuldner ist.

Tritt der Nichtunternehmer als Verkäufer auf, ergibt sich ein anderes Bild. Während in der deutschen Haftungsnorm explizit geregelt ist, dass der Betreiber auch bei Nichtunternehmern sicherstellen muss, dass sie nicht ihren Unternehmerstatus verheimlichen, sprechen die britischen Haftungsnormen Personen, die nicht verpflichtet sind sich aus umsatzsteuerlichen Gründen registrieren zu lassen (= das britische Äquivalent zum deutschen Nichtunternehmer), nicht gezielt an. Ohne Datenmaterial lässt sich jedoch nur mutmaßen, inwiefern die Verheimlichung der Registrierungspflicht aufgrund der Höhe der Umsätze eines potenziellen Unternehmers ein Problem darstellt.

5.4.6 Bescheinigung

Die Bescheinigung über die steuerliche Erfassung ist nur im deutschen Vorschlag vorgesehen. Das britische Recht hegt somit keinen Missbrauchsverdacht gegenüber jedem Verkäufer, der keine Bescheinigung vorlegt. Die Bescheinigung soll offensichtlich als Signal dafür dienen, die „Guten“ von den „Bösen“ zu trennen. Sie weicht damit den Zielkonflikt auf, vor dem der Gesetzgeber steht. Einerseits geht er ein Risiko ein, wenn

er kein Misstrauen gegenüber (neuen) Marktteilnehmern hegt, andererseits zerstört er den Markt, wenn er Markteintrittsbarrieren zu hoch legt. Die Bescheinigung wird so zur Eintrittsbarriere. Ob sie geeignet ist, die Steuerhinterzieher von den Marktplätzen fernzuhalten, wird sich zeigen. Bereits der Bundesrechnungshof stellte fest, dass eine steuerliche Registrierung mitnichten mit einer korrekten Steuerzahlung gleichzusetzen ist.[96]

Gerade in Kombination mit der Durchführung des Bescheinigungsverfahrens in Papierform erscheint es zweifelhaft, dass damit dolose Händler von den gängigen Marktplätzen verschwinden. Zu einfach erscheint es, sich steuerlich zu registrieren und danach geplant in Insolvenz zu gehen und unter neuer Firma dasselbe „Spiel“ fortzusetzen.[97]

Aus staatlicher Sicht birgt die Bescheinigung die Gefahr, das implizite Ziel, die Steuerbefolgungskosten auf den Betreiber abzuwälzen, zu verfehlen. Der Betreiber könnte die Haltung einnehmen, dass er seine Pflicht erfüllt hat, wenn er die Bescheinigung des Verkäufers dokumentiert hat. Einerseits stellt die Bescheinigung zwar ohne Zweifel keinen *safe harbour* dar, jedoch bleibt ungewiss, was darüber hinaus zu unternehmen ist, um eine Haftung auszuschließen.

Weiter erscheint es fraglich, warum man mit der Bescheinigung einen nationalen Alleingang gehen musste. Ein vergleichbares System existiert bereits in der EU in Form der USt-Id. und deren Erfassung in einem MwSt-Informationsaustauschsystem (MIAS). Dabei erscheint es einfacher, diese verpflichtend werden zu lassen und nachzuholen, dass USt-Id. in Deutschland bisher nicht weitreichend erteilt wurden.

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96 Bundesrechnungshof (n 7) 9, 4.3.

97 Ab 2021 wurde die Bescheinigung durch die USt-Id. ersetzt, siehe Regierungsentwurf eines Jahressteuergesetzes 2020, Drs. 19/22850 (Bundesregierung, Bundesrepublik Deutschland) Art. 11 Nr. 17 bst c).

Großbritannien nutzt die bereits bestehende Möglichkeit, USt-Id. zu verifizieren.[98] Deutschland hingegen ging einen eigenen Weg durch Erteilung gesonderter Bescheinigungen durch das Bundeszentralamt für Steuern bzw. die Einrichtung einer entsprechenden Datenbank. Mit dem Jahressteuergesetz 2020 ist geplant die Bescheinigung durch die USt-Id. zu ersetzen.

Problematisch erscheint allerdings auch im britischen Modell die fokussierte Anknüpfung an USt-Id. aus einem eher fiskalischen Grund. Wie bereits ausgeführt, ist es den Steuerbehörden bisher kaum möglich, betrügerische Teilnehmer rechtzeitig zu erkennen und dann ihre USt-Id. für ungültig zu erklären. Somit dürfte auch die britische Regelung in weiten Teilen eher eine Abschreckungsfunktion für die nicht schwer kriminellen Marktteilnehmer haben. Organisierte Steuerbetrüger wird sie kaum von ihren Machenschaften abhalten.

5.4.7 Kompatibilität mit dem neuen EU-System

Das ab 2021 in national geltendes Recht zu überführende System der EU, das den Betreiber des elektronischen Marktplatzes in die Lieferkette integriert, scheint bei keiner der beiden Regelungen als Blaupause gedient zu haben.[99] Nach den noch umzusetzenden Richtlinien der EU wird für Fernverkäufe von aus dem Drittlandsgebiet eingeführten Gegenständen in Sendungen mit einem Sachwert von höchstens 150 € fingiert, dass der Verkäufer steuerbar und steuerfrei an die Plattform liefert und die Plattform steuerbar und steuerpflichtig an den Käufer.

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98 Sec. 77E VATA 1994.

99 Art. 14 Council Directive (EU) 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, OJ L348/7 (European Union).

Dies wirft diverse Fragen auf. Zwar mag es durch den „Brexit“ im Vereinigten Königreich keine tatsächliche Anwendung finden, dennoch erscheint es eigenartig, dass sich im Rat Wirtschaft und Finanzen auf EU-Ebene dafür eine Mehrheit finden konnte, jedoch die beiden EU-Schwergewichte UK und Deutschland offensichtlich andere Lösungen präferieren. So bleibt bisher unbeantwortet, warum man nicht ein System einführt, dass dem geplanten EU-System ähnlicher ist. Im deutschen Fall existieren – *de lege ferenda* – dann beide Systeme, da das EU-System nicht alle Lieferungen abdeckt. Das rechtliche Gerüst wird einem Flickenteppich gleich kommen.

5.5 Kritik an der deutschen Ausgestaltung

Besonders problematisch ist die potenziell verschuldensunabhängige Anwendung der Haftung. Es ist kritisch zu sehen, dass Marktplatzbetreiber grundsätzlich auch für Umsatzsteuerschulden, die wegen einer Insolvenz nicht entrichtet werden können, haften.

Zusätzlich besteht wie bei allen Haftungsnormen das Problem der rückwirkenden Inanspruchnahme. Der Marktplatzbetreiber muss sich genaugenommen überlegen, wie er sich finanziell gegen dieses Risiko absichern kann. Beispielsweise könnte, ähnlich wie bei Forderungsabtretungen nach § 13c UStG, an das Institut der Zahlung der Umsatzsteuer für den Verkäufer (§ 48 AO) gedacht werden. Ob dies allerdings zivilrechtlich und tatsächlich umsetzbar ist, bleibt abzuwarten. Aus Sicht eines risikoaversen Marktplatzbetreibers erscheint es nicht sinnvoll, Verkäufer ohne Bescheinigung zuzulassen.

Zusätzlich besteht das Problem, dass der Marktplatzbetreiber in vielen Fällen

gar nicht erkennen kann, ob eine inländische Umsatzsteuerpflicht besteht bzw. ob ein Unternehmer oder ein Nichtunternehmer agiert. Dies gilt vor allem, wenn er gar nicht in den Versand der Ware eingeschaltet ist und somit weder Abgangs- noch Bestimmungsort kennt. Ebenso problematisch erscheinen Fälle der eventuellen Steuerschuldnerschaft des Leistungsempfängers (zum Beispiel für Telekommunikationsgeräte und Tablet-Computer unter bestimmten weiteren Voraussetzungen[100]) oder Fälle mit unklaren Steuersätzen. Auch dürfte es im Massengeschäft einem Marktplatzbetreiber kaum möglich sein, zuverlässig Fälle des § 3 Abs. 8 UStG von solchen zu unterscheiden, in denen der Abnehmer tatsächlich der zollrechtliche Abgabenschuldner bei der Einfuhr geworden ist. Ebenfalls erscheint es schwer vorstellbar, dass Marktplatzbetreiber beim grenzüberschreitenden Versandhandel in der EU die korrekte Anwendung der Lieferschwellen nachvollziehen können.[101]

Die in Deutschland vorgesehenen Aufzeichnungspflichten dürften in vielen Fällen nicht erfüllbar sein.[102] Zuzugestehen ist dem Gesetzgeber, dass bei Einsatz von Auslieferungslagern des Marktplatzbetreibers dieser tatsächlich die relevanten Informationen über Abgangsort und Bestimmungsort haben wird. Beim direkt durch die Verkäufer erfolgenden Versand (besonders relevant bei eBay) wäre der Marktplatzbetreiber aber darauf angewiesen, diese Informationen zusätzlich von den Händlern zu erhalten. Gerade ein betrügerischer Händler wird jedoch wenig Skrupel haben, in derartigen Fällen schlicht und ergreifend falsche Informationen zu übermitteln, ohne dass der Marktplatzbetreiber dies verifizieren könnte.

Weiter fällt negativ auf, dass der deutsche Vorschlag eine sehr offene Definition

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100 § 13b Abs. 2 Nr. 10 UStG.

101 § 3c Abs. 3 UStG.

102 So auch Luther (n 20) 1946.

des elektronischen Marktplatzes enthält. § 25e Abs. 5 UStG spricht von zur Verfügung gestellten Informationen, die es ermöglichen, Umsätze auszuführen. Diese Definition würde grundsätzlich nicht nur echte Verkaufsplattformen wie eBay oder Amazon erfassen, sondern sogar alle Formen von Preisvergleichsportalen. Allerdings könnte sich aus § 25e Abs. 1 UStG die notwendige Beschränkung des Anwendungsbereichs der Norm ergeben, denn hier wird von „auf dem Marktplatz rechtlich begründeten" Lieferungen gesprochen.[103]

Zusätzlich fällt auf, dass in Deutschland keine Beschränkung auf Umsätze an Nichtunternehmer vorgesehen ist. Dies hat dann zur Folge, dass auch reine Unternehmensmarktplätze (zum Beispiel Ersatzteilmärkte, wie sie von Automobilherstellern und Maschinenbauunternehmen in den letzten Jahren zunehmend eingerichtet wurden) von der Regelung erfasst werden. Hier scheint die identifizierte Drittenstaatenproblematik eher unwahrscheinlich.

Schließlich ist kritisch anzumerken, dass viele Elemente des neuen Modells kaum das gesetzgeberische angestrebte Ziel erreichen werden. Einmal abgesehen von begründeten Zweifeln, ob die Finanzverwaltung tatsächlich in der Lage sein wird, ist aktuell festzuhalten, dass das elektronische Abrufsystem,[104] stellt sich die Frage, was in der Praxis passieren wird. Viele Betrugskarusselle auf dem Gebiet der Umsatzsteuer werden mit erheblicher krimineller Energie errichtet. Den Beteiligten ist es in der Vergangenheit nie besonders schwer gefallen, sich deutsche Steuernummern, USt-Id.

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103 Luther (n 20) 1942, sieht die Reichweite der Norm durch den Anwendungsbereich der Aufzeichnungspflichten eingeschränkt.

104 Die Kapazitäten des hauptsächlich für Drittlandsfälle zuständigen Finanzamt Berlin-Neukölln könnten alsbald an ihre Grenze kommen, siehe Senatsverwaltung für Finanzen, Pressemitteilung Nr. 18-009 (25 August 2018). Siehe auch Christian Ramthun, Neukölln gegen Seattle, 'WirtschaftsWoche' (27 Juli 2018).

oder sogar Bescheinigungen von Finanzämtern zu beschaffen.[105] Somit muss als recht wahrscheinlich angesehen werden, dass, auch wenn die angestrebte Erfassungsdatenbank tatsächlich live gegangen ist, viele der dort gespeicherten Informationen unzutreffend sein werden. Dies stellt sich aber regelmäßig erst dann heraus, wenn es zu Steuerausfällen gekommen ist, genau wie aus dem Karussellbetrug bekannt.

Rechenschaft über die umgesetzten Maßnahmen ist der Gesetzgeber den Betroffenen bisher noch schuldig geblieben. Es existieren bisher keinerlei datengestützte Studien über die Wirksamkeit der Maßnahmen.

Eine sinnvolle Lösung zur Bekämpfung der Steuerhinterziehung sollte unseres Erachtens ein kontinuierliches Monitoring enthalten. Hierzu sollte sich der deutsche Fiskus vielleicht von den neueren Entwicklungen in Spanien[106] und Italien[107] inspirieren lassen. Diese, auch noch in den Kinderschuhen steckenden Systeme verfolgen ohne zu stark auszuholen und in die Tiefe zu gehen, den Gedanken, die Zeit zwischen Verwirklichung des Umsatzes und Übermittlung und damit zusammenhängende Überprüfung durch die Finanzbehörden erheblich zu verringern. Als Ziel gilt die sogenannte Live-Übermittlung, bei der gar kein zeitlicher Versatz zwischen Umsatz, Übermittlung und Abführung der Steuer liegt. Minimalinvasive Änderungen, erscheinen nicht aussichtsreich.

Im Übrigen wird es einem böswilligen Verkäufer ein Leichtes sein, sich als Nichtunternehmer auszugeben und temporär scheinbar unter die Regelung des § 25e Abs.

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105 Siehe Frank Breuer, 'Fiskus vs. Goliath: Der Kampf der Steuerbehörden gegen den Vorsteuerbetrug' (2018) 67(8) Umsatzsteuer-Rundschau 306.

106 Verpflichtung zur sofortigen Übermittlung von Informationen, siehe Jordi Sol (Hrsg.), *Value Added Tax - Country Tax Guides (online) - Spain* (IBFD 2019) 36.

107 Verpflichtendes E-Invoicing über ein von den Behörden betriebenes System, siehe Davide Morabito und Lorenzo Bellavite (eds), *Value Added Tax - Country Tax Guides (online) - Italy* (IBFD 2019) 34.

3 UStG zu fallen. Bis der Marktplatzbetreiber die viel zu offen gehaltene Voraussetzungen erkennt, dass er bei der vermeintlichen Privatperson nach Art, Menge oder Höhe der erzielten Umsätze davon auszugehen hat, dass die Umsätze im Rahmen eines Unternehmens erbracht wurden, kann bereits ein nicht unerheblicher Betrag an Steuer hinterzogen worden sein. Bis der Verkäufer dann zumindest digital als Steuerschuldner identifiziert wurde, firmiert er bereits unter einem neuen Namen – einer anderen scheinbaren Privatperson. Dieses Katz- und Mausspiel wird im englischen Sprachgebrauch als *phoenixism* betitelt.[108] Entsprechende Verstöße sollten jedoch nicht finanziell zu Lasten der Marktplatzbetreiber gehen.

Als letztes Wort an dieser Stelle sei angemerkt, dass es zwar eine theoretisch gute Idee ist, ausländische Marktplatzbetreiber auch haften zu lassen. In der Praxis wird jedoch die Durchsetzung der entsprechenden Steuern genauso wenig möglich sein, wie in der Vergangenheit bei ausländischen Betrügern. Allenfalls der Einsatz von Internetsperren könnte hier vielleicht als Druckmittel erwogen werden. Doch auch diese kämen natürlich nur zur Anwendung, wenn der Schaden bereits eingetreten ist, und erreichen somit nicht das gewünschte Ziel.

Vermutlich wäre es viel geschickter, wenn der Gesetzgeber sich entweder in Einzelelementen an der europäischen Regelung orientiert oder alternativ oder kumulativ darüber nachdenkt, den Mechanismus des *split payment* zu nutzen. Da die Zahlungsabwicklung bei Internetmarktplätzen sehr häufig unter Einschaltung der Marktplatzbetreiber geschieht, wäre es zumindest theoretisch kein größeres Problem, eine entsprechende Quellen-Umsatzsteuerschuld einzurichten. Diese müsste allerdings vermutlich vorsorglich mit dem Regelsatz von erfolgen, verbunden mit einer

[108] Vgl. House of Commons Committe of Public Accounts, *Progress in tackling online VAT fraud: Forty-Ninth Report of Session 2017–19: HC 1304* (2018) 8, Nr. 7.

Exkulpationsmöglichkeit oder Erstattungsverfahren. Durch den weit verbreiteten Einsatz von Zahlungsdienstleistern die z.B. PayPal wird ein *split payment* System in gewisser Weise bereits praktiziert. Es fehlt lediglich die Berücksichtigung des Fiskus als weiteren Kreditor.

5.6 Kritische Betrachtung des EU-Modells

Das „Betrugsfeld“ der Inlandslieferungen bleibt unberücksichtigt. Der wesentliche und offensichtliche Schwachpunkt des EU-Modells ist die Begrenzung auf bestimmte grenzüberschreitende Transaktionen. Damit bleibt das wahrscheinlich sehr bedeutende Feld des Betrugs bei Inlandslieferungen ebenso außerhalb der Norm wie der grenzüberschreitende Betrug durch EU-Unternehmer. Insoweit sind der deutsche und der britische Ansatz aus fiskalischer Sicht sehr viel besser konzipiert.

Sehr positiv für die Marktplatzbetreiber ist anderseits die Ausgestaltung als Lieferkettenfiktion ohne die originäre Steuerschuldnerschaft als Ausnahme einzusetzen. Damit entfällt das Risiko der rückwirkenden Inanspruchnahme für die Umsatzsteuer wie im britischen und deutschen Ansatz. Allerdings muss der Marktplatzbetreiber, wenn er sich nicht selbst um die Zahlungsabwicklung kümmert, sicherstellen, dass er die finanziellen Mittel für die Abführung der Umsatzsteuer erhält. Außerdem werden ihm größere administrative Verpflichtungen aufgebürdet, denn er ist dann verpflichtet, die Rechnungen an die Kunden zu stellen und den zutreffenden Umsatzsteuerbetrag und die zutreffende Bemessungsgrundlage zu ermitteln. Dies sehen wir jedoch als vertretbare Forderung an. Es spiegelt den ursprünglichen Gedanken des Unternehmers als geeignete Stelle der Steuerabführung einer indirekten Steuer wider.

Ein Risiko besteht allerdings bezüglich der Eingangsseite. Wenn nämlich der

Marktplatzbetreiber eine fiktive Lieferung vom Verkäufer bezieht, müsste diese regelmäßig auch entsprechend der Umsatzsteuer unterworfen werden. Für den Vorsteuerabzug benötigt der Marktplatzbetreiber jedoch eine ordnungsmäßige Rechnung. Gegebenenfalls könnte er zwar die Abrechnung im Gutschriftsverfahren nutzen.[109] In beiden Fällen bleibt jedoch das Risiko bestehen, dass ihm bei betrügerischem Verhalten des Verkäufers der Vorsteuerabzug wegen fahrlässigen Übersehens einer Steuerhinterziehung desselben versagt werden könnte, es sei denn, er kann erfolgreich Gutgläubigkeit vorbringen.[110]

Für den Fiskus ist das Konzept allerdings ebenfalls nicht problemlos. Die sogenannte. App-Store-Regel wurde zum 01.01.2015 eingeführt, um insbesondere Umsatzsteuerhinterziehungen durch Softwareverkäufer aus Drittstaaten zu vermeiden. Diese hätten sich eigentlich bei B2C-Umsätzen bereits seit 2003[111] in der EU registrieren und Umsatzsteuer abführen müssen, unterließen dies allerdings oftmals. Die Leistungskette nach der App-Store-Regel bewirkt nun eine Ausgangssteuerschuld beim App-Store-Betreiber, womit es dem Fiskus möglich ist, sich auf einige wenige Anbieter zu fokussieren, die auch i.d.R. in der EU erfasst, wenn nicht gar (Apple iTunes, Google Play) dort niedergelassen sind. Zugleich greift hier jedoch für die Eingangsleistung das Reverse-Charge-Verfahren,[112] d.h. Vorsteuer und Umsatzsteuer

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109 § 14 Abs. 2 Satz 2 UStG.

110 Siehe u.a. Verbundene Rechtssachen 80/11 and 142/11 *Mahagében Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága (C-142/11)* ECLI:EU:C:2012:373; *Urteil zu den Anforderungen an die Gewährung des Vorsteuerabzugs aus Billigkeitsgründen - Nachprüfung einer Ermessensentscheidung* V R 62/14 vom 18 Februar 2016 (Bundesfinanzhof); *Urteil zum Steuersatz bei Überlassung digitaler oder elektronischer Sprachwerke im Sinne des UrhG* V R 43/13 vom 3 Dezember 2015 (Bundesfinanzhof).

111 Vgl. § 3a Abs. 3a UStG a.F. und Art. 57 MwStSystRL a.F.

112 § 13b UStG bzw. Art. 196 MwStSystRL.

entstehen beim App-Store als Leistungsempfänger und ein Betrug im Sinne einer *missing-trader*-Struktur ist nicht mehr möglich.

Dies ist bei den nunmehr erfassten Warenlieferungen anders. Hier wird nämlich – vorbehaltlich eines rein national für Lieferungen nichtansässiger an niedergelassene Unternehmer implementierten Reverse-Charge-Verfahrens[113] – weiter der ausländische Händler der Steuerschuldner sein. Damit besteht aber erneut für den Fiskus das Steuerausfallrisiko, wenn nämlich dieser mit Umsatzsteuer abrechnet, die Steuer jedoch nicht abführt, und zugleich der Marktplatzbetreiber wegen Gutgläubigkeit den Vorsteuerabzug behält.[114] Gerade diese Problematik war in Deutschland Anlass für die zunehmenden Erweiterungen des § 13b UStG z.B. auf Bauleistungen, Gebäudereinigung, Schrottumsätze etc.[115]

Schließlich ist unklar, wann genau ein Marktplatz im Sinne der EU-Regelung vorliegt, der zum Steuerschuldner wird. Die Formulierung, ein Marktplatz „unterstütze" den Verkauf von Waren, ist nämlich sehr offen. Bei einer weiten Auslegung würde ein Preisvergleichsportal, das Links zu den Anbieterseiten enthält und so die Bestellung ermöglicht, durchaus den Verkauf „unterstützen". Dies ist aber keine sinnvolle Auslegung, denn das entsprechende Portal hätte – anders als z.B. der Amazon Marketplace oder eBay – gar keine Informationen über den zustande kommenden Vertrag, weil es an der weiteren Abwicklung der Bestellung gar nicht teilnimmt. Hier wäre eine klarstellende Anpassung vor dem Umsetzungstermin sehr wünschenswert.

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113 Art. 194 MwStSystRL, umgesetzt z.B. in Frankreich, Spanien oder Belgien, nicht aber in Deutschland.

114 Siehe Breuer (n 105).

115 § 13b Abs. 2 Nr. 4, Nr. 5, Nr. 6, Nr. 7, Nr. 8, Nr. 10 und Nr. 11 UStG.

5.7 Weiterführende Überlegungen

Trotz der anerkennenswerten Notwendigkeit, den Umsatzsteuerbetrug zu bekämpfen,[116] darf das Geschäftsmodell des Online-Vertriebs nicht über Gebühr belastet werden. Hier erscheint die durch die in Deutschland eingeführte Aufzeichnungspflicht in Kombination mit der Beantragungspflicht einer „Bescheinigung über die steuerliche Erfassung“ – und ggf. immer noch bestehenden Haftungsrisiken – als überschießend. Es kann auch nicht sinnvoll sein, von Marktplatzbetreibern Aufzeichnungen über Warenwege zu fordern, wenn sie in den Versandprozess überhaupt nicht eingebunden sind.

Alle Verkäufer zu treffen, zeugt von tradierter Prüfungsmentalität, die jeden Einzelfall prüfen möchte. Von dieser Denkweise sollte auch in einer nicht ausreichend digitalisierten Welt Abstand genommen werden. Vielmehr muss ein risikoorientierter Ansatz gewählt werden. Dazu passt abermals das britische Modell, das den Behörden ermöglicht, per *Notice* den Marktplatzbetreiber unter Fristsetzung aufzufordern, als potenzielle Steuerbetrüger identifizierte Verkäufer von Marktplätzen auszuschließen, und nur bei Nichtreaktion hierauf zu haften.

Ein noch besserer Ansatz könnte das sog. *split payment* Verfahren sein. Dessen Nachteile begrenzen sich hauptsächlich auf das B2B-Geschäft.[117] Auch wenn es auf wenig Gegenliebe der EU-Kommission trifft, wird es bereits von diversen Mitgliedstaaten genutzt.[118] Es zeichnet sich dadurch aus, dass der Steuerbetrag nicht in die Hände

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116 Ständige Rechtsprechung, u.a. Rechtssache 255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I–1609.

117 Robert C Prätzler, ‘Split Payments in VAT Systems – Is This the Future?’ (2018) 29(2) International VAT Monitor 66, 5-6.

118 U.a. Polen, Italien und Rumänien. Auch in Überlegung im Vereinigten Königreich, vgl. House of

der potenziell betrügerisch motivierten Verkäufer gelangt. Der Versandhandel ist für dieses Verfahren unseres Erachtens geradezu prädestiniert. Da der Endkonsument in aller Regel über einen Zahlungsdienstleister elektronisch bezahlt, muss dort angesetzt werden. Gewissermaßen wird das *split payment* Verfahren schon angewendet, nur noch nicht für steuerliche Zwecke.

Im Übrigen sollten die Steuerbehörden zeitnaher und zielgerichteter prüfen. Im realen Leben stellt sich die Situation nämlich so dar, dass viele der Betrüger mit einfachsten Mitteln zu identifizieren sind. USB-Sticks die auf dem größten hiesigen Internet-Auktionsmarktplatz käuflich erworben werden können und, angeblich aus Büsingen[119] geliefert werden, werden sich aller Voraussicht physisch zu keinem Zeitpunkt dort befinden. Diese Fälle gilt es in einem ersten Schritt zu unterbinden.

Durchforstet man die australische Internetseite des größten Internetauktionshauses, fällt auf, dass die generelle Erhebung der dortigen Mehrwertsteuer durch den Marktplatz[120] das Bild durchaus verändert hat. Solch ein Bild sollte als erstes Etappenziel auch in Deutschland gesetzt werden. Die in Deutschland umgesetzten Maßnahmen sind unseres Erachtens jedoch überschießend und können Kollateralschäden im Online-Handel auslösen.[121] Außerdem erscheint uns ein derartiger Bürokratieaufwand nicht zielführend.

Commons Committe of Public Accounts, *Progress in tackling online VAT fraud: Forty-Ninth Report of Session 2017–19: HC 1304* (n 108) 3.

119 Umsatzsteuerliches Ausland, § 1 Abs. 2 Satz 1 UStG.

120 Änderung der GST-Regelungen zum 01.07.2018, siehe weiterführend Australian Taxation Office, Law Companion Ruling (LCR) 2018/02 - GST on supplies made through electronic distribution platforms (7 März 2018).

121 Im Rahmen des Jahressteuergesetzes 2020 sind diverse Änderungen geplant. Jedoch ist eine Umsetzung derzeit noch nicht absehbar.

6 Die umsatzsteuerliche Plattformhaftung in Österreich im Vergleich zu ihrem deutschen Pendant

6.1 Einleitung

Plattformen in die Pflicht zu nehmen, entwickelt sich zu einem internationalen Trend. Nachdem das Vereinigte Königreich eine spezielle Haftungsnorm für Betreiber von Online-Marktplätzen mit dem *Finance Act 2016* eingeführt hat,[1] zog der deutsche Gesetzgeber mit dem sog. Jahressteuergesetz 2018 mit einer Norm zur Haftung von Betreibern von elektronischen Marktplätzen nach.[2] Jüngst verkündete auch Italien die Einführung einer Plattformhaftung. Auch die Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD) beschäftigte sich im März 2019 im Rahmen des Treffens des Global Forum on VAT (*Value Added Tax*) mit der Rolle von

[1] Siehe weiterführend Max Schofield und Rita de la Feria, 'Finance Act 2016: Section 123 VAT: Representatives and security; Section 124 VAT: Joint and several liability of operators of online marketplaces' (2016) 61(5) British Tax Review 604.

[2] Siehe weiterführend Matthias Luther, 'Die neue Haftung für Online-Marktplätze' (2018) 71(33) Der Betrieb 1942.

digitalen Plattformen bei der Eintreibung von Mehrwertsteuern im Online-Geschäft.[3] Neben dem von der Europäischen Union ab 2021 gewählten Weg, Plattformen über eine fiktive Lieferkette direkt haftbar zu machen,[4] thematisiert der OECD-Bericht auch den Einbezug von Plattformen in Form einer gesamtschuldnerischen Haftung.

Diesen Weg wählt Österreich nicht. In Österreich wurde die Haftung von Plattformen für die Umsatzsteuer mit dem Abgabenänderungsgesetz 2020 ab 01.01.2020 eingeführt.[5] Die Ausgestaltung orientiert sich an ihrem deutschen Pendant, sodass es besondere Brisanz birgt, dass am 10.10.2019 die Kommission der Europäischen Union ein Aufforderungsschreiben an die Bundesrepublik Deutschland[6] richtete und diese zum Widerruf der jüngsten Gesetzesänderungen zulasten europäischer Unternehmen aufforderte, die online Waren an deutsche Verbraucher verkaufen. Die deutsche Regierung hatte zwei Monate Zeit, darauf zu reagieren.[7]

Ziel dieses Kapitels ist es, die österreichische Ausgestaltung einzuordnen und Praxisfolgen aufzuzeigen. Dabei wird sie mit der deutschen Regelung verglichen und Unterschiede sowie Gemeinsamkeiten werden aufgezeigt. Am Ende des Kapitels wird kurz auf die Bedenken der Europäischen Kommission gegenüber der deutschen

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3 Siehe OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales: As presented for consideration at the fifth meeting of the Global Forum on VAT* (2019).

4 Art. 2 Council Directive (EU) 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, OJ L348/7 (European Union) (nachfolgend: E-Commerce RL) insbesondere Art. 2.

5 Siehe Art. 4 Abgabenänderungsgesetz 2020 – AbgÄG 2020, BGBl. I Nr. 91/2019 (Republik Österreich)(nachfolgend: AbgÄG 2020).

6 Siehe European Commission, October infringements package: key decisions (10 Oktober 2019).

7 Laut einer Aussage einer Sprecherin des Bundesministeriums der Finanzen wird die deutsche Bundesregierung in den Dialog mit der Kommission treten und die Regelung verteidigen, siehe Volker Votsmeier, Martin Greive, und Florian Folf, Gut gemeint, schlecht gemacht, 'Handelsblatt' (22 Oktober 2019) 17. Die Folgen der Bemühungen der Kommission sind ungewiss, ein Vertragsverletzungsverfahren ist zum aktuellen Zeitpunkt nicht eröffnet.

Plattformhaftung eingegangen, da diese Bedenken auch auf die österreichischen Normen anwendbar sein könnten. Das Kapitel schließt mit einer Zusammenfassung der Ergebnisse.

6.2 Österreichische Ausgestaltung der Plattformhaftung

Die österreichische Ausgestaltung der Plattformhaftung in § 27 Abs. 1 UStG 1994 i.d.F nach dem AbgÄG 2020[8] lehnt sich stark an die deutsche Haftungsnorm an, was einen Vergleich nahelegt.[9] Im Vergleich zur ursprünglichen Fassung des Ministerialentwurfs im Rahmen des „Bundesgesetzes, mit dem das Digitalsteuergesetz 2020 erlassen und das Umsatzsteuergesetz 1994 geändert wird"[10], ist die Haftungsnorm unverändert. § 27 Abs. 1 UStG 1994 sieht vor, dass bestimmte Personen „für die Steuer haften, wenn sie nicht mit ausreichender Sorgfalt davon ausgehen können, dass der Steuerpflichtige seinen abgabenrechtlichen Pflichten nachkommt". Diese Formulierung ist für Unternehmer potenziell gefährlich, da sie von „[der] Steuer aus der Verletzung von abgabenrechtlichen Pflichten" spricht. Nach dem Sinn und Kontext der Norm wird aber davon auszugehen sein, dass sich die Haftung auf die Umsatzsteuer beschränkt. Auch in der deutschen Ausgestaltung wird von „nicht entrichtete[r]

8 Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994 - UStG 1994), BGBl. I Nr. 663/1994 (Republik Österreich) (nachfolgend: UStG 1994).

9 Umsatzsteuergesetz, BGBl. I 2005, 386 (Bundesrepublik Deutschland) (nachfolgend: UStG-D).

10 Ministerialentwurf betreffend eines Bundesgesetzes, mit dem das Digitalsteuergesetz 2020 erlassen und das Umsatzsteuergesetz 1994 geändert wird, ME/132 (Bundesministerium für Finanzen, Republik Österreich) vom 04.04.2019.

Steuer“ gesprochen,[11] was unter anderem Fragen bezüglich der Einfuhrumsatzsteuer aufwirft.

Die österreichische Norm sieht eine Haftung für drei verschiedene Arten von Unternehmern vor, jedoch nur unter der Bedingung, dass diese „nicht mit ausreichender Sorgfalt davon ausgehen können, dass der Steuerpflichtige seinen abgabenrechtlichen Pflichten nachkommt“.[12] Die deutsche Norm, die nicht nach Unternehmertypen differenziert, sondern Betreiber von elektronischen Marktplätzen adressiert, enthält ein ähnliches Element.

Nach der deutschen Ausgestaltung hat der Betreiber des elektronischen Marktplatzes Aufzeichnungen zu führen, die ihn von einer Haftung entbinden, jedoch nicht, wenn der „Betreiber Kenntnis davon hatte oder nach der Sorgfalt eines ordentlichen Kaufmanns hätte haben müssen, dass der liefernde Unternehmer seinen steuerlichen Verpflichtungen nicht oder nicht im vollen Umfang nachkommt“.[13] Dieses Erfordernis lässt sich inhaltlich in das österreichische Erfordernis der ausreichenden Sorgfalt übersetzen.[14] So ist vorweg festzuhalten, dass die österreichische Haftungsnorm greift, wenn der Betreiber nicht mit ausreichender Sorgfalt davon ausgehen kann, dass der Steuerpflichtige seinen abgabenrechtlichen Pflichten nachkommt und die deutsche Haftungsnorm anwendbar bleibt, wenn der Betreiber ein abstrakt inhaltsgleiches Erfordernis nicht erfüllt.

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11 § 25e Abs. 1 UStG-D. Siehe dazu auch Benno L'habitant, 'Das BMF-Schreiben vom 28.1.2019 zur Haftung für Umsatzsteuer beim Handel mit Waren im Internet' (2019) 21(5) Steuern und Bilanzen 177.

12 § 27 Abs. 1 UStG 1994.

13 § 25e Abs. 2 Satz 2 UStG-D.

14 Die Ursprünge beider Formulierungen dürften in der Rechtsprechung des EuGH liegen. In Verbundene Rechtssachen 439/04, 440/04 *Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04)* [2006] ECR I–6161, Rz. 56, nutze das Gericht die Formulierung „Steuerpflichtige[r] ..., der wusste oder hätte wissen müssen“.

Im Folgenden wird zunächst auf die betroffenen Unternehmer und daraufhin auf das Merkmal der ausreichenden Sorgfalt eingegangen. Von besonderer Relevanz wird dabei die in § 27 Abs. 1 UStG 1994 vorgesehene Verordnungsermächtigung sein, wonach der Bundesminister für Finanzen festlegen kann, welche Unternehmer als „beteiligt“ gelten und bestimmen kann, wann keine ausreichende Sorgfalt im Sinne der Bestimmung vorliegt. Im Rahmen des oben angesprochenen Ministerialentwurfs wurde diesbezüglich ein Entwurf einer Sorgfaltspflichten-Umsatzsteuerverordnung (Sorgfaltspflichten-UStV) vorgelegt,[15] der im Rahmen des Abgabenänderungsgesetzes nicht mehr auftauchte. Am 29.10.2019 wurde die Sorgfaltspflichten-UStV im Bundesgesetzblatt unverändert kundgemacht.[16]

6.2.1 Betroffene Personen

6.2.1.1 Aufzeichnungspflichtige

§ 27 Abs. 1 UStG 1994 nennt drei Arten von Unternehmern, die für eine Haftung in Betracht kommen. Zunächst haften Unternehmer, die eine Aufzeichnungspflicht gemäß § 18 Abs. 11 UStG 1994 haben, für die Steuer auf die von dieser Bestimmung erfassten Umsätze. Dies zielt auf Unternehmer ab, die nicht selbst Steuerschuldner sind, jedoch bestimmte Lieferungen „unterstützen“.

Der Begriff „unterstützen“ ist in Art. 54b E-Commerce DVO definiert. Er be-

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15 Entwurf einer Verordnung des Bundesministers für Finanzen, mit der Aufzeichnungs- und Sorgfaltspflichten im Bereich des E-Commerce und des Versandhandels bestimmt werden (Sorgfaltspflichten-Umsatzsteuerverordnung – Sorgfaltspflichten-UStV), (Bundesministerium für Finanzen, Republik Österreich).

16 Verordnung des Bundesministers für Finanzen, mit der Aufzeichnungs- und Sorgfaltspflichten im Bereich des E-Commerce und des Versandhandels bestimmt werden (Sorgfaltspflichten-Umsatzsteuerverordnung – Sorgfaltspflichten-UStV), BGBl. II Nr. 315/2019 (Republik Österreich).

zeichnet grundsätzlich die Nutzung einer interaktiven elektronischen Schnittstelle. Das sind Schnittstellen, die es Dritten ermöglichen, in Kontakt zu treten. Gemeint sind Erwerber und Lieferer, die über die elektronische Schnittstelle Gegenstände verkaufen oder Dienstleistungen erbringen. Die Schnittstelle ermöglichst es also Lieferern, an Erwerber Waren oder Dienstleistungen zu verkaufen. Es existieren jedoch Ausnahmen.[17]

Die Haftung trifft für den Zeitraum vom 01.01.2020 bis zum 01.01.2021 zunächst jegliche unterstützten Umsätze auf elektronischen Schnittstellen.[18] Die ab dem 01.01.2021 als in die Lieferung eingebunden geltenden und damit selbst zum Steuerschuldner werdenden Unternehmer fallen dann aus der Anwendung des § 27 Abs. 1 Z. 1 UStG 1994 heraus, da sie als primäre Steuerschuldner nach § 19 UStG 1994 ohnehin zur Umsatzsteuerzahlung verpflichtet sind.

6.2.1.2 Lieferungen

Als zweite Personengruppe können Unternehmer in die Haftung genommen werden, die an einem innergemeinschaftlichen Versandhandel oder einem Einfuhr-Versandhandel beteiligt sind.[19] Der Begriff „beteiligt“ ist bisher weder auf unions- noch auf österreichischer Ebene definiert. § 1 Sorgfaltspflichten-UStV sieht vor, dass Unternehmer im Sinne der angesprochenen Norm als beteiligt gelten, wenn sie über

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17 Siehe Art. 54b Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods, COM/2018/821 final (nachfolgend: E-Commerce DVO). Eine Anwendung ist ab dem 01.01.2021 vorgesehen.

18 Exklusive der unter Art. 9a Council Implementation Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L77/1 (European Union) (nachfolgend: MwStDVO) fallenden Umsätze.

19 § 27 Abs. 1 Z. 2 UStG 1994.

eine elektronische Schnittstelle potenzielle Kunden in den Webshop oder auf die Webseite eines Lieferanten leiten und die Höhe des Entgelts, welches die weiterleitenden Unternehmer dafür erhalten, zumindest teilweise vom Zustandekommen und der Höhe des Umsatzes des Lieferanten abhängt. Die Haftung greift aber nur, wenn die Umsätze der Lieferanten insgesamt 1 Mio. € übersteigen.[20]

6.2.1.3 Sonstige Leistungen

Die dritte Personengruppe umfasst Unternehmer, die an einer sonstigen Leistung an einen Nichtunternehmer beteiligt sind, die durch die Nutzung einer elektronischen Schnittstelle unterstützt oder angebahnt wird. Jedoch gelten auch wieder die beiden Bedingungen der Sorgfaltspflichten-UStV, nämlich dass die für den weiterleitenden Unternehmer resultierenden Umsätze zumindest teilweise vom Zustandekommen und der Höhe des Umsatzes des Leistungserbringers abhängen müssen und diese Umsätze der Leistungserbringer insgesamt 1 Mio. € übersteigen müssen.[21]

Zunächst könnte § 27 Abs. 1 Z. 3 UStG 1994 als gleichlautendes Komplement zu Z. 2 verstanden werden, da Z. 2 von Versandhandel spricht, wohingegen Z. 3 sonstige Leistungen an Nichtunternehmer regelt. Jedoch sticht im Vergleich ins Auge, dass Z. 2 nicht das Erfordernis der Nutzung einer elektronischen Schnittstelle nennt. Auf den ersten Blick könnten so auch Umsätze zu einer Haftung führen, die nicht über elektronische Schnittstellen ausgeführt werden. § 1 Sorgfaltspflichten-UStV definiert allerdings, dass ein Unternehmer nur dann als beteiligt gilt, wenn das Zustandekommen seiner Umsätze von Umsätzen über eine elektronische Schnittstelle abhängt. Versandhandelsumsätze, die nicht über eine elektronische Schnittstelle

[20] Vgl. Beispiel 1 der Erläuterungen der Sorgfaltspflichten-UStV.

[21] § 27 Abs. 1 Z. 3 UStG 1994.

abgewickelt werden, führen im Ergebnis daher nicht zu einer Haftung.

Das deutsche Pendant zur österreichischen Haftungsnorm listet keine Unternehmer auf, für die eine Haftung entsteht, sondern spricht gezielt die nicht entrichtete Steuer aus der Lieferung eines Unternehmers an und zielt dem Wortlaut nach auf alle Unternehmer ab. Mittels eines nur die Finanzverwaltung bindenden BMF-Schreibens werden beispielsweise Direktverkäufe, bei denen die Ware bei Abschluss des Kaufvertrags nicht im Inland lagert, die Beförderung oder Versendung im Drittland beginnt und der Ort der Lieferung nicht nach § 3 Abs. 8 UStG-D in Deutschland liegt, vom Geltungsbereich der Haftungsnorm ausgenommen.[22] Dies ist durchaus kritisch zu sehen, da die Verwaltungsauffassung selektiv stark in den Anwendungsbereich des Gesetzes eingreift. Weiter wird deutlich, dass die deutsche Norm „Beteiligte“im Sinne der österreichischen Norm nicht in den Anwendungsbereich zieht.

Durch den Zusatz „aus der Lieferung eines Unternehmers“ der deutschen Norm wird deutlich, dass die deutsche Haftungsnorm nicht für § 27 Abs. 1 Z. 3 UStG 1994 vergleichbare sonstige Leistungen an einen Nichtunternehmer gilt. Damit wird der unterschiedliche Anwendungsbereich offenkundig.[23] Während die österreichische Norm spezifisch über Z. 2 und Z. 3 Unternehmer durch eine Umsatzschwelle aus dem Anwendungsbereich ausnimmt, kennt die deutsche Norm keine dergearteten Schwellenwerte. Jedoch zielt die deutsche Norm nur auf Lieferungen ab und lässt sonstige Leistungen unbedacht.

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22 Bundesministerium der Finanzen, Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (2019) Rz. 11. Davon unberührt sind die Aufzeichnungspflichten nach § 22f UStG-D.

23 Bemängelt von Martin Kemper, ‘Die geplante Regelung einer Haftung für die Betreiber elektronischer Marktplätze (Plattformbetreiber) im Onlinehandel – Eine Einschätzung’ (2018) 19(10) Umsatz-Steuerberater 289, 293.

6.2.2 Ausreichende Sorgfalt

Für die von § 27 Abs. 1 UStG 1994 betroffenen Personen ist unter Zugrundelegung der Bestimmungen der Sorgfaltspflichten-UStV zu prüfen, ob diese nicht mit ausreichender Sorgfalt davon ausgehen können, dass der Steuerpflichtige seinen abgabenrechtlichen Pflichten nachkommt. Im Umkehrschluss wird dann implizit ausreichende Sorgfalt angenommen, falls die Tatbestandsmerkmale nicht erfüllt sind. Konkret definiert wird ausreichende Sorgfalt jedoch nicht.

Der Bundesminister für Finanzen stellt unterschiedliche Sorgfaltsmaßstäbe auf. Dafür werden für die oben angeführten drei Personengruppen (Aufzeichnungsverpflichtung (Z. 1), Lieferungen (Z. 2) und sonstige Leistungen (Z. 3)) Fallunterscheidungen vorgenommen.

Unternehmer, die eine Aufzeichnungspflicht gemäß § 18 Abs. 11 UStG 1994 haben, werden in § 3 Sorgfaltspflichten-UStV weiter unterteilt. Einerseits in Unternehmer, deren Umsätze, für die eine Aufzeichnungspflicht besteht und Umsätze nach § 3 Abs. 3a UStG 1994 insgesamt 1 Mio. € übersteigen, und andererseits Unternehmer, deren Umsätze diese Schwelle nicht übersteigen. Die Sorgfaltspflichten-UStV gibt jedoch nur Maßstäbe für die erste Gruppe von Unternehmern vor, womit wohl Unternehmer unter der Umsatzschwelle grundsätzlich nicht in die Haftung einzubeziehen sind.

§ 3 Z. 1 a und b Sorgfaltspflichten-UStV sind ab dem 01.01.2020 anzuwenden, so dass für Unternehmer über der Umsatzschwelle, die eine Aufzeichnungspflicht gemäß § 18 Abs. 11 UStG 1994 haben, bereits ab 01.01.2020 die Plattformhaftung gilt. Ab dem 01.01.2021 zählen auch die Umsätze nach § 3 Abs. 3a UStG mit in die relevante Umsatzschwelle.[24] Bei den von dieser Bestimmung umfassten Unternehmern kann in

[24] § 28 Abs. 47 Z. 4 UStG 1994.

drei Fällen nicht von einer haftungsbefreienden, ausreichenden Sorgfalt ausgegangen werden:

- § 3 Z. 1a Sorgfaltspflichten-UStV betrifft die Verletzung der Aufzeichnungspflichten i.S.d. § 18 Abs. 11 UStG 1994 oder das nicht rechtzeitige Übermitteln der Aufzeichnungen gem. § 18 Abs. 12 UStG 1994 an das Finanzamt.
- § 3 Z. 1b Sorgfaltspflichten-UStV umfasst den Fall, dass eine Person im Inland (neu) aufzeichnungspflichtige, sonstige Leistungen für einen Gesamtbetrag über 35.000 € erbringt und diese Person dem Unternehmer weder eine inländische Umsatzsteuer-Identifikationsnummer (USt-Id.) noch Information über den Mitgliedstaat, in dem eine One-Stop-Shop Sonderregelung in Anspruch genommen wird, inklusive USt-Id. aus diesem Mitgliedstaat, und auch keine sonstigen Nachweise über die Besteuerung mitgeteilt hat.[25]
- § 3 Z. 1c Sorgfaltspflichten-UStV, der allerdings erst ab dem 01.01.2021 anzuwenden ist, zielt auf Personen ab, die (neu) aufzeichnungspflichtige Lieferungen von Gegenständen für einen Gesamtbetrag von über 10.000 € ausführen und diese Person dem Unternehmer weder eine inländische USt-Id. noch Information über den Mitgliedstaat, in dem eine One-Stop-Shop Sonderregelung in Anspruch genommen wird, inklusive USt-Id. aus diesem Mitgliedstaat, und auch keine sonstigen Nachweise über die Besteuerung mitgeteilt hat.

In allen genannten Fällen kann nicht von ausreichender Sorgfalt des unterstützenden Unternehmers ausgegangen werden, sodass eine Haftung eintritt.

Bei dem in § 3 Z. 1c Sorgfaltspflichten-UStV vorgesehenen Schwellenwert hat man sich wohl an der ab 01.01.2021 geltenden Umsatzgrenze für grenzüberschreitende Lieferungen und sonstige Leistungen an Private orientiert. Derzeit gilt für Versandhandelslieferungen gem. Art. 34 MwStSystRL[26] noch eine höhere Lieferschwelle von 100.000 € pro Bestimmungsland, welche von den Mitgliedstaaten auf 35.000 € begrenzt werden kann. Ab 2021 wird Art. 34 MwStSystRL aufgehoben und es gilt

[25] § 3 Z. 1b Sorgfaltspflichten-UStV.

[26] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union)(nachfolgend: MwStSystRL).

ein neu eingeführter Art. 59c MwStSystRL.[27] Dieser sieht für Steuerpflichtige, die Versandhandelslieferungen tätigen und Dienstleistungen gemäß Art. 58 MwStSystRL erbringen, das Ursprungslandprinzip vor, sofern der Gesamtbetrag dieser Lieferungen oder Dienstleistungen im laufenden Kalenderjahr nicht 10.000 € übersteigen. Der Schwellenwert von 35.000 € in § 3 Z. 1b Sorgfaltspflichten-UStV hat seinen Hintergrund vermutlich in der ab 01.01.2020 erhöhten innerstaatlichen Kleinunternehmergrenze gem. § 6 Abs. 1 Z. 27 UStG 1994.

Für Unternehmer, die unter § 27 Abs. 1 Z. 2 und 3 UStG 1994 fallen, also die zwei übrigen Personengruppen, werden in § 3 Z. 2 Sorgfaltspflichten-UStV ebenfalls Sorgfaltsmaßstäbe festgelegt, sofern die unterstützten Umsätze der Lieferanten bzw. Leistungserbringer 1 Mio. € übersteigen. Diese Bestimmung gilt erst ab 01.01.2021.

Für die genannten Unternehmer liegt nach § 3 Z. 1c Sorgfaltspflichten-UStV keine ausreichende Sorgfalt vor, wenn der Gesamtbetrag der Entgelte für Lieferungen an Personen, die eine österreichische IP-Adresse (*internet protocol*) und in den Webshop oder auf die Webseite des Leistungserbringers geleitet werden, 10.000 € übersteigt, und die im obenstehenden Absatz aufgezählten Nachweise nicht erbracht sind.[28] Bei sonstigen Leistungen gilt eine Umsatzgrenze von 35.000 €.

Nach der Intention des Gesetzgebers soll die Haftung wohl vorwiegend „große“ elektronische Schnittstellen treffen. Dies erschließt sich aus der Zielsetzung des ganzen Gesetzgebungsunterfangens rund um die Besteuerung der großen digitalen Konzerne. Technisch muss jedoch angemerkt werden, dass § 3 Sorgfaltspflichten-UStV lediglich Sorgfaltsmaßstäbe für Unternehmer festlegt, die den Schwellenwert von 1 Mio. € übersteigen. Die Ausgestaltung intendiert wohl, unterstützende Unternehmer unter

[27] Art. 2 Abs. 7 E-Commerce RL.

[28] § 3 Z. 2 Sorgfaltspflichten-UStV.

den genannten Schwellenwerten generell von der Haftung zu befreien. Dies kann aus den Erläuterungen zu § 1 und § 2 Sorgfaltspflichten-UStV entnommen werden, wo es heißt, dass für die oben angeführte Definition von „beteiligt“ aus Gründen der Verhältnismäßigkeit die Bestimmung nur gelten soll, wenn die betroffenen Lieferungen und sonstigen Leistungen aller zugrunde liegenden Unternehmer insgesamt 1 Mio. € nicht übersteigen. An einer konkreten Norm für den Unternehmer im Rahmen der ausreichenden Sorgfalt mangelt es jedoch.

6.2.2.1 Anwendung

Gemäß § 28 Abs. 47 UStG tritt die Haftungsnorm für Aufzeichnungsverpflichtete (§ 27 Abs. 1 Z. 1 UStG 1994) am 01.01.2020 in Kraft und ist erstmals auf Umsätze und sonstige Sachverhalte anzuwenden, die nach dem 31.12.2019 ausgeführt werden, bzw. sich ereignen. Entsprechend sind nach § 6 Sorgfaltspflichten-UStV auch die Ausführungen des § 3 Z. 1c und Z. 2 anzuwenden. Die Plattformhaftung für Unternehmer, die am Versandhandel (§ 27 Abs. 1 Z. 2 UStG 1994) oder an sonstigen Leistungen an einen Nichtunternehmer (§ 27 Abs. 1 Z. 3 UStG 1994) beteiligt sind, sind erstmals auf Sachverhalte anzuwenden, die nach dem 31.12.2020 ausgeführt werden, beim Einfuhr-Versandhandel auf Lieferungen, für die die Zahlung nach dem 31.12.2020 angenommen wird.[29] Entsprechendes gilt für die dazugehörigen Bestimmungen der Sorgfaltspflichten-UStV.

Die deutsche Plattformhaftung ist bereits seit 01.01.2019 in Kraft. Anzuwenden ist sie jedoch für Umsätze von Unternehmern ohne Wohnsitz oder gewöhnlichen Aufenthalt, Sitz oder Geschäftsleitung im Inland, einem anderen Mitgliedstaat der

[29] § 28 Abs. 47 Z. 2 und Z. 4 UStG 1994.

Europäischen Union oder in einem Staat, auf den das Abkommen über den Europäischen Wirtschaftsraum anwendbar ist, ab dem 01.03.2019. Für alle Umsätze von anderen Unternehmern ist sie ab dem 01.10.2019 anzuwenden.[30]

6.2.2.2 Vergleich

Im Vergleich zur deutschen Norm ist zu bemerken, dass der österreichische Gesetzgeber den Terminus „ausreichende Sorgfalt“ nutzt, wohingegen der deutsche Gesetzgeber von einem Kennenmüssen spricht.[31] Konsequenterweise ist für Betreiber von elektronischen Marktplätzen bzw. Plattformen demnach von gesteigertem Interesse, wie die gesetzlich geforderten Maßstäbe einzuhalten sind.

Konkrete Aussagen wann die nationalen Maßstäbe erfüllt sind, tätigen beide Gesetzgeber nicht. Zunächst ist festzustellen, dass der österreichische Gesetzgeber den Weg zu wählen scheint, durch eine Negativabgrenzung der Finanzverwaltung die Möglichkeit zu geben, keine ausreichende Sorgfalt nachzuweisen. So kann undefiniert bleiben, was unter ausreichender Sorgfalt zu verstehen ist.

Im Gegensatz dazu schreibt der deutsche Gesetzgeber gesetzlich lediglich fest, dass bei einem Kennenmüssen die Haftungsnorm greift. Wie dieses Kennenmüssen definiert ist, wird nicht gesetzlich oder per Verordnung geregelt. Jedoch ist ein Schreiben des Bundesministeriums der Finanzen ergangen, das eine Aussage zur Kenntnis oder einem Kennenmüssen für Zwecke der deutschen Norm trifft. Darin heißt es, dass „von einer Kenntnis oder einem Kennenmüssen insbesondere auszugehen ist, wenn der Betreiber des elektronischen Marktplatzes ihm offensichtliche oder bekanntgewordene Tatsachen außer Acht lässt, die auf eine umsatzsteuerliche Pflichtverletzung des auf

[30] § 27 Abs. 25 Satz 4 UStG-D.

[31] Siehe § 25e Abs. 2 und 3 UStG-D.

seinem Marktplatz tätigen Unternehmers schließen lässt.“ Weiter heißt es, dass „ein aktives Ausforschen dazu nicht erforderlich ist und das Kennenmüssen sich lediglich auf Sachverhalte, die dem Betreiber im Rahmen seines eigenen Unternehmens bekannt werden und auf eine umsatzsteuerliche Pflichtverletzung schlussfolgern lassen.[32] Auch stellt das BMF-Schreiben klar, dass die Darlegungs- und Feststellungslast der Kenntnis oder des Kennenmüssens grundsätzlich bei dem für den Erlass des Haftungsbescheid zuständigen Finanzamts liegt.[33]

So stellen beide Gesetzgeber Normen auf, die mit Rechtsunsicherheit verbunden sind. In beiden Ländern sollen die Betreiber von Plattformen angehalten werden, darüber Bescheid zu wissen, ob auf ihren Plattformen Umsatzsteuerbetrug stattfindet. Um diesen Anspruch auf ein solides Fundament zu stellen, wird die Haftung mit gewissen Aufzeichnungspflichten verknüpft.

6.3 Aufzeichnungsnorm für elektronische Schnittstellen

6.3.1 Anwendungsbereich

Durch zwei neue Absätze wird § 18 UStG 1994 um Aufzeichnungspflichten für Unternehmer erweitert, die nicht selbst Steuerschuldner sind und mittels einer elektronischen Schnittstelle Lieferungen von Gegenständen unterstützen, deren Beförderung

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[32] Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (n 22) Rz. 16.

[33] Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (n 22) Rz. 17. Siehe auch Verbundene Rechtssachen 80/11 and 142/11 *Mahagében Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága (C-142/11)* ECLI:EU:C:2012:373 Rz. 62.

oder Versendung in Österreich endet und an einen Abnehmer im Sinne des Art. 3 Abs. 4 UStG 1994 ausgeführt werden.[34] Ebenfalls inkludiert sind Unternehmer mit Umsätzen durch sonstige Leistungen an einen österreichischen Nichtunternehmer. Die Unternehmer müssen Aufzeichnungen führen, die so ausführlich sind, dass die Steuerbehörden feststellen können, ob die Steuer korrekt berücksichtigt worden ist. Diese Anforderung wird durch die Sorgfaltspflichten-UStV konkretisiert.

Diese österreichische Vorschrift ist an Art. 242a MwStSystRL angelehnt.[35] Darin wird gefordert, dass Steuerpflichtige, die innergemeinschaftliche Lieferungen von Gegenständen und Dienstleistungen an Nichtsteuerpflichtige durch die Nutzung einer elektronischen Schnittstelle ausführen, Aufzeichnungen führen, die so ausführlich sind, dass die Steuerbehörden des Mitgliedstaats feststellen können, ob die Mehrwertsteuer korrekt berücksichtigt wurde. Sie wird auf Ebene der Europäischen Union durch Art. 54c Abs. 2 MwStDVO mit konkret aufzuzeichnenden Informationen gefüllt. Beide Artikel gelten erst ab dem 01.01.2021.

Der Anwendungsbereich der Regelung verändert sich im Zeitablauf in Hinblick auf die Steuerschuldnerschaft der elektronischen Schnittstellen. Grundsätzlich gelten die neuen Aufzeichnungspflichten ab dem 01.01.2020.[36] Da die zwingend zum 01.01.2021 umsetzbaren EU-Regelungen zur fiktiven Steuerschuldnerschaft der Unternehmer, die elektronische Schnittstellen betreiben, nicht frühzeitig eingeführt werden konnten, sind sie – bis dahin – ohne weitere Bedeutung für die Zwecke des § 18 Abs. 11 UStG. Bereits von Bedeutung sind jedoch die Regelungen der MwStDVO[37] für Unternehmer,

[34] § 18 Abs. 11 und 12 UStG 1994.

[35] Eingeführt durch Art. 2 Abs. 11 E-Commerce RL, anzuwenden ab dem 01.01.2021.

[36] § 27 Abs. 47 Z. 1 UStG 1994.

[37] Siehe Fn. 18.

die elektronisch erbrachte Dienstleistungen über ein Telekommunikationsnetz, eine Schnittstelle oder ein Portal wie einen Appstore erbringen. Für solche Unternehmer ist, unter weiteren Anforderungen, davon auszugehen, dass ein an dieser Erbringung beteiligter Steuerpflichtiger im eigenen Namen, aber für Rechnung des Anbieters dieser Dienstleistungen tätig ist, es sei denn, dass dieser Anbieter von dem Steuerpflichtigen ausdrücklich als Leistungserbringer genannt wird und dies in den vertraglichen Vereinbarungen zwischen den Parteien zum Ausdruck kommt.[38] Unter diese Regelung fallende Unternehmer sind durch ihre Steuerschuldnerschaft vom Anwendungsbereich der hier thematisierten Aufzeichnungspflichten nicht betroffen.

Ab dem 01.01.2021 werden elektronischen Schnittstellen im Rahmen der Umsetzung der E-Commerce RL teilweise selbst zum Steuerschuldner (§ 3 Abs. 3a UStG 1994), weswegen die hier thematisierten Aufzeichnungspflichten auf sie dann teilweise keine Anwendung mehr finden. Für sie gelten die gewöhnlichen Aufzeichnungspflichten der §§ 18 Abs. 1 bis Abs. 10, 25a Abs. 12, 25b Abs. 10 und Art. 25a Abs. 10 UStG 1994.

Die Steuerschuldnerschaft nach § 3 Abs. 3a UStG 1994 gilt jedoch nur für Einfuhr-Versandhandelsumsätze, deren Einzelwert 150 € nicht übersteigt, und für innergemeinschaftliche Lieferungen die durch einen Unternehmer, der im Gemeinschaftsgebiet weder sein Unternehmen betreibt noch eine Betriebsstätte hat, ausgeführt werden.[39] Für Unternehmer, die solche Umsätze unterstützen, werden – dann – die bereits unionsrechtlich vorgesehenen Aufzeichnungspflichten nebst den vom Rat (Wirtschaft und Finanzen) verabschiedeten unmittelbar ab dem 01.01.2021

[38] Art. 9a MwStDVO.

[39] § 3 Abs. 8a UStG 1994, Art. 14a MwStSystRL.

wirksamen Aufzeichnungspflichten der E-Commerce DVO gelten.[40]

Nach derzeitiger Ausgestaltung der MwStSystRL müssen Unternehmer, die eine elektronische Schnittstelle betreiben, nur für innergemeinschaftliche Lieferungen von Gegenständen und Dienstleistungen gesonderte Aufzeichnungen führen.[41] Diese gesonderten Aufzeichnungspflichten sind in Art. 54c E-Commerce DVO niedergelegt. Für Einfuhr-Versandhandelsumsätze unter 150 € sind unionsrechtlich keine zusätzlichen Aufzeichnungspflichten geregelt. Demnach gelten die allgemeinen Pflichten des Art. 242 MwStSystRL, die besagen, dass jeder Steuerpflichtige Aufzeichnungen zu führen hat, die so ausführlich sind, dass sie die Anwendung der Mehrwertsteuer und ihre Kontrolle durch die Steuerverwaltung ermöglichen.

Die deutsche Aufzeichnungsverpflichtung ist nicht derart ausgestaltet und greift für den Betreiber eines elektronischen Marktplatzes für Lieferungen eines Unternehmers, die auf dem vom Betreiber bereitgestellten Marktplatz rechtlich begründet worden sind und bei denen die Beförderung oder Versendung im Inland beginnt oder endet.[42] Sie ist nicht derart an der E-Commerce DVO orientiert, obwohl Entwurfsfassungen auch schon zum Zeitpunkt vor dem Inkrafttreten der deutschen Normen vorlagen. Es bleibt abzuwarten, ob im Zuge der Umsetzung des Art. 14a der MwStSystRL der Anwendungsbereich der deutschen Norm beschnitten wird. Ebenso wie in der österreichischen Version sind die Unterlagen auf Verlangen des Finanzamts zur Verfügung zu stellen.[43] Der österreichische Gesetzgeber sieht zusätzlich vor, dass bei

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40 Siehe Art. 54b und 54c E-Commerce DVO.

41 Art. 54c E-Commerce RL verweist auf „Steuerpflichtiger gemäß Art. 242a der Richtlinie 2006/112/EG“. Art. 242a MwStSystRL spricht von einem Steuerpflichtigen, der die innergemeinschaftliche Lieferung von Gegenständen und Dienstleistungen an eine nicht steuerpflichtige Person unterstützt.

42 § 22f UStG-D.

43 § 18 Abs. 12 Satz 1 UStG 1994 sowie § 22f Abs. 3 Satz 1 UStG-D.

einem Gesamtwert der Umsätze über 1 Mio. € pro Kalenderjahr die Aufzeichnungen ohne Aufforderung bis zum 31.01. des Folgejahres elektronisch zu übermitteln sind.[44]

6.3.2 Aufzeichnungspflichtige Informationen

Zunächst bleibt § 18 Abs. 11 UStG 1994 bezüglich der aufzuzeichnenden Informationen vage und verpflichtet den Unternehmer lediglich Aufzeichnungen zu führen, die so ausführlich sein müssen, dass die Steuerbehörden feststellen können, ob die Steuer korrekt berücksichtigt worden ist.[45] Diesbezüglich ist der deutsche Gesetzgeber konkreter und schreibt bereits in der Norm selbst fest, welche Informationen aufzuzeichnen sind. In Österreich wird diese Konkretisierung auf eine Verordnung ausgelagert.

Entgegen der EU-Version der Aufzeichnungspflicht, unterscheidet § 18 Abs. 11 UStG 1994 nicht danach, ob der Verkäufer eine der Sonderregelung für Drittlandsunternehmer genutzt hat oder nicht.[46] Die oben näher erläuterten Fälle, in denen ein Unternehmer, der nicht selbst Steuerschuldner ist, entweder Lieferungen von Gegenständen nach Österreich an einen nicht steuerpflichtigen Abnehmer, oder sonstige Leistungen in Österreich an einen Nichtunternehmer unterstützt, führen ohne Ausnahme zur Aufzeichnungspflicht von in § 4 Sorgfaltspflichten-UStV genannten Informationen. Demnach sind folgende Informationen aufzuzeichnen:

1. Name, Postadresse und elektronische Adresse/Website des Verkäufers;
2. USt-Id. oder nationale Steuernummer des Verkäufers, falls erhältlich;

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44 § 18 Abs. 12 Satz 2 UStG 1994.

45 § 18 Abs. 11 UStG 1994. Vgl. Art. 242 MwStSystRL.

46 Art. 54c Abs. 1 a) und b) E-Commerce DVO.

3. Bankverbindung oder Nummer des virtuellen Kontos des Verkäufers, falls erhältlich;
4. Bei Lieferung von Gegenständen:
   (a) Beschreibung der Gegenstände;
   (b) Entgelt, bzw. Wert der Gegenstände;
   (c) Ort an dem die Beförderung oder Versendung endet;
   (d) Zeitpunkt, an dem die Lieferung ausgeführt wird, falls nicht vorhanden Zeitpunkt der Bestellung;
   (e) Falls erhältlich, einmalige vergebene Transaktionsnummer;
5. Bei sonstigen Leistungen:
   (a) Beschreibung der sonstigen Leistung;
   (b) Entgelt, bzw. Wert der sonstigen Leistung;
   (c) Informationen zur Festlegung des Ortes der sonstigen Leistungen;
   (d) Zeitpunkt, an dem die sonstige Leistung ausgeführt wird, falls nicht vorhanden Zeitpunkt der Bestellung;
   (e) Falls erhältlich, einmalige vergebene Transaktionsnummer.

Dieser Katalog bedient sich aus dem Katalog des Art. 63c E-Commerce DVO, der vorgibt, ab wann Aufzeichnungen im Sinne der Art. 369 und 369k der MwStSystRL als hinreichend ausführlich gelten. Unberücksichtigt lässt der österreichische Gesetzgeber unter anderem den anzuwendenden Mehrwertsteuersatz, den Betrag der zu zahlenden Mehrwertsteuer unter Angabe der verwendeten Währung, das Datum und den Betrag der erhaltenen Zahlungen, Vorauszahlungen sowie, falls erhältlich, eine Rechnung und Nachweise über etwaige Rücksendungen.

Von Unternehmern, die die Vermietung von Grundstücken für Wohn- oder Campingzwecke oder die Beherbergung in eingerichteten Wohn- und Schlafräumen unterstützen, wird zusätzlich gefordert, dass die Beschreibung der sonstigen Leistung jedenfalls die Aufenthalts- bzw. Mietdauer und die Anzahl der Personen, die

übernachten, oder falls nicht erhältlich, die Anzahl und Art der gebuchten Betten enthalten muss, und dass die Informationen zur Festlegung des Ortes der sonstigen Leistung jedenfalls die Postadresse des Grundstücks enthalten müssen.[47]

Im Ergebnis ziehen die nationalen Regelungen die – mit einer Begründung der Steuerschuldnerschaft einhergehenden – Aufzeichnungspflichten um ein Jahr vor. Warum diese Aufzeichnungspflicht nicht ab dem 01.01.2020 den Regelungen der §§ 18 Abs. 1 bis Abs. 10, 25a Abs. 12, 25b Abs. 10 und Art. 25a Abs. 10 UStG 1994 oder denen des Art. 54c E-Commerce DVO entsprechen, ist nicht evident.

Im Gegensatz zu den österreichischen Aufzeichnungspflichten beschränken sich die deutschen Aufzeichnungspflichten für Umsätze von als Unternehmern registrierten Personen auf folgende Informationen:[48]

1. Vollständiger Name und die vollständige Anschrift des liefernden Unternehmers;
2. die dem liefernden Unternehmer von dem nach § 21 Abgabenordnung[49] zuständigen Finanzamt erteilte Steuernummer und soweit vorhanden die ihm vom Bundeszentralamt für Steuern erteile Umsatzsteuer-Identifikationsnummer;
3. das Beginn- und Enddatum der Gültigkeit einer Bescheinigung;
4. den Ort des Beginns der Beförderung oder Versendung sowie den Bestimmungsort;
5. den Zeitpunkt und die Höhe des Umsatzes.

Bisher noch unerwähnt ist die in § 22f Abs. 1 Satz 1 Nr. 3 UStG-D erwähnte Bescheinigung. Diese Bescheinigung fungiert als Nachweis über die Angaben nach § 22f Abs. 1 Satz 1 Nr. 1 bis 3 UStG-D. Solch eine Bescheinigung muss vom liefernden Unternehmer beantragt werden und beim Betreiber des elektronischen Marktplatzes hinterlegt

47 § 5 Sorgfaltspflichten-UStV.

48 § 22f Abs. 1 Satz 1 UStG-D. Weiterführend L'habitant (n 11) 179.

49 Abgabenordnung, BGBl. I 2002, 3866 (Bundesrepublik Deutschland).

werden.[50] Sie ist längstens drei Jahre gültig. Ursprünglich war die Einrichtung eines elektronischen Datenabrufverfahrens vorgesehen,[51] jedoch ist dieses noch nicht eingerichtet. Bis zur Einrichtung wird die Bescheinigung übergangsweise in Papierform erteilt.[52] Der Antrag ist schriftlich per Post oder E-Mail an das zuständige Finanzamt zu senden/übermitteln. Im Ergebnis zwingt das deutsche Gesetz damit jeden Händler, der über elektronische Marktplätze Transaktionen tätigt, die in Deutschland beginnen oder enden, sich in Deutschland zu registrieren. Dabei sei bemerkt, dass es sich um einen formalen Akt handelt, mit der Registrierung geht ausweislich der Verwaltungsanweisung keine umsatzsteuerliche Prüfung einher. Explizit heißt es, dass vorliegende Anhaltspunkte, die darauf hinweisen, dass der Antragsteller seinen umsatzsteuerlichen Pflichten nicht oder nicht im wesentlichen Umfang nachkommt, einer Erteilung der Bescheinigung nicht entgegenstehen.[53]

In Fällen, die auf Grund der Anwendung der Lieferschwelle in § 3c Abs. 3 UStG-D nicht in Deutschland steuerbar sind, ist laut dem Bundesministerium der Finanzen keine Bescheinigung erforderlich. Selbiges gilt für sog. Direktverkäufe, für die keine Steuerpflicht gemäß § 3 Abs. 8 UStG-D erwächst. Ersatzweise haben solche Unternehmer eine Erklärung abzugeben, dass sie keine in Deutschland steuerbaren

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50 Zur Beantragung kann das Formular USt 1 TJ genutzt werden, siehe Bundesministerium der Finanzen, Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften; Vordruckmuster USt 1 TJ - Antrag auf Erteilung einer Bescheinigung nach § 22f Abs. 1 Satz 2 UStG - und Vordruckmuster USt 1 TI - Bescheinigung nach § 22f Abs. 1 Satz 2 UStG: III C 5 - S 7420/14/10005-06 (2018).

51 § 22 Abs. 1 Satz 6 UStG-D.

52 Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften; Vordruckmuster USt 1 TJ - Antrag auf Erteilung einer Bescheinigung nach § 22f Abs. 1 Satz 2 UStG - und Vordruckmuster USt 1 TI - Bescheinigung nach § 22f Abs. 1 Satz 2 UStG: III C 5 - S 7420/14/10005-06 (n 50) Abs. 4.

53 Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (n 22) Rz. 4.

Umsätze ausführen, die eine Registrierung rechtfertigen würde.

6.4 Bedenken der Europäischen Kommission an der deutschen Ausgestaltung

Relativ wortkarg äußerte sich am 10.10.2019 die Europäische Kommission mit einer Mitteilung über ein Aufforderungsschreiben an die Bundesrepublik Deutschland. Darin fordert sie den Widerruf der „jüngsten Gesetzesänderungen zulasten europäischer Unternehmen, die online Waren an deutsche Verbraucher verkaufen."

Präzisierend führt die Kommission an, dass die Verpflichtung des Marktplatzbetreibers, eine Bescheinigung auf Papier vorzulegen, die dem auf seiner Plattform tätigen Verkäufer von der deutschen Steuerbehörde ausgestellt wurde, ineffizient und unverhältnismäßig sei und außerdem den Zugang europäischer Unternehmen zum deutschen Markt behindert, was einen Verstoß gegen das EU-Recht darstellt.[54] Weiter wird angeführt, dass die den Betreibern digitaler Marktplätze zur Vermeidung der gesamtschuldnerischen Haftung auferlegte Verpflichtung über das in den EU-Vorschriften vorgesehene Maß hinaus gehe und im Widerspruch zu den Zielen der Strategie für einen digitalen Binnenmarkt stehe.[55]

Es bleibt abzuwarten, ob die Europäische Kommission mit ihren Bedenken durchdringen wird. Vor dem Hintergrund, dass die österreichische Ausgestaltung keine der deutschen Ausgestaltung vergleichbare Bescheinigung kennt, dürfte das Vertragsverletzungsverfahren keinen direkten Einfluss auf die österreichischen Haf-

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[54] Ulrich Hufeld, 'Betreiberhaftung im Internethandel' (2018) 106(20) Deutsche Steuer-Zeitung 755, 757, forderte bereits vor Einführung der Haftung diese von der funktionstüchtigen elektronischen Abfrage beim Bundeszentralamt für Steuern abhängig zu machen.

[55] October infringements package: key decisions (n 6) 13-14.

tungsbestimmungen haben. Interessant wird sein, ob die Europäische Kommission weitere Punkte aufbringt.

6.5 Ergebnis

Das vorliegende Kapitel hat die österreichische Plattformhaftung erstmalig erläutert und der deutschen Plattformhaftung gegenüber gestellt. Im Ergebnis zeigt sich, dass die österreichische Implementierung detaillierter ausgestaltet ist und weniger dem sog. „Gießkannenprinzip" folgt. Auch zeigt sich, dass das österreichische System kompatibler mit noch umzusetzendem Recht der Europäischen Union ist.

Technisch folgen sowohl österreichische als auch deutsche Ausgestaltung der Idee, dass Aufzeichnungen zu führen sind, die eine Haftung von Plattformbetreibern abwendet. Wohingegen der österreichische Gesetzgeber jedoch nur bestimmte Unternehmer anspricht, differenziert der deutsche Gesetzgeber nicht nach Unternehmertypen und stellt auf die Steuerzahlung ab. Präzisierend wird in Deutschland zwar die Finanzverwaltung tätig, die beispielsweise bestimmte Direktverkäufe aus dem Anwendungsbereich der Norm ausnimmt. Dies ist jedoch aus rechtsstaatlicher Sicht nicht sauber gelöst. Die deutsche Norm kennt ferner keine Schwellenwerte, wie sie in der österreichischen Norm zu finden sind. Jedoch greift die deutsche Norm nur für Unternehmer.

Nicht mehr haftungsbefreiend wirken die Aufzeichnungspflichten, wenn ein Betreiber Kenntnis davon hatte oder nach der Sorgfalt eines ordentlichen Kaufmanns hätte haben müssen, dass der liefernde Unternehmer seinen steuerlichen Verpflichtungen nicht oder nicht im vollen Umfang nachkommt (Deutschland) oder keine ausreichende Sorgfalt (Österreich) walten lässt. Auf der Definitionsebene sehen beide Staaten von

konkreten Definitionen ab. Österreich führt verwaltungsseitig eine Negativabgrenzung an, durch die Steuerpflichtige erkennen können, wann die Finanzverwaltung nicht mehr von einer ausreichenden Sorgfalt ausgehen wird. Die deutsche Finanzverwaltung verweist bei bei dem in Deutschland maßgeblichen „Kennenmüssen“ auf Rechtsprechung des EuGH. Rechtsunsicherheit bleibt somit in beiden Staaten bestehen.

Die österreichischen Aufzeichnungspflichten sind zwar detaillierter, jedoch beinhalten sie keine Aufzeichnung einer Bescheinigung über die steuerliche Registrierung der Händler. Dies ist zu begrüßen. Die Abschaffung und Ersetzung dieses Erfordernisses in Deutschland durch die Aufzeichnung der USt-Id. steht unmittelbar bevor und könnte bald gesetzlich verabschiedet werden.

Ob beide Ausgestaltungen in der Lage sind, ein effektives Mittel zur Verhinderung des Umsatzsteuerbetrugs beim Internethandel darzustellen, werden nur Daten zeigen können. Es ist zu hoffen, dass verwaltungsseitig entsprechendes Datenmaterial gesammelt und analysiert wird, sodass die getroffenen Maßnahmen vor diesem Hintergrund evaluiert werden können.

7 Value Added Tax Enforcement in the Era of E-Commerce

7.1 Introduction

The barnstorming rise of commerce over electronic means, commonly labelled e-commerce, does not show any signs of a slowing down. Since 1999, the market in Germany with final consumers has grown constantly, every single year. For 2019, sales in Germany are estimated at €57.8 billion.[1] Global business to consumer (B2C) sales are estimated to be worth in the region of $2 trillion annually with projections indicating they may reach $4.5 trillion by 2021. $1 trillion of which in cross-border e-commerce.[2]

In comparison, the numbers in the Value Added Tax (VAT) world are nothing to be joyful about. A frequent cited number is the VAT gap, which works as the primary indicator for revenue losses for VAT in the European Union (EU). Recently, the 2019 yearly update of the VAT gap put out the number of €137.5 billion for

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1 Torsten Riecke, Sting gab den Startschuss zum Online-Shopping, 'Handelsblatt' (7 August 2019) 22.

2 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales: As presented for consideration at the fifth meeting of the Global Forum on VAT* (2019) (hereinafter: *Platform Report*) no 3.

the year 2017.[3] Despite small rays of hope,[4] it is highly alarming that 11.2 per cent of theoretical VAT revenues are not collected. Especially, as VAT is the highest revenue yielding tax within several countries within the Organisation of Economic Co-operation and Development (OECD).[5] Rightly, the validity of the VAT gap is challenged.[6] Nevertheless, the numbers indicate that severe enforcement problems persist.[7]

The VAT gap is estimated using a "top-down" methodology.[8] Technically, it is defined as the difference between the amount of VAT collected and the VAT total tax liability – namely, the tax liability according to the law.[9] This does not allow deeper qualitative insights into the reasons of the collection deficiencies. However, anecdotal evidence strongly suggests that VAT fraud takes place in the sector of e-commerce.[10]

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3 CASE, *Study and Reports on the VAT Gap in the EU-28 Member States: 2019 Final Report: TAXUD/2015/CC/131* (2019) 8.

4 On general terms, the VAT gap is slowly decreasing and expected to be below €130 billion in 2018, CASE (n 3) 18.

5 Eight OECD countries raised the largest part of their revenues from consumption taxes, OECD, *Revenue Statistics 2018: Tax revenue trends in the OECD* (2018) 8; also Wolfgang Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy' (2018) 72(4/5) Bulletin for International Taxation 278, 286 stating that "nobody doubts the role of VAT and GST as a source of revenue for destination countries.".

6 Kyriaki Yiallourou, 'The Limitations of the VAT Gap Measurement' (2019) 28(4) EC Tax Review 196, for an analysis of the limitations of the VAT gap measurement.

7 On top, plenty of anecdotal evidence exists of more fraud, see for example, Christian Ramthun, Kampf gegen Steuerbetrug bei Ebay, Amazon & Co. 'WirtschaftsWoche (online)' (5 May 2017). Hans-Werner Sinn, Andrea Gebauer, and Rüdiger Parsche, 'The Ifo Institute's Model for Reducing VAT Fraud: Payment First, Refund Later' [2004] (2) CESifo Forum 30, 34 describe the system as "inviting fraud".

8 CASE (n 3) 63.

9 CASE (n 3) 9.

10 Massimo Bognanni and Volker Votsmeier, Tatort Amazon, 'Handelsblatt' (6 December 2016) 18; Martin Greive, Kampf gegen Steuerbetrug, 'Handelsblatt' (1 August 2018); Simon Tulett, Amazon and eBay 'liable' if they ignore VAT fraud, 'BBC News (online)' (1 November 2015) or Simon Bowers, Amazon and eBay to be held liable for VAT fraud by sellers, 'The Guardian (online)' (16 March 2016). Also Walter Demmelhuber and Patrick Cato, 'Obstacles To Global B2C

Despite a lack of hard and reliable facts on the impact of fraud in e-commerce, also from a tax morale point of view, tax fraud must be combated. The European Court of Auditors has recently ascertained and reiterated that administrative cooperation by member states (MS) of the EU in the field of e-commerce is not fully exploited and ready to combat deceitful behaviour. Also, a lack of effective controls on cross-border e-commerce and ineffective enforcement of collection is pointed out.[11]

This chapter provides an in depth look at two specific mechanisms to tackle VAT fraud. Germany has recently implemented the mechanism of joint and several liability (JSL) for supplies of goods. This gives cause to research the theoretical questions coming with such rules. In the main analysis, the chapter reviews Court of Justice of the European Union (CJEU) jurisprudence on different kinds of VAT fraud and distils the core statements on the obligations of involved parties. After an interim conclusion, the German national implementation of JSL is tested in a case study. Instead of testing for fraud in general, the analysis is executed for the common fraud of undervalued consignments. With unsatisfying results from this analysis, a second measure to combat VAT fraud is elaborated on. Ideas on how to apply the split payment mechanism (SPM) to cross-border e-commerce transactions are laid out and a special scheme for the VAT Directive[12] is proposed.

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eCommerce From China And The USA Depending On Local Fiscal and Customs Regulations' (2016) 86 International Proceeding of Economics Development and Research 1. For an economic analysis see Beate Wohlfahrt, *Umsatzbesteuerung und Umsatzsteuerausfall in der EU: Eine rechtliche und ökonomische Analyse* (Doctoral dissertation 2013) 119-22. For fraud on platforms, though, not in the sector of e-commerce see Christoph Spengel and others, 'Sharing Economy – Steuerliche Herausforderungen und Lösungsansätze' (2020) 9(3) ZEWpolicybrief.

11 European Court of Auditors, *E-commerce: many of the challenges of collecting VAT and customs duties remain to be resolved: Special Report 12/2019* (2019) (hereinafter: *Special Report 12/2019*) 5.

12 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 (European Union) (hereinafter: VAT Directive).

The structure of this chapter is as follows. Section 2 thoroughly lays out the theoretical concepts of consumption taxation. Attention is spent to the concepts of substantive and enforcement jurisdiction. Thereby, the concerns of the Supreme Court of the United States (SCOTUS) in several opinions are pointed out. These conceptional concerns of consumption taxation are also of relevance for a jurisdiction's claim for tax revenues stemming from consumption. The insights are transferred to the current problems in EU VAT. The enforcement problem in the EU is then identified as the current pressure point. After a review of selected publications by the OECD, the focus is put on the question whether parties who did not directly commit fraud but had merely been involved can be made liable for revenue losses. Therefore, section 3 distils the CJEU's interpretation of the VAT Directive from different fields of VAT fraud. It concludes that the VAT Directive's scope of JSL is too narrow to prevent VAT fraud. Section 4 conducts a case study and answers the question whether digital platforms can be made liable for undervalued consignments in the light of the German implementation of JSL. With a similar scope than CJEU jurisprudence, the ability to effectively prevent fraud is also non-existent. Section 5 brings up the so called split payment system. After reviewing studies on its general use, its application for the field of e-commerce is elaborated. It is shown how a SPM could be implemented into the VAT Directive to effectively prevent VAT fraud with undervalued consignments. Section 6 summarizes the chapter.

7.2 The Enforcement Problem of Indirect Consumption Taxation

7.2.1 Theoretical Background

Paying taxes annoys most citizens.[13] The results of taxation such as democracy, embodied in a working legal system, a government, or simply public buildings and roads are most often more cause for mockery in public than a reason to be grateful for the achievements of a society. Eventually,[14] every state needs revenues, making taxes indispensable.[15] How to generate these revenues through taxation is a task dependent on such a variety of parameters, no single veritable solution can balance all of them. Scholars have brought up numerous ideas for fundamental changes to current tax systems.[16] Though, reforms are generally hesitant and often only lead to small changes and "minimum standards".[17] Still, in a long-term view over the last centuries, an evolution of taxation took place.[18] With different mechanics, most developed countries rely on a tax system based on a taxation of the factors land,

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13 Marjorie E Kornhauser, People don't like paying taxes. That's because they don't understand them. 'The Washington Post Online' (14 April 2017) morns the lack of tax literacy among Americans.

14 The Gulf Cooperation Council States have introduced a VAT from 2018 onward with the intention to reduce their oil-revenue dependency, see Robert F van Brederode and Markus Susilo, 'The VAT in the Arab Countries of the Gulf Cooperation Council' (2017) 28(6) International VAT Monitor 435, 437.

15 Roman Seer, 'Steuerrecht als Teil der Rechtsordnung' in Klaus Tipke and Joachim Lang (eds), *Steuerrecht* (Otto Schmidt 2018) 1, assesses that a modern society would be "inoperable without taxation".

16 Out of many Alan J Auerbach, A Modern Corporate Tax: The Center for American Progress/The Hamilton Project (2010) with a Destination-Based Cash Flow Tax to revolutionize business taxation; or Paul Kirchhof, *Bundessteuergesetzbuch: Ein Reformentwurf zur Erneuerung des Steuerrechts* (Müller 2011) with the proposal of a complete tax system solely consisting of income tax, inheritance- and gift tax, a general VAT and special consumption taxes.

17 OECD/G20, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report: OECD/G20 Base Erosion and Profit Shifting Project* (2015) (hereinafter: *Action 1 - 2015 Final Report*) uses the wording "measures" and "minimum standards".

18 Tax structure statistics reveal stable property taxation for the years 1965-2016, increasing value added taxation and dropping taxation on other goods and services for the OECD, OECD Revenue Statistics 2018, available at OECD Revenue Statistics, last accessed 07.12.2020.

labour and capital.[19] All these factors eventually lead to income, which nowadays works as the most feasible proxy for the ability to pay.[20] To some extent, income works as the smallest common denominator in international taxation.[21]

Income taxation, despite any national definitions of income, can be seen from two different angles.[22] First and foremost, income taxation affects income at the time of the inflow of the income, mostly through a withholding by the employer; if not, at the end of the fiscal year through a tax assessment. Second and less visible, most income is taxed again at the time of the outflow of the income earner, through a consumption tax.[23] In this vein, a consumption tax is a second income tax. Most countries make use of such a two-staged approach of taxing income by levying a value added tax or a retail sales tax.

According to the idea of a (general) tax on consumption, the consumption of individuals should be taxed once, by one particular jurisdiction. Which jurisdiction may tax the consumption is an unpretentious exercise if a national transaction takes place. If the transaction crosses a border, the determination which jurisdiction ought to tax the transaction is commonly done either through the localization of the

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19 OECD, *Revenue Statistics 2018: Tax revenue trends in the OECD* (n 5) 8, for the tax structure of OECD countries.

20 Taxation according to the ability to pay has a long standing and commonly accepted tradition, for instance in Germany, see art 134 Die Verfassung des Deutschen Reichs - Weimarer Reichsverfassung 1919, RGBl. 1919, 383 (Deutsches Reich).

21 The SCOTUS labelled the receipt of income by a resident explicitly as a "taxable event universally recognized" in 1937, *New York ex rel Cohn v Graves et al* [1937] 300 US 308 (Supreme Court of the United States) 312-13.

22 Dieter Endres and Christoph Spengel (eds), *International company taxation and tax planning* (Wolters Kluwer 2015) 31.

23 Not all future consumption necessarily needs to be already taxed by income taxation, for instance inheritances or gifts, Joachim Englisch, '§ 17 Umsatzsteuer' in Klaus Tipke and Joachim Lang (eds), *Steuerrecht* (Otto Schmidt KG 2018) 981-82.

place of consumption or through a taxation at the reception of the benefit of the transaction.[24]

When it comes to enforcement, both ways of taxation deviate insofar as the tax on earned income is generally levied directly from the taxed person whereas the tax on consumption is generally levied indirect through the suppliers of goods or services. Right from the outset, it is therefore obvious, that this indirect approach to tax involves a further person in addition to both involved parties, namely the person which is burdened by the tax and the state.

By theory, EU VAT as an example, tries to be neutral to businesses in the way that it intends to tax only the final consumer;[25] taxable persons should only be involved as tax collectors.[26] However, the real-world deviates in this point from pure theory. The involved party, the taxable person, is burdened heavily with reporting and filing obligations.[27] Nevertheless, in the EU context, it is generally accepted that this burden can be given to suppliers free of any conditions.

7.2.2 Concerns of the Supreme Court of the United States

In comparison, in the United States of America (USA), the SCOTUS, had, and still has its issues with the concept of burdening out of state suppliers with the task to

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24 Christian Korn, 'Seminar J: Erhebung der Mehrwertsteuer auf grenzüberschreitende Lieferungen und Dienstleistungen in bestimmungslandbasierten Mehrwertsteuersystemen' (2018) 27(16) Internationales Steuerrecht 643, 644. See further Christoph Spengel, 'Die Umsatzbesteuerung im EG-Binnenmarkt: Vom Bestimmungslandprinzip über das Ursprungslandprinzip zum Gemeinschaftsprinzip' (1993) 22(1) WiSt - Wirtschaftswissenschaftliches Studium 45, with an analysis of the different principles for international transactions and their revenue consequences.

25 Case 317/94 *Elida Gibbs Ltd v Commissioners of Customs and Excise* [1996] ECR I–5339 at [19].

26 Case 246/16 *Enzo Di Maura v Agenzia delle Entrate – Direzione Provinciale di Siracusa* ECLI:EU:C:2017:887 at [23].

27 European Commission, *Study on tax compliance costs for SMEs: Final report* (2018).

collect and pay a consumption tax. A thought alien to a European mindset.

Back in the 1967, SCOTUS held in *Bellas Hess*, that states were prohibited from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the state was by common carrier or mail.[28] This business model was one of the predecessors of e-commerce. By that time, Illinois statutes aimed at retailers "engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."[29]

Transferring this question to the current EU VAT gives a puzzled image. From a European mindset, the seller's tie with the jurisdiction of consumption is not decisive for the question whether VAT comes due.[30] Through focussing on the consumer, the place of consumption within a specific jurisdiction is decisive instead of the characteristics of the seller.

In *Bellas Hess*, appellant and appellate disagreed on the obligations of the responsible party for the collection in the process. The appellant, National, argued that the obligation to collect and pay the tax which Illinois had imposed on them violated the Due Process Clause and created a violation of the Commerce Clause.[31] While both clauses where relevant for the case, the Commerce Clause is not relevant

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28 *National Bellas Hess v Department of Revenue of Illinois* [1967] 386 US 753 (Supreme Court of the United States).

29 *Bellas Hess* (n 28) 755.

30 One must note that currently turnover thresholds exist. They intend to prevent foreign suppliers from the obligation to know the law of the consumption jurisdiction. However, they simply regulate which law applies, not if VAT applies in general. See art 34 VAT Directive, deleted through art 2 (4) Council Directive (EU) 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, OJ L348/7 (European Union) (hereinafter: e-commerce Directive) from 01.01.2021 on.

31 *Bellas Hess* (n 28) 756.

for this chapter. The Commerce Clause is laid out in the US constitution and prescribes the power to regulate commerce with foreign Nations, and among the several States, and with Indian Tribes to Congress.[32] It grants Congress the authority to regulate interstate commerce. The implication of that is that the states are barred from regulating interstate commerce. In this vein, the name "dormant" or "negative" Commerce Clause has evolved. As a regulation in the form of taxation interferes with the Commerce Clause, the states are theoretically banned from taxing interstate commerce. However, as such a bar is unworkable, both legislative and judicial rules have evolved over the years. In 1977, in *Complete Auto Transit*, SCOTUS synthesized these rules in a four factor test.[33]

In contrast, the Due Process Clause is of interest to this chapter. The Due Process Clause is laid out in the Fourteenth Amendment to the US constitution and states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law [...]".[34] This idea can be transferred to the EU context or to any other consumption tax, as it "centrally concerns the fundamental fairness of governmental activities".[35] While a foreign supplier is – in the worst case – not even aware of a consumption tax in another jurisdiction as such, it is a legitimate question to ask if a state has the power to deputize out of state suppliers.

Already in 1819, SCOTUS had held that "the power to tax is essential to the very

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32 Art I §8 cl 3 The Constitution of the Unites States, (United States of America)(hereinafter: US Const).

33 *Complete Auto Transit, Inc v Brady* [1977] 430 US 274 (Supreme Court of the United States).

34 § 1 Amendment 14 to the US Const.

35 *Quill Corp v North Dakota* [1992] 504 US 298 (Supreme Court of the United States) 312.

existence of government"[36], though, the legitimacy of that power requires drawing a line between taxation and mere unjustified "confiscation".[37]

Regarding the Due Process Clause, which in essence asks for justification of a state to tax, the court decided that the "simple and controlling question is whether the State has given anything for which it can ask return".[38] The same principle has been held applicable in determining the power of a state to impose the burdens of collecting the power of a state to impose the burdens of collecting use taxes upon interstate sales. By the interpretation of the court, the Constitution requires "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax."[39]

With these principles in mind, the court has upheld the power of a state to impose a liability upon an out-of-state supplier to collect a local use tax in a variety of circumstances. For instance, in *Felt & Tarrant Co. v. Gallagher*, the power to tax was upheld where the sales were arranged by local agents.[40] The same result holds for a situation, where the mail order seller maintained local retail stores, as decided in *Nelson v. Sears, Roebuck & Co.*[41] Those decisions where justified in the

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36 *M'Culloch v State of Maryland et al* [1819] 17 US 316 (Supreme Court of the United States) 428.

37 *Miller Brothers Co v Maryland* [1954] 347 US 340 (Supreme Court of the United States) 342.

38 *Wisconsin v JC Penney Co* [1940] 311 US 435 (Supreme Court of the United States) 444. Also *Standard Oil Co v Peck, Tax Commissioner, et al* [1952] 342 US 382 (Supreme Court of the United States); *Ott, Commissioner of Public Finance, et al v Mississippi Valley Barge Line Co et al* [1949] 336 US 169 (Supreme Court of the United States) 174.

39 *Miller Brothers Co v Maryland* (n 37) 334-45.

40 *Felt & Tarrant Manufacturing Co v Gallagher et al* [1939] 306 US 62 (Supreme Court of the United States). Further, the "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State'". See also *North Carolina Department of Revenue v Kimberly Rice Kaestner 1992 Family Trust* No 18–457 (Supreme Court of the United States 2019), 6 and *International Shoe Co v State of Washington et al* [1945] 326 US 310 (Supreme Court of the United States).

41 *Nelson, Chairman of the State Tax Commission, et al v Sears, Roebuck & Co* [1941] 312 US 359

way that the out-of-state supplier was plainly accorded the protection and services of the taxing state.[42] In *Scripto, Inc. v. Carson*, SCOTUS cleared the way to deputize an out-of-state retailer as its collection agent for a use tax where the seller had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that state to Atlanta for shipment of the ordered goods".[43]

Until 1967, SCOTUS had never held that a state may impose the duty of use tax collection and payment upon a seller whose only connection with the customers in the state is by common carrier or the United States mail.[44] Precisely, in *Bros. Co. v. Maryland*, the court held that Maryland could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland.[45] In effect, the court build a sharp distinction between sellers with retail outlets, solicitors, or property within a state, and those who do not do more than communicate with customers in the state by mail or common carrier as part of a general interstate business.[46] Further, it stated that it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions at issue in the case of *National Bellas Hess*.

Without a sharp distinction between the Commerce Clause and the Due Process clause, the court concluded that if the power of Illinois to impose use tax burdens upon National was upheld, the resulting impediments upon the free conduct of its

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(Supreme Court of the United States).

42 *Bellas Hess* (n 28) 753.

43 *Scripto, Inc v Carson, Sheriff, et al* [1960] 362 US 207 (Supreme Court of the United States) 211.

44 *Bellas Hess* (n 28) 758.

45 *Miller Brothers Co v Maryland* (n 37).

46 *Bellas Hess* (n 28) 758.

interstate impediments upon free conduct of its interstate business would neither be imaginary nor remote.[47] Despite the irrelevancy of the Commerce Clause for this chapter, the courts following argumentation is also applicable to other jurisdictions.

By stating, Illinois were to impose such burdens, so could every other state, municipality, school district and every other political subdivision throughout the Nation with power to impose sales and use taxes, the court makes a valid point.[48] Through the combination of many variations of tax rates, allowable exemptions, and in administrative and record keeping obligations, National's interstate business would become a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government".[49] Consequently, the court followed precedent and held that out-of-state vendors could not be burdened with collecting obligations.

The court's argumentation, no matter on what legal basis, still holds today. Nevertheless, the thought that especially third country sellers coming from a different (tax) culture background might be overburdened with the obligations of collecting and paying a local consumption tax is unknown to the EU VAT context. While it is no question at all, it seems to be inherent to the VAT Directive that consumption within the territory of the MS clearly suffices to burden foreign sellers with the obligation to collect and remit a local consumption tax.

However, a quarter century later than *National Bellas Hess*, in 1992, SCOTUS had to decide another decisive case in the history of consumption taxation in the

47 *Bellas Hess* (n 28) 758.

48 *Bellas Hess* (n 28) 759. In 1965, sales taxed were imposed by over 2,300 localities.

49 *Bellas Hess* (n 28) 760.

US.[50] In *Quill*, which basically resembled *National Bellas Hess*, a supplier of office equipment and supplies through catalogues and flyers was made liable to collect and pay North Dakota use tax, as North Dakota amended its statutory definition of the term "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in the State".

Despite admitting that reasoning existed to overrule *National Bellas Hess*, SCOTUS decided not to do so. However, of more interest than the final decision in the *Quill* case for this chapter was the court's explanation on its interpretation on the Due Process Clause. While the Due Process Clause and the Commerce Clause had not been precisely and clearly separated in *National Bellas Hess*, SCOTUS distinguished both from each other in *Quill*.

In *Quill*, the petitioner, took the position that North Dakota did not have the power to compel it to collect a use tax from its North Dakota customers.[51] The trial court ruled in favour of Quill and found the case indistinguishable from *National Bellas Hess* by stating that there was "no nexus to allow the State to define retailer in the manner it chose".[52] The North Dakota Supreme Court reversed the judgment on the grounds that "wholesale changes" in both the economy and the law made it inappropriate to follow *National Bellas Hess* at the time of the proceedings. The court observed that advances in computer technology greatly eased the burden of compliance with a "virtual welter of complicated obligations" imposed by state and local taxing authorities. Already the North Dakota Supreme Court made the pivotal statement, that cases following *National Bellas Hess* had not constructed minimum

50 *Quill* (n 35).

51 *Quill* (n 35) 303.

52 *Quill* (n 35) 303.

contacts to require physical presence within a state as prerequisite to the legitimate exercise of state power.[53]

While disagreeing with the North Dakota Supreme Court's view on the Commerce Clause, SCOTUS agreed on its interpretation of the Due Process Clause. SCOTUS held that although both being closely related, the clauses pose distinct limits on the taxing powers of states. It stated that while a state may, consistent with the Due Process Clause, have the authority to tax a particular tax payer, imposition of the tax may nonetheless violate the Commerce Clause. Consequently, after this identification, SCOTUS decided to consider each constitutional limit separately.[54] As the assessment of the court on the Commerce Clause is of no interest to this chapter, it is consequently omitted in the following.

Regarding the Due Process Clause, the court noted that the decision in aforementioned *National Bellas Hess* "suggested" that a physical presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary.[55] Over the course of the years, however, the court abandoned more formalistic tests that focused on a defendant's presence within a state in favour of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of the US federal system of government to require it to deputize in tax collection. In referring to *Burger King Corp. v. Rudzewicz* the court explained that jurisdiction may not be avoided merely because the defendant did not physically enter the forum state.[56] "Although territorial presence will enhance a potential defendant's

53 *Quill* (n 35) 298.

54 *Quill* (n 35) 306.

55 *Quill* (n 35) 307.

56 *Burger King Corp v Rudzewicz* [1985] 471 US 462 (Supreme Court of the United States) 476.

affiliation with a state and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted".[57] So long as commercial actor's efforts are "purposefully directed" toward residents of another state, SCOTUS has consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.[58] Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous duty and widespread solicitation of business within a state. Consequently, to the extent that former decisions by the court indicated that the Due Process Clause requires physical presence in a state for the imposition of duty to collect a use tax, these decisions were overruled as superseded by developments on the law of due process.[59]

As a result, one must acknowledge that only since the year 1992, SCOTUS accepted on the grounds of the Due Process Clause, that out-of-state vendors could be held responsible for the collection and payment of a consumption tax of another state. From that time, it was clear that the US mindset matches the EU playing field. In saying so, one must mention that it took until the year 2018 for SCOTUS to overrule its interpretation of the Commerce Clause which had prevented out-of-state consumption taxation by non-established sellers until that day.[60]

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57 *Quill* (n 35) 308.

58 *Quill* (n 35) 308.

59 *Quill* (n 35) 308.

60 *South Dakota v Wayfair, Inc* No 17–494 (Supreme Court of the United States 2018).

7.2.3 The Lack of Enforcement Jurisdiction

With the result in mind, that both the US and the EU are on the same page on the question whether out-of-state suppliers should be burdened with tax collection and payment, the next step can be taken.

The destination principle as the commonly accepted principle with regards to consumption taxation[61] leads in cross-border scenarios to a deviation of the jurisdiction imposing the tax (substantive jurisdiction) and the jurisdiction enforcing (enforcement jurisdiction) the tax.

The terms substantive and enforcement jurisdiction were minted by Hellerstein. He describes substantive jurisdiction as the power of the state to impose tax on a specific subject. In essence, the question is whether a state should tax a particular action? In contrast stands the term enforcement jurisdiction. This term relates to the power of a state to compel collection of the tax over which it has substantive jurisdiction. Rephrasing this definition, the question is whether a state has the ways and means of collecting a tax, for example on a taxable person outside of their respective jurisdiction.[62]

While the US concerns mainly dealt with the question of substantive jurisdiction, the question on enforcement jurisdiction is even more critical, as the rest of this chapter will show. To some extent, argumentation into the direction of enforcement jurisdiction has been brought up by stating that an out-of-state tax collection and

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61 See OECD, *International VAT/GST Guidelines* (2017) (hereinafter: *VAT/GST Guidelines*) 3.1 describe the destination principle as generally achieving VAT neutrality in international trade. Also Walter Hellerstein, 'Taxing Remote Sales in the Digital Age: A Global Perspective' (2016) 65 American University Law Review 1196, 1233.

62 Walter Hellerstein, 'Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective' (2003) 38(1) Georgia Law Review 1, 35-36.

payment would create a virtual welter through the complexity of thousands of different taxing system.[63]

Burdening an out-of-state supplier with the obligation to collect and pay a consumption tax of another state might in fact be a challenging task. Apparently, the foreign seller would be in need to know and apply the consumption tax law of the state he sells in. This is an issue which can hardly be underestimated. Not even a common legal framework such as the VAT Directive or the Streamlined Sales and Use Tax Agreement[64] form a basis which allows enough understanding of other, similar consumption tax systems. Taking language barriers into account as well might easily prove SCOTUS right with the wording "virtual welter of complicated obligations", when the debate is extended to all consumption taxation systems in the world.[65]

The theoretical depiction of consumption taxation leads to the following conclusions. Despite differences in the past, both the EU and the US agree that seller in foreign jurisdiction should be deputized with the obligations to collect and pay local consumption taxes imposed by the jurisdiction of consumption. This clears the theoretical path for indirect consumption taxation.

However, doing so in the real world is not a straightforward task. While the obligation can easily be put on those sellers through legal ways – they might not even be aware of it. On top of that, such a setting is a fertile ground for fraud. Therefore, a thorough analysis of possibilities of tax enforcement in the consumption tax field is undertaken in the next subsection.

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63 *Bellas Hess* (n 28) 760.

64 Streamlined Sales Tax Governing Board, Inc, Streamlined Sales and Use Tax Agreement (2002).

65 *Wayfair* (n 60) *Roberts* (dissenting) states that only in the US, over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different governing tax-exempt goods and services, different product category definitions".

7.2.4 Proposals by the Organisation for Economic Co-operation and Development

In the early days of e-commerce, the OECD has identified the field and devoted many publications on how to design a fitting system of consumption taxation. The following overview highlights selected milestones during the last two decades.

7.2.4.1 Ottawa Taxation Framework Conditions and Implementation Ideas

E-commerce started being one of the major issues on the OECD's agenda back in 1998 with a conference held in Ottawa, Canada, entitled "A Borderless World – Realising the Potential of Electronic Commerce".[66] Already at that time, it was recognized that "new challenges will arise in areas such as taxation, where governments will continue to seek to raise revenue without distorting economic or technological choices".[67] With 20 years time between now and this statement, one has to acknowledge how right the OECD was back in the days. The wording "challenges" is interesting and insightful, as one can see that the OECD perceived e-commerce more as a thread than an opportunity.

Starting with the Ottawa Taxation Framework Conditions prepared by the Committee on Fiscal Affairs (CFA) of the OECD in 1998, a rudimentary framework on the taxation of e-commerce was set out.[68] Taking into consideration the extreme positions

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66 Taxation was not the main topic of the conference. Three ministerial declarations in other fields were adopted. The report regarding taxation issues was "welcomed" by the Ministers, see OECD, *OECD Ministerial Conference "A Borderless World: Realising the Potential of Global Electronic Commerce": Conference Conclusions* (1998) 7-8.

67 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (2001) 9.

68 OECD, *Electronic Commerce: Taxation Framework Conditions* (1998).

participants of the discussions took – from e-commerce as a tax-free environment to the introduction of new taxes specifically designed to tax e-commerce – the Ottawa Taxation Framework Conditions are to be regarded as quite a compromise.[69]

The Framework Conditions are principles (of taxation in general).[70] The CFA was able to achieve a consensus among all involved governments on the statement that "the same principles that governments apply to taxation of conventional commerce should apply to e-commerce".[71] Precisely, the Ottawa Framework Conditions are:[72]

- neutrality;
- efficiency;
- certainty and simplicity;
- effectiveness and fairness;
- flexibility.

69 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 9.

70 For tax principles see Luc Hinnekens, 'International Taxation of Electronic Commerce: An Emerging Framework' (1999) 27(12) Intertax 440.

71 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 10.

72 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 9.

It was soon recognized that there are circumstances in which these principles may compete, and that government and business may have different views on what the balance and priority of their application should be in particular contexts.[73]

Regarding consumption taxation, four further elements were laid out providing more detail.[74] From a theoretical perspective, these four elements include (1) rules to account for a taxation in the jurisdiction where consumption takes place in the context of cross-border trade and (2) the agreement that the supply of digitalised products should not be treated as a supply of goods. From a practical perspective, it was laid down for cross-border acquired services and intangible property "that (3) countries should examine the use of reverse charge, self-assessment or other equivalent mechanisms where this would give immediate protection of their revenue base and the competitiveness of domestic suppliers".[75] Furthermore, regarding physical goods, (4) it was stated that countries should ensure the development of appropriate systems in co-operation with the World Customs Organisation and in consultation with carriers and other interested parties. Certainly, a task closely related to the framework conditions of efficiency, effectiveness and fairness. With this rudimentary and basic framework, a work plan for the near future on consumption taxation of e-commerce was set out.[76]

Following the e-commerce work plan developed by the CFA, each of the CFA's Working Parties was tasked with aspects of the Taxation Framework Conditions

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73 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 18, also Hinnekens (n 70) 441.

74 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) box 3 (v) – (viii).

75 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) box 3 (vii).

76 OECD, *Implementation of the Ottawa Taxation Framework Conditions* (2003) no 11.

to progress.[77] One of the Working Parties (WP) 9 was specifically engaged with consumption taxation. Later, also a further sub-group on e-commerce was created. In addition, technical advisory groups (TAGs) consisting of government officials, from both member and non-member countries and business participants were established to provide greater business and non-member country input into the debate.[78] Next to a Consumption Tax TAG, a Technology TAG was also established;[79] moreover, the European Commission (EU COM) participated in the discussion on consumption tax matters. From that time on, the Consumption Tax TAG focused on advising on the practical implementation of the Ottawa principles of taxation in the place of consumption and on collection mechanisms that might serve best to ensure the effective operation of this principle.[80]

Nevertheless, guidelines on the definition of the place of consumption, and recommended approaches for tax collection mechanisms were being drafted.[81] Regarding the latter, CFA claimed to narrow the focus on consumption tax issues on the role of technology-based systems in tax collection.[82] While there had been a clear-cut recommendation to use a reverse charge or self-assessment mechanisms for business to business (B2B) transactions, a clear recommendation for B2C transactions was

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77 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 12.

78 Jeffrey Owens, 'Taxation and E-Commerce' (2001) 29(1) Intertax 10, 11.

79 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 12, Annex II for an overview of the working parties in 2001. See OECD, *Implementation of the Ottawa Taxation Framework Conditions* (n 76) 17.

80 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 13-14.

81 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 15.

82 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 15.

missing in the Framework Conditions.[83]

With respect to the theoretical questions behind these issues, such a recommendation for B2B transactions is quite evident, as in such case the jurisdiction of consumption has both substantive and enforcement jurisdiction over the recipient of the supply.[84] In addition to these fundamental requirements of taxation, public and visible businesses have enough incentive to follow imposed rules. This is one – if not the – pivotal difference in comparison to individual persons. Since they could be made liable through a self-assessment, the real world has shown that this is highly inefficient and therefore commonly labelled as an ineffective "tax on honesty".[85] From a pure theoretical point of view, it is so far unexplained why consumers do not feel obliged to declare their legally inflicted tax on consumption. Casual research could be undertaken with respect to this phenomenon in behavioural psychology. However, taxation must face the challenges of the real world.

In this vein, it cannot be emphasized enough that the main question in the whole cosmos of consumption taxation and cross-border e-commerce is how to collect a consumption tax in B2C transactions. Therefore, the following depiction of OECD deliverables will focus on undertakings to address this issue. With this question on top of the agenda, all other questions seem rather semantical. The following depiction of the OECD's ideas over the last 20 years shows the slow progress in the quest to find a solution to this problem.

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83 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 20.

84 Hellerstein, 'Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective' (n 62).

85 Walter Hellerstein, 'A Hitchhiker's Guide to the OECD's International VAT/GST Guidelines' (2016) 18(10) Florida Tax Review 589, 621.

In addressing the problem of enforcement in cross-border consumption taxation, the CFA made the comprehensible step of developing a range of approaches which could be used to collect a consumption tax. Besides guidelines on the "Definition of the Place of Consumption", "Recommended Approaches to the Practical Application of the Guidelines on the Definition of the Place of Consumption" were agreed upon.[86] While the recommended approaches only consist of three collection mechanisms typically in place at that time in consumption tax systems, namely registration, reverse charge/self-assessment, and collection of tax by customs authorities on importation of tangible goods, the more extensive report on the implementation of the Framework Conditions opened the range of collection approaches and depicts five discussed approaches in total.[87] Without abstracting completely from known paths, these approaches picture all theoretically possible collection approaches.

The WP evaluated all mechanisms in terms of feasibility of implementation, effectiveness, and compliance as well as administrative burden. The technology TAG supported the analysis of the different approaches from a technological perspective. Also, the Business TAG which mainly dealt with questions of direct taxation was involved. The following subsection briefly summarizes all considered approaches and primarily analyses them for their ability to solve the enforcement problem in B2C consumption. The B2B context is widely disregarded.

Self-assessment/Reverse Charge

As already mentioned, the reverse charge/self-assessment collection system was determined to be feasible and effective in the B2B context; though, not in the B2C

[86] OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) app I to ch 2.

[87] OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 30.

context. However, the problems within such a collection system specifically lie within the differentiation between B2B and B2C. Commonly, this differentiation - fraud proof - is quite a challenge for sellers. With the theoretical explanation given above, this result is acceptable, however surprising that the WP did not see the need to expressively state the theoretical advantages. As this chapter focuses on individual consumption and nothing is brought forward indicating self-assessment by consumers as a good idea, no further elaboration on a self-assessment system is necessary.

Registration

The collection mechanism through a registration system is an obligation to non-resident businesses to register in a jurisdiction and to charge, collect and remit the consumption tax to that country, just as it is commonly done in a national context. While some deficiencies are addressed, the needed focus on the imposition of registration requirements and enforcing obligations on non-residents is drastically missed. This pivotal issue stands at the forefront of the approach and deems all other points rather insignificant, as the future has proven.

While this approach can be shaped to pure legal perfection – a fraudulent foreign supplier would still neglect his duties and consumption taxation would therefore fail.[88] Such a behaviour is highly intolerable; however, the jurisdiction of consumption commonly lacks the means of changing it. Instead of putting the pressure on this point, the WP chose to study the advantages and disadvantages of registration thresholds for B2C transactions, especially based on competitive equity between domestic and foreign suppliers, and the compliance burden imposed on private-sector stakeholders. In course of this focus, three thresholds, namely a threshold for

[88] See also Spengel and others (n 10), 3 who assume the same behaviour.

registration, a threshold for distance selling, and a threshold for simplified taxing and/or reporting requirements were mentioned. While this discussion certainly has its right to exist, no fundamental problems are addressed.

Tax at Source and Transfer

As quite an innovative option, a tax at source and transfer approach was discussed rudimentarily in the report. This mechanism would reduce the "significant compliance costs associated with the registration option".[89] The idea of a tax at source and transfer system is that a business would collect consumption tax on exports to non-residents and remit the amount to their domestic revenue authority, where it would be forwarded to the revenue authority in the country of consumption. This approach fulfils the three identified and needed characteristics. Whit both substantive and enforcement jurisdiction over the supplier, the incentive to comply with legislation could be high enough, as sanctions by local authorities for foreign law breaches could be faced.

This approach is only theoretically appealing. It is evident that in a world with immense complexity of consumption taxation systems, already in 2001, this option was not considered feasible, mostly due to the significant increase in the cost of administration, in addition to the need for international agreements regarding enforcement, collection and revenue transfers. Such an approach would require domestic revenue authorities to be able to administer foreign tax law. A thought quite alien to common standards. While the Technology TAG advised that such an approach was theoretically feasible, and that the idea could also be used in a varied model where a trusted third party would undertake the collection function(s), it was

[89] OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 32.

dismissed early in the process.

Collection by Third Parties

Also, only in a short note and not recommended, a collection by third parties is recognized. In such a system, third parties (such as financial intermediaries) would be enlisted to collect consumption taxes on payments between recipients and suppliers. The third party would then remit the tax to the country of consumption. While this would be a fundamental change, from the 2001 perspective, time has shown that this approach has significantly gained momentum over the years. Especially if all the depicted criteria of substantive and enforcement jurisdiction and sufficient incentive to oblige the law are satisfied by the third party.

Still, also the theoretical questions were recognized at these early stages. Precisely, the question if the onus of collection should be laid on any third party intermediary or set of intermediaries was laid out. This question closely resembles the concerns of SCOTUS. In a way, the question shifted from fairness issues with regards to a taxation of the supplier, to fairness issues with regards to taxation or taxation burdens of intermediaries. The Technology TAG argued that the responsibility for collection should not be imposed on such actors and any such participation should be voluntary and based upon market-driven commercial viability, recognising that such a model could be successful if third parties were provided with incentives.[90]

Technology-based and/or Technology-facilitated Options

Finally, various collection approaches based on new technology were taken into consideration. Such technology-based approaches could be a software, which would automatically calculate the tax due on a transaction and remit (through a financial

[90] OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 32.

intermediary or a trusted third party) the tax to the destination jurisdiction. It was recognized that private entities together with tax administrations could develop such a software. The approach was considered a medium to long run option by the WP.

The business members of the Consumption Tax TAG pointed out that technology should merely assist in developing alternative tax collection mechanisms in the future. A full reliance on technology systems seemed to progressive while the integrity of the tax system should be paramount.[91] The Technology TAG added that approaches are not mutually exclusive and could be combined in hybrid versions. Additionally, the Technology TAG underlined that B2C trade was – at that time – very much in its infancy and that the balance between compliance costs and expected revenues was crucial.[92]

Interim Approach

While no clear recommendation on a preferable collection approach for B2C consumption was compiled, TAGs efforts led to an interim approach in 2001. This deliverable was likely the compromise with the least resistance, as the registration approach was already in use.[93] Long-term ideas for tax collection approaches were left to further work. In the medium to long term, the WP envisaged a move towards technology-based options.[94]

In this vein, "Recommended approaches to the Practical Application of the

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91 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 33.

92 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 34.

93 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) app I B 2.

94 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) 35.

Guidelines on the Definition of the Place of Consumption" were given.[95] On the crucial question of B2C consumption, the WP recommended that countries may wish to consider registration regimes that include simplified registration requirements for non-resident suppliers (including electronic registration and declaration procedures).[96] In the view of the Business TAG, simplicity was the key issue to overcome compliance issues. It was suggested that non-resident suppliers should be obliged to register through an electronic system with a minimalistic input of data. While the supplier should still be calculating the tax on his own, the possibility to deduct input tax should not be given. To a large extent this reflects a pragmatic approach to reality, as foreign suppliers incur, in accordance with the Guidelines – no VAT, as their exports are zero-rated or free of VAT.[97] Therefore, the forfeiture of the possibility to deduct input VAT in the jurisdiction of consumption does no harm. From a perspective of tax fairness, domestic suppliers have no disadvantage in not having the possibility to use a simplified collection regime, as this makes no difference from an economical point of view.[98] Regular filing, with the full possibility to deduct tax should be available on a voluntary basis. As apparent and explicitly stated, this collection mechanism should expect good faith and best efforts by business to comply with their respective tax rules. From a perspective of a fraudster, one must note that systems without the possibility to enforce are easy to avoid.

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95 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) app I B.

96 OECD, *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions* (n 67) app I B 10. Also Owens (n 78) 12.

97 OECD, *VAT/GST Guidelines* (n 61) no 1.9.

98 Spengel and others (n 10) emphasise the re-evaluation of the threshold for the special scheme for small taxable persons.

7.2.4.2 BEPS Action 1

More than 15 years later, the first of 15 actions in the base erosion and profit shifting (BEPS) project dealt with the so called digital economy and the accompanied challenges thereof. Next to the identification of a multitude of challenges for direct taxation, indirect tax issues were also addressed.[99] In this vein, the OECD picked up the problem of VAT collection which had been in deep sleep over the years.

As – by nature of an indirect tax – businesses have conceptually no incentive to neither avoid nor evade a consumption tax burden,[100] these issues are to some extend alien to the whole project. The OECD decided to incorporate some pressing issues under the headline "Broader tax challenges raised by the digital economy".[101] Even though no final financial tax liability by businesses is to be avoided, consumption taxation puts the economic burden of the tax on final consumers, suppliers can gain an unfair advantage when supplies are offered with a profit margin which is positively influenced by what is supposed to be the tax, but is never levied to the authorities. Consequently, from an economical perspective, cost benefits can be achieved for businesses. This justifies the incorporation of indirect taxes in action 1 on the challenges of the digital economy.

The report specifically addresses that cross-border trade in goods (and in services and intangibles) creates challenges for VAT systems, particularly where such products

99 OECD/G20, *Action 1 - 2015 Final Report* (n 17) ch 8.

100 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 41 and 45. Many VAT systems impose VAT burdens not solely on final consumption, but also on various entities that are involved in non-business activities or in VAT-exempt activities. See also Martin Kemper, 'Die geplante Regelung einer Haftung für die Betreiber elektronischer Marktplätze (Plattformbetreiber) im Onlinehandel – Eine Einschätzung' (2018) 19(10) Umsatz-Steuerberater 289 fn 3.

101 OECD/G20, *Action 1 - 2015 Final Report* (n 17) 13.

are acquired by private consumers from suppliers abroad.[102] Such problems have existed before, however the digital economy magnifies these challenges, also due to the rise of e-commerce. In this vein, the OECD identified low value parcels from online sales which are treated as VAT exempt and the strong growth of e-commerce and trade in services in the B2C context on which often no or an inappropriately low amount of VAT is levied due to the complexity of enforcing VAT payments on such supplies. This identification of problems undermines the OECD's orientation towards the solution of "challenges" instead of actively proposing ideas which could have prevented foreseeable problems. However, the challenges of imports of low value parcels are used to propel the still unsolved problem of VAT collection. The challenges from strong growth in the trade in services and intangibles are consequently omitted in the following.

Regarding exemptions for imports of low valued goods, the OECD asserted that many VAT jurisdictions apply an exemption from VAT for imports of low value goods as the administrative costs associated with collecting the VAT on the goods are likely to outweigh the VAT that would be paid on those goods.[103] The antiquated thresholds stem from an era before the internet and are subject to debate in the era of e-commerce. The maintaining of thresholds is reasonable from an economic perspective, however, violates the issue of fair competition. Certainly true, decades ago, foreign suppliers were highly disadvantaged in comparison to national suppliers.

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102 OECD/G20, *Action 1 - 2015 Final Report* (n 17) 120.

103 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 310. With studies on the right level for a low value import relief threshold, see Juha Hintsa and others, The import VAT and duty de-minimis in the European Union – Where should they be and what will be the impact? (2014), also Christine McDaniel, Simon Schropp, and Olim Latipov, Rights of Passage: The Economic Effects of Raising the de minimis Threshold in Canada (Essential Policy Intelligence, 2016) and William Steel and others, A Proposed Pathway towards future reform of New Zealand's de minimis threshold (New Zealand Institute for the Study of Competition and Regulation ed, 2013).

This differential still exists.[104] Though, research regards administrative costs almost as exogenously given. With new technology, the associated costs of customs authorities could be reduced significantly, what obviously changes the picture.

To solve the problem, the OECD provided an analysis of possible approaches for improving efficiency of the VAT collection on imports of low value goods.[105] Again, as like in the aftermath of the Ottawa Conference, models for collecting import VAT are explored. The models are namely the traditional collection model, with handling of the customs authorities, the purchaser collection model, the vendor collection model and the intermediary collection model. The models essentially differ based on the person liable to account for the VAT.[106]

Traditional Collection

In a digital world, traditional collection of consumption taxes (and customs) at the border seems – especially in free trade zones like the EU – almost like a relic of the old days. Nevertheless, customs are predominant in international trade and necessary from the viewpoint of other fields, such as disease prevention or detection and prevention of unlawful movement of illicit and counterfeited goods. The OECD rightfully questions whether customs authorities should deal with consumption taxes (and customs payments) in general, especially of regularly flowing trade items. The efficiency of the traditional model might in the OECD's view improve over time, when electronic systems for pre-arrival declaration and electronic tax assessment and

104 Ali Hortacsu, FAsís Martínez-Jerez, and Jason Douglas, 'The Geography of Trade in Online Transactions: Evidence from eBay and MercadoLibre' (2009) 1(1) American Economic Journal: Microeconomics 53 and Andreas Lendle and others, 'There Goes Gravity: How eBay Reduces Trade Costs' [2012] Policy Research Working Paper.

105 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 323.

106 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 325.

payment are implemented worldwide to replace paper based and manual verification processes.

Purchaser Collection

The purchaser collection model relies on the purchaser to self-assess and pay the consumption tax. This model has not proven to be feasible. It was applied through the usage of use taxes in the US before SCOTUS opened the way for states to require out-of-state suppliers to collect their taxes.[107] The inefficiency of the whole method was the very reason for the state of South Dakota to implement such a law. This conceptionally unfit model which is also assessed by the OECD as leading to low levels of compliance by purchasers and complex and costly for customs and tax administrations to implement and operate.[108]

Vendor Collection

The vendor collection model, in essence, mirrors what was formerly titled as the registration approach. In the report, the OECD recognized that this model would create an additional burden for non-resident vendors, however, it could also create opportunities for governments to remove or reduce import exemption thresholds. The additional burden could be mitigated by complementing the model with a simplified VAT registration. Insofar, no substantial change can be noted. Simply the little add on that possible fast-track processing could be made available in customs for low value goods that are imported under this model.

Intermediary Collection

The intermediary collection model foresees the collection of a consumption tax on imports (of low value goods) by intermediaries such as digital platforms on behalf

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107 *Wayfair* (n 60).

108 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 329.

of non-resident vendors. Possible intermediaries are postal operators, express carriers, transparent e-commerce platforms and financial intermediaries.[109] In comparison to the results from the Ottawa Taxation Framework, the importance of this approach was somehow altered. As it did not make the category of "recommended approaches" in the Ottawa Taxation Framework implementation, it was still not recommended – as the OECD did not recommend any approach – however, more substance was given to the concept.

The idea of an intermediary collecting and remitting a consumption tax on behalf of non-resident vendors is seen to be an improvement of the efficiency of the collection of consumption taxes. To an extent, such an idea is a living repetition of trade history. An analogy is easily found in grocery stores.[110] Just as single products of suppliers were once bundled in supermarkets to increase the variety and enhance the consumption of individuals, the internet enables digital supermarkets – commonly referred to as digital platforms – to supply an unseen variety of goods and especially also services. From a fiscal perspective – which drives most of the OECD's work – it seems reasonable to source tax collection out to intermediaries, just as it was once done with supermarkets. By construction of VAT, the staged system leads to a setting where the prior stages – once the last transaction is fulfilled – become an act of bureaucracy. With the artificial inclusion of digital platforms in the value chain a bottleneck of trade, such as with supermarkets, is found. This drastically decreases the number of auditable tax payers. Further stages are at least from a theoretical point of view a smaller fraud risk, due to the self-enforcing mechanism of VAT. The

[109] OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 330.

[110] Ulrich Hufeld, 'Betreiberhaftung im Internethandel' (2018) 106(20) Deutsche Steuer-Zeitung 755, 756 compares to carriers.

OECD finds this model to be particularly effective when the consumption tax is collected by intermediaries that have a presence in the country of importation. On top of the enforcement possibilities, their understanding of local tax and customs rules and procedures could provide benefits to both vendors and tax administrations.

In substantiating the approach, the OECD lists postal operators and express carriers, e-commerce platforms and financial intermediaries as possible intermediaries to collect and remit an indirect consumption tax. Regarding postal operators, the OECD notes that information to them is limited and mostly collected and transmitted on paper forms. Further, most operators do not have the appropriate systems in place to manage the assessment and collection of a consumption tax on low value goods. In contrast, express carriers most often already have electronic systems in place and collection of a consumption tax and customs by express carriers is already common practise. For the system to work smoothly, the OECD saw it in combination with sufficiently simple compliance regimes and with fast-track processing. Financial intermediaries are basically ruled out as they do not collect the necessary information for the assessment and payment of a consumption tax. A model relying on these intermediaries would involve deep changes in the data collection processes. Therefore, the OECD considered it unlikely that financial intermediaries could play a role in a more efficient collection of consumption taxes.

In contrast, transparent e-commerce platforms providing a framework for vendors but not being parties of the commercial transaction between vendor and purchaser generally have access to the key information needed for assessing consumption taxes of the country of consumption. In the OECD's view, the measure should also be combined with sufficiently simple compliance regimes and with fast-track processing. However, the OECD also recognized that e-commerce platforms may often still need

to implement system changes to ensure the process. When e-commerce platforms do not have a presence in the country of importation, enhanced international and inter-agency (tax and customs administrations) co-operation would be required to help ensure compliance.[111]

Conclusion

The OECD did not give a recommendation to tackle the identified issues of imports of low value parcels. From its background, such a conclusion might seem evident, as the OECD is simply a soft law maker. It cannot put any pressure on jurisdictions to implement its will. However, the problem of low value parcels is basically transferable to the problem of enforceability in general. No matter from what cultural background tax systems stem, all consumption taxes face the identified problem of a lack of enforcement jurisdiction when it comes to e-commerce.

However, the OECD did not focus on this pivotal issue. Instead, the OECD mentioned that jurisdictions could opt for a combination of models. As an example, it is put forward, that an optional vendor collection model could be combined with an intermediary collection model (which may notably allow small and medium size businesses to comply more easily), whereby the vendor as well as the intermediary would benefit from a simplified registration and compliance regime designed and operated in conformity with the system applied under the B2C Guidelines.

In sum, the statements of the report are only minimal additions, with unsubstantial content. Still, the simplified registration approach is the OECD's best suggestion when it comes to overcoming the lack of enforcement jurisdiction. This is a very poor result, especially from the background that the circumstances have shifted from a

111 OECD/G20, *Action 1 - 2015 Final Report* (n 17) no 330.

green field environment after the millennium, to 2015 where fraud had already been noted in e-commerce. Even though the OECD does not make use of the word fraud, the identification of low value parcels clearly points into the direction, that a solution to the problem would not be nice to have, but clearly requested by countries.

7.2.5 Mechanisms for the Effective Collection of VAT/GST

With momentum gained through the tempered debate on the digital economy, the OECD delivered a report on the design and operation of mechanisms for the effective collection of VAT/GST in cases where the supplier is not located in the jurisdiction of taxation in 2017 (Collection Report).[112] However, unfortunately, the report focussed on cross-border supplies of services and intangibles.[113]

Right from the table of contents of the report, it is evident that the OECD kept the opinion of recommending a "simplified registration" for suppliers not located in the jurisdiction of consumption. Even though, the jurisdictional break in the chain of the staged tax collection process is identified as the pivotal problem, it remains unaddressed.[114] From this background, the report included technical details for governments who intended to implement "simplified registrations" instead of the much-needed international coordinated idea to tackle the enforcement problem.

Nevertheless, in contrast to the technical details on simplified registration and collection regimes, the details on the collection through intermediaries are of im-

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112 OECD, *Mechanisms for the Effective Collection of VAT/GST: Where the Supplier in not located in the Jurisdiction of Taxation* (2017). The debate on the digital economy evolved away from consumption tax problems. In an update the BEPS Action 1, VAT issues merely build a side note, see OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* (2018) no 308.

113 This focus was requested by the CFA, see OECD, *Collection Report* (n 112) preface 9.

114 OECD, *Collection Report* (n 112) no 21.

portance for this chapter. In substantiating the intermediary collection model, the OECD states that business models and technology continue to develop, the role of intermediaries in supply chains are becoming increasingly complex and this may affect the way tax should or could be collected. The idea of intermediaries collecting a consumption tax is split in two approaches. A contractual approach, based on the relevant contractual and related arrangements between parties; and a deemed supplier approach, which deems the intermediary to be the supplier for VAT compliance purposes.[115]

The contractual approach follows the legal relationships as determined under the business agreement. Under this approach, by means of contractual agreements, the intermediary agrees to fulfil the supplier's consumption tax obligations.[116] It is highlighted, that such an approach might increase the efficiency of consumption tax collection, if the intermediary is in the possession of the information needed to make the appropriate taxing decision and to meet the supplier's compliance obligations.

Under the deemed supplier approach – a novelty in this report – intermediaries are deemed to be the statutory designated suppliers for VAT and accompanied compliance purposes. This approach certainly has the benefit that consumption taxation due is collected by fewer parties that can be monitored more easily.[117] Also, the OECD ascertained that this approach could significantly reduce trade obstacles caused by the compliance burden associated with doing business in the global digital market for small and medium businesses.[118]

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115 OECD, *Collection Report* (n 112) no 61-63.

116 OECD, *Collection Report* (n 112) no 64.

117 OECD, *Collection Report* (n 112) no 66.

118 OECD, *Collection Report* (n 112) no 67.

The deemed supplier approach can be implemented in two different models. First, by seeing the intermediary to have received and on-supplied the digital service (re-seller model) or second, by considering the intermediary to supply services to the digital service provider (agency or facilitations services).[119]

The EU has picked up the deemed supplier approach. From 2021 on, a new Article 14a will deem a person to have received and supplied the goods himself, where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding €150.[120] As this chapter intends to analyse current legislation, no further elaboration on the EU approach is necessary at this point.

7.2.6 The Role of Digital Platforms in the Collection of VAT/GST on Online Sales

In a major step forward, the OECD, in 2019 issued the latest deliverable on VAT, labelled "The role of digital platforms in the collection of VAT/GST on online sale" (Platform Report).[121] It provides practical guidance to tax authorities on the design and implementation of a variety of solutions for enlisting the platforms economy, including e-commerce marketplaces and other digital platforms, in the effective and efficient collection of VAT/GST on digital sales.[122] It thereby complements the aforementioned Collection Report. With this report, the OECD finally brings

119 OECD, *Collection Report* (n 112) box 2.

120 Art 2(2) e-commerce Directive.

121 OECD, *Platform Report* (n 2).

122 OECD, *Platform Report* (n 2) 3.

substantiated ideas on how to address the enforcement problem.

The report picks up different ways and means of liability. In the centre of the report are regimes that impose full liability on digital platforms for the consumption tax due on the online sales in which these platforms play a role. It is recognized that such regimes are under consideration by a growing number of jurisdictions.[123] Therefore, the OECD analyses key aspects and design considerations of a full liability to reduce the costs and risks for tax authorities of administering, policing and collecting consumption tax on ever increasing volumes of online sales.

Also, variations of a liability regime that do not impose a full liability on the digital platforms for the tax due on online sales they facilitate are elaborated. Thereby, also obligations such as information sharing between platforms and tax authorities, education of suppliers, and formal co-operation agreements between tax authorities and platforms are mentioned.

Finally, the OECD also examines the form of JSL to encourage compliance and co-operation. In expanding the scope, the OECD not just targeted e-commerce on digital platforms but also encouraged to give due consideration to the compliance role and obligations of the broad range of actors in online trade, beyond digital platforms.[124] JSL, as a – from a policy perspective – relatively easy to implement mechanism, is generally not considered to be a primary tool in securing the collection of consumption taxes on online sales, as either the platform or an underlying supplier will have the statutory liability for the tax. However, the OECD regards a JSL as a useful tool to support tax authorities in cases of non-compliance and indeed can deter

123 OECD, *Platform Report* (n 2) 6.

124 OECD, *Platform Report* (n 2) no 156.

non-compliant behaviour.[125] For the purposes of this chapter, JSL builds the focus as several of the such are currently used to combat negative revenue consequences. From this background, the chapter rather intends to analyse current implementations for their suitability instead of designing a single standing solution.

By speaking of "experience" the OECD drew the conclusion that JSL can offer a strong incentive for digital platforms to ensure that the underlying suppliers using the platform are in compliance with their consumption tax obligations.[126] Also based on experience, two variations of applying JSL are observed in the real world. They are not mutually exclusive.

The first variation is forward looking and declares the digital platform liable once the tax authority had spotted cases of non-compliance and the digital platform did not take appropriate action within a specified number of days. Such appropriate action may be defined in more detail, but eventually leads either to the platform taking care that the supplier becomes compliant or the platform removing the supplier from its marketplace. If the digital platform does not take appropriate action, the authorities can decide to consider the platform liable for consumption taxation on any future sales made by the non-compliant underlying supplier.[127] This variation typically does not require the tax authority to prove fraudulent behaviour by the underlying supplier. Further, the platform's "knowledge" is irrelevant.[128]

The second variation has its focus on past liability. It allows a tax authority to make a digital platform liable in respect of past sales of a non-compliant underlying

125 OECD, *Platform Report* (n 2) no 159.

126 OECD, *Platform Report* (n 2) no 161. For a deeper explanation and analysis of implemented JSL norm, see Chapter 5 and Chapter 6.

127 OECD, *Platform Report* (n 2) no 163.

128 OECD, *Platform Report* (n 2) no 165.

supplier, if the platform should have had a reasonable expectation based on the underlying supplier's activities on the platform that the supplier should be registered for consumption tax purposes but has not. This variation puts the onus on digital platforms to carry out due diligence on the underlying suppliers by requesting for registration numbers and carrying out checks to ensure these numbers are valid.[129] This implicit demand requites that the digital platform has the legal and practical means to check whether a supplier is displaying a valid number. Typically, proof will be required to justify the platform's joint and several liability for unpaid consumption taxation in respect of past sales.[130]

7.2.7 Theoretical Conclusion

The principles of consumption taxation are generally accepted across national boundaries. Worldwide consensus exists that suppliers outside of the consumption jurisdiction can be burdened with the collection and remittance of the tax. Though, problems exist when the supplier is not located in the jurisdiction of consumption. In such a case, the consumption jurisdiction is unable to put pressure on the supplier to fulfil his obligations. While, 20 years ago, this might have been an attractive brain teaser to think about, nowadays a serious revenue problem exists. With worldwide e-commerce, suppliers can sell all over the world. This tremendous opportunity transfers to the obligation to know and comply with consumption tax systems of the jurisdictions where consumers reside.

This consequence of globalization has obviously not been understood by all

[129] OECD, *Platform Report* (n 2) no 166.

[130] OECD, *Platform Report* (n 2) no 169.

commercial players. The lack of understanding is fostered by the missing possibility to sanction non-compliance.[131] A progressive idea might be to include payment service providers in the process.[132] Over the years, several indicators have shown that the problem must be taken seriously. The United Kingdom and Germany have chosen to implement legislation to alter the compliance in their national general consumption taxes. Through the implementation of JSL norms, these countries enlighten to tackle revenue losses.

Their national laws are bound by the VAT Directive. While Article 205 VAT Directive allows, in certain situations, to hold persons other than the person liable for payment of VAT to be held jointly and severally liable for payment of VAT, the CJEU has had cases to decide, where it was questionable, whether persons other than the person liable for payment of VAT should bear an additional burden through VAT. The next section will elaborate on the question whether JSL is inherently present in the VAT Directive.

7.3 Joint and Several Liability in the VAT Directive

7.3.1 Different Forms of Joint and Several Liability

In search for a solution to the consumption taxation enforcement problem of taxable persons without enforcement jurisdiction, responsibility has been used in the EU

[131] Or additionally, as in the German case, a lack ot personnel at the respective tax offices, see Senatsverwaltung für Finanzen, Pressemitteilung Nr. 18-009 (25 August 2018).

[132] See Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers, COM(2018) 812 final (European Commission). Elaboration to this idea is given in chapter 7.5.

VAT context.[133] Through this mechanism, other players than the actual tax payer are made responsible for the tax payer's liability. This can be done either by regulations directly foreseeing liability, such as the aforementioned deemed supplier approach or by implementing JSL norms.[134] Economically, especially in the context of fraud, JSL norms come down to a simple third party liability as the original debtor most often simply disappears.[135] In such a scenario, the third party must step in for the full amount of tax payment.

A very similar result, especially from the financial perspective, can be achieved by refusing the right of deduction or exemption.[136] Even though a denial of the right to deduct input VAT is legally not a liability of an intermediary or an involved person, the financial consequences are alike. Also, from a state's budget perspective, financials are covered if others are made responsible – if the responsible person can be held liable. Therefore, the following analysis takes an economic instead of a purely legal perspective with respect to liability norms.

Through a passing-on to a local taxable person, a reterritorialisation of the problem may occur. By finding a responsible person in the enforcement jurisdiction, the identified problem may be solved. Though, it is evident, that in absence of an adequate third party located in a state's jurisdiction, reterritorialising fails. Eventually, the problem of substantive jurisdiction without enforcement jurisdiction remains

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133 Rita de La Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240, uses the terminology "responsibilization".

134 Hufeld (n 110) 756, also states that the formal tax payment requirement has the character of a liability.

135 Hufeld (n 110) 762, uses the terminology "fourth party".

136 Caroline McCarthy, 'The good faith requirement in VAT' (2017) 6(2) World Journal of VAT/GST Law 63.

unaddressed.[137] In this vein, right from the beginning, extending or shifting the tax liability to others may only be a second-best solution.

While the making responsible of someone for another's behaviour may positively affect the total tax revenue outcome, the wrongdoer's actions might still be unaffected. Such argumentation leaves such a concept in unclear surroundings. It comes with a deterrence effect for the future, which is intended to motivate the responsible person to put pressure on the initial tax payer to fulfil his obligations. In a way, the decision to implement such a system into legislation implicitly states that third parties are in a better position to enforce tax payments, than the tax administration is.

JSL in the consumption tax context is different than in the context of direct taxation. Indirect taxes are already designed in the way that the one who is supposed to carry the burden of the tax is not the one remitting the tax to the authorities. Henceforth, it is a matter of perspective how to pick the terminology if a consumption tax burden is shifted or extended from the consumer to another person. For the following part, third party liability is understood as any originally unintended consumption tax burden on a taxable person.

In the past, tax authorities tried to achieve JSL in different ways. First and foremost, input VAT deductions were rejected by the tax authorities within the EU. This has been in the focus of national authorities around the fight against carousel fraud. Several pivotal judgments of the CJEU in this area are closely depicted in the first subsection of this section.

The second subsection depicts cases where tax authorities tried to make taxable persons liable in intra-Community supplies without a straightforward missing trader

[137] OECD, *Platform Report* (n 2) no 175, emphasising to not lose sight of online sales that do not involve digital platforms.

intra-Community (MTIC) fraud context.

The same concept has been applied by authorities in the field of invoicing, where input deductions have been refused due to incorrect invoicing. This is looked at in the third strand of jurisprudence.

Finally, liability was appointed on taxable persons due to specific regulations and not on the interpretation of the VAT Directive. These judgments are closer looked at in the fourth subsection.

This section closes with an interim conclusion on the question whether the VAT Directive and the jurisprudence on its own are sufficient to prevent the herein depicted fraud. In such a case, any amendments in the VAT Directive or in national VAT laws would be unnecessary.

7.3.2 Missing Trader Intra-Community Fraud

An important year for JSL marks the year 2006. Before digital platforms became a huge success, the CJEU had to deal with the question of responsibility in the context of MTIC and carousel fraud. Several judgments of the court are concerned with the rejection of input tax in connection to MTIC. In these judgments, the court had to carve out in which circumstances involved persons could be held liable for other's tax liabilities.

For an MTIC fraud, a cross-border scenario is necessary. One company (A) is in one MS and two or more other companies (B, C and D) are in another MS. A sells taxable goods to B in another MS. This intra-Community supply is VAT zero-rated, but A has the right to deduct input VAT.[138] Company B is a defaulting trader or

[138] Art 138 and art 169(b) VAT Directive.

a trader using a hijacked VAT number.[139] Company B sells goods at a discount to company C. Company C works as a buffer company. Company B incurs liability for VAT on the purchase of the goods and is also entitled to deduct that VAT as input VAT.[140] It also incurs liability for the output VAT it has charged to company C but goes missing before discharging that liability to the tax authorities. Company C sells to another buffer company (D) and remits the output VAT charged after having deducted the input VAT paid. When the goods eventually end up again with company A, a carousel fraud took place.[141] By using a discount – which can be financed though the fraud – company B can offer attractive prizes. Companies other than company B might not necessarily be aware of the fraud.

Currently, deductions are regulated in Title X of the VAT Directive. Art 168 VAT Directive provides, that in so far as the goods and services are used for purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the MS in which he carries out these transactions, to deduct certain VAT from the VAT which he is liable to pay. This right is a fundamental principle of the common system of VAT established by EU legislation.[142]

A good starting point on the jurisprudence on MTIC fraud is the *Optigen and Others* case. In *Optigen and Others*, the court had to answer the question whether the right to deduct input VAT could be refused due to trading with a fraudster. In the

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139 The fraud also works with insolvent traders in the position of B, see Rita de la Feria, 'Tax Fraud and the Rule of Law' [2018] (02) Oxford University Centre for Business Taxation (Working paper series) 9.

140 Art 168 VAT Directive.

141 Joined Cases 354/03, 355/03, 484/03 *Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03) v Commissioners of Customs & Excise* [2006] ECR I–483 at [13].

142 Case 518/14 *Senatex GmbH v Finanzamt Hannover-Nord* ECLI:EU:C:2016:691 at [26] and the case-law cited.

above mentioned example, company B. In the case, the appellants in the proceedings were not the missing trader. They were unaware of the fraud taking place and acting in good faith. As in MTIC fraud tax money is stolen from MS, it is evident that the authorities try to compensate the financial damage. With the missing trader being untraceable, laying penalties on him is no feasible option. However, the authorities had several ideas on how to use the VAT Directive to make others liable for the missing tax money.

The United Kingdom (UK) authorities tried to make other taxable persons liable by seeing the missing trader's transactions outside of the VAT Directive.[143] Such a classification would lead to a loss of the right to deduct input VAT, as no legal grounds for such a claim were available. The appellants took the position that they had not been aware of the misconduct of their trading partners. Both parties agreed on the fact that the appellants were innocent parties who were not involved in and had no knowledge of or reason to have knowledge of the fraud.[144] Through several questions, the referring court – in essence – asked the question whether transactions which are themselves not vitiated by VAT fraud, but which form part of a chain of supply in which another prior or subsequent transaction is vitiated by such fraud, in the absence of the applicants being aware of the fraud, constitute supplies of goods within the meaning of the VAT Directive.[145] Such a question can be rephrased. The question is how much due diligence taxable persons must undertake before transacting with other parties. As the following cases will show, understandings of enough differ.

143 *Optigen and Others* (n 141) at [14].

144 *Optigen and Others* (n 141) at [22].

145 *Optigen and Others* (n 141) at [29].

7.3. JOINT AND SEVERAL LIABILITY IN THE VAT DIRECTIVE

In *Optigen and Others*, the court ruled that the disputed transactions were within the VAT system. On the grounds of a uniform definition of taxable transactions,[146] and the objectivity of the character of the term economic activity,[147] the court decided not to differentiate between legitimate and fraudulent transactions for the applicability of VAT.[148]

Such a judgment is in line with previous jurisprudence, stating that it would be contrary to the objectives of the VAT system, if the authorities had the obligation to carry out inquiries regarding the intentions of taxable persons.[149] An even stronger violation of the objectives would consequently be an obligation on the tax authorities to investigate in prior or subsequent transactions in the chain.[150]

This leads to the clear statement, that each transaction must be regarded on its own merits and the character of a transaction in the chain cannot be altered by earlier or subsequent events.[151] Regarding the right to deduct input VAT, the court reiterated in *Optigen and Others* that being an integral part of VAT, it may not be limited in principle. The court clearly stated that it is irrelevant to the right of the taxable person to deduct input VAT whether VAT on earlier or later sales has been paid or not.[152]

The judgment in *Optigen and Others* is highly in favour of taxable persons.

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146 *Optigen and Others* (n 141) at [36].

147 *Optigen and Others* (n 141) at [43].

148 The argument to generally exempt unlawful transactions from the scope of VAT had already been dismissed in earlier case law, *Optigen and Others* (n 141) at [53-54].

149 Case 4/94 *BLP Group plc v Commissioners of Customs & Excise* [1995] ECR I–983 at [24].

150 *Optigen and Others* (n 141) at [46].

151 *Optigen and Others* (n 141) at [47].

152 Case 395/02 *Transport Service NV v Belgische Staat* [2004] ECR I–1991 at [26].

They receive the signal from the CJEU that their right to deduct input VAT is unaffected by the fact that in the chain of supply other transactions are vitiated by VAT fraud. Nevertheless, the court adds the pivotally important side note, that such an assessment only holds for taxable persons not knowing or having any means of knowing of fraud in the supply chain.

A few months later in 2006, the CJEU had to decide on another British initiative against MTIC. Through the Finance Act 2003, the UK had implemented s 77A into the national Value Added Tax Act 1994 (hereinafter: VATA 1994) to combat MTIC, including "carousel fraud, in the field of VAT".[153] It was complemented by regulations regarding requirements of evidence or security. VATA 1994 s 77A intended JSL for purposes of VAT for specific products. In contrast to the *Optigen and Others* case, the fight against VAT fraud was now based on a national law, rather than legal conception of the VAT Directive by the authorities. The relevance of such norms for current JSL norms are obvious, as they initially explored such extensions of liability covered by the Sixth Directive.[154] The German legislator also introduced such a measure; in force since 01.01.2002.[155] In analysing this judgment one must be precise on the normative basis. At this point, the analysis is done for the interpretation of the VAT Directive and not for the national implementation.

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153 Value Added Tax Act 1994, 1993 c 23 (United Kingdom); Finance Act 2003, 2003 c 14 (United Kingdom) s 17. In force since 10.04.2003.

154 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ L145/1 (European Communities) (hereinafter: Sixth Directive) is the precursor of the VAT Directive.

155 § 25d Umsatzsteuergesetz, BGBl. I 2005, 386 (Bundesrepublik Deutschland) (hereinafter: UStG), implemented through art 1 Gesetz zur Bekämpfung von Steuerverkürzungen bei der Umsatzsteuer und zur Änderung anderer Steuergesetze (Steuerverkürzungsbekämpfungsgesetz - StVBG), BGBl. I 2001, 3992 (Bundesrepublik Deutschland).

7.3. JOINT AND SEVERAL LIABILITY IN THE VAT DIRECTIVE

In *Federation of Technological Industries* the appellant, the federation, lodged an application for judicial review of the UK JSL provisions.[156] This led to the question for the CJEU whether Article 21(3) Sixth Directive permitted MS to provide that any person may be made jointly and severally liable for payment of tax with any person who is an actual taxable person, as long as the general principles of Community law are kept. The UK rules demanded liability for taxable persons, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that VAT.[157] Several governments were of the opinion that any person may be made jointly and severally liable for payment of VAT with any person who is made liable for payment under Articles 21(1) and (2) Sixth Directive, subject only to the general principles of Community law.

The court ruled that Article 21(3) Sixth Directive "permits such a rule in general". However, MS must still comply with the general principles of law which form part of the Community legal order, in particular, the principles of legal certainty and proportionality. With regards to the principle of proportionality, the court pointed out that JSL provisions are legitimate to preserve the rights of the public exchequer. Nevertheless, such measures must not go further than necessary for the purpose. With the remark that a strict liability mechanism would go beyond what is necessary,[158] the court avoided a conclusion. The CJEU ruled that it is for the national court to

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156 Case 384/04 *Commissioners of Customs & Excise and Attorney General v Federation of Technological Industries and Others* [2006] ECR I–4191 at [8].

157 *Federation of Technological Industries* (n 156) at [18].

158 *Federation of Technological Industries* (n 156) at [30]-[33].

determine whether the national legislation complied with the general principles of Community law.[159] Later judgments will show how the court substantiated how the VAT Directive precludes extensive JSL.

As a result, a first important milestone for JSL was set.[160] In contrast to the *Optigen and Others* case, the court had not only confirmed the possibility of third party liability rules in general; it also put it in the hands of national courts to decide whether the criterion of "a taxable person who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous supply, would go unpaid" could be used.

Only half a year later came the *Kittel* case. In contrast to the *Optigen and Others* case one important detail changed. While both parties agreed in *Optigen and Others* that the applicants had been unaware of the fraud, the authorities believed the appellant knowingly participated in a VAT "carousel" in *Kittel*.

The appellant was of the opinion, that the right to deduct input VAT remains applicable even in the case of a recipient who knows of the fraudulent motives of his supplier.[161] Such a perspective might be justified with the argumentation that material requirements are indeed fulfilled. However, the Belgian law contained a provision potentially in violation of the Sixth Directive.[162] Also, the argumentation of a broad scope of VAT, the objective character, the practicability issues of tax

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159 *Federation of Technological Industries* (n 156) at [35].

160 Jan de Weerth, 'Gemeinschaftsrechtliche Voraussetzungen für eine gesamtschuldnerische Haftung für die Zahlung von Mehrwertsteuer' (2006) 15(11) Internationales Steuerrecht 385, 389.

161 Joined Cases 439/04, 440/04 *Axel Kittel v Belgian State (C-439/04) and Belgian State v Recolta Recycling SPRL (C-440/04)* [2006] ECR I–6161.

162 *Kittel* (n 161) at [39].

administrations,[163] the impossibility of principally limiting the input deduction, the irrelevancy of prior or subsequent sales of the goods and the general distinction between lawful and unlawful transactions are reiterated. Consequently, the *Kittel* judgment concludes in the same manner as the *Optigen and Others* case.

However, the court also gave additional insights. In condensing other judgments, it also drew reference to *Federation of Technological Industries* in stating, that traders who take every precaution which could be reasonably required of them to ensure that their transactions are not connected with fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct input VAT.[164]

By using the converse argument from the *Halifax and Others* case, the court stated that objective criteria are not met by a taxable person evading the tax himself.[165] Preventing tax evasion, avoidance and abuse is one objective recognised and encouraged by the Sixth Directive. Accordingly, Community law cannot be relied on for abusive or fraudulent ends.[166] Tax authorities have the right to refuse to allow the right to deduct input tax where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends.[167]

The court extended these consequences to a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT. Such a person must, for VAT purposes, be regarded

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163 *BLP Group* (n 149) at [24].

164 *Federation of Technological Industries* (n 156) at [33].

165 Case 255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I–1609 at [59].

166 Joined Cases 487/01, 7/02 *Gemeente Leusden (C-487/01) and Holin Groep BV cs (C-7/02) v Staatssecretaris van Financiën* [2004] ECR I–5337 at [76].

167 *Kittel* (n 161) at [55] with further references.

as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.[168] This extension was justified by two points. First, in such a situation, the taxable person aids the perpetrators of the fraud and becomes their accomplice; second such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent such transactions.[169]

The *Kittel* decision is pivotal for the history of JSL as the court unambiguously states that national courts have to refuse entitlement to the right to deduct input VAT where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT.[170]

A few years later, in 2014, in *Italmoda*, a Dutch shoe trader carried out transactions relating to computer hardware. These transactions were drawn into question by the authorities, as the Netherlands tax authorities took the view that Italmoda had knowingly participated in fraudulent activity designed to evade VAT in Italy. The other appellants in the joined case were dealing with mobile phones in comparable arrangements. The court had to answer the question whether national authorities and courts must refuse a taxable person which knew, or should have known, that it was participating, in the context of intra-Community supplies, in a transaction involving VAT evasion, the right to deduct input VAT, regardless of national law containing provisions for such a refusal.

In the judgment, besides the known general matters of the question, the court undertook the important step to explicitly phrase the prevention of fraud as a general

168 *Kittel* (n 161) at [56].

169 *Kittel* (n 161) at [57]-[58].

170 *Kittel* (n 161) at [59].

principle of law. In this vein, the CJEU ruled that even in the absence of national rules or general principles prohibiting the abuse of rights, it cannot nevertheless be inferred that national authorities and courts would be prevented from refusing a benefit derived from a right laid down by the Sixth Directive in the event of fraud.[171]

The appellant believed a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as a such, by a MS, against an individual. This argumentation was not accepted by the court as the relevant case-law has not envisaged a situation comparable to the one in question.[172] Further, the court stated that a refusal of a benefit does not amount to imposing an obligation on the individual concerned, but is merely a consequence of the finding that the objective conditions required for obtaining the advantage sought, under the directive as regards that right, have, in fact not been satisfied.[173] Also, the court decided that there is no objective reason to conclude that fraud committed in another MS is any better than fraud in the MS where a taxable person improperly seeks to benefit from a right under the Sixth Directive.[174]

These essential MTIC cases show that where it is ascertained, having to regard objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct input VAT. As a takeaway for third party liability,

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171 Joined Cases 131/13, 163/13 and 164/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' MariaNoPreviti vof and Turbucom BV and Turbucom Mobile Phone's BV v Staatssecretaris van Financiën* ECLI:EU:C:2014:2455 at [54].

172 *Italmoda* (n 171) at [55].

173 *Italmoda* (n 171) at [57].

174 *Italmoda* (n 171) at [65].

one must acknowledge, that in contrast to the appellants opinion in *Kittel* even in the presence of all material requirements, third persons can be made liable. For the further analysis, the take away point is that no matter how rules are set up, third persons cannot simply excavate themselves by following the such rules. They have to keep an open mind and active will to prevent VAT fraud.

7.3.3 Intra-Community Supplies

Closely connected to input VAT deductions – especially in the MTIC context – is the right to exemption for intra-Community supplies. The CJEU has built a further strand of judgments particularly on the rejection of the right to this exemption. Such situations are not necessarily connected to carousel fraud or even fraud at all. Still, the authorities have repeatedly tried to shift the tax burden to taxable persons through the rejection of the exemption. Through such actions, the court has had several possibilities to substantiate where further implicit obligations are given to third parties.

Intra-Community supplies as regulated in Article 138 VAT Directive. The regulation provides that the MS shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a MS other than that in which dispatch or transport of the goods began. This system has been implemented in the context of transitional arrangements for VAT applicable to intra-Community trade, for the purpose of the abolition of internal frontiers on 01.01.1993. Since that date, the imposition of tax on imports and the remission of tax on exports in trade

between MS were definitively abolished.[175] The system has the purpose to transfer the tax revenue to the MS in which the final consumption of the goods supplied takes place.[176] In conjunction with intra-Community acquisitions, the mechanism makes it possible to delimit clearly the authority to tax of the MS concerned.[177]

While the rejection of the exemption due to missing transaction details might appear as merely a legal problem in the first place, a second thought – further away from the precise regulations – reveals that a rejection also gives insights about inherent obligations of taxable persons.

Again, in an UK case, taxable persons had contracted with their buyers to be only required to place sold goods at the buyer's disposal at a warehouse in the UK ("ex-works" or EXW). The buyer was then responsible for arranging the transport to other MS. In result, an intra-Community supply was intended by the contracting parties. Teleos and others received stamped and signed originals of the (Convention Relative au Contrat de Transport International de Marchandises par la Route - CMR) consignment notes. On subsequent checks, the Commissioners discovered that some of the CMR notes were false. The Commissioners concluded that the goods in question never left the UK. Consequently, by assessing VAT on the applicants for national transactions, they were made liable by the authorities.

If such a liability was justified and inherent to the VAT Directive, was questionable in the case. Regarding the knowledge, the authorities acknowledged that

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175 Case 409/04 *The Queen, on the application of Teleos plc and Others v Commissioners of Customs & Excise* [2007] ECR I–7797 at [21].

176 Case 285/09 *Criminal proceedings against R* [2010] ECR I–12605 at [37].

177 Case 245/04 *EMAG Handel Eder OHG v Finanzlandesdirektion für Kärnten* [2006] ECR I–3227 at [30] and [40.]

the appellants were in no way involved in any fraud.[178] Further, the national court considered it proven that there was no reason for Teleos and others to doubt any authenticity of information.

While the technical question was on the correct interpretation of the word "dispatched" in Article 138 VAT Directive,[179] the court also gave statements which are of importance for JSL. Regarding JSL, it was questionable whether MS could reject the right to exemption from a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption to account for VAT where later that evidence was found to be false, without, however, the supplier's involvement in fraud.[180]

In his answer, the court repeated the objectivity condition and brought forward the difficulty, due to the abolition of frontier checks between MS, to satisfy themselves that the goods have or have not physically left the territory of that MS. Without frontier checks, it is principally based on the evidence provided by taxable persons and of their statements that the tax authorities are satisfied.[181] As laid out in the VAT Directive, it is for the MS to lay down the conditions for the application of the exemption of intra-Community supplies of goods.[182] When exercising their powers, MS must comply with the general principles of law which form part of the Community legal order. These include, in particular, the principles of legal certainty

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178 *Teleos and Others* (n 175) at [16].

179 *Teleos and Others* (n 175) at [35] and the case-law cited for the necessity of several possible interpretations of an expression.

180 *Teleos and Others* (n 175) at [43].

181 *Teleos and Others* (n 175) at [44].

182 Case 146/05 *Albert Collée v Finanzamt Limburg an der Lahn* [2007] ECR I–7861 at [24].

and proportionality.[183] Further, the prevention of fraud may not be used in such a way as to undermine the fiscal neutrality.[184]

The appellants brought forward that the imposition by the tax authorities of the entire burden of proof, as well as the liability to account for VAT, on the supplier of goods sold under the system of intra-Community supplies, is incompatible with the principles of legal certainty, proportionality and fiscal neutrality. Furthermore, such measures adversely affect the proper functioning of the single market and interfere with the free movement of goods.

Regarding the principle of legal certainty, the court observed that all the more strictly in the case of rules liable to entail financial consequences, those concerned may know precisely the extent of the obligations which such rules impose on them. From this statement follows, that it is necessary that taxable persons are aware before concluding a transaction, of their tax obligations.[185] Accordingly, it would be contrary to the principle of legal certainty if a MS accepts documents in order to exempt intra-Community supplies and subsequently requires that supplier to account for the VAT on that supply.[186]

As regards the principle of proportionality, the court recalled that, in accordance with that principle, the MS must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant Community

183 *Teleos and Others* (n 175) at [45] with further case-law.

184 *Teleos and Others* (n 175) at [46].

185 *Teleos and Others* (n 175) at [48].

186 *Teleos and Others* (n 175) at [50].

legislation.[187] In this vein, the government of the UK referred to the Case *Faroe Seafood and Føroya Fiskasøla*, which dealt with post-clearance demands for payments of customs duties issued by the UK customs authorities.

In *Faroe Seafood and Føroya Fiskasøla*, the court had to deal with a similar question. Instead of intra-Community supplies, certain imports of shrimps and prawns from the Faroer Islands to the United Kingdom benefitted from a tariff reduction conditional upon a certificate issued by the Faroe Islands. Just as in *Teleos and Others*, the question was who could be made liable for "erroneous" certificates while the applicant believed in good faith that the certificate was correct.[188] The court in *Teleos and Others* did not accept any applicability of the this case due to the fact that the division of powers in tax matters in the internal market permits the tax authorities to resort to both the supplier and the purchaser to obtain payment of the VAT, whereas, under the common customs regime, duties are recoverable only from the importer.[189]

The CJEU ruled that the objective of preventing tax evasion sometimes justifies stringent requirements regarding suppliers' obligations. A sharing of risk between supplier and the tax authorities is possible, though only under the condition to be in line with the principle of proportionality. Furthermore, the court made an important assessment. It ruled that a measure imposing the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud,

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187 *Teleos and Others* (n 175) at [50]. *Collée* (n 182) at [45] with further case-law.

188 Joined Cases 153/94 and 204/94 *The Queen v Commissioners of Customs & Excise, ex parte Faroe Seafood Co Ltd, Føroya Fiskasøla L/F (C-153/94) and Commissioners of Customs & Excise, ex parte John Smith and Celia Smith trading as Arthur Smith (a firm) (C-204/94)* [1994] ECR I–2465 at [10].

189 *Teleos and Others* (n 175) at [57].

does not necessarily safeguard the VAT system from fraud by purchasers. This argumentation shows that the extension of a liability is no solution to the problem, as it could also lead to a situation where the purchasers could be encouraged not to dispatch or not to transport the goods out of the MS.[190]

In terms of the principle of fiscal neutrality the court clearly saw that a tax payment for suppliers would be a violation of the such, as supplies in national transactions would not lead to VAT payments by the supplier.

Just as with the principle of proportionality, the free movement of goods can, in certain circumstances be restricted. The prevention of possible tax evasion, avoidance and abuse is an objective recognized and encouraged by the Sixth Directive.[191] The Sixth Directive therefore gave MS the possibility to impose obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion. By way of analogy, the court transferred the conclusions from *Federation of Technological Industries* and *Kittel* and ruled that MS can require suppliers to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion.[192] Following this conclusion, the court also highlighted the fact that the supplier acted in good faith and took every reasonable measure in his power and that his participation in fraud is excluded were important points in deciding whether that supplier can be obliged to account for VAT after the event.[193]

Eventually, the CJEU concluded that MS are precluded from refusing the right

190 *Teleos and Others* (n 175) at [58].

191 *Teleos and Others* (n 175) at [64].

192 *Teleos and Others* (n 175) at [65].

193 *Teleos and Others* (n 175) at [66].

to the exemption of an intra-Community supply of goods, when a supplier acted in good faith where evidence was found to be false, without the supplier's involvement. By ruling so, the court basically transferred the jurisprudence of input deductions to intra-Community supplies. This is important for JSL, as the court made clear that the interpretation of the VAT Directive regarding MTIC fraud is not limited to a such.

Through further judgments, the CJEU substantiated the duties of taxable persons. In *R*, a manager of a German company carried out a series of manipulations, concealing the identity of the true purchasers of vehicles to enable distributors in the Portuguese Republic to evade the payment of VAT in Portugal.[194] The court was asked to give answer to the question if such actions must lead to a refusal of the exemption from VAT.[195] In line with previous jurisprudence, the court ruled that the presentation of false invoices or false declarations and any other manipulation of evidence leads to the possibility for MS from treating the issuing of irregular invoices as amounting to tax evasion and therefore refusing the right for exemption of intra-Community supplies.[196] Such a result is not called into question by the principles of fiscal neutrality or legal certainty, or by the principle of the protection of legitimate expectations.[197]

With this ruling, the court made it clear that any fraud supporting actions lead to a refusal of rights, even in the presence of the material requirements for intra-Community supplies.

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194 *R* (n 176).

195 *R* (n 176) at [35].

196 *R* (n 176) at [48]-[49].

197 *R* (n 176) at [54].

7.3. JOINT AND SEVERAL LIABILITY IN THE VAT DIRECTIVE

In a Hungarian case, the court had to answer the question whether MS can refuse the right of exemption of intra-Community supplies, where certain additional requirements asked by the MS had not been fulfilled. In repeating that it is for the MS to impose the requirements with regard to evidence, the court decided that this is a matter for the referring court to assess.[198] Nevertheless, additionally, the requirement to act in good faith is still applicable, independent from the national requirements.[199] Additionally, the court ruled, that it would be contrary to the principle of proportionality that the vendor be held liable for VAT solely on the ground that the purchaser's VAT identification number was removed from the register with retroactive effect.[200]

In *Traum*, the legal question was again regarding the use of the VAT identification number. The appellant, a Bulgarian construction company declared intra-Community supplies of knife blocks and blanks. The Bulgarian company had received invoices containing the Greek VAT identification number, acceptance and handover reports, international consignment notes and a signed certificate attesting receipt of the goods.[201] While the VAT number could be initially confirmed by the authorities through the VAT Information Exchange System (VIES) database, a subsequent check revealed that the Greek company has been de-registered for VAT since before contracting with the Bulgarian company. On top of that, the Greek company did not declare intra-Community acquisitions. The Bulgarian authorities tried to manifest a

198 Case 273/11 *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* ECLI:EU:C:2012:547 at [45].

199 *Mecsek-Gabona* (n 198) at [48].

200 *Mecsek-Gabona* (n 198) at [64].

201 Case 492/13 *Traum EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralnoupravlenie na Natsionalnata agentsia za prihodite* ECLI:EU:C:2014:2267 at [8].

tax liability by interpreting the VAT Directive in the way that the supplier was in breach of his obligations as he did not prove the authenticity of the signature on the documents submitted.

The court restated the *Teleos and Others* argumentation that it would be contrary to the principle of legal certainty if a MS which has laid down the conditions for the application of the VAT exemption, and which it has accepted documentation, would subsequently require the supplier to account for VAT if the goods turned out not to have left the territory of the MS of supply.[202] As the obligation to check the status of a taxable person must be discharged by the competent national authority before it assigns that person a VAT identification number, possible irregularities cannot deprive the trader in his rights.[203] Consequently, the court interpreted the VAT Directive in line with previous judgments in the way that the principle of legal certainty precludes MS from acting like the Bulgarian authorities did. Additionally, the court made clear, that the VAT Directive must be interpreted as having direct effect in such circumstances, so that it may be relied upon by taxable persons.[204]

In the German case *Plöckl*, the German authorities tried to deny the exemption for intra-Community transfers from VAT claiming the taxable person has not provided a VAT identification number issued by the MS of destination, where there was no evidence of tax fraud and the other conditions of the exemption from tax are also met.[205] An intra-Community transfer, described as a transfer by a taxable person of goods from his undertaking to a MS other than that in which that undertaking

202 *Traum* (n 201) at [31].

203 *Traum* (n 201) at [31].

204 *Traum* (n 201) at [48].

205 Case 24/15 *Josef Plöckl v Finanzamt Schrobenhausen* ECLI:EU:C:2016:791 at [25].

is established is to be treated as a supply of goods effected for consideration.[206] It follows that for the purposes of the exemption from VAT, an intra-Community transfer is to be treated as an intra-Community supply.[207]

The court interpreted the VAT Directive as precluding a tax authority from refusing the exemption, due to a missing VAT identification number where there is no specific evidence of tax evasion and the goods have been moved to another MS and the other conditions of the exemption from tax are also met. Such a national measure goes further than what is necessary to ensure the correct collection of the tax. The right of exemption from VAT must not be subject to compliance of formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied.[208] Such a treatment would violate the principle of fiscal neutrality. The court had previously already decided that the exemption from VAT must be allowed if the substantive conditions are satisfied, if a transfer of goods meets the conditions laid down in the VAT Directive.[209] However, only if the supplier was acting in good faith and having taken all the measures which can reasonably be required of him.[210]

In reviewing the intra-Community supply jurisprudence, one must acknowledge that the court has consequently dismissed extensions of taxable persons' obligations. It has transferred the requirement of good faith from the MTIC cases to the field of intra-Community supplies. Though, as long as taxable persons act in good faith,

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206 *Plöckl* (n 205) at [26].

207 *Plöckl* (n 205) at [29].

208 *Plöckl* (n 205) at [37].

209 *Collée* (n 182) at [30].

210 Case 587/10 *Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH Rodewisch (VSTR) v Finanzamt Plauen* ECLI:EU:C:2012:592 at [51].

they have to fear no liability.

7.3.4 Input Tax

Another way pursued by tax authorities to make other taxable persons liable for VAT was attacking the correctness of invoices and disbelieving that actual supplies took place. The deduction of input VAT is in accordance with Article 178 VAT Directive only possible when the taxable person holds an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240 VAT Directive. Also, with a truly juridical appeal at the beginning, the jurisprudence on invoices gives insights on the obligations of taxable persons. From the above mentioned case-law, the criteria of good faith are still away from being substantiated.

7.3.4.1 Substantial Issues

In the joined cases *Mahagében and Dávid*, the authorities questioned supplies where only invoices confirmed that transactions took place. On substantive requirements, the authorities doubted that these sales could have been conducted. In *Mahagében*, the authorities mentioned missing lorries to transport unprocessed acacia logs; in *Dávid*, missing employees and the equipment necessary to carry out constructions are mentioned.

In consequence, the authorities questioned that the economic transactions had taken place and refused input tax deductions.[211] The referring court was unsure as to whether the taxable person has the right to deduct input VAT without carrying out supplementary inspections.[212] In essence, the court referred the question whether the criteria "good faith" could be fulfilled in the light of the above mentioned peculiarities.

In answering the question, the court primarily pointed out the deduction was denied without the competent authority establishing that the taxable person concerned was aware of that improper conduct or colluded in that conduct himself.[213] After reiterating the known arguments, the court transferred the *Kittel* guiding principle to invoices. According to which it must be established, on the basis of objective factors, that the taxable person to whom were supplied goods or services served as the basis on which to substantiate the right to deduct, knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction.[214] The establishment of a strict liability would go beyond what is necessary to preserve the public exchequer's rights.[215] It made the pivotal note that it is for the tax authority to establish, to the requisite legal standard, the objective evidence which allows the conclusion to be drawn that the taxable person knew, or ought to have known, that the transaction

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211 With a very similar setting Case 18/13 *Maks Pen EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia* ECLI:EU:C:2014:69 at [22]. Here, it was apparent that a supply was made by a different supplier.

212 Joined Cases 80/11 and 142/11 *Mahagében Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v Nemzeti Adó- és Vámhivatal Északalföldi Regionális Adó Főigazgatósága (C-142/11)* ECLI:EU:C:2012:373 at [27].

213 *Mahagében and Dávid* (n 212) at [36].

214 *Mahagében and Dávid* (n 212) at [45].

215 *Federation of Technological Industries* (n 156) at [32].

relied on as a basis for the right to deduct was connected with fraud committed by the supplier or by another trader acting in the chain of supply.[216] Henceforth, without such clear evidence of the authorities, the court ruled that the right to deduct input VAT in light of the foregoing considerations must not be refused. Further, the court denied responsibility of the taxable person to satisfy himself that the issuers of the invoice was in the possession of the goods in question and was in a position to supply them, and that he had satisfied his obligations as regards declaration and payment of value added tax.

In a Hungarian case named *Tóth*, the appellant undertook building works using subcontractors who were paid in cash.[217] One of the subcontractors had not complied with his tax obligations before contracting. Further, in the year of contracting with the appellant, the competent authority revoked this subcontractors licence to operate as an individual contractor. The Hungarian authorities were of the opinion that such a non-licensed contractor could not issue valid invoices which led to a denial of input tax deductions from such invoices.[218] The Hungarian court stated that the subcontractor had not declared temporary workers, and therefore, it had not been proved that he had carried out the works. Again, it was the question if the appellant knew or ought to have known that he was participating in a transaction connected with fraudulent evasion of VAT.[219] The referring court saw the possibility that the addressee of the invoice is guilty of a lack of care.

The missing license by the subcontractor was dismissed by the court as a reason

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216 *Mahagében and Dávid* (n 212) at [49].

217 Case 324/11 *Gábor Tóth v Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága* ECLI:EU:C:2012:549 at [15].

218 *Tóth* (n 217) at [17].

219 *Tóth* (n 217) at [20].

to refuse the right to deduct input tax.[220] Also, in repeating *Mahagében and Dávid*, the court decided that without objective evidence provided by the authorities, the deduction cannot be refused even in the case where the supplier did not register his employees.[221] Regarding further duties, the court decided that the fact that the appellant did not verify whether a legal relationship existed between the workers employed on a work site and the issuer of the invoice or whether the latter had declared those workers does not constitute an objective factor which demonstrates that the appellant knew or ought to have known that he was participation in fraudulent evasion of VAT.[222]

The same result brought up the Bulgarian case *Bonik*. In this case, the authorities found that there was no evidence of intra-Community supplies of wheat and sunflower declared by the appellant.[223] As the quantities of the goods were missing in the appellants accounts, the authorities undertook further investigations. Eventually, it could not be established, that supplies on the previous stage had been carried out to the appellant himself. As a consequence, the authorities refused the appellant the right to deduct.[224] Hence, the referring court asked the CJEU whether the right to deduct VAT can be refused on the ground that, in view of factors relating to transactions upstream of that supply, the supply is considered not to have actually taken place.[225] The court did not substantially rule over the details but followed that

220 *Tóth* (n 217) at [33].

221 *Tóth* (n 217) at [39].

222 *Tóth* (n 217) at [45].

223 Case 285/11 *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralnoupravlenie na Natsionalnata agentsia za prihodite* ECLI:EU:C:2012:774 at [11].

224 *Bonik* (n 223) at [17].

225 *Bonik* (n 223) at [24].

the referring court was to find whether or not the national tax authorities had enough evidence to establish on objective factors that fraud took place.[226] This has to be noted for the correct interpretation of the VAT Directive for third party liability issues.

In the aftermath of the forgoing judgments, the authorities had to realize that without objective evidence, the right to deduct input VAT could not be refused. The court had maintained basically no additional obligations for taxable persons in trading with others. No matter how shady other traders appeared or how unlikely the transaction could have been performed, the court refused to put a liability on suppliers who had no knowledge of fraud of their business partners.

7.3.4.2 Formal Issues

As the endeavors to make taxable persons, who are somewhere between being an accomplice to a fraudster and simply been negligent in search for their business partner, liable, the authorities came up with another idea. By interpreting the formal requirements for invoices in a restricted way, taxable persons who could not present acceptable invoices should have been made liable for unpaid VAT through a refusal of their rights. This leads the focus from good faith to the material conditions such as the invoice.

Similar to the previous cases is the case *PPUH Stehcemp*. In this case, the authorities refused to allow the appellant the deduction of input VAT by claiming the invoices corresponding to fuel purchases had been issued by a non-existent trader.[227]

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[226] *Bonik* (n 223) at [44].

[227] Case 277/14 *PPUH Stehcemp sp j Florian Stefanek, Janina Stefanek, Jaroslaw Stefanek v Dyrektor Izby Skarbowej w Łodzi* ECLI:EU:C:2015:719 at [18].

This closely resembles the *Tóth* case, however, not the non-existent trader was drawn in question but the invoices of the non-existent trader. Consequently, the court had to answer the question whether invoices issued by such traders could lead to input deductions.

The argument that the supplies could not have been supplied out of dilapidated buildings of the supplier were dismissed by the court. Such a finding does not mean that that activity could not be conducted in other places.[228] Also, the failure to submit a tax return and pay VAT, the defiance of the obligation to publish annual accounts or a missing concession to sell fuel do not change the status of the supplier.

Nevertheless, the court ruled, that a taxable person could be obliged, when there are indications pointing to an infringement or fraud, to make enquiries about the trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness. Such a statement is a clear signal into the direction of a JSL. However, the court limits this statement by ruling that such an obligation may not be required from taxable persons as a general rule.[229]

In *Barlis 06*, a Portuguese case, the authorities tried to dismiss the right to deduct input VAT of a hotel company on the grounds of insufficient descriptions of the supplies. Their suppliers issued invoices which only contained the description "legal services rendered from such a date until the present date".[230] While the court ruled that such a description does not specify the conditions required by Article 226(7) VAT Directive, it also had to answer if such a failure to comply leads to the

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228 *PPUH Stehcemp* (n 227) at [35].

229 *PPUH Stehcemp* (n 227) at [53].

230 Case 516/14 *Barlis 06 – Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira* ECLI:EU:C:2016:690 at [13].

consequence that the right to deduct input VAT is lost.[231] In answering, the court held that the fundamental principle of the neutrality of VAT requires deduction of input to be allowed if substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions.[232] In this vein, the court saw further obligations in the field of the tax authorities. They cannot restrict themselves to examining the invoice itself. They must also take account of the additional information provided by the taxable person.

In the German case *Geissel and Butin*, the authorities believed invoices containing an address of the supplier which led to a place where no economic activity was conducted did not fulfill the requirements of an invoice in the sense of Article 226 VAT Directive. In other words, the authorities denied the input deduction stemming from transactions with "ghost companies" and "letterbox addresses".[233] This view was rejected by the court. In line with previous case-law, the court reiterated that, as long as the substantive requirements are fulfilled, the formal conditions are of minor importance. Surprisingly, the court saw no need to take a fraud prevention perspective. Both on substantial and on formal issues, the court repeatedly and stringently took a position where tax payers who had acted in good faith could not be punished with a liability through the refusal of the right to deduct input VAT. The court has consequently ruled in favour of taxable persons who could have been made liable for trading with perceived bogus traders. Nevertheless, it also ruled that JSL is not fully off the table, when indications of fraud are evident.

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231 *Barlis 06* (n 230) at [36].

232 *Barlis 06* (n 230) at [42].

233 Joined Cases 374/16 and 375/16 *Rochus Geissel v Finanzamt Neuss and Finanzamt Bergisch Gladbach v Igor Butin* ECLI:EU:C:2017:867 at [15] and [23].

7.3.5 Specific Liability Rules

In *Vlaamse Oliemaatschappij*, the court had to deal with a true JSL rule and not the inherent liability requirements of the VAT Directive. The appellant, a service provider which unloaded and stored petroleum products, operated a "tax warehouse" within the meaning of Article 4(b) Directive 92/12.[234] Goods in this warehouse were placed under suspensive VAT arrangements in the first place. Later, when goods were removed from the warehouse and either are no longer under warehousing arrangements other than customs warehousing, or are supplied for valuable consideration, VAT became chargeable in respect of those goods. In detail, the case was a question if the appellant showed enough caution or not.

A further taxable person stored its petroleum products in the appellants warehouse. This company was declared insolvent and the appellant received an order for recovery under the Belgian VAT code for the other persons tax liability. The appellant saw the Belgian JSL rule of the warehouse-keeper in violation to the general principles of legal certainty and proportionality. The appellant saw reasoning for this opinion because the Belgian rule applied irrespective of whether or not the warehouse-keeper acted in good faith.[235] He brought forward, that the warehouse-keeper, since he merely made his warehouse available to his customers and allowed goods to be stored and had no legal or fiscal means at his disposal to monitor or enforce the effective payment of VAT by his customers, exceeds the limits of what is appropriate and necessary for the attainment of the objectives that it pursues.

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[234] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ L76/1 (European Communities).

[235] Case 499/10 *Vlaamse Oliemaatschappij NV v FOD Financiën* [2011] ECR I–14191 at [15].

The court agreed with the opinion of the appellant. In reiterating *Federation of Technological Industries*, it stated that national measures which bring about, de facto, a system of strict JSL, go beyond what is necessary to preserve the public exchequer's rights. It added that it would be clearly disproportionate to hold the warehouse-keeper unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever. It is not contrary to the EU law to require the person other than the person liable to pay the tax to take every step which could be reasonably required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion.[236]

The *Jestel* case was regarding the payment of a customs debt arising from the unlawful introduction of goods into the customs territory of the EU.[237] It closely resembles the current situations of digital platforms and VAT enforcement. The appellant auctioned goods originating in China on the internet platform eBay. He acted as intermediary in the conclusion of the contracts of sale of those goods and collected the sale price. The prices and the procurement of the goods was in the hands of the Chinese supplier who directly delivered to the purchasers based in Germany by post.[238] The supplier made inaccurate declarations with regards to the content and the value of the shipment. In comparison to the current problems on platforms, the case differs from this situation insofar, as the authorities tried to make the seller liable, not the platform.

Article 202(3) Customs Code contained that the debtors for a customs debt shall

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236 *Vlaamse Oliemaatschappij* (n 235) at [24] and [25].

237 Case 454/10 *Oliver Jestel v Hauptzollamt Aachen* [2011] ECR I–11725 at [2].

238 *Jestel* (n 237) at [4].

be,[239] amongst others, any person who participated in the unlawful introduction of the goods and who was aware or should have been aware that such introduction was unlawful. Insofar, the wording of the Customs Code was further than the VAT Directive. The wording of the VAT Directive is more reluctant as Article 205 VAT Directive puts it into MS hands to provide that a person other than the person liable for payment of VAT is to be held joint and severally liable for payment of VAT.

The referring court asked the CJEU whether the second indent of Article 202(3) Customs Code must be interpreted as meaning that an intermediary who did not actively engage in the process of the unlawful introduction of goods into the customs territory of the EU could be held liable? The referring court further asked whether such a person, in the case of a liability, only becomes a debtor if he expects the goods concerned to be unlawfully introduced or whether it is sufficient for such a person to merely consider such an introduction conceivable.[240]

The court ruled, in line with VAT case-law, it is for the national courts to carry out an overall assessment of the circumstances of the case.[241] Nevertheless, the court gave clarifications to guide the national court in its decision.

The court saw, in particular, that it must be held that a person acting as intermediary in the conclusion of contracts must know that the delivery of goods from a third state into the EU gives rise to an obligation to pay import duties.[242] Further, the information that was available to the intermediary, of which he should reasonably have been aware, must also be taken into account. In this vein, it is

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239 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L302/1 (European Communities).

240 *Jestel* (n 237) at [11].

241 *Jestel* (n 237) at [23].

242 *Jestel* (n 237) at [24].

important to know whether the import duties to be paid were indicated on the contracts or on other documentation available to the intermediary, which would suggest that the introduction of the goods into the territory of the EU would be carried out in a lawful manner. Also, the period during which the intermediary provided his services to the seller of the goods may be considered. Over a longer period, it may appear unlikely that the intermediary did not have the opportunity to become aware of the practices of the seller concerning the delivery.

7.3.6 Joint and Several Liability in the VAT Directive without National Implementations

The VAT Directive contains specific provisions regarding persons liable for the payment of VAT to the tax authorities.[243] The general rule prescribes VAT to be payable by any person carrying out a taxable supply of goods or services.[244]

Further provisions shift the tax liability in specific cases to other persons in the chain of supply. A prominent example is Article 199 VAT Directive which lists the circumstances where the reverse-charge procedure applies and the taxable person to whom any of the listed supplies are made, become the person liable for payment of VAT.

In addition, Article 205 VAT Directive gives another possibility. This article allows for MS to 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. This essentially leads to three different liable persons.[245] Primarily, the provider of the supply. Secondarily,

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243 Title XI VAT Directive.

244 Art 193 VAT Directive.

245 Refraining from other special cases such as persons designated or recognized as liable for importation

the recipient of the supply, and thirdly other persons.

As the thorough review of CJEU jurisprudence has shown, JSL is embodied through the principle to prevent fraud,[246] as stated in *Italmoda*. However, the applicability of the principle has a tiny scope. The judgments show that bad faith is inevitable to trigger liability. Especially the judgments on the substantive requirements for the input deduction show, that suspicious transactions can occur without leading to a liability for taxable persons in the chain of supply. The court has consequently been reluctant in giving taxable persons further obligations. Their rights remain unaffected if the tax authorities are unable to present objective evidence, that the taxable person knew or ought to have known that he was participating or enhancing fraudulent activity.

Taking a step back, the court's reluctance is in line with the logic behind the VAT Directive. As the VAT Directive opens the possibility to include JSL norms to MS, it becomes evident, that obligatory joint and several liability through the VAT Directive itself does not make sense. Against this background, it is stringent that the court – even in the presence of highly suspicious cases – has refrained from an extensive use of JSL. Contrary judgments would effectively deprive the MS from the possibility to opt not so use JSL mechanisms.

(Art 201 VAT Directive) or persons entering VAT on an invoice (Art 203 VAT Directive).

246 Roland Ismer, Rechtswissenschaftliches Gutachten: Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht (2018) 15.

7.3.7 Insights from the VAT Directive

As an interim conclusion, one must note that JSL on the grounds of the VAT Directive is possible. However, the scope is small and practicability issues prevent the extensive use of this mechanism in the fight against fraud.

The problem can be depicted as follows. By default, the VAT Directive appoints every taxable person good faith. This is in line with general principles of law which prevent a negative outcome without objective evidence of wrongdoings. In this vein, VAT law is perfectly in line with criminal law. As VAT is a mass procedure, skepticism towards traders would also be a highly inefficient basis. Additionally, from this standpoint, the court did good in not putting further obligations which might have looked appealing in a certain case but would have been impossible to maintain in other similar cases. Nevertheless, some traders start with dishonorable intentions. Also, intentions of traders who showed good faith previously might change in the lapse of time.

The VAT Directive and the court's accompanying jurisprudence are unable to effectively prevent fraud. Objective criteria are in the utmost cases only visible – if they become visible at all – after the VAT fraud has been committed. In the VAT context, fraudsters can successfully circumvent the criterion of leaving objective criteria that anyone involved must have known that his trading partner would be committing fraud.

From this standpoint, it is comprehensible that MS are undertaking initiatives, being it through acts of tax authorities or through legislative actions. The next section elaborates on the German implementation of a JSL rule.

7.4 Case Study: VAT Fraud on a Digital Platform in Germany

7.4.1 The German Joint and Several Liability Rule

The last section has shown that the VAT Directive itself is an unsuitable measure to fight VAT fraud. To be in a better position to fight fraud, the German legislator has implemented a JSL rule for electronic marketplaces effective from 2019 on.[247]

The German national implementation foresees JSL for an operator of an electronic marketplace. Precisely, the JSL is for unpaid tax from a supply of a taxable person which has been conducted on its marketplace.[248] As the CJEU has ruled in *Vlaamse Oliemaatschappij* that unconditional liability would be disproportionate, the German legislator chose a special design for the provision. The liability norm is flanked with a separate documentation norm.[249] These documentation requirements are designed in the way that the liability is to be regarded as conditional and therefore in line with CJEU jurisprudence.[250]

The operator of an electronic marketplace in the German provision can escape liability through two ways. The method depends on how the trader has identified

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247 § 25e UStG. Implemented through art 9 Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften, BGBl. I 2018, 2338 (Bundesrepublik Deutschland). This section builds on the groundwork done in Chapter 5.

248 § 25e (1) UStG. See also Aleksandra Bal, 'Germany: New VAT Compliance Obligations for Online Platforms' (2019) 28(2) EC Tax Review 114.

249 § 22f UStG.

250 Bernd Heuermann, 'UStG § 25e Haftung beim Handel auf einem elektronischen Marktplatz' in Wilfried Wagner (ed), *Sölch/Ringleb Umsatzsteuergesetz* (2019) 3. With a different assessment, Rechtswissenschaftliches Gutachten: Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht (n 246).

him or herself in his or her marketplace profile. Hence, first, the operator of the marketplace may not be made liable if he or she is in possession of a certificate of registration of the respective seller. However, this possibility to defer liability only exists, if the marketplace operator does not know or should not have known that the supplier was not fully following his tax obligations.[251] Second, the operator is not made liable if the seller has not registered him or herself as a taxable person and the operator fulfils his documentation requirements.[252]

Taking a closer look at the first possibility to escape the JSL, one must acknowledge the proximity to the CJEU jurisprudence. Once the marketplace is in possession of the certificate, the liability is excluded as long as the operator did not have or should not have known that the supplier was in breach of his tax obligations.

7.4.1.1 Undervalued Consignments

Until this point, VAT fraud has not been substantiated. While the above mentioned MTIC fraud is presumably the most famous kind of fraud, other types of fraud exist.[253] One major current field of VAT fraud typically occurs with regard to consignments sent from third countries,[254] as already indicated above in the section on BEPS Action 1. This kind of fraud will be depicted closer below in the light of the German JSL rule in part of the following section.

Anecdotal evidence reports that especially Asian sellers flush the EU market

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251 § 25e (2) UStG.

252 § 25e (3) UStG. Bearing in mind § 25e (3) sent 2 UStG.

253 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (2017) 99 table 11. Robert C Prätzler, 'Split Payments in VAT Systems – Is This the Future?' (2018) 29(2) International VAT Monitor 66, also depicts different kinds of fraud.

254 European Court of Auditors, *Special Report 12/2019* (n 11) no 82.

through (undervalued) parcels.[255] It is this section's task to elaborate on the question whether the German version of JSL can effectively prevent VAT fraud with undervalued consignments. In order to do so, an overveiled depiction of the correct handling of consignments in EU MS is necessary.

In the EU, B2C supplies of goods purchased from non-EU countries have a low value consignment relief when the value of the consignment does not exceed €22.[256] Germany makes use of this possibility and exempts goods of a value not exceeding €22.[257] This leads to goods coming into the EU market without VAT and customs payments.[258] For gifts, sent from one private individual to another private individual (P2P) the threshold lies at €45.[259] Above these thresholds, importation VAT applies.

In this event, according to the VAT Directive, generally, the chargeable event during importation shall occur when the goods are imported. VAT shall become chargeable at the same time.[260] The place of importation of goods shall be the MS within whose territory the goods are located when they enter the Community.[261] The taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force. [262] Further rules regarding the importation

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255 For instance see Tatort Amazon (n 10).

256 Art 23 of Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods, OJ L292/5 (European Union). This possibility is abolished from 01.01.2021, see art 3 e-commerce Directive.

257 § 1 Einfuhrumsatzsteuer-Befreiungsverordnung, BGBl. I 1992, 1526 (Bundesrepublik Deutschland).

258 The threshold for customs duties is set at €150, for an overview see European Court of Auditors, *Special Report 12/2019* (n 11) table 3.

259 Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small, OJ L286/15 (European Union).

260 Art 70 VAT Directive.

261 Art 60 VAT Directive.

262 Art 85 VAT Directive.

are laid out in the Unions Customs Code.[263] These rules prescribe for instance that goods brought into the customs territory of the Union shall be covered by an entry summary declaration.[264]

However, several reports of the European Court of Auditors (ECA) reveal that such taxes are often not levied by the responsible customs authorities. The latest special report of the ECA reveals that EU customs still struggle heavily with abuse of the low value consignment relief (LVCR) for goods imported from non-EU countries.[265] The ECA specifically mentions that the here depicted undervaluation of goods is used in order to abuse the thresholds for VAT and/or customs exemptions.

To verify whether MS customs clearance systems are able to apply the law, the ECA carried out a test in the dummy environment of five visited MS.[266] The ECA found that all customs electronic clearance systems accepted declarations that were not eligible for the LVCR.[267] In Sweden, only 30 per cent of the imports were identified as correct. Four of the five MS accepted import declarations applying for the customs duty relief for B2C consignments, even though the declared intrinsic value was higher than €150.[268] The ECA already recommended measures to fix this problem in special

263 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Unions Customs Code (recast), OJ L269/1 (European Union) (hereinafter: Union Custom Code).

264 Art 127(1) Union Customs Code.

265 European Court of Auditors, *Special Report 12/2019* (n 11) 29.

266 The MS were Ireland, Sweden, the Netherlands, Austria and Germany.

267 European Court of Auditors, *Special Report 12/2019* (n 11) 30.

268 In breach of art 23 Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, OJ L324/23 (European Union).

report 19/2017,[269] however, none of the MS addressed the recommendations.[270] The clear statement that the customs electronic clearance systems are not able to prevent the importation of goods that are ineligible for the LVCR brings up systematic questions.

7.4.2 Applying the German Statutes to Undervalued Parcels

With the new German JSL norm in place since 01.01.2019 it is to verify now whether the rules successfully prevent VAT (and customs) fraud with undervalued parcels.

The rules, namely the documentation requirements and the JSL itself, deem the electronic platform liable in specific cases. As the following case study will show, the scope of the rules does not cover all cases.

Before making an operator of an electronic marketplace liable for unpaid VAT and customs duties, one must differentiate. As stated above, commercial consignments with a value not higher than €22 are excluded from VAT and customs. Hence, no one is liable for any tax payments or customs duties. The same applies to private gifts up until €45. Notwithstanding that gifts may not be sold for commercial purposes without a violation of the term gift, the label "gift" on consignments may also be used by fraudsters.

Goods over €22 sold on an electronic marketplace come with a connected VAT burden which can theoretically be put on the shoulders of the operator of the electronic marketplace. For such parcels one must take a closer look on the contractual

[269] European Court of Auditors, *Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU* (2017).

[270] European Court of Auditors, *Special Report 12/2019* (n 11) 31.

agreements between the seller and the buyer. Before the burden can be extended to the operator of an electronic marketplace, one must identify if a duty to pay a tax exists and who is liable for the payment.

Even though the wording of the German statute "liability for unpaid tax from a supply of a taxable person" suggests a broad scope, supplementary documentation by the German tax authorities reveals that direct sales, in which a good not stored in Germany at the time of contracting, or where transport or dispatch begins in a third country and the place of delivery is not in Germany according to § 3 (8) UStG, are not covered by the liability rules.[271] Accordingly, it is of pivotal difference who is originally liable for the tax. If consumers are liable for VAT, precisely importation VAT, the German rules are inapplicable.

The contractual agreements of the seller and the buyer are of major importance for the applicability of the German JSL norm. As international trade inevitably leads to a clash of different national commercial law practices and traditions, common international standards are essential. Such voluntary international commercial terms are set by the International Chamber of Commerce (ICC). The terms hold universal meaning for buyers and sellers around the world. The ICC started working on predefined commercial terms in 1923. Their results, the International Commercial Terms (short: Incoterms) were amended over the years. Currently, the eighth version of the Incoterms which has been published on 01.01.2011 is in place. While the Incoterms are commonly used and known in international trade between merchants, private

[271] Bundesministerium der Finanzen, Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (2019) no 11. Nevertheless, they are covered by the documentation requirements. Also Benno L'habitant, 'Das BMF-Schreiben vom 28.1.2019 zur Haftung für Umsatzsteuer beim Handel mit Waren im Internet' (2019) 21(5) Steuern und Bilanzen 177, 178.

persons do commonly not possess knowledge of them.

On a cursory note, the Incoterms give pre-defined sets of a sharing of obligations between the buyer and seller. The Incoterms 2010 consist of 11 sets. Seven of them are rules for any mode of transport, while four are specific rules for sea and inland waterway transport. Amongst a variety of points, customs duties and taxes are also part of the pre-defined rules. Each set is abbreviated with a three-letter abbreviation, such as EXW, standing for "Ex Works". For example, if seller and buyer contract under these EXW terms, both are supposed to know that the seller only pays for export packing, marking and labelling, while all other duties must be covered by the buyer. In focusing on the responsibility for customs duties and taxes, one must notice that only one set of terms (out of the mentioned 11), namely DDP standing for "Delivered Duty Paid", foresees the seller to cover the costs for taxation and customs.[272] Within the other ten pre-defined sets of contractual agreements, the buyer is responsible for the tax. These circumstances contribute to a fertile ground for fraud, as fraudsters can easily shift responsibilites to others, for example the consumer. While the consumer is unaware of his responsibilites, and the customs offices apparently are not able to remind the consumer of his responsibilites, fraud can easily take place.

As elaborated above, for JSL of the operator it is of importance who is initially liable for VAT. Accordingly, two different scenarios need to be looked at.

[272] ICC, Incoterms® 2010 Quick Reference Chart (2010).

7.4.2.1 Responsibility of the Buyer for VAT

When the buyer is liable for VAT, two scenarios appear feasible. Either customs authorities clear the consignment without further inspection and the consignment is directly delivered to the consumer; or the consumer must pick up the consignment at the nearest customs office.

In the latter case, consumers must pay taxes and duties before they can take the good in their possession. To some extent, such a procedure seems relatively fraud proof. However, the procedure comes with high administrative burden and costs. Within this scenario, one must further differentiate between a customs procedure in general – leading to a tax and potentially a customs payment – and the correct customs procedure which, to a certain degree, determines the correct value of the consignment and accordingly the correct amount of tax and duties. Especially for not regularly traded foreign goods, a justifiable value is tough to find under harsh time and cost restraints. However, as customers commonly have to provide supplementary documentation to come up with a customs value, the procedure has sufficient controls to come up with a reasonable customs value and the respective amount of tax.

If the afore mentioned reports are true, such a traditional border crossing procedure is chosen by customs authorities in very few cases. The reports suggest that most consignments from non-EU MS enter the free market without further inspection. In such a case, where a consumer receives a consignment without any VAT and customs payments – when those should have actually been levied – German law requires the consumer to "immediately indicate and conduct the necessary rectification" with the tax authorities once they come in possession of the good.[273] The said obligation is

[273] § 153 (1) sent 1 Abgabenordnung, BGBl. I 2002, 3866 (Bundesrepublik Deutschland).

most likely unknown to the average German consumer. Moreover, it is – just as in the US pre-*Wayfair* area – a tax on honesty.[274] It is not surprising that consumers do not comply with this regulation, as the likelihood of being found guilty is basically zero.[275]

On the question of JSL, from a general perspective, it is debatable whether an operator of an electronic marketplace should be made liable in such a scenario. As indicated above, the German tax authorities expressively excluded cases of direct sales from the scope of the JSL norm. This is understandable from the legal viewpoint that neither the seller nor the electronic platform evades VAT and customs. Nevertheless, the seller aids the evading process by purposefully understating the value of the consignment. From this viewpoint, it seems incomprehensible why the scope of the JSL rule does not cover such a case. To conclude one has to note that the German JSL rule is ineffective against fraud with undervalued consignments where the buyer has the responsibility for (importation) VAT. An easy and minimalistic solution – from the perspective of the German legislator – would be to include such transactions in the scope of the JSL norm.

7.4.2.2 Responsibility of the Seller for VAT

The case for unpaid VAT on undervalued consignments is different when the seller has to account for VAT. German VAT law provides that in cases where a good is dispatched or transported from a third country by the supplier or an agent of the supplier who becomes liable for import VAT, the place of supply lies within the

[274] Hellerstein, 'A Hitchhiker's Guide to the OECD's International VAT/GST Guidelines' (n 85) 621.

[275] Kemper (n 100) 290, calls it a "win-win" situation for consumers and suppliers.

territory of Germany.[276] This leads to the following consequences.

First, as the seller has contractually obliged himself to pay customs and VAT, it is evident that a liability exists which could potentially be in scope of the German JSL statute. However, the liability for (import) VAT is less of interest, as it comes with an input tax deduction for a taxable person importing the good for the purposes of its business.[277] Second, and more important, the place of supply is Germany. Hence, the seller is (also) liable for general VAT in Germany. Accordingly, a VAT liability exists. The administrative guidelines by the German tax authorities explicitly state that such a case is within the scope of the German JSL norm.[278] As anecdotal evidence suggests very few Asian sellers are registered in Germany and consequently file VAT returns.[279]

Now, as the scope of the German JSL rule with regards to undervalued consignments has been brought to light, one must check whether the electronic marketplace can prevent liability. As stated liability can be diminished through a certificate of registration of the seller. If the operator of the electronic marketplace holds such a certificate of registration of the seller, he or she may be made liable only if he or she, according to the standard of a reasonable businessman, knew or should have known, that the supplying taxable person is not complying fully or partly with his or her tax duties or if he or she received a notice by his local tax office.[280]

This wording mirrors the CJEU's wording with the slight amendment of the

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276 § 3 (8) UStG.

277 § 15 (1) no 2 UStG.

278 Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (n 271) no 6.

279 Pressemitteilung Nr. 18-009 (n 131).

280 § 25e (2) sent 2 UStG.

"standard of a reasonable businessman". In essence, through the national implementation of the JSL statute, the German legislator transferred the court's jurisprudence into national law. Consequently, a different conclusion for the German law is off the table. The German statute is just as effective as the court's jurisprudence.

Just as the CJEU, the German legislator also refrains from substantiating the term "should have known". Only the German tax authorities gave the non-binding statement that it is to be assumed that the operator of the electronic marketplace has knowledge or ought to have knowledge if he or she disregards obvious facts or facts that have come to his or her attention that indicate a breach of duty with regard to VAT by the taxable person operating on his or her marketplace.[281] Further, the German authorities substantiate, that "active investigation" is not necessary. Only facts that become known to the operator within the framework of his or her own company, leading to the conclusion that VAT obligations are violated need to be considered. Also, regarding the burden of presentation and determination, the German authority interpretation is in line with the court's interpretation that this obligation is with the tax authorities.

7.4.3 Interim Conclusion

As shown in this section, the German JSL norm is not an effective measure to fight VAT fraud with undervalued parcels.[282] Primarily, it is dependent on the

[281] Umsatzsteuer; Haftung für Umsatzsteuer beim Handel mit Waren im Internet (§§ 22f, 25e und 27 Abs. 25 UStG): III C 5 - S 7420/19/10002 :002 (n 271) no 16.

[282] Hufeld (n 110) 760, sees constitutional problems. Rechtswissenschaftliches Gutachten: Die geplanten Neuregelungen zu Aufzeichnungspflichten und zur Haftung von Marktplatzbetreibern in § 22f und § 25e UStG-E aus rechtstechnischer und europarechtlicher Sicht (n 246) doubts its compatibility with EU law.

contractual agreements between the contracting parties. An electronic marketplace is not necessarily in possession of these contractual agreements, as they are often not expressively stated. Cases where the buyer is responsible for VAT payments are not within the scope of the German JSL norm. Thus, they are completely ineffective in these cases. Cases where the seller is responsible for VAT payments fall under the German JSL norm. If, in such a case, the seller refrains from fulfilling his or her tax obligations, the operator of an electronic marketplace can be made liable for the unpaid VAT. However, the CJEU standard of "should have known" is applied.

With reference to the analysis of the CJEU jurisprudence in section 3 of this chapter, one has to note that such a setting does not go further than the court's judgments. The court had already ruled even before the German implementation of a JSL norm that taxable persons other than the actual taxable person can be made liable if tax authorities can prove that the other taxable person knew or should have known, that the supplier was not fulfilling his VAT obligations. Insofar, the German implementation is not stricter than the CJEU, however, creating much more bureaucracy.

7.5 The Split Payment Mechanism in B2C E-Commerce Transactions

Both the CJEU's jurisprudence and the German national implementation of JSL for electronic marketplaces are ineffective with regard to undervalued consignments. Also, the question of proportionality may be posed.[283] It is this section's purpose to

[283] Kemper (n 100) 292.

show a more effective solution to the problem.[284]

In drawing insights from the previous sections, one major conclusion is that *ex post* fraud mechanisms have the disadvantage of not preventing fraud in the first place. JSL norms intend to compensate realised revenue losses. This section elaborates on a mechanism which intends to prevent the fraud of actually taking place.

In the recent years, an alternative collection system labelled as the SPM became popular in several MS.[285] In contrast to a standard transaction, where a taxable person collects the payment of the taxable base and the VAT from its client, a SPM introduces a change in such a regular transaction. In the general idea of split payments, the payments are split between the taxable base (consideration) and the actual tax.[286]

This idea can be implemented in different ways. While one alternative includes a blocked VAT bank account, another alternative foresees a direct payment to the treasury, also known as VAT withholding or real-time VAT.[287] In the blocked bank account alternative, a bank account can be held at different levels, for example at the level of a clearing house or at the level of the taxable person's bank. Technically, an automated system needs to be implemented into transaction processes routing payments automatically to two accounts, one account for the supplier's received

284 Also Hufeld (n 110) 768 or Kemper (n 100) 293.

285 Prätzler (n 253) 67-69.

286 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 20. The original idea goes back to Sinn, Gebauer, and Parsche (n 7) 31.

287 Richard Thompson Ainsworth and Boryana Madzharova, 'Real-Time Collection of the Value-Added Tax: Some Business and Legal Implications' [2012] (12-51) Boston University School of Law Working Paper 8.

payments and one special tax account. The intention of a separate account is obviously to give the supplier limited disposal possibilities over this account. Depending on the implementation, a blocked bank account can commonly only be used for tax payments. Through such a mechanical stripping of his possibilities to dispose over VAT from consumers, fraud – as one possibility to use the money – is heavily reduced.

Two graphical illustrations are presented in the following in order to enhance the understanding of the SPM in a cross-border scenario.

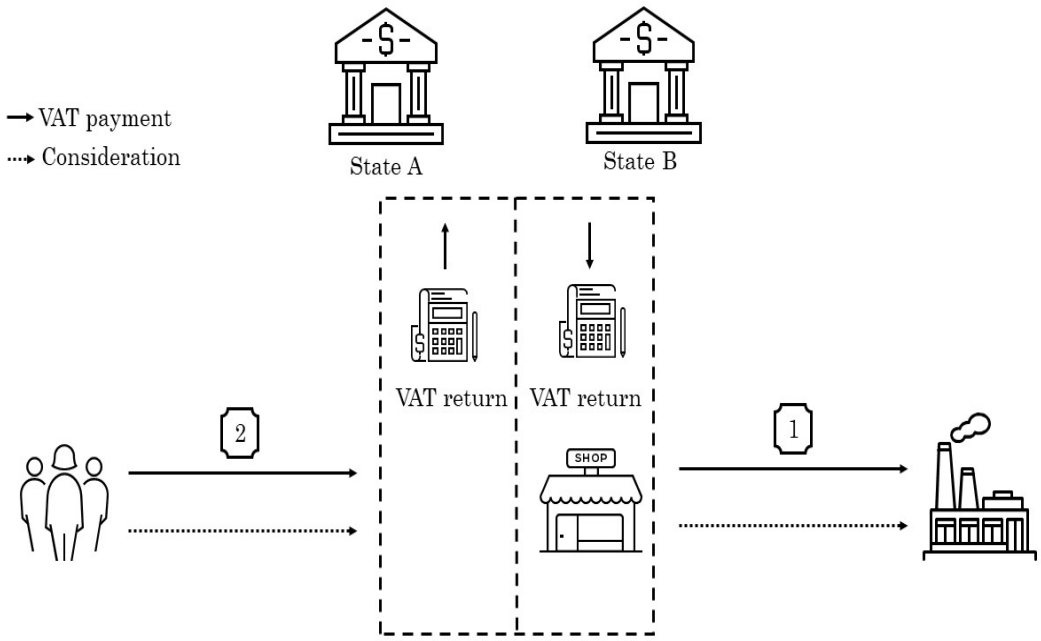

Figure 7.1: Cross-border scenario with VAT returns in both states
Inspired by European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (2017) 19.

Figure 7.1 illustrates a traditional registration, collection and payment procedure

in a cross-border setting. Beginning from the right to the middle (labelled as transaction 1), a trader buys a good from a manufacturer in order to export the good to state A. As exports are commonly zero-rated, he keeps his input VAT deduction right – even without revenues in state B. The taxable person files a VAT return and receives the paid VAT back in full. The transaction between the final consumer and the trader is under state A's jurisdiction. The payment and the consideration is received, a VAT return is filed in state A and the trader has to fully pass on the VAT payment of the consumer. This evidently shows the risk of simply omitting the necessary VAT payments in state A. It also highlights that state B has no incentive to care for state A's revenues, as state B fully applies internationally accepted principles of indirect consumption taxation.

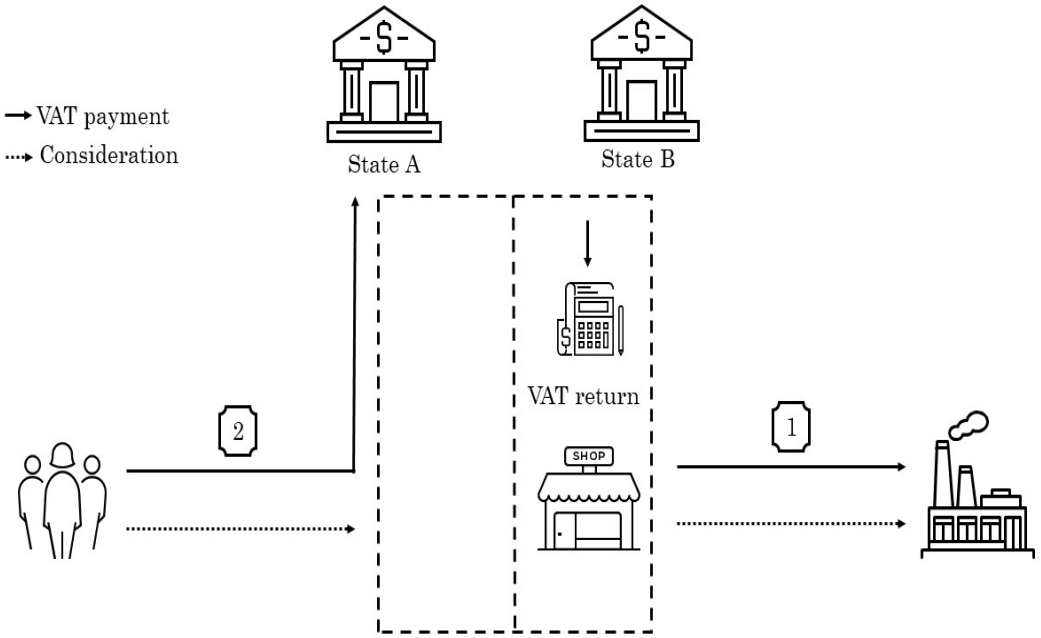

Figure 7.2: Cross-border scenario with SPM in state A
Inspired by European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (2017) 20.

The intention of Figure 7.2 is to illustrate the general idea of a SPM. Transaction 2 is unchanged, as logically the VAT consequences. Note, it is state A applying the SPM mechanism for cross-border transaction, not state B. Only transaction 2 is affected. In this rudimentary example, the payment of the final consumer is split into the VAT payment and the consideration. Just going by the idea, the VAT payment is going directly to the state treasury, without the power of disposal of the trader. Coming with this lack of disposal is the possibility to use the VAT payments as working capital. As stated above, this could be done in several ways, for example

with blocked accounts or with intermediary payment providers who split the payment. Though, this graphic solely intends to illustrates the idea of SPM.

In the last decade, studies on the general use of the SPM have been conducted. While these studies had no focus on e-commerce, they still may be used as a starting point for developing a solution to cross-border e-commerce transactions.[288]

7.5.1 Studies on the Split Payment Mechanism

7.5.1.1 PricewaterhouseCoopers Report

The split payment system has been brought into discussion by the EU COM in its communication on the future of VAT in 2011,[289] also known as the Green Paper on VAT. The EU COM described the SPM as a model in which the purchaser pays the VAT to a blocked account with the tax authorities' bank which can only be used by the supplier for paying VAT to his suppliers' blocked VAT bank account.[290]

The COM stated in 2011 that the SPM prompted generally negative reactions from business and tax practitioners. Practitioners were concerned about the impact of the method regarding cash flow, compliance costs, commercial issues and its ability to reduce the VAT gap.[291] This conclusion was based on an extensive study

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[288] Also, the literature focusses on reforms in total instead of focussed reforms, see for instance Ainsworth and Madzharova (n 287).

[289] 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 system tailored to the single market* (COM(2011) 851 final, 2011) 5.3.3.

[290] European Commission, *Commission Staff Working Document: Accompanying document to the Green Paper on the future of VAT Towards a simpler, more robust and efficient VAT system* (SEC(2010) 1455 final, 2010) 102.

[291] 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,*

by PricewaterhouseCoopers from 2010. However, the COM staff saw the need to express that these borrowed conclusions and recommendations are the result of independent work carried out by PricewaterhouseCoopers and do not necessarily reflect the opinions or position of the Commission.[292] Hence, the study should be seen as an initial assessment of the feasibility of changing the way VAT was collected at the time. In this vein, the EU COM comitted itself so further analyse the feasibility of the split payment mechanism and its design in order to allay the concerns expressed with a view to deciding on the appropriate follow-up at a later stage.[293]

The cited study was an extensive study conducted by PricewaterhouseCoopers commissioned by the EU COM.[294] It was released in 2010. The study explored the feasibility of alternative methods for improving and simplifying the collection of VAT by means of modern technologies and/or financial intermediaries in general. It was motivated by the VAT gap which had been estimated at €118.8 billion in the year of 2009.[295] The study considered fourteen different alternative collection models, four of them dealt with the SPM for goods and services purchased via electronic fund transfer (EFT). However, the SPM was considered only in the B2B context,[296] which deems the results completely inapplicable to the herein depicted

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more robust and efficient VAT system tailored to the single market (n 289) 5.3.3.

[292] European Commission, *Commission Staff Working Document: Accompanying document to the Green Paper on the future of VAT Towards a simpler, more robust and efficient VAT system* (n 290) 105.

[293] 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 system tailored to the single market* (n 289) no 23.

[294] PricewaterhouseCoopers, *Study on the feasibility of alternative methods for improving and simplifying the collection of VAT through the means of modern technologies and/or financial intermediaries: Final Report – 20 September 2010* (2010).

[295] PricewaterhouseCoopers (n 294) 122.

[296] PricewaterhouseCoopers (n 294) 11.

problem. Nevertheless, the study led to the perception by the EU COM that further investigation is necessary.[297]

7.5.1.2 Deloitte Report

In 2017, the EU COM commissioned another study, this time to Deloitte.[298] This study was more specific than the PricewaterhouseCoopers study and focussed on an analysis of the impact of the SPM as an alternative VAT collection method instead of alternative models in general. Even though the study had an extended scope, also including B2C and even business to government (B2G) transactions, it is still widely inapplicable to the problem of undervalued consignments from abroad. Instead of an isolated focus on the impacts of SPM for B2C transactions in particular, the study contributed by extending the former results of a system change for B2B transactions. The study was designed in the way that no scenario gives insights on the specific effects for the application on e-commerce.

The Deloitte study concluded in the same manner as the PricewaterhouseCoopers study.[299] While the SPM was recognized as reducing the VAT gap by intervening in the payment and collection cycle, the findings of the analysis stated "no strong evidence that the benefits of split payment would outweigh its costs".[300] To come

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297 PricewaterhouseCoopers (n 294) 252.

298 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253).

299 Furthermore, the European Commission discarded the option of payment service providers to split payments, European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposals for a Council Directive, a Council Implementation Regulation and a Council Regulation on Modernising VAT for cross-border B2C e-Commerce* (SWD(2016) 379 final, 2010) 5.2.6.

300 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) i.

up with such a conclusion, a cost-benefit analysis with a standard cost model (for administrative burden analysis)[301] was conducted.

7.5.2 Applicability the Split Payment Mechanism in the Field of E-Commerce

7.5.2.1 Assessment Framework

The conclusion that split payments are not recommendable on EFT between taxable persons and final consumers and taxable public bodies does not give insights on its application in the field of cross-border e-commerce.[302] Further, the chosen scenario in the Deloitte report only applied split payments to cross-border B2C transactions which are treated as domestic supplies. This resembles the complexity of problems in the usage of the German JSL norm. To evaluate the SPM in the context of e-commerce, therefore, a further qualitative analysis is necessary. To do so, the Deloitte report suggests a starting point. However, this suggestion will not be agreed for the following reasons.

The used design in the Deloitte study is disregarded as it made use of a peculiar implementation of the SPM. The study suggested requiring the supplier to split the payments or to contract an intermediary to fulfil his respective VAT obligations. The idea of using the supplier as the splitting agent raises eyebrows, as it pushes the SPM dangerously close to a normal registration model.[303] The study further

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301 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 7.

302 In the same vein, HM Revenue & Customs, *Alternative method of VAT collection – split payment: Summary of Responses* (2018) 3.4.

303 Charlène A Herbain and Alain Thilmany, 'Split payment: the validity of a not so new alternative VAT collection model' (2018) 63(2) British Tax Review 156, 157 also state that the main feature of

finds that despite the object of split payments to collect VAT before it reaches the supplier, it could be considered "most appropriate as well as practical (i.e. the only feasible option) to continue to oblige the supplier to collect VAT and pay it to the tax authority".[304] The main difference to a normal registration model would then be the requirement of the supplier to pay VAT on a near real time basis.[305] On the question why the supplier collection should be the "most appropriate" way of collecting in B2C transactions discloses a lack of creativity by the report writers. While the American pre-*Wayfair* era has shown that consumer collection is certainly not a revenue maximising idea, one can approve the decision not to recommend consumer splits. Only little attention is paid to intermediaries. However, the report did not fully disregard intermediaries. It suggested that the use of an intermediary would remain optional. On a general note, the report stated that it would be legally and practically challenging to shift the liability for VAT and or/splitting to an intermediary in case of B2C EFT transactions.[306]

Consequently, the Deloitte report does not work as a good basis to draw conclusions on the applicability of the SPM for e-commerce. Hence, the next subsection analyses the SPM with a scope on cross-border e-commerce transactions for the critique points of the EU COM in its Green Paper, namely impacts on cash flows, compliance costs and the ability to reduce the VAT gap.[307] Special reference to a

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the split payment scheme is the elimination of the business collector.

304 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 75.

305 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 75-76.

306 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 75.

307 European Commission, *Communication from the Commission to the European Parliament, the*

comparison with the abovementioned German implementation of JSL is drawn.

7.5.2.2 Cash Flow Problems

A general remark of the SPM are the negative cash flow consequences for businesses.[308] As they are *de facto* not in the position to freely decide on how to use the money on the separate account, this money is not available for other financial responsibilities and does not qualify as working capital. While certainly a valid argument, one must question the financial management of a business which is dependent on VAT payments. Through the jurisdictional break, the cash flow problem shines in a different light than in a national context.

The setting for exporting sellers opens an appreciative opportunity for destination countries. Evidently shown in a comparison of domestic and national transactions. In a national stetting with a SPM, the seller suffers negative cash flow effects because he does not receive output VAT while he already incurred input VAT on the previous stage and a claim for a deduction of this input VAT. Hence, the seller suffers cash outflows if the refund does not come on a timely basis. Note the difference between input VAT and output VAT, the value added will eventually lead to a definite VAT payment. For this difference between output and input VAT, the above mentioned argument holds that the company might be ill-managed if this money, which is pure tax money, is needed to operate the business. The cash flow problem for the matching part of output and input tax definitely exists and is due to the fact that the regular

Council and the European Economic and Social Committee: on the future of VAT Towards a simpler, more robust and efficient VAT system tailored to the single market (n 289) 5.3.3. They also mentioned commercial issues are omitted as the EU Commission does not substantiate these concerns.

308 Ainsworth and Madzharova (n 287) 12.

cash flow is missed due to an alleviating refund usually taking some time.

However, taking a closer look, one must note that immediate cash flow after the sale is particularly the door opener for fraud.[309] This holds for the abovementioned traditional MTIC fraud where a missing trader vanishes just as it holds for fraudulent suppliers who face no sanctions when keeping VAT instead of remitting it to the respective tax authorities. From this point of view, cash flow effects might not be brought forward as a disadvantage, as this is precisely what the SPM intends to prevent.[310]

Comparing the national setting of a SPM to a cross-border situation leads to insightful leverage of the destination country over the exporting country. In a cross-border setting, the refund is given by a different country than the country demanding the output VAT. A technical netting where the taxable person only transfers the value added on his or her stage, as in the domestic case, does not take place. Hence, the destination jurisdiction has a reasonable claim not just on the value added between output and input VAT, but on the whole VAT liability of the final transaction in the chain. It is not evident why this money should be given to the seller as working capital.

Accordingly, if the seller ends up having financial distress, the blame is to give the exporting country which should be giving timely refunds of input VAT. In revisiting the origins of the problem, that the substantive jurisdiction lacks the enforcement jurisdiction and leverage to force non-established sellers to comply with their regulations, this setting gives leverage to the country with substantive

309 Ainsworth and Madzharova (n 287) 17, with features of the VAT design which are susceptible to fraud.

310 Ainsworth and Madzharova (n 287) 2, speak of "eliminating voluntary compliance".

jurisdiction as they can legitimately put pressure on the exporting jurisdiction. It is in fact the exporting jurisdiction who is under coercion to give a timely refund possibility to the exporter to alleviate the cash flow problem.

Hence, the cash flow problems for SPM are in a different light. They give the destination jurisdiction leverage over the exporting country. Further, SPM specifically intents to prevent "excessive" cash flows which can be misused by sellers.

7.5.2.3 Compliance Costs

Another big issue are the compliance costs for affected parties. With the above mentioned conclusion on the unsuitability of suppliers and consumers to be in the position of the splitting agent, only intermediaries remain to fulfill the task of the splitting agent. This makes it evident that this chapter only advocates for a usage of the SPM on cross-border e-commerce over digital intermediaries instead of all cross-border e-commerce transactions. This follows the EU COM decision to discard the option of an intervention of the payment service providers.[311]

In elaborating the compliance costs of intermediaries, one particularly has to keep in mind that intermediary compliance costs are not zero at the status quo. Both with the CJEU's jurisprudence or especially with the German implementation of JSL, compliance costs for intermediaries are already in place. Hence, it is not a binary choice between compliance costs or not, it is a choice of the amount of compliance costs. It is not the question whether bureaucracy costs for intermediaries and suppliers with a SPM are excessive; it is the question whether compliance costs

311 European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposals for a Council Directive, a Council Implementation Regulation and a Council Regulation on Modernising VAT for cross-border B2C e-Commerce* (n 299) 5.2.6.

for the SPM in the context of cross-border e-commerce are higher than for JSL? All compliance costs are only roughly assessable. As JSL, in the form of the German implementation affects all sellers and all platforms, one can come to the decision that leaving sellers out of the equation might be a less burdensome task. However, it is beyond this chapter's focus to give an estimation of compliance costs for one or the other alternative.

In transferring the setting to the real world, it appears that compliance costs in the German implementation for JSL for intermediaries and suppliers taken together are far away from being negligent. While the suppliers all have to get familiar with the German system, they also must register themselves and obtain a certificate of registration. Intermediaries are hit by further documentation requirements and need to document the certification of registration. On top, they still do not face full certainty to not be liable for unpaid VAT. From this perspective, compliance costs, depending on the form of the implementation, are not so be seen as a non-starter. Compliance cost will occur, however, not only from revenue standpoints but also from tax fairness points, they might be necessary.

7.5.2.4 Ability to Reduce the VAT Gap

The SPM has the clear intention to reduce VAT fraud and thereby also the VAT gap. In contrast to the literature, this section evaluates the SPM for one specific area instead of a general mechanism against VAT fraud. The national implementations of JSL of several countries work as reasoning to assume that the field of e-commerce is a playing field for fraudsters. Hence, without the ambition to stop VAT fraud in general, the SPM is considered closer for this area.

In picking up the argumentation for cash effects, the SPM strips the supplier

from the possibility to commit fraud with the received amount of VAT. Other fraud possibilities might not be solved,[312] remain, however, in the jurisdiction of origin. The destination jurisdiction can effectively safeguard its legitimate tax claim. Further, in comparison to JSL liability, SPM with a mechanical procedure has the benefit of certainty instead of perceived certainty.

Additionally, the SPM comes with a handy feature directly targeting the undervaluation problem. Under split payments, the VAT payment is directly linked to the final price the consumer pays. This is of major importance and a pivotal difference to the traditional system where VAT in cross-border transactions is linked to the customs value. Through this link, the supplier is stripped from the incentive of indicating a customs value which is lower than the actual value of the consignment. The customs value becomes unnecessary for VAT purposes. This deems SPM an effective mechanism to reduce VAT fraud.

The EU COM doubts regarding the ability to reduce VAT fraud are not justifiable in the field of e-commerce. Especially with regards to the executed case study, the SPM shows its technical superiority in preventing fraud compared to the mechanism of JSL.

7.5.3 Feasibility for E-Commerce

7.5.3.1 Split Payment Principles

The previous section has shown that the EU COM general critique points on the SPM are manageable in the ring-fenced field of e-commerce through digital marketplaces.

[312] Konstantin V Pashev, 'Countering cross–border VAT fraud: The Bulgarian experience' (2007) 14(4) Journal of Financial Crime 490, 497.

Still, implementing a SPM in the e-commerce sector poses further questions. To address them, HM Revenue & Customs (HMRC) also opened the debate around split payments in 2017.[313] In this vein, they brought forward design principles of a SPM which – in their view – should be respected. These principles help building a solid framework for an implementation of the SPM.

From a consumer perspective, the principles instruct that the split payment should be invisible to the UK consumer who should be able to continue to pay by whichever method he or she chooses. Also, consumers' rights shall not be affected. Regarding the seller, the principles state that a SPM should increase tax efficiency, and that the mechanism should be proportionate, fair and every effort will be made to ensure a level playing field for all sellers to UK consumers.[314]

Concerning the most pressing issue for an implementation of the SPM, namely who will perform the split, HMRC states that the split should be initiated at a point in the payment and be driven by payment technology. Further, the system should increase tax efficiency for both businesses and HMRC.[315]

These principles leave room for intermediaries as splitting agents. Certainly, this limits the scope to transactions conducted through intermediaries. That leaves the obvious critique that suppliers may circumvent split payment rules by refraining from the usage of digital platforms. However, aligned with the scope of the German JSL. Nevertheless, a digital platform stands in the middle of consumer and supplier. Henceforth, a platform is in a good position to be the splitting agent. A platform has

313 HM Revenue & Customs, *Alternative method of VAT collection: Summary of responses* (2017) and HM Revenue & Customs, *Alternative method of VAT collection – split payment: Summary of Responses* (n 302).

314 HM Revenue & Customs, *Alternative method of VAT collection: Summary of responses* (n 313) 19.

315 HM Revenue & Customs, *Alternative method of VAT collection: Summary of responses* (n 313) 19.

more incentives to comply with the law as a single standing consumers, no possibility to disappear with VAT as suppliers and the possibility to shift its compliance cost to its users. In Germany, it is possible to implement a SPM which is a more proportionate measure to prevent VAT fraud than the currently implemented JSL. Consequently, this raises the voice for the current JSL rule to be a violation of the principle of proportionality.

7.5.3.2 A Split Payment Special Scheme for E-Commerce

Without violating the design principles postulated by HMRC, a split payment might be implemented into the VAT Directive as a special scheme.[316] This last section intends to give a framework of how a split payment special scheme could look like.

Primarily, it must be noted that the SPM could be a further special scheme such as the special scheme for small enterprises or the special scheme for travel agents. It does not attempt to solve all problems regarding VAT fraud. Furthermore, it might be extremely harmful and destructive to the economy in other areas. Logically imminent to a special scheme, deviations to the normal procedure occur. A special scheme commonly makes use of assumptions which might or might not be reversed by the final consumer in the taxation process. Accordingly, it is up to a political debate on how much speciality a legislator wants to appoint to the herein depicted problem. Current proposals show, that the EU legislator does not refrain from implementing articles in the VAT Directive which need extensive implementing regulations.[317]

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316 European Commission, *Analysis of the impact of the split payment mechanism as an alternative VAT collection method: Final Report* (n 253) 44, also consider it appropriate to introduce a new special scheme under Title XII VAT Directive.

317 See for instance the current implementing regulations regarding the supporting evidence for intra-Community supplies, Bertrand Monfort, 'Quick Fixes: Das Verhältnis von Art. 45a MwSt-DVO zu § 17a UStDV' (2019) 68(11) Umsatzsteuer-Rundschau 407.

As elaborated above, digital platforms stand out as possible splitting agents. They could be incentivised to implement such a system. This incentivisation could be done either by the resulting legal certainty which deems JSL inapplicable for them, or, in the German case, by releasing them from their documentation requirements. Furthermore, digital platforms could also be forced to implement a SPM.

On the technical level, several questions stand out. Most of these questions present a trade-off between simplicity and accuracy. On the pivotal question of the tax rate, for the sake of simplicity, it is recommended to apply the standard rate to all products sold on the digital platform. Such a methodology has also been applied with electronic service by the EU legislator when such services first occurred.[318] In a trade-off between the necessity to determine the rate and the revenue consequences of a single rate, it seems reasonable to apply a system with one rate per country.

As this chapter deals with tangible goods, the country of consumption should be easy to determine, as the consumer has to enter his or her correct address to be able to receive the good. With a tax rate for the specific country, the platform could apply simple mathematics to calculate the tax base and the tax payment.

Then, both payments simply need to be commissioned by the buyer in the same way as it is currently done with one payment. Currently, the platform automatically forwards the final price to a chosen payment provider. Consumers must enter their credentials for the payment provider (i.e. paypal, debit or credit cards) and approve the payment. The same procedure must be applied twice, with different creditors.

As the Polish experience shows some difficulties with separate bank accounts, it

[318] See for instance, Case 390/15 *Proceedings brought by Rzecznik Praw Obywatelskich (RPO)* ECLI:EU:C:2017:174 at [66] where the CJEU held that the overall coherence of the measure intended by EU legislature to not apply the reduced rate to electronic services ranked higher than the necessity to extend the reduced rate of physical books to digital books.

seems closer to implement a SPM in which the buyer directly transfers to the tax authority of the destination jurisdiction. Refunds or other similar issues could still be handled. However, as the experience with refunding tax money shows it seems as safeguarding measure that the tax authority, at least, keeps track of VAT payments from transaction of a single supplier.

7.6 Summary

In contrast to other tax areas, consumption taxation enjoys widespread consensus. Concepts such as neutrality, the destination principle or the concept of taxable persons are spread in consumption taxation systems all over the world. This is embodied in the OECD VAT/GST Guidelines or the EU VAT Directive. Therefore, in contrast to direct taxation, this chapter has focussed on the enforcement of consumption taxes. In this area, problems emerge nowadays through e-commerce. These problems existed ever since, but are, however, boosted by e-commerce. Perceptively, the problems have evolved to a point where a serious fraud industry exists.

By starting from the theoretical foundations of consumption taxation, this chapter strived to unite opinions of SCOTUS with general consumption tax questions. These opinions show how the court has dealt with questions on the justification of consumption taxation for a long time. Analysing these opinions presented interesting insights on the roots of all consumption taxation, the justification to levy a consumption tax and the justification to deputize parties to collect a consumption tax.

As shown through an extensive recap of the ideas of the OECD to reform VAT collection, the collection problem in VAT has been procrastinated over at least the last two decades. The pressure to adapt the VAT collection system increases day by

day. Nowadays, it is very likely that e-commerce harms the local economy which is unable to make use of the displayed methods to circumvent taxation. By aiming at tax fairness issues, this point stands independent from actual revenue consequences.

This treatise has shown that both, the CJEU jurisprudence and the German implementation of JSL, are unable to prevent VAT fraud. This is a devastating result. Not just for marketplaces who must bear the burden, but also for academia which intends to fight VAT fraud. The case study of undervalued consignments provided evidence for this conclusion. Highly specific rules make the correct tax treatment difficult to assess. Fraudsters can easily combine difficult rules, *de minimis* thresholds and overstrained authorities to circumvent tax payments – even without being clearly identified as tax avoiders themselves. JSL is not powerful enough to tackle the problem at its roots. Further, a heavy bureaucracy burden is put on the involved parties. This burden was recently categorized as going beyond what is provided for by the EU rules and to be at odds with the goals of the Digital Single Market Strategy for Europe by the EU COM. By letter of formal notice, the COM requests that Germany withdraws its implementation of the JSL.[319]

To solve the problem of cross-border e-commerce from third countries, the chapter campaigned for a use of the SPM. In this vein, the idea is applied to a small scope of e-commerce over digital platforms, in analogy to the German JSL rule. In applying the mechanism to e-commerce, it showed that the destination jurisdiction gains legitimate leverage against the exporting jurisdiction and their suppliers. This shed a different light on the often mentioned cash flow problem. Commonly identified issues of the SPM if applied in general can be held to a minimum. Compliance costs,

[319] European Commission, October infringements package: key decisions (10 October 2019) no 7.

occurring mainly at the level of electronic marketplaces, appear relatively smaller compared to the current implementation of JSL in Germany. In conclusion, a special scheme for the VAT Directive is proposed. Such a special scheme could be unilaterally used to prevent fraud in the field of e-commerce over digital platforms. After an implementation for this scope, a starting point is made and technology could be used on a larger scale to collect VAT to increase tax fairness.

8 Conclusions

This thesis has dealt with different pressing issues facing Value Added Taxation (VAT) in the digital economy. Its goal has been to shed light on complex and opaque consumption patterns and to identify and prevent VAT revenue losses from the digital economy. With the gained understanding of these patterns, VAT exaction should be adapted to the digital economy where necessary. The thesis led to the following recommended actions in the depicted fields.

Chapter 2 asked the question whether additional taxation of consumers, also in the form of VAT, is necessary for service supplying platforms with non-neutral pricing strategies. *In conclusio*, the findings in Chapter 2 indicate that no additional measures are needed to cover for revenue leakage. On top of the fact that measures such as specific digital services taxes are imprecise, no revenue shortfall can be ascertained. Proponents of additional taxation of such services misconstrue the fact that higher monetary consideration is paid at a different level, also accompanied by VAT payments for those services. Therefore, a change to the current treatment of such transactions is unnecessary both as regards current legislation as well as current jurisprudence. The digital economy drags VAT in this specific area into another era, where consumption is far less direct and personal than before. Supposedly "free" services on multi-sided digital platforms do not lead to a lack of tax revenue. The

economic implications of such an impersonal VAT remain open to further research. Empirical research can build on these findings in order to quantify whether this leads to a situation where VAT is paid by individuals who do not make use of "free" services or whether the targeted advertisements are precise enough that these consumers pay their respective VAT on products which are advertised through the platforms.

Chapter 3 devoted attention to the phenomenon of sharing. As the sharing economy is not a scientifically defined concept, the scope of the issue is narrowed at the beginning of the chapter to the most common business model. Individuals are identified as the pivotal factor in the sharing economy and how VAT revenues are affected by their actions is the focus of this chapter. The chapter finds that largely exempting sharers is no longer good tax policy. However, taxing the sharing process is difficult. Applying the regular input VAT deduction does not seem like an adequate solution as tax collection costs would be excessive and heavily discourage sharing. As regular consumption taxation in the sharing economy would easily resemble a single-stage sales tax – violating the fundamentals of VAT – the collection mechanism can in fact lead to over-taxation. After assessing other implemented options in the VAT Directive, recently implemented mechanisms and other proposals are analysed for their power to solve the identified inefficiency of the current system. Ideas from direct taxation are borrowed, and a solution to the problem through a deemed consumption on the previous stage is proposed to take into account the value added problem of previous stages. Further research, based on data in the respective fields, can provide legislators with justifiable numbers for the proposed deemed consumption provisions.

For the first two chapters, an overarching conclusion can be drawn: a definite

understanding of problems is commonly missing. Only with a precise description of the problem, precise and adequate measures can be found. Campaigning to adapt the system without reasonable cause why change is needed, is pointless. The first part executed a thorough analysis of two problems and proposed changes where necessary, and it opened the field to further research on the implications and behavioural effects of the proposed policies.

The second part of this thesis was dedicated to enforcement. While enforcement may appear to be a non-academic problem, this is untrue. Chapter 4, starting with the Supreme Court of the United States' *Wayfair* judgment, connects enforcement with the digital environment. With this judgment, states in the Unites States are able to tax consumption within their jurisdiction without physical presence of the supplier – just like in the European VAT system. However, with this broadened scope of consumption taxation, problems comparable to the European context are to be expected. Such problems in member states of the European Union can be summarized as a lack of enforceability. While the theory insists on the taxation of out of jurisdiction suppliers, common measures of enforcement have proven to be largely ineffective in certain fields in revenue terms. The chapter contributed to the German speaking literature by connecting sales taxes and VAT. As the states in the United States are now applying the thinking of economic nexus, the link of both systems is of major importance. If fraud issues occur in the states with economic nexus, the states are encouraged to learn from the fight against fraud in the European Union.

Especially in the field of e-commerce, a large enforcement problem persists in parts of the European Union. National governments are now increasingly tackling this problem through joint and several liability (JSL). Chapter 5 analysed the German statute and compared it to the statute in the United Kingdom. It shows that the

German version comes with too much bureaucracy, puts the operators of electronic marketplaces in unclear legal surroundings and is not attacking the problem precisely enough. The European Commission evidently comes to the same conclusion. A similar inference was made for the Austrian statute in Chapter 6.

The insights of these chapters were used for Chapter 7. After elaborating on and connecting the jurisprudence from the Supreme Court of the United States to fundamentals of all consumption taxes, the jurisprudence of the Court of Justice of the European Union (CJEU) with regards to JSL was analysed extensively. With a case study, the chapter showed that both the CJEU's jurisprudence and the German national implementation are unable to prevent one of the biggest frauds in e-commerce, namely undervalued consignments. Even though low value consignments will be taxable in the European Union by the year 2021, the undervaluation problem will not disappear, as – by technical design – not all goods will be affected by this measure. Finally, the use of the split payment mechanism for business to consumer e-commerce transactions was proposed to tackle the most pressing enforcement issues.

With the broader topics of exaction of VAT in digital business models and enforcement in e-commerce, this thesis has contributed by proposing precise measures to diminish VAT revenue shortfalls while simultaneously showing where no action is necessary. In other words, this thesis broadly challenged whether the current system of VAT is still fit for the digital economy. It did not tackle the enforcement problems of the mini-one-stop-shop. This, likewise under-researched field also needs further attention.

The initial statement of this thesis also holds in a digital environment: taxation takes a part of freedom in order to give another part of freedom. The digital environment complicates the picture and makes it tough to judge whether the right

individuals pay the right amount of tax in the right jurisdiction. This thesis has shown that generally the VAT system is resilient to developments which are partly characterised as disrupting in other fields. Nevertheless, specific adjustments to the system have been identified as necessary.

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Text of Affidavit

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