E-Commerce VAT Concerns

In this article, the author discusses the new e-commerce rules in the field of VAT, as a consequence of the entry into force on 1 July 2021 of the VAT Package, which includes Council Directive (EU) 2017/2455 and Council Directive (EU) 2019/1995. He welcomes the new provisions on e-commerce, but highlights that VAT is still threatened by new challenges caused by globalization and by existing realities that have not yet been sufficiently tackled. The author adopts a practical approach in this article, which aims to highlight some of his key concerns.

1. Introduction

VAT is being modified by a new scenario that forces a break with the principles of localization that have traditionally governed international trade in the internal market. Indeed, digitalization, in line with the evolution of European law so far approved, is the driving force behind the changes in the European Union’s tax policy. The VAT Directive is required to adapt its traditional conception and evolve in response to the rapid changes in business models and consumer habits. The ambition for harmonized taxation is the result of decades of consensus among Member States, nourished by the European Commission, first translated in the form of Council Directive (2008/8/EC) and completely transforming the place of supply rules applicable to telecommunications, broadcasting and television services, as well as electronically supplied services at EU level, when these are provided to final consumers.

However, reality is gradually outstripping the legal text. It is therefore necessary, as expressed in the VAT Action Plan 2016, to undertake new objectives adapting VAT to a new changing scenario and to cover other types of taxable event – supplies of goods – as well as to extend existing mechanisms to tax new transactions. Similarly, it should be assumed that, in tax matters, the taxable person cannot be conceived as the traditional natural individual or legal person, as in most of the cases platforms or marketplaces already existing in the VAT legislation, and in particular chain transactions among taxable persons in different Member States take place.

2. New E-Commerce Rules

The new e-commerce rules, although novel in their practical application, have been inspired by mechanisms already existing in the VAT legislation, and in particular two schemes: the distance selling scheme and the “one-stop shop”.

Based on those mechanisms, and marking another milestone in the taxation of electronic commerce, the Council Directives on electronic commerce (e-commerce) – Directive 2017/2455 and Directive 2019/1995 – constitute a turning point in the way of taxing transactions in the internal market with final consumers, and in particular, in transactions with a digital component characterized by specific operators and baptized under the name “Electronic Interfaces”. This reform is a consequence of the European Commission’s main aspirations, which aim to create a digital single market in which the free movement of goods, persons, services and capital is guaranteed under the conditions of full and free competition.

The reform also addresses one of the European Union’s main concerns in the context of fraud prevention by ensuring that all transactions involving the importation of goods from third territories must be subject to VAT without exception. Cross-border fraud, which the Commission already denounced at the outset in its 2016 Action Plan, is responsible for a loss of VAT revenue of around

EUR 50 billion per year in the European Union. For this reason, Directive 2017/2455 amends the taxation of the import of goods, abolishing the exemption for imports of low-value goods and small consignments contained in Directive 2009/132/EC, with effect from 1 July 2021. In this regard, it avoids the competitive commercial advantage it offered to non-EU businesses, thus levelling the playing field between EU and non-EU businesses.

However, the objectives cannot be set at disproportionate limits. Aware of the technical complexity that it could entail for individuals acquiring goods from outside the European Union to have obligations with the custom authorities for each import they make, and how burdensome in economic and operational terms this could be, Directive 2017/2455 establishes a new taxable event. As such, “distance sales of imported goods” from third territories or countries is introduced, in the case of goods in consignments whose intrinsic value does not exceed EUR 150, since, above this amount, it will be necessary to make a full customs declaration form at the time of import.

Having recognized the specific taxable event for these transactions, the previous is encompassed by a simplification of tax obligations through the so-called “Import Scheme”. This introduces an innovation in terms of the relations with the tax administration of the country where goods are imported and businesses or professionals who make distance sales of goods imported from third countries or territories in consignments whose intrinsic value does not exceed EUR 150 with the exception of products subject to excise duties, as the one-stop shop is available for declaring the VAT on these transactions. This is a voluntary system, in the sense that taxable persons are entitled to opt for this system, known as the “special arrangements for declaration and payment of import VAT”, which is conceived as a monthly declaration system to be carried out by those presenting the goods to customs. The VAT declared is actually collected from the recipients of the consignments, the latter becoming legally liable for payment of the VAT. If neither of these regimes are chosen, EU law leaves the final consignee with no other option but to suffer the double taxation that will result from being subject to VAT on importation following the suppression of the exemption for low-value goods previously held in Title IV of Council Directive 2009/132/EC, and as expressly addressed in article 143(1)(ca) of the VAT Directive.

A similar solution can be found regarding supplies of goods made by suppliers from one Member State to another, where the final recipients are consumers, despite the value of the goods. In this regard, the taxable event “intra-Community distance sales of goods” is now introduced, which, by inspiration of the taxation close to consumption principle, the transactions are now subject to VAT in the Member State where the recipient receives the goods. Suppliers performing intra-Community supplies of goods can also simplify their obligation by benefiting from the one-stop shop regime, which is included in the so-called “Union Scheme”.

Finally, it should be recalled that telecommunications, radio and television broadcasting services and electronically supplied services to final consumers established in Member States are subject to this optional one-stop shop regime, whether they are provided by businesses or professionals not established in the European Union – who are covered under the “non-Union scheme” provisions – or by taxable persons established in the European Union – who are covered by the “Union scheme” provisions. Moreover, not only do these specific services enjoy such treatment, but, as from 1 July 2021, Directive 2019/1995 extends the one-stop shop to all business-to-consumer services taking place in Member States where the supplier is not established.

The effective and efficient collection of VAT requires the adoption of fictitious solutions in the face of the inoperability of other studied alternatives, such as the arduous task of naming and identifying those jointly and severally liable for the payment of tax debts and requiring consequent payment from them. To achieve this objective and to lighten the administrative burden on sellers, the new article 14(a) of the VAT Directive presumes that electronic interfaces mediating in the distance sale of imported goods or facilitating the supply of goods from suppliers non-established in the Community area shall be regarded as the ones who receive and deliver the goods themselves – referred to as “deemed supplier”. This new fiction removes the actual supplier of the goods for VAT purposes – referred to as the “underlying supplier” – in dealings with the Member States’ tax administrations. Each intermediary is deemed to have received and further supplied the electronic service himself. Consequently, for VAT on e-commerce transactions, the electronic platform acts as if it were the actual supplier of the goods or services and subsequently resells the goods to the final customer, who are themselves capable of using the one-stop shop.

All these special one-stop-shop schemes – which are optional, as businesses can always be identified in each Member State of consumption and declare VAT therein – allow businesses or professionals to pay the VAT due on their transactions carried out in the Community (Member State of consumption), for each quarter or calendar month depending on the applicable special scheme, by means of a single tax return submitted electronically to the tax administration of the Member State for which the

5. Arts. 369y-369zh VAT Directive
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8. Council Implementing Regulation (EU) 282/2011 in the supply chain between an electronic service provider and the end consumer, each intermediary is deemed to have received and further supplied the electronic service himself. Consequently, for VAT on e-commerce transactions, the electronic platform acts as if it were the actual supplier of the goods or services and subsequently resells the goods to the final customer, who are themselves capable of using the one-stop shop.

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taxable person has opted or must opt to identify (Member State of identification). VAT is charged at the applicable rate of the country of destination. The country of identification is responsible for transferring the VAT collected to the Member State of the final consumer.

3. Chain Transactions: Concerns on Existing Realities

It is noteworthy that the VAT Directive has not detailed the chain transactions\(^9\) that may originate in e-commerce and that may affect the interface. Its treatment can be analysed from the wording of article 36(a), which states that “where the same goods are supplied successively and those goods are dispatched or transported from one Member State to another Member State directly from the first supplier to the last customer in the chain, the dispatch or transport shall be ascribed only to the supply made by the intermediary operator” [emphasis added]. Nevertheless, from the wording of articles 14(a) and 66(a) of the VAT Directive, such a general premise is not applicable when electronic interfaces mediate in the supply of goods performed by non-established underlying suppliers. In this sense, article 36(a) paragraph 4 expressly excludes the chain transaction regime in these types of situations. Note that the two situations covered by article 14(a) of the VAT Directive are the following:

- marketplaces facilitating distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150 (leading to the taxable event, distance sales of imported goods); and
- marketplaces facilitating the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person (leading to the taxable event, intra-Community distance sales of goods).

Analysing the foregoing, it can now be understood that, in the case of intra-Community distance sales in which there are successive deliveries, the dispatch or transport of the goods is ascribed to the supply made by the interface in favour of the end consumer (article 14(a) of the VAT Directive) and not to that made by the underlying supplier in favour of the interface\(^10\) (which, as noted before, is the general rule envisaged in article 36(a) of the VAT Directive) only in the case where the goods are within the Community and supplied by a taxable person not established within the Community, as established in article 14(a) point 2 of the VAT Directive.

However, although a solution in this respect is given by the new amendments of Council Directive (EU) 2017/2455 by the introduction of article 14(a), problems arise when the hypothesis shows otherwise. In this regard the amendments to the VAT Directive have not granted specific treatment to chain transactions when they take place among suppliers and intermediaries in the European Union (where electronic interfaces could easily be found).

For example, this could be the case of simple suppliers dispatching intra-Community goods whose value is more than EUR 10,000 to final consumers in other Member States. An exemplary case would be the following:

Entrepreneur B established in Italy sells a lawnmower to a Spanish retired couple living on a farm in Seville through his website. The lawnmower, however, is from a German supplier called “DEUTCH S.U.”, established in Germany. The Italian company buys the lawnmower from DEUTCH S.U., and subsequently orders DEUTCH S.U. to deliver it according to specific standards and guidelines, assuming the risk of damage, to the Spanish retired couple.

Two possible solutions to this problem can be considered:

1. First, the transaction could be conducted under the general regime of article 36(a), so that the supply with dispatch or transport would be ascribed to the supply made by the German company (DEUTCH S.U.) to the Italian. If such were the case, two scenarios would appear:
   - first, there would be an intra-Community supply of goods performed under the transaction between the German entrepreneur and the Italian entrepreneur, which would be exempt unless the Italian reveals a German VAT registration number, in which case it would be a local supply. Correlatively to this, there would simultaneously be another taxable event consisting of an intra-Community acquisition of goods located in Spain, to be declared by the Italian company; and
   - second, there would be a genuine supply of local goods (domestic supply) in Spain from the Italian supplier to the Spanish final customer.

For this transaction, the VAT identification of the Italian supplier in Spain will be required. As there is no dispatch or transport from a Member


These types of transactions take place when the same goods, which are to be dispatched or transported to another Member State directly from the first supplier to the final purchaser in the chain, are the subject of successive supplies between different traders or professionals. Thus, the goods will be delivered to at least one first intermediary who, in turn, will deliver them to other intermediaries or to the final customer in the chain, there being, for VAT purposes, only one intra-Community transport.

\(^10\) Art. 14a(2) states that “where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself”. Therefore, any supply that takes place in a chain, other than by the interface to the final customer, will be regarded as a local supply of goods, as there is no transport for VAT purposes connected to the transaction.
State other than the Member State of arrival to the final customer, it would not qualify for the one-stop scheme, as the conditions for the taxable event “intra-Community distance sales of goods” are not met.\(^1\)

The one-stop scheme would only be available in the event that the Italian displays a German VAT registration number to the German company, as for such cases, the supply between the two entrepreneurs would be a domestic supply located in Germany (article 36(2)(a) of the VAT Directive), with the dispatch and transport being ascribed to the supply from the Italian company to the Spanish consumer.

(2) A second alternative involves considering the transaction between the Italian company and the Spanish customer as an “intra-Community distance supply of goods”. At the end of the day, it could be held that there is an indirect involvement of the Italian company in the transport of the goods as it has given specific transport instructions to the German supplier. Although it could be argued that chain transactions other than those regarding interfaces under article 14(a) are not covered by such taxable event, the Court of Justice of the European Union (ECJ) has held in various cases that in certain circumstances where the wording of a VAT provision proves insufficient, applying the provision to certain coherent circumstances offers a useful point of reference which leads to a rational result for tax purposes,\(^1\) giving pre-eminence to “the simple application of VAT”\(^1\).

In the absence of authoritative criteria on the subject referenced, both options could be feasible. While option A can be described as more technical and precise, it should be noted that an interpretation in the light of the e-commerce Directives would lead to the application of option B. As has been noted, the aim of the e-commerce Directives is to adjust the taxation of e-commerce within the framework of an updated internal market, absorbing all the realities that previous Community legislation was unable to address. Thus, as stated in recital 9 of Directive 2017/2455, legal certainty requires that, in situations of indirect participation by the supplier, it should be possible to apply the special one-stop-shop regimes (in this case, the Union Scheme) when the goods are transported or dispatched on behalf of the supplier, even when the supplier is indirectly involved in the transport or dispatch of the goods. The taxable event “intra-Community distance selling of goods” itself would therefore be defined in cases such as the current, where, despite the indirect participation of a supplier who has offered his goods via his website or any form of “on-line” sale – a situation in which the taxable event applies – it is taxed under the provisions concerning chain sales. It should be noted that Directive (EU) 2019/771\(^4\) does not address e-commerce concerns but other awareness at Community level, especially the allocation of transports in the scheme of transactions among economic operators subject to intra-Community distance sales. It has also been noted that, according to the e-commerce Directives, the one-stop shop is the only system that can achieve the objectives of reducing bureaucratic burdens, ruling out any other type of alternative. Thus, the objectives introduced through Directive 2017/2455 would be disregarded by the alternative of direct registration and payment required by the “sales chain” system at destination held in article 36a of the VAT Directive. And, in short, from a European law perspective, interfaces (typically established in non-EU countries) would be favoured over European business or economic operators, suppliers of goods, in a situation that, objectively speaking, could be considered comparable.

4. Unexplored Scenarios for VAT in E-Commerce: Non-Fungible Tokens

4.1. NFTs or “unique digital assets”

One of the key concerns that perhaps cannot be adequately tackled with the new e-commerce rules can be observed in what has recently been a trending form of cryptographic exchange. Indeed, non-fungible tokens (NFTs) or “unique digital assets” can easily challenge the efficient taxation of the electronic transactions within the internal market, as the e-commerce provisions may prove insufficient.

In an electronic world, cryptocurrency has been able to give digital form to the virtues of the human intellect in a digital form by the hand of crypto-engineering and under the security of blockchain algorithms. Things like art, music, games and any other forms of intellectual expression can be digitalized (minted) and sold electronically, backed up by blockchain engineering.

As their name expresses, NFTs are not interchangeable for other items because they have unique properties. They grant ownership of a piece of digital content, but not the underlying utility or asset it represents. For example, someone buying an NFT that consists of an art painting would not be buying the real art painting, nor will they have the copyright to that painting; they will only be considered the owner of the digital token.

The transaction can only be carried out by means of cryptocurrency and on a specific network. Such network is decentralized; that is, no central authority or third party (i.e. company) is the owner, and the laws that govern it are predefined by blockchain and supervised by each of the independent computers that make up the highly decentralized network. Such network is called “Ethereum” and the only possible currency that can be used is...

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11. According to art. 14(4)(1) VAT Directive, “intra-Community distance sales of goods’ means supplies of goods dispatched or transported by or on behalf of the supplier, … from a Member State other than that in which dispatch or transport of the goods to the customer ends” [emphasis added].


ethers (a crypto-coin). Ethereum is the only decentralized network that enables such digital exchanges by deploying a so-called “smart contract” in its network.

4.2. VAT treatment of NFTs

After an introduction, albeit brief, to the nature of NFTs and their exchange peculiarity, it is interesting to note that the new e-commerce provisions can be easily challenged when these types of transactions are performed by any consumer located in a Member State.

4.2.1. From the perspective of the nature of the assets sold

First of all, as NFTs are sui generis, a question arises as to their nature, and from a VAT perspective, whether the NFTs can be considered goods or services. This is an important concern, as it can determine taxation in one way or another, as well as the localization of the taxable event in question and the application of the one-stop shop mechanism.

According to article 14(1) of the VAT Directive, “supply of goods” shall mean the transfer of the right to dispose of tangible property as owner, whereas “supply of services” shall mean any transaction which does not constitute a supply of goods. From the wording it can be held that the sale of NFTs can only fall under the category of supply of services, as, although granting the owner the right to dispose of the NFT, it does not grant it a right over tangible property. In the same line, article 25 of the VAT Directive states that “the assignment of intangible property, whether or not the subject of a document establishing title, shall be regarded as a supply of service”.

From an EU case law perspective, no solid precedents are found. Nevertheless, perhaps it is important to cite the ECJ’s case Hedqvist (C-264/14), as it is the first EU case law that dealt with the crypto-environment. The ECJ held that the Bitcoin virtual currency with bidirectional flow, which will be exchanged for traditional currencies in the context of exchange transactions, cannot be characterized as “tangible property” within the meaning of article 14 of the VAT Directive.

Although it can be argued that many circumstances differentiate bitcoins from NFTs (the first being a means to consumption, while the latter is a consumption in itself) and that the context of Hedqvist (C-264/14) is different from that of NFTs (in the Hedqvist case bitcoins were exchanged for Swedish krona on a centralized platform), it is harsh to conceive of NFTs as goods under the VAT Directive, as tangibility is always missing, not fitting into the wording of article 14(1).

4.2.2. Electronic service?

Moreover, subscribing to the view that NFTs shall be regarded as services and not goods, due to the fact that they are supplied through electronic means, it can be held that NFTs should be regarded as “electronic services”, and thus fall under the scope of article 58 of the VAT Directive, which is the provision regulating these services.

In this line, according to article 7(1) of Implementing Regulation 282/2011, electronically supplied services, within the meaning of the VAT Directive, are to include “services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology”.

Although electronically supplied services usually involve, to some extent, human intervention, but mining involves finding a mathematical answer (hash) by sending random numbers (nodes) into the network, calculated by powerful computers and beyond the reach of human intellectual capacities.

Thus, in the framework of the e-commerce provisions, NFTs shall be regarded as electronically supplied services, and not supplies of goods (whether distance sales of imported goods or intra-community distance sales of goods) within the meaning of the new article 58 of the VAT Directive, introduced by the Council Directive (EU) 2017/2455.

4.2.3. Identifying the taxable person?

In the author’s opinion, the main difficulty regarding NFTs is identifying the sellers and consumers. Knowing who the seller and consumer of the NFT are, is not only relevant for determining its status as a taxable person or not, where the taxable event should be located or which one-stop shop regime the seller could apply. As can be observed, the identity of the users is important due to the main objective of control and transparency, preventing any possible fraudulent practices that could hamper the e-commerce Directives and the internal market as a whole.

As described above, NFTs are traded in an electronic decentralized network called “Ethereum”. That is, no third party shall be reported for anything accruing therein. Users have an “external owned account”, which is essentially a large numerical code that allows them to send and receive crypto-coins and, in combination with a “contract account”, sell and purchase NFTs. What is important to note is, regardless of any technical understanding of Ethereum, the identities are unknown, and the playing field of the exchange belongs to all the single computers connected to the network (the so-called “nodes”).

Moreover, due to the complexity of Ethereum for beginners, decentralized apps have been created (known as "DApps"). These DApps aid the exchange of NFTs through Ethereum’s network. Sellers of NFTs deploy their smart contracts in the DApp and wait for buyers to accept them. What is important to know is that these DApps do also lack owners, as they can be altered by any user of the network (i.e. the DApp belongs to the network).

In this complex scenario, the VAT Directive could be easily challenged, either because the identity of the users is unknown, or because the electronic marketplaces that foster the exchange of the NFT seems to have no ownership, and its condition makes it impossible to be taxed.

In this sense, the driving force behind the VAT e-commerce is to locate taxation in the Member State of consumption and to regard electronic platforms as a deemed supplier of goods or services when they facilitate distance sales of goods or electronic supplied services using an electronic interface, according to the new article 14(a) of the VAT Directive and article 9(a) of Council Regulation 282/2011.16

In cases such as the current one, Ethereum users are under the veil of a decentralized network, and the platforms that facilitate the transactions do not have ultimate third-party ownership or authority controlling its structure, as they belong to the global network.

Directives 2017/2455 and 2019/1995, regarding the place of supply, and Council Implementing Regulation (EU) 282/2011, regarding platforms as a deemed supplier of the services, would be easily challenged and the internal market easily harmed, as some of these transactions can amount to high values. As a matter of fact, The Merge is a digital artwork created by an anonymous digital artist nicknamed Pak. It was sold on 6 December 2021 for USD 91.8 million on the NFT decentralized marketplace NiftyGateway.

5. Conclusion

Despite the progress made so far to implement rules for e-commerce transactions from a VAT perspective, in this article the author has shown that some challenging scenarios remain inadequately addressed. Chain transactions and NFTs are good examples and are in rapid expansion, but many more could be listed. In the author’s opinion, it may be that VAT cannot promptly respond to concerns raised by digitalization because EU law-making always lags behind the digital reality or either proves incomplete or incompatible with existing provisions. Such concerns could, however, at least be improved with the unity of all Member States and EU institutions in the process of making VAT legislation, promptly responding to the challenges and reaching consensus that responds to realities and not to political ideologies, maintaining and safeguarding the internal market.

16. The validity of art. 9(a) Council Regulation is currently being challenged, as it can exceed the natural scope of an implementing act under the European Union Treaty on the Functioning of the European Union (TUEU) and European Union EC/EU Treaty, art. 291, Treaties & Models IBFD (see request for Preliminary Ruling lodged by the First-tier Tribunal (Tax Chamber) of the United Kingdom (U.K. EC), Case C-695/20, Fenix International Limited v. Commissioners for Her Majesty’s Revenue and Customs). Despite the ECJ’s upcoming resolution and its outcomes (which go beyond the purpose of the present article), the author wishes to state the importance of the consensus reached by the EU institutions clearly reflected in the request cited: the need for online platforms to be held liable for the collection of VAT in supplies of services (see points 45 and 46 of the request).