*Hans-Martin Grambeck**

Online Intermediation Services – The Italian Case of *Booking.com*

Online booking platforms have become very important in the tourism sector. However, the VAT treatment of commissions earned by such booking platforms has still not been conclusively clarified as is shown by the Italian case of *Booking.com NL*. In this article, the author suggests that to avoid such conflicts between tax authorities and taxable persons it would be necessary that rules are fixed and harmonized across the European Union.

1. The Case of *Booking.com* in Italy

Booking.com, which is based in the Netherlands, acts as a "genuine" (disclosed) agent with regard to the provision of accommodation services by third parties. As far as the properties are located in Italy, Booking.com NL had apparently assumed that the landlords would have to withhold Italian VAT according to the reverse charge mechanism. However, the Italian tax authorities take the view that Booking.com NL is liable to account for Italian VAT if the landlords do not hand over an Italian VAT identification number (VAT ID). If, under such circumstances, the landlord (as the recipient of the service provided by Booking.com NL) is supposed *not* to be in business (i.e. not to be a taxable person) and if the VAT place of supply of this intermediary service is in Italy, the Italian VAT is actually owed by the supplier. From this background, Booking.com NL is now requested to remit a VAT amount of EUR 150 million, which is derived from EUR 700 million in commissions paid by approximately 900,000 Italian landlords between 2013 and 2019.[1]

2. Nature of the Service Provided by Booking.com

The situation, which looks disastrous for Booking.com NL, is based on the assumption that the service provided is a service which is actually taxable in Italy. In a B2C scenario, there are two different ways to come to this conclusion (for consequences in a B2B scenario, *see* section 4.):

- The service provided is an intermediary service in relation to accommodation. Then, according to article 31 IR 282/2011[2] the place of supply is where the underlying service is carried out (article 46 of the VAT Directive[3]). In case of a rental contract, this is the place where the property is located (article 47 of the VAT Directive). The domicile of the landlord would not be relevant.
- Booking.com NL provides an electronically supplied service, and the landlord is domiciled in Italy (article 58 of the VAT Directive). The location of the property would not be relevant.

This distinction is only irrelevant if the landlord lives in the same EU Member State in which the property is located. If this is Italy, the service charge of Booking.com NL would be subject to Italian VAT and, indeed, Booking.com would be liable to remit this tax (*see* Figure 1).

If, however, the place of residence of the landlord is different from the location of the property, both approaches lead to different results as can be seen from the following example.

Example

Peter, who lives in Berlin (Germany), owns a holiday flat on the island of Mallorca (Spain). So far, he has used it only for private purposes. In the future, he wants to rent it out via Booking.com (*see* Figure 2).

In this case the commission is subject to:
- German VAT if the booking service is supposed to be an electronically supplied service; or
- Spanish VAT, provided that the service is linked to the place where the underlying service (rent of property) is carried out, i.e. where the property is located.

There is obviously not a simple answer to the question which of both approaches is correct – as can also be seen from the documentation published by the VAT Committee, the VAT Expert Group (VEG) and the Group on the Future of VAT (GFV).[4] The assumption of an electronic service may be supported by the fact that the service provided by a booking platform is largely automated and under normal circumstances works without any human intervention. Also, the service is not comparable to a typical activity of mediation, which is characterized by bringing together the needs of the potential contracting parties through negotiation. Rather, the service is similar to an online advertising service since the landlord can offer his property on the platform and conclude a contract

* **Dr Hans-Martin Grambeck, Managing Director, nesemann&-grambeck GmbH, Norderstedt, Germany.**

1. *See* D. Majorana, *Italian tax authorities accuse Booking.com of VAT fraud*, MNE Tax (30 June 2021), available at https://mnetax.com/italian-tax-authorities-accuse-booking-com-of-vat-fraud-44928 (accessed 12 Apr. 2022).
2. Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Primary Sources IBFD.
3. Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L347 (2006), Primary Sources IBFD [hereinafter VAT Directive].
4. VAT Committee, Working Paper No. 814 (31 July 2015), Working Paper No. 906 (6 June 2016), Working Paper No. 947 (3 Apr. 2018); VAT Expert Group, VEG No. 090, *VAT Treatment of the Platform Economy* (16 Apr. 2020), taxud.c.1.(2020)2365654; Group on the Future of VAT, GFV No. 086, *VAT Treatment of the Sharing Economy* (5 Apr. 2019) and GFV No. 097, *VAT Treatment of the Platform Economy* (16 Apr. 2020).

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Figure 1 – Landlord and property in Italy

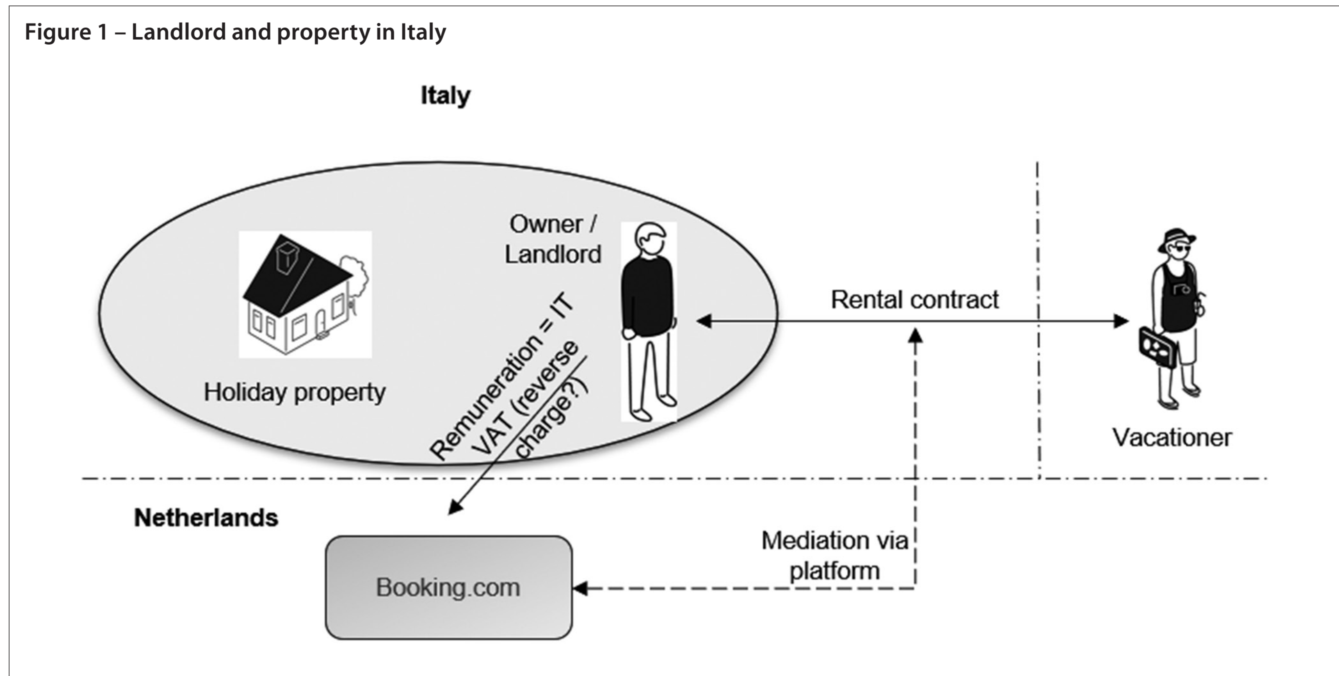
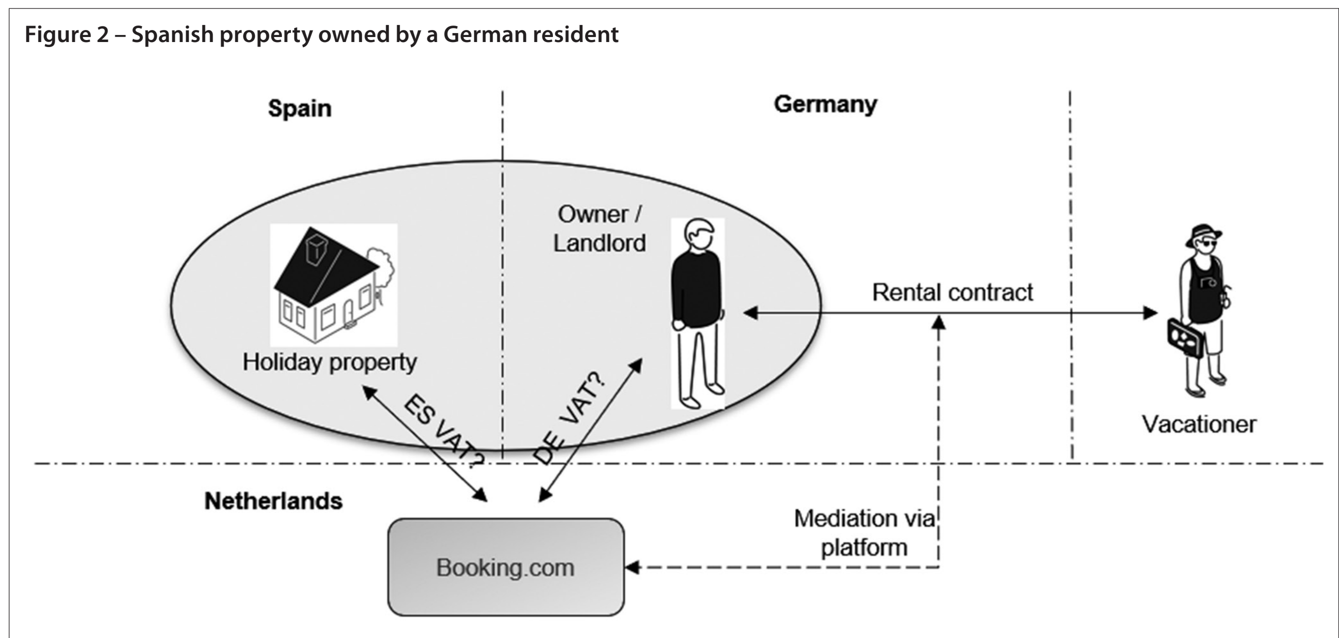


Figure 2 – Spanish property owned by a German resident



largely automatically. On the other hand, the assumption of a service which is to be taxed where the property is located (or – which is the same – where the underlying rental service is provided) is supported by the fact that there is a close factual connection between both the property and the related booking service. Thus, the Internet is merely used as an automated means of communication, with the operator of the platform providing a "passive" automated service.

Furthermore, it is argued[5] that the introduction of the special VAT place-of-supply rules for electronic supplies was not intended to shift tax revenue between Member States and thus should not create new place-of-supply rules. The VAT Committee[6] sums it up as follows:

> Intermediation services are closely connected with the underlying service and therefore both should be taxable at the same place. Disconnecting an intermediation service from the underlying service puts at risk revenue of the Member State of consumption and artificially divides two very closely associated supplies.

Even though there is currently no binding rule which gives a definite answer to the question of what the nature is of the supply carried out by electronic platforms and on what basis the place of supply should be defined, there seems to be some consensus (i.e. in Germany and also in Italy, *see* Italian Circular on the place of supply for booking services[7]) that those platform services should be taxed where

5. VAT Committee, WP 814, *supra* n. 4, at p. 12.
6. VAT Committee, WP 906, *supra* n. 4, at p. 5.
7. IT: Agenzia delle Entrate, Risoluzione 199, 16 May 2008, available at http://www.studiogiardini.com/wordpress/wp-content/uploads/downloads/2011/09/RM.199.E.2008.territorialit%C3%A0.intermediazione.alberghiera.pdf (accessed 4 May 2022).

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the underlying transaction is carried out, disregarding the special place-of-supply rule for electronic services. Of course, this lack of legal clarity is not a good situation since opinions by bodies such as the VAT Committee, the VEG and the GFV are not binding to tax authorities and taxable persons. It is likely that this question on the nature of the supply will have to be answered by the Court of Justice of the European Union (ECJ) one day. The matter of Booking.com NL would not be affected anyway since the nature of supply is only relevant if the landlord is not resident in the state where the property is located.

3. How to Declare and Pay the VAT Related to B2C Transactions?

With the place-of-supply rules for electronic services came the introduction of the Mini One-Stop Shop (MOSS) on 1 January 2015. This special scheme enables companies to declare and remit their VAT liabilities on services being taxable in other EU Member States in the EU Member State of establishment (Member State of identification). Companies from outside the European Union can choose an EU Member State in which they submit their MOSS return.

However, since MOSS was limited to electronic services, a regular registration would be required for any other type of cross-border B2C service (i.e. those which are in the scope of article 46 of the VAT Directive). This changed on 1 July 2021, when MOSS was transformed into OSS and extended to all types of cross-border B2C services (article 369a et seq. of the VAT Directive). Hence, irrespective of whether the service provided by Booking.com NL is an electronic service or a service linked to the underlying transaction (rent of property), the company could now make use of OSS.

As a side note there is an interesting detail about OSS when it comes to suppliers which are not established in the European Union. Those companies can generally also make use of OSS (article 358a et seq. of the VAT Directive). However, whereas the Union scheme is not limited (article 369b of the VAT Directive says: "[t]his special scheme applies to all those goods or services supplied in the Community by the taxable person concerned"), the non-Union scheme (article 359 of the VAT Directive) is limited to services provided to EU residents ("Member States shall permit any taxable person not established within the Community supplying services to a non-taxable person *who is established in a Member State or has his permanent address or usually resides in a Member State*, to use this special scheme. This scheme applies to all those services supplied within the Community [emphasis added].). This wording is likely to be an error in the legislation, caused by the fact that the MOSS regulation was focused on TBE services supplied to EU resident consumers. Under the OSS scheme, it obviously does not make any sense to limit it accordingly since EU as well as non-EU suppliers of services can render those to both EU and non-EU resident consumers. Anyway, when read literally, non-EU suppliers of services would have to register locally as soon as there is one customer from outside the European Union (*see* following example).

Example

A Switzerland-based booking platform markets hotel accommodation worldwide as a disclosed agent and charges a fee to the consumer.

- Heidi from Zurich (Switzerland) books a stay in a hotel in Berlin (Germany). According to German guidance, the service fee is subject to German VAT (where the underlying service is provided) and the booking platform has to remit it to the German tax office. According to the wording of the VAT Directive the platform has to register locally in Germany. However, the wording of the German VAT Act does not limit the OSS in that regard and thus OSS would be applicable.
- Arthur from Paris (France) books a stay in a hotel in Rome (Italy). Here, there is no doubt: the OSS is applicable because the customer is an EU resident.

Since OSS and local registration lead to the same fiscal result, i.e. the tax is collected by the member state of consumption, it would be reasonable if all Member States would allow non-EU suppliers to apply OSS irrespective of whether or not the customer is resident in the European Union. For the sake of clarification, it would be necessary to amend the wording of article 359 of the VAT Directive.

4. What if the Customer of Booking.com is in Business?

When reading article 9 of the VAT Directive ("[t]he exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity") it is reasonable to assume that a landlord who markets his flat on a booking platform such as Booking.com is in business. This is because the only rational reason for renting a flat to strangers is to earn money.

From this background it is easy to understand the rationale of Booking.com in Italy, arguing that the recipients of their service (landlords) should remit Italian VAT themselves since they are supposed to be in business. The Italian tax authorities, conversely, claimed that a missing VAT ID of the customer automatically means they are not in business and the supplier cannot rely on the reverse charge mechanism.

Interestingly – and this could indeed be the last resort for Booking.com in Italy – EU law does not provide a rule on how a supplier of services should determine and document whether or not his customer is in business. This is different for the intra-Community supply of goods (article 138 of the VAT Directive), where zero rating is strictly linked to a valid VAT ID of the customer. With regard to services, article 18 of IR 282/2011 only says that under certain circumstances it is possible to *assume* that the customer is in business or not in business.

It is worth noting that exactly this question is now pending at the German Federal Fiscal Court.[8] In this case, a supplier

8. DE: Federal Fiscal Court, pending since 20 Oct. 2020, V R 20/21.

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from another EU Member State has supplied a service to a German resident recipient and claimed that the recipient has to apply the reverse charge mechanism even though the supplier could not present a German VAT ID of his German customer. In the proceedings, the Regional Tax Court of Saarland[9] is of the opinion that proof can also be given in another way, provided that "it is certain that the recipient of the service is an entrepreneur". Having in mind that the German Federal Fiscal Court quite often refers questions on EU law to the ECJ, it is not unlikely that the latter will shortly get a chance to sort this out. Booking.com could benefit from a positive outcome.

The fact that the role of the customer's VAT ID for applicability of the reverse charge mechanism is not defined in EU law should be an incentive for the legislator to provide clarification. Of course, linking the reverse charge (and also the default place-of-supply rule for cross-border services) to the VAT ID of the customer is only possible if any business customer is given a VAT ID upon application.

This said, if a service of a booking platform is provided to another business, it does not matter if the service is regarded as an electronic or an intermediation service. In both cases the default place-of-supply rule (article 44 of the VAT Directive) applies, and the service is taxed where the business customer is established. Even though there is a strong link to the property, the application of article 47 (place of supply where the property is located) of the VAT Directive is excluded by article 31 IR 282/2011. Furthermore, if the platform operator is not established in the member state where the service is taxable, the reverse charge mechanism of article 196 of the VAT Directive applies. This is also the case if a landlord does not surpass the threshold of a small entrepreneur (article 282 of the VAT Directive).

Hence, the VAT handling of B2B services is straightforward. There may, however, be some case of doubt if the property is located in a state which is different from the state of residence of the landlord. As an example, the German tax authorities still take the view that a rented property creates a fixed establishment for VAT purposes. Thus, the service would be taxed in the Member State where the property is located – and not in the (other) Member State where the landlord is resident. Since the ECJ has confirmed in its judgment in *Titanium*[10] that a VAT permanent establishment requires both technical and personnel resources, a rented property does not meet the requirements of a fixed establishment. The service fee can thus only be taxable in the Member State where the landlord is resident. If the landlord is resident outside the European Union, the fee would be out of scope of EU VAT.

5. Conclusion

The correct VAT treatment of services provided by booking platforms remains a tricky matter. On EU level, the discussion is rather controversial and not finished yet. As long as there is no binding rule, there is a risk of a non-uniform interpretation of alternative rules by EU Member States. This is not acceptable as it gives raise to non-taxation or double taxation, as well as criminal proceedings like in the case of Booking.com NL in Italy. Doubts about the entrepreneurial status of participants in the sharing economy – such as landlords renting their homes to strangers on a temporary basis – add complexity.

In the B2C sector, linking the place of supply of electronic booking services to the place where the underlying service is provided may be fiscally desirable. However, the reasoning is weak since those services are usually provided fully automatically and the platform operator does not act as a genuine intermediary. It also seems to be unfortunate to exclude specific Internet services from the special place-of-supply rules for electronic services. Anyway, with the new OSS it will not make much difference to the suppliers of cross-border services as long as this reporting scheme is applicable for any EU as well as non-EU business (irrespective of the domicile of the customer) and if there are binding rules on the nature and place of supply.

In the B2B area, there is an urgent need to harmonize the fixed establishment status of a rented property as well as the entrepreneurial status of participants in the sharing economy. Furthermore, guidance is required as regards the role of the VAT ID of the business customer with regard to the applicability of the reverse charge mechanism.

Coming back to the initial *Booking.com NL* case, if the taxable person and the Italian tax authorities do not find a mutual agreement, the case is likely to find its way to the ECJ. In the author's opinion it would be very surprising if the ECJ confirms the position of the Italian authorities, according to which the VAT ID of the customer is a "must have" to rely on the reverse charge mechanism. Other booking platforms, as well as individuals making use of those platforms to benefit from the sharing economy, should also have a look at this matter in order to avoid unpleasant surprises.

9. DE: Regional Tax Court of Saarland, 12 May 221, 1 K 1144/18.
10. AT: ECJ, 3 June 2021, Case C-931/19, *Titanium Ltd v. Finanzamt Österreich, formerly Finanzamt Wien*, Case Law IBFD (accessed 12 Apr. 2022).

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