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

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

1. Introduction

On 1 July 2021, a major change took place with regard to the VAT rules for B2C e-commerce sales of goods in the European Union. The new rules have far-reaching consequences for platforms as, in certain situations, they will be deemed to supply the goods to the consumer instead of the real supplier. This has far-reaching consequences, particularly in terms of liability. Some Member States (Austria, France, Germany and Italy) also have national liability regimes for platforms which are likely to remain in place after 1 July 2021. These regimes differ from one Member State to another. The harmonized EU VAT rules for e-commerce already entail far-reaching consequences regarding, among others, the liability for the VAT due. If, in addition, different national liability regimes (continue to) apply, the consequences for platforms will be even more extreme. In this article, the author discusses this preoccupying issue in more details. For this purpose, it is important to first describe the platform liability under the EU harmonized rules (section 2.). This section discusses the deemed supplier provision in section 2.1., the reliance of platforms on information of suppliers that might be incorrect in section 2.2., and the platform liability in section 2.3. The other consequences of the new VAT e-commerce rules for platforms and entrepreneurs trading via platforms, including the special information obligations that will apply, will not be dealt with. In section 3., the author examines the national liability regimes and the differences between them. The domestic liability regimes can be divided into three different models, i.e. the Austrian model (section 3.1.), the UK model (section 3.2.), and the German model (section 3.3.). In section 3. these models are compared with each other and with the EU harmonized rules (sections 3.4. and 3.5.). Finally, a conclusion and recommendations are given in section 4.

2. Platform Liability under EU Harmonized Rules

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


4. i.e. (i) the provider is not self-employed, (ii) the platform provides the service in its own name and for its own account, (iii) the platform acts as a commission agent (in its own name, but on behalf of the provider), (iv) the fiction of article 9a VAT Implementing Regulation or article 14a VAT Directive is applicable.


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

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

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

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

2.1. The deemed supplier provision

The deemed supplier provision of article 14a of the VAT Directive determines that in certain cases platforms are deemed to supply goods to the consumer instead of the actual supplier for VAT purposes. A platform is also deemed to have received the goods from that supplier. The transport of the goods is always attributed to the supply deemed to have received the goods from that supplier. The actual supplier for VAT purposes. A platform is also

2.1.1. Facilitating

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

the use of an electronic interface to allow a customer and a supplier offering goods for sale through the electronic interface to enter into contact which results in a supply of goods through that electronic interface.

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

2.1.2. Application of the deemed supplier provision

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

– where a platform facilitates distance sales of goods from third countries or third territories with an intrinsic value not exceeding EUR 150, regardless of where the supplier is established; and

– where a platform facilitates intra-Community distance sales of goods and local supplies to private individuals by entrepreneurs established outside the European Union.

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


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

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


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

2.1.3. Fraudulent application of import arrangements

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

2.2. Incorrect information

As mentioned before, the consequence of the application of the deemed supplier provision is that the platform is responsible for declaring and paying the VAT due. In order to determine the correct VAT treatment of a transaction, a platform may rely on information provided by the supplier and/or the customer. Although not explicitly stated in the first situation listed in section 2.1.2., it is likely that in both situations in which the deemed supplier provision applies the platform is only responsible for the payment of VAT where the supplier is a taxable person. The definition of distance sales of goods imported from third territories or third countries refers to the supplier (article 14(4) of the VAT Directive). For VAT purposes, this is always a taxable person. For the application of the deemed supplier provision, it is also required that the customer is a private individual or a person treated as such. The platform may assume that the supplier is a business and the customer a private person, unless the platform has information to the contrary. This is laid down in article 5d of the VAT Implementing Regulation. What matters is whether or not a VAT number is provided. The platform must check the status of the supplier. With regard to the customer, the platform may assume that if no VAT number or comparable tax number is provided, it is a private customer, unless of course the platform has information to the contrary. Subsequently, the information received by a platform may be incorrect. In such situations, article 5c of the VAT Implementing Regulation stipulates that a platform is not responsible for the payment of additional VAT if, due to incorrect information, too little VAT has been paid, where the platform can prove that it did not know and could not have known that such information was incorrect. The platform must take sufficient measures to collect information from the actual supplier in order to fulfill its obligations. The platform will have to elaborate this in the commercial relationship with the supplier. If the supplier continuously fails to comply with the agreements made to provide information, the platform must take the necessary action (notifying or blocking the seller).

2.3. Liability

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

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

but

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

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

12. For more information on the import scheme, see European Commission, supra n. 3, at sec. 4.2, pp. 54-78.
13. For more information on the special IOSS VAT identification number, see European Commission, supra n. 3, at sec. 4.2.6, p. 37.
14. For more information on the new VAT e-commerce rules regarding platforms, see Merks & Janssen, supra n. 8.
15. See, for example, Lamensch, supra n. 2.
17. European Commission, supra n. 3, at pp. 24-26 and p. 75. For more information on the new VAT e-commerce rules regarding platforms, see Merks & Janssen, supra n. 8. For more information on the new VAT rules in general, see Merks, supra n. 3, at pp. 197-205.
19. For more information on the import scheme, see European Commission, supra n. 3, pp. 54-78.
3. Different National Models to Hold Platforms Liable

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

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

When applying domestic legislation implementing this provision, the tax authority must be able to prove that a taxable person knows or should have known of the fraudulent activities of the co-contractor.22 This measure was considered as insufficient to address fraud in the field of e-commerce23 and, as a result, the European Commission introduced the deemed supplier provision for platforms.24

Under the EU harmonized deeming provision, a platform may become primarily liable as the deemed supplier whereas the underlying supplier is no longer liable. The EU harmonized deeming provision and the option to adopt anti-fraud measures now coexist, and several Member States have already implemented their own domestic liability regimes. The domestic liability regimes can be divided into three different models, i.e. the Austrian model discussed in section 3.1, the UK25 model discussed in section 3.2, and the German model discussed in section 3.3. Subsequently, these models are compared with each other and with the EU harmonized rules in sections 3.4 and 3.5. The analysis26 aims to distinguish the advantages and disadvantages of the platform liability under domestic VAT legislation and the overall burden potentially arising from the combined application of the EU harmonized and national rules.27 Some of the domestic liability regimes use the terms marketplace and operator rather than the term platform. In this section, both terms are used interchangeably.28

3.1. Austrian model

In Austria, platform liability is linked to the information obligations of platforms. Platforms are obliged to keep records of transactions to non-taxable persons, which they have facilitated through their platform29 for ten years.29 The Austrian tax authority uses this information to determine whether VAT has been declared correctly. Additionally, platforms are held liable if they have not established with sufficient care that the supplier is fulfilling its VAT obligations.30 The Austrian platform liability rules only apply to turnover achieved after 31 December 2019.31

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

3.2. UK model

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

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


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

25. This analysis covers what is considered to be a platform and the scope of the platform liability. There are also differences with respect to the
to an online marketplace, is defined as the person who controls access to, and the contents of, the online marketplace.33 The operator is liable for the VAT due by a (taxable) person34 in respect of all taxable supplies of goods made by that (taxable) person through the online marketplace in the relevant period.35 It appears from the Guidance Note36 that platforms thus are liable for:

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

and

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

Furthermore, the operator is liable within the relevant period.37 When a UK business is involved, the liability period starts when the operator has been given a liability notice, which HMRC will issue when they have established that a UK business is non-compliant.38 In that case, the platform liability starts from that moment and ends with the day on which the platform secures compliance from the supplier or removes it from its online marketplace. In contrast, when a non-UK business is involved, the liability period starts with the day on which the operator first knew or should have known that the supplier was in breach of a registration requirement and ends when the supplier ceases to be in breach of the registration requirement. It also appears from the Guidance Note39 that a platform is granted a period of delay to avoid liability. The duration of this period also differs, depending on whether the supplier is a UK business or a non-UK business. In the case of a UK-business, the platform normally has 30 days to avoid liability, which can be established in two manners: by contacting and securing the compliance of the business, or by removing the business from its website. When the platform does not take any action during this period, it will be held jointly and severally liable for the future unpaid VAT, which will be calculated based on the unpaid VAT from the day after the date of HMRC’s notice. However, in the case of a non-UK business, a platform must ensure, within a period of 60 days of knowing, that the unregistered non-UK business can no longer sell goods to UK consumers through the website of the platform. If the non-UK business is still allowed to sell its goods through the website of the platform after the 60-day period, the platform can be held jointly and severally liable for the unpaid VAT.

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

3.3. German model

In December 2018, Germany adopted special rules on the liability of platforms for unpaid German VAT.42 These rules are implemented in the German VAT Act43 and apply as of 1 January 2019.44 The German VAT Act defines an online marketplace as a website or any other instrument through which information is made available over the Internet and which enables a third party, other than the operator of the marketplace, to carry out transactions.45 Additionally, an operator of an online marketplace is defined as anyone who maintains an electronic marketplace and enables third parties to carry out transactions through this marketplace.46 The operator is liable for the unpaid VAT on supplies which has been legally established through the marketplace irrespective of the location of the supplier and the platform or the type of

34. Art. 77B(4) VAT Act 1994 does not use the word “taxable person” but the abbreviation “P”, which is clarified in art. 77B(1a) VAT Act 1994 as “a person (P) who makes taxable supplies of goods through an online marketplace…”
35. Art. 77B(5) and art. 77BA(4) VAT Act 1994.
37. Art. 77B(5-8) and art. 77BA(4-6) VAT Act 1994.
38. See HMRC, supra n. 36.
39. Id.
42. DE: VAT Act (Umsatzsteuergesetz), §§ 25e and 293A, para. 32e (21 Feb. 2005). For a complete analysis of these rules, see Grambeck, supra n. 25, at p. 7. See also Bal, supra n. 24, at p. 114; and Van der Hel-van Dijk & Grillissen, supra n. 24, at p. 399.
44. The rules adopted in December 2018 basically consist of two elements: (i) record-keeping obligations for operators of electronic marketplaces; and (ii) liability for traders. Only the second element is discussed in this section. For more information on the record-keeping obligations for operators of electronic marketplace in Germany, see Grambeck, supra n. 25, at sec. 2.1.
45. Art. 25e(5) German VAT Act.
46. Art. 25e(6) German VAT Act.
the supply. Furthermore, the platform liability also applies when, for example, a third-country seller is involved in the transaction.\textsuperscript{47} If the supplier does not fulfil his tax obligations or does not fulfil them to a significant extent, the tax authority must inform the operator if other measures do not promise immediate success. After receipt of the notification, the operator shall be held liable for the unpaid VAT, provided that the legal transaction underlying the transaction was concluded after receipt of the notification. However, a claim against the operator shall not be made if the operator proves within a period of time set by the German tax authority that the supplier can no longer offer goods through the online marketplace.\textsuperscript{48} The operator shall not be held liable when it submits a certificate from the taxable person or electronic confirmation from the Federal Central Tax Office which shows that the supplier is in possession of a VAT registration.\textsuperscript{49} However, this exception does not apply if the operator was aware or should have been aware, according to the due diligence obligation of a prudent businessperson, that the supplier did not or not fully comply with this VAT obligation. Furthermore, if the seller is a non-taxable person, the operator shall not be held liable if it has met its recordkeeping obligations. Also, in this situation, the exception does not apply when it can be assumed, based on the type, quantity or amount of the turnover achieved, that the operator was aware or should have been aware, based on the due diligence of a prudent businessperson, that the turnover was generated within the framework of an enterprise. In contrary to the aims of the EU VAT e-commerce package, under the German model, platforms must check if their European sellers have a regular VAT registration in Germany. A consequence, for example, is that a Dutch seller could use the One-Stop Shop (OSS) return to report German distance sales of goods but would still require a non-resident VAT registration in Germany in order to provide the proof necessary (for the platform) of their German tax identification number registration certificate from a tax authority in Germany.\textsuperscript{50}

3.4. Comparative analysis of the models

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

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

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

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

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

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

\textsuperscript{47} Art. 25(e)(1) German VAT Act.
\textsuperscript{48} Art. 25(e)(4) German VAT Act.
\textsuperscript{49} Art. 25(e)(2)-(3) German VAT Act.
\textsuperscript{50} Arts. 25e and 22(f)(1) German VAT Act.
\textsuperscript{51} See also Bal, supra n. 24, at p. 117.
\textsuperscript{52} Id., at p. 119.
\textsuperscript{53} Id.
\textsuperscript{54} H-M. Grambeck, supra n. 25, at p. 10.
\textsuperscript{55} Id.
own domestic liability systems, it becomes more challeng-
ing to know which platform is liable and for what.\textsuperscript{56} Lúðvíksson also describes some advantages and short-
comings of joint and several liability.\textsuperscript{57} Lúðvíksson notes that implementing joint and several liability is undoub-
edly a simple way and can work well in the fight against VAT fraud,\textsuperscript{58} but that it must be set up with clear rules in order to comply with general principles of EU law, in particular the principles of legal certainty, transparency and proportionality. Provisions implementing joint and several liability may not go further than necessary to reach the intended aim.\textsuperscript{59} Besides, Lúðvíksson mentions that, when a liability regime uses the concept of “the knowledge test” (in order to be held jointly and severally liable, a plat-
form must know or should have known about VAT fraud), it is up to the national courts to interpret this concept, which creates interpretation problems and uncertainty issues.\textsuperscript{60} Interestingly, De la Feria notes that introducing third-party liability as a measure in the fight against (VAT) fraud is, because of its design, not successful in tackling (VAT) fraud per se, but merely capable of minimizing the revenue costs of (VAT) fraud.\textsuperscript{61} Combined with the afore-
mentioned remarks of Lúðvíksson, Van der Hel-van Dijk and Griffioen, this makes the author wonder whether the liability of platforms under domestic VAT legislation (and even under EU law) does not go further than necessary.

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

the legislator wants to close all potential future loopholes that could arise if the wording was very narrow and to cover all future (yet unknown) technological developments.\textsuperscript{62}

However, Bal notes that certain broadly drafted provi-
sions could also create much uncertainty. The author agrees with Bal\textsuperscript{63} that it cannot be ruled out that some taxable persons may accidentally fall within the scope of the German provision, whereas this provision was not originally intended for them. Bal even concludes that the fact that the German rules differ in scope from the EU harmonized rules shows:

that the European Commission’s objective to establish a bal-
anced and uniform regulatory framework for online platforms is not likely to be achieved.\textsuperscript{64}

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

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

The European Commission has even sent a letter of formal notice to Germany and requested that Germany with-
draws the legal changes affecting European businesses selling goods online to German consumers.\textsuperscript{66} The Euro-
pean Commission considers the fact that platform liabil-
ity can be avoided only if the platform produces a cer-
ificate from the German tax authority (which the German tax authority has provided to the business selling goods on the electronic platform) as:

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

Furthermore, the European Commission notes that:

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

Additionally, the author agrees with Grambeck that there is already doubt as to whether non-domestic or even non-EU platforms will be aware of the domestic liabil-
ity regimes, which raises questions as to whether EU tax authorities can effectively enforce VAT law in case of fraudulent traders.\textsuperscript{68}

\textsuperscript{56} Vander Hel-van Dijk & Griffioen, supra n. 24, at p. 399. See also Lúðvík-
sson, supra n. 22, at p. 23.
\textsuperscript{57} Lúðvíksson, supra n. 22, at pp. 22-23.
\textsuperscript{58} Id., at p. 38.
\textsuperscript{59} Id., at p. 22.
\textsuperscript{60} Id., at p. 23. See also R. de la Feria, Tax Fraud and Selective Law Enforce-
\textsuperscript{61} De la Feria, supra n. 60, at p. 19.
\textsuperscript{62} Id., supra n. 24, at p. 117.
\textsuperscript{63} Id., supra n. 23, at p. 9.

\textsuperscript{64} Id., at p. 119.
\textsuperscript{65} Id.
\textsuperscript{67} European Commission, October infringements package: key decisions (10 Oct. 2019). The European Commission stated that if Germany does not act within the next two months (after 10 October 2019), the Commission may send a reasoned opinion to the German author-

Search=false&active_only=0&noncom=0&r_dossier=INFR%282019%294080&decision_date_from=30%2F09%2F2019&decision_date_to=17%2F07%2F2019&EM=DE&DG=TAXUD&title=&submit=Search (accessed 17 July 2021).
\textsuperscript{68} Grambeck, supra n. 23, at p. 9.
Finally, it is interesting to mention that the Dutch *Commissie Deeleconomie* (commission for the sharing economy, hereinafter Dutch commission) has written a report on the fiscal aspects of the sharing and gig economy and has, among other things, paid attention to the liability of platforms.  

69. The Dutch commission is of the opinion that Member States should not apply a liability regime/model too easily, because the VAT due is then shifted to the platform. The Dutch commission indicates that a withholding model with sufficient certainty for a platform about the VAT amount to be withheld is preferred by platforms over a liability model.  

70. In the case of a liability model, there is uncertainty for a platform as to whether it can recover the VAT due from the underlying supplier, whereas in the case of a withholding model, the VAT due can be deducted directly from the fee that a platform must pay to the provider.  

71. If, however, a liability regime is adopted, the Dutch commission prefers the UK model. According to the Dutch commission, this model should then be combined with a regulation for the platform to actively provide information to the national tax authorities, so that the non-compliance of suppliers can be established. The Dutch commission indicates that a platform must be given time to remedy the situation found, and that the platform can only be held liable if it fails to remedy the situation within that time, with liability only applying to the future. The Dutch commission also recommends that the Dutch tax authorities, in the event of the exclusion of a provider from a certain platform, should immediately inform all other platforms known to them of the identity of the removed supplier, and that attention should be paid to the fact that suppliers may act under different identities.  

72. The author is of the opinion that this advice also applies to all other national tax authorities to the extent applicable. In addition, according to the Dutch commission, a liability scheme must comply with the neutrality principle and the principle of legal certainty, and it must be simple and flexible. The Dutch commission does note, however, that national tax authorities must continue to track down non-compliant taxable persons.  

73. Subsequently, the Dutch commission considers the Austrian model less desirable, as the liability is linked to the information obligations and, in the Dutch commission’s opinion, imposing liability when information is lacking to a limited extent may be disproportionate. A fine depending on the extent to which a platform fails to comply with the information obligations and the degree of its culpability is, in the Dutch commission’s opinion, more appropriate.  

74. With regard to the German model, the Dutch commission suggests that such a model contributes to a certain extent towards the tax authorities gaining more knowledge of the providers, but that this model results in a considerable administrative burden, which may not outweigh the aim of ensuring greater compliance with tax legislation.  

75. Finally, the Dutch commission states that holding a platform liable when it knew or should have known that a supplier (taxable person) was not meeting its tax obligations leads to time-consuming procedures and uncertainty for both the platform and the national tax authority. Moreover, the business models of the various types of platforms differ considerably, as a result of which many platforms do not have information with which they could have established that tax obligations exist.  

### 4. Conclusions and Policy Recommendations

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


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69. Rapport Commissie Deeleconomie, supra n. 5.  
70. Id., at p. 191.  
71. Id., at pp. 191-192.  


74. Rapport Commissie Deeleconomie, supra n. 5, at p. 192.

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

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

77. Rapport Commissie Deeleconomie, supra n. 5, at p. 193.

78. Id.

79. Id.

80. Id.

81. Id., at p. 194.
it has been given time to do so, and has received an official notification, the author believes that it is justified to hold a platform liable for unpaid VAT. Suppose a platform knows that the supplier is not fulfilling its obligations but does not take measures against that supplier after being officially warned. In that case, the platform is, as it were, facilitating fraud and, therefore, in the author’s opinion, it is justified that the platform is held liable. In contrast, the author argues that domestic liability regimes such as the Austrian model are not proportionate because certain rules go further than necessary to reach the intended aim.

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

From the combination of EU harmonized and domestic legislation, extra burdens will arise for platforms in general. The fact is, however, that the business models of the various types of platforms differ considerably. As a result, platforms that have sufficient insurance in place against liability for fraud or non-compliance of the underlying supplier will receive less impact than platforms that must set up new processes/procedures.

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

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83. Rapport Commissie Deeleconomie, supra n. 5.