

The use of new technologies in VAT and taxpayers' rights

Marta Papis-Almansa

- 1. Introduction**
- 2. The use of new technologies in VAT**
 - 2.1. VAT fraud and technology
 - 2.2. Examples of technology VAT tools
 - 2.3. Advantages and disadvantages of the current state of play
- 3. The concept of taxpayers' rights and their sources of protection**
 - 3.1. The concept and legal research on taxpayers' rights
 - 3.2. Sources and legal status
 - 3.3. Limitations to the rights
- 4. New technologies and taxpayers' rights at stake**
 - 4.1. Rights affected by the use of technology
 - 4.2. Right to privacy and protection of personal data
 - 4.2.1. Legal framework
 - 4.2.2. Legality of a restriction
 - 4.2.3. Right to privacy and the exchange of information
 - 4.2.4. Right to privacy and electronic surveillance
 - 4.2.5. Right to privacy and protection of personal data and the use of technologies in VAT in the light of the CJEU and ECtHR's case law
 - 4.3. Right of defense and to effective legal remedy
 - 4.3.1. Legal framework
 - 4.3.2. Applicability and normative content of the guarantees
 - 4.3.3. Right of defense and to effective legal remedy, and the use of technologies in VAT, in light of the CJEU and the ECtHR's case law
- 5. Final reflections: the future of taxpayers' rights in technology based VAT**

Due to the requirements for the recruitment, appointment and training of persons holding public office and the generally applicable management procedures, which generally ensure a high level of quality in public administration, it must be assumed that there is a particularly justified presumption that administrative acts are flawless.¹

This is how administrative law generally works. It assumes that government agencies are operating lawfully and enforcing the law. The courts do not accept the failure of the entire system.²

1. Introduction

Digitalization and emergence of new technologies, including Artificial Intelligence (AI), has influenced the dynamics of, and shaped new organizational principles for the functioning of economies and societies globally. Technology has also changed the landscape for taxation and interactions between tax administration and taxpayers. Recently various models of electronic reporting and invoicing, split-payment mechanisms, as well as electronic tools for data analysis and risk assessment have been adopted by many of the Member States in the EU. Technology will also have a central role to play in the future of the EU VAT and administrative cooperation.³

The discussion and awareness on the legal disruption caused by AI has emerged as an aftermath of the digital revolution, and has already started changing the regulatory framework in the EU.⁴ Alongside the undisputed opportunities of im-

1 Unofficial translation from Danish of a passage in the judgment by a district court in a tax law case SKM 2021.390 regarding legal effects of an administrative decision issued in breach of law. Danish, original version reads as follows: "Som følge af de krav, der gælder ved ansættelse, udnævnelse og uddannelse af personer, der beklæder offentlige stillinger, og de almindeligt gældende forvaltningsprocedurer, der generelt tilsikrer et højt niveau af kvalitet ved offentlig forvaltning, må der antages at være en særlig begrundet formodning for, at forvaltningsakter er mangelfri." The judgement has been appealed to a higher instance by the taxpayer.

2 President of the Supreme Administrative Court in Trouw (the Netherlands), 9 January 2021 in the context of the Dutch childcare benefit scandal; quoted after S. Douma, Automated Decision Making & Taxpayers' Rights, presentation at Thøger Nielsen Konference om Skat og Fremtiden, University of Copenhagen, 28 October 2021.

3 European Commission, Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021.

4 It has motivated among others adoption of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR). See also the Proposal for a Regulation of the European Parliament and the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC COM(2017) 10 final, Brussels, 10 January 2017. The most significant recent developments include the European Commission's Proposal for Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM(2021) 206 final, Brussels, 21 April 2021.

proved monitoring of compliance with tax obligations in an effective, cost and time efficient way, possibilities in preventing tax evasion and fraud, transparency and enhanced protection of compliant taxpayers, there are also challenges for protection of taxpayers' rights, including the right to privacy and protection of personal data,⁵ right of defence and to effective legal remedy,⁶ prohibition of discrimination,⁷ freedom to conduct business,⁸ and protection of property.⁹

The issue of taxpayers' rights is strictly related to one of the classic legal issues concerning the limits of the power of the state authority and guarantees for individuals stemming from the rule of law. The resilience of a balanced relationship between a taxpayer and a state exercising its sovereign rights to tax, which the taxpayers rights' aim at achieving,¹⁰ depends not only on existence of formal guarantees for the protection of the rights, but most importantly on their full realisation through effective mechanisms for their protection and enforcement.

The protection of taxpayers, as a starting point, should consider the *a priori* asymmetry between a state, with its apparatus powers to impose coercive measures, on the one hand, and an individual who is obliged to obey to the tax laws, on the other hand. The delicate balance between a state and a taxpayer have been strained by a major focus in tax law developments being on the combat of tax avoidance, evasion and abuse.¹¹ The objective of securing tax revenues through the design of "fair" tax systems enforcing existing tax rules and improving compliance have dominated the international tax law debate¹² and resulted in an increase in obligations imposed on taxpayers stemming from new and often complex legal provisions, as well as strict controls,¹³ also in the field of VAT. The economic disruption caused by the Covid-19 crisis have further enhanced the necessity to secure tax revenues and facilitate recovery of the Member States.¹⁴

5 Arts. 7 and 8 of the Charter of Fundamental Rights of the European Union (CFR); Art. 16(1) of the Treaty on the Functioning of the European Union (TFEU); Art. 8 of the European Convention on Human Rights (ECHR). See further section 4.2.

6 Arts. 47 and 48 CFR; Art. 6 ECHR.

7 Art. 21 CFR.

8 Art. 16 CFR.

9 Art. 17 CFR; Art. 1 of the Protocol no. 1 ECHR.

10 D. Bentley, *Taxpayers' Rights. Theory Origin and Implementation*, (Alphen aan den Rijn: Kluwer Law International, 2007) p. 56.

11 B. Brzeziński, K. Lasiński-Sulecki, *Problematyka ochrony praw podatnika jako kierunek badań nad prawem podatkowym*, in A. Franczak (ed.), *Ochrona praw podatnika. Diagnoza sytuacji*, (Alphen aan den Rijn: Kluwer Law International, 2021) pp. 17-23; P. Baker, *60 Years of the European Convention on Human Rights and Taxation*, *European Taxation* 2021, p. 526.

12 J. Kokott et al., *Public International Law and Tax Law: Taxpayers' Rights: The International Law Association's Project on International Tax Law-Phase 1*, *Geo. J. Int'l L.* 2020, p. 381.

13 A. Franczak, *Od redaktora naukowego* in A. Franczak (ed.), *Ochrona praw podatnika. Diagnoza sytuacji*, (Alphen aan den Rijn: Kluwer Law International, 2021) pp. 11-14.

14 European Commission, Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021.

Combatting VAT fraud and streamlining tax compliance has also been the main rationale underlying development and adaptation of technology based VAT tools.¹⁵ With a dominance of anti-fraud discourse, the perspective of taxpayers' rights has received considerably less reflection, in the tax law debate, in the EU.¹⁶

Against that backdrop, the passage from a recent judgment of a Danish district court in a tax case, as quoted in the opening of this paper, concerning the alleged presumption of flawlessness of administrative decisions is surprising and should be considered unacceptable in States governed by a rule of law. It could only be imagined how a similar way of reasoning would in the future supporting the presumption of flawlessness, omnipotence and suitability of technology to solve all problems of taxation.

The infamous Dutch childcare benefit scandal illustrates how severe the consequences of similar and such assumptions could be.¹⁷ As a result of the use of an automated, self-learning algorithmic system for risk assessment, and selection of application for review and control, thousands of parents were confronted with discriminatory and unjust actions for repayment of the benefits. The scandal has been described as “*unprecedented injustice*”¹⁸ and led to the dismissal of the Dutch government, in January 2021.

Reliance on technology and automation, in VAT reporting, collection, auditing, a cross-border exchange of VAT information, is an inevitable element of the future functioning of the EU VAT system. The Commission has announced that it will present a legislative proposal for modernising VAT reporting obligations, which would ensure a more detailed and possibly real-time collection and exchange of information, among others, on VAT intra-EU transactions.¹⁹ It has also acknowledged the benefits of the use of digital solutions and data analytics as instrumental

15 M. Merckx & N. Verbaan, *Technology: A Key to Solve VAT Fraud?* EC Tax Review 2019, p. 300.

16 J. Kokott et al., *Public International Law and Tax Law: Taxpayers' Rights: The International Law Association's Project on International Tax Law-Phase 1*, Geo. J. Int'l L. 2020, p. 381. See also J.M. Calderón Carrero, *Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administrations*, Intertax 2000, p. 462; M. Schaper, *Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination*, Maastricht Journal of European and Comparative Law 2016, p. 514.

17 Amnesty International, *Xenophobic machines: Discrimination through unregulated use of algorithms in the Dutch childcare benefits scandal*, 25 October 2021, available on <https://www.amnesty.org/en/documents/eur35/4686/2021/en/>, accessed at 2 February 2022.

18 Final report of the Parliamentary Inquiry Committee on Childcare Allowance, (Eindverslag van de Parlementaire ondervragingscommissie Kinderopvangtoeslag) from 17 December 2020, available on https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf, accessed at 2 February 2020.

19 European Commission, Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021, p. 9.

for facilitating the tasks of tax administrations and businesses.²⁰ Furthermore, the Commission has envisaged further steps to equip Eurofisc in more data and tools, at its disposal, to enhance its “*true EU capability against VAT fraud in cross-border transactions*”.²¹

It is, therefore, more than ever, important and timely to address the question on the normative value and content of taxpayers’ rights, and consequently on the requirements or limits, which must be respected when designing and using technology, in VAT administration. To that end, this paper aims to contribute by identifying the implications of the use of new technologies, in VAT, for the legal framework, for the protection of taxpayers’ rights in the EU.

Section 2. of this paper provides an overview of different technologies for VAT tools, and the benefits of their use in tax administration. Section 3. elaborates on the concept of taxpayers’ rights. In Section 4., after an overview of the taxpayer’ rights which are special attention is given to the right to privacy and personal data protection and the procedural rights of defence and effective legal remedy. The importance of the developments in jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) and conclusions steaming therefrom are discussed in the context of the use of new technologies in VAT. Section 5. concludes with a reflection on the future of taxpayers’ rights protection, in the context of new technologies.

2. The use of new technologies in VAT

2.1. VAT fraud and technology

Technology and digitalization, in VAT, as well as its impact on the emergence of new business models, new types of goods and services, and the channels of their distribution, causes challenges to the existing framework and fundamental concepts of VAT. Technology, on the other hand, provides for unprecedented opportunities for facilitating tax collection. For the purpose of this paper, it is that latter dimension of technology, in VAT, that is further discussed.

Over the last years, Member States have been quite active, when it comes to development and adoption of technology based VAT tools. Technology has been a means for streamlining compliance, but most importantly, a tool for combating VAT

20 European Commission, Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021, p.5.

21 European Commission, Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021, p. 11.

fraud.²² VAT fraud causes billions of euros being lost yearly, by the Member States.²³ VAT fraud erodes budgets of both the Member States and the EU, and leads to distortions of competition. It affects honest businesses, as well as consumers, and violates the very fundamentals of the Internal Market. The loss of tax revenue impedes the fulfilment of redistributive tasks of the Member States, and thus, also their role in protection of the fundamental economic and social rights of individuals.

The CJEU has consistently held that the Member States, while having procedural and institutional autonomy as to the prevention of breach of VAT laws, are obliged to take all measures appropriate for ensuring collection of all the VAT due on their territory. In addition, they must fight against tax evasion and tax fraud.²⁴

Technology allows remedying one of the weaknesses of traditional methods of fighting VAT fraud, namely its time aspect. Traditional methods, to detect fraud, take time and are, thus, ineffective, as the fraudsters need very little time to “disappear” with stolen amounts of undeclared VAT. Since the traditional methods have been failing in prevention and timely identification, prosecution and sanctioning of fraudsters, the fight against VAT fraud and responsibilities for its commitment has been extended to third parties, who participate in the production and distribution chain, including fraudulent transactions.

In a line of cases, the CJEU developed a principle of “good faith” in VAT, as a requirement to be able to benefit from the rights enshrined in the VAT Directive.²⁵ Since the judgment in *Kittel and Recolta Recycling*,²⁶ the CJEU has consistently held that a taxable person is to be refused a right to deduct, refund, and even the right to exempt an intra-EU supply of goods. However, it must be established that that person, based on objective factors “*knew or should have known*” that, he or she was participating in a transaction connected to the evasion of VAT and irrespective of whether the fraudulent transaction conferred on the taxable person any tax advantage.²⁷

22 M. Merks & N. Verbaan, *Technology: A Key to Solve VAT Fraud?* EC Tax Review 2019, p. 300.; R. Ismer & M. Schwarz, *Combating VAT Fraud through Digital Technologies: A Reform Proposal*, International VAT Monitor 2019, p. 240.

23 European Commission, VAT Gap Report 2021, available at <https://op.europa.eu/en/publication-detail/-/publication/f769dd4a-57da-11ec-91ac-01aa75ed71a1/language-en/format-PDF/source-245971484>, accessed at 10 December 2021.

24 According to CJEU, that obligation follows from Arts. 2 and 273 of the VAT Directive read in conjunction with Art. 4(3) TEU, as well as from Art. 325 TFEU. See for instance judgments in: CJEU, 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para. 25; CJEU, 8 September 2015, C-105/14, *Taricco and Others*, EU:C:2015:555, para. 36-37; CJEU, 20 March 2018, C-524/15, *Menci*, EU:C:2018:197, paras. 18-19.

25 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

26 CJEU, 6 July 2006, C-439/04 and C-440/04, *Kittel and Recolta Recycling* EU:C:2006:446.

27 See among other judgments in CJEU, 21 June 2012, C-80/11 and C-142/11, *Mahagében and Dávid*, EU:C:2012:373; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547; CJEU, 6 December 2012, C-285/11, *Bonik*, EU:C:2012:774; CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69; CJEU, 22 October 2015, C-277/14, *PPUH Stehcemp*, EU:C:2015:719; CJEU, 16 October 2019, C-189/18, *Glencore Agriculture Hungary*, EU:C:2019:861.

In *Italmoda*,²⁸ the CJEU went as far as to conclude that the Member States should refuse the rights to a taxable person, who knew or did not take every precaution that could reasonably be required from them, even if there is no explicit provision to that end, in the national legislation, and thus, establishing the third-party liability for VAT fraud as a principle.²⁹

In the recent *Finanzamt Wilmersdorf*³⁰ case, where the CJEU decided by an order. The CJEU stressed that even if evasion has been committed downstream or upstream in the supply chain, and not directly at the level of transaction to which a taxpayer has been a party, the right to deduct should be refused, where a taxpayer was not in good faith. The CJEU rejected the narrower interpretation of the concept of “supply chain” as suggested by the Finance Court, Berlin-Brandenburg, which referred the question to the CJEU. The German court argued that in the light of the principle of neutrality and proportionality, the transactions within the supply chain, in relation to which the right to deduct can be denied, must be connected in a specific way to the fraudulent transaction; for instance: by forming a part of an overall plan of fraudulent nature. The CJEU ruled that the good faith condition does not require any active participation in the fraudulent activities, and in principle, no matter at which stage of the supply chain the fraud is committed, any taxable person being a party to any transaction in that chain can be held liable for the fraud, if in bad faith.³¹ The CJEU’s order stresses the responsibility and instrumental role of taxable persons, in the combat against VAT fraud.³²

The doctrine of good faith, in VAT, as developed by the CJEU, has been criticised in the academic literature as shifting the tasks of tax administration on taxpayers and imposing excessive burdens on them without providing sufficient legal certainty, or even as infringing the principle of the rule of law.³³ Against that background, technologically enhanced possibilities to combat VAT fraud by tax administrations, as well as greater transparency and security of the transactions, supported by technology could, to a large extent, limit or substitute the third party liability. Being a convenient mechanism for recovering the forfeited revenue, third party liability would have less relevance, where fraud would be prevented in an effective way.

28 CJEU, 18 December 2014, C-131/13, *Schoenimport “Italmoda” Mariano Previti*, EU:C:2014:2455.

29 R. de la Feria & R. Foy, *Italmoda: the birth of the principle of third-party liability for VAT fraud*, British Tax Review 2016, p. 262.

30 CJEU, 14 April 2021, C-108/20, *Finanzamt Wilmersdorf*, EU:C:2021:266.

31 Further development of the principle of good faith and third party liability for VAT fraud is expected in a near future, as the currently pending case CJEU, C-596/21, *Finanzamt M*, raises the question on a possibility to refuse the right to deduct to several taxable persons in a supply chain and thus, over-compensation of the VAT revenue.

32 The CJEU will also have a chance to determine the limits to the principle of third party liability in VAT in the pending C-227/21, *HA.EN.*, in which a Lithuanian court referred a question on compatibility with the principle of neutrality a practice of national tax authorities to deny the right to deduct to a taxable person who, when acquiring goods, knew or should have known that the supplier due to its insolvency would not pay or not be able to pay the output VAT.

33 R. de la Feria & R. Foy, *Italmoda: the birth of the principle of third-party liability for VAT fraud*, British Tax Review 2016, p. 262.

2.2. Examples of technology VAT tools

Technology facilitates automated access to large amounts of VAT relevant data, even in real time. It also facilitates advanced analysis of that data, in order to combat VAT fraud, in an effective manner. Among the tools in which Member States have been experimenting with during the recent years, either by way of exercising discretion or derogations granted based on the VAT Directive, electronic reporting tools such as SAF-T (Standard Audit File for Tax) has been used. Originally developed by OECD, in 2005, and currently being used in various not coordinated versions, in several Member States, SAF-T is an electronic format ensuring efficient and accurate transfer to tax authorities, of accounting data of businesses, allowing for automated auditing. The standardised format for reporting, if followed internationally, would facilitate the exchange of information and joint audits by different tax jurisdictions.³⁴ SAF-T can also facilitate automated compliance, especially when replacing traditional VAT reporting. However, approaches in the Member States vary as to the personal scope, technical requirements, and the use of SAF-T by tax administrations, thus, the potential of SAF-T has not been fully exploited.³⁵

Another electronic reporting tool, such as the Spanish SII System³⁶ allows tax administrations to receive information on each VAT transaction in (almost) real-time. In 2019, Italy was the first Member State to introduce obligatory e-invoicing, which requires a transmission of individual invoices to the tax authorities' IT system before being provided to a customer. A validation of an invoice, by tax authorities, is a necessary step for issuing an invoice. Various "reporting" and "clearance" models³⁷ of electronic invoicing, facilitating gathering data on a transaction basis, by tax authorities, are adopted or being considered for adoption, in other Member States, for example France and Poland. Introduction of obligatory e-invoicing, for the whole EU, is also currently being researched and discussed.³⁸

34 See more in detail M. Merckx & N. Verbaan, *Technology: A Key to Solve VAT Fraud?* EC Tax Review 2019, p. 300.

35 A. Majdanska & K. Dziwinski, *The Potential of a Standard Audit File – Tax in the European Union: A Chance for Coordinated VAT Administration?*, BIT 2018, p. 585.

36 Sistema de Suministro Inmediato de Informacion. For a broader overview see L.M. Romero Flor, *The New Spanish Immediate Information Supply System*, International VAT Monitor 2019, p. 220.

37 On the difference as well as advantages and disadvantages of the models see R. Ismer, *Towards Mandatory E-Invoicing for VAT and Common Clearance System: Rich Pickings from Embracing Technology*, EC Tax Review 2021, p. 82.

38 European Parliamentary Research Service, *Fair and simpler taxation supporting the recovery strategy – Ways to improve exchange of information and compliance to reduce the VAT gap (2021)*, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694223/EPRS_STU\(2021\)694223_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694223/EPRS_STU(2021)694223_EN.pdf), accessed at 10 December 2021; see also Peppol's initiative on a harmonized transaction control system available at <https://peppol.eu/wp-content/uploads/2021/09/Peppol-CTC-Reference-Document-v1.0.pdf>, accessed at 10 December 2021. In relation to the announced by the Commission plans of bringing the EU's VAT rules into the digital age, including the announced proposal on modernizing invoicing rules, a call for feedback was launched by the Commission, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13186-VAT-in-the-digital-age/public-consultation_en, accessed at 10 December 2021. A legislative proposal to that end by the Commission is expected by the end of 2022.

IT systems based on algorithms and big data have been developed for purposes of analysis of detailed transaction and payment data, in order to detect irregularities and prevent fraud. For example, the Polish “STIR”³⁹ system for exchange of information between financial sector institutions and tax administration, detects risk based on automated and supported by confidential algorithms analysis of massive amounts of data.⁴⁰ The results of a risk analysis, conducted by the system, can be the basis of certain measures of tax administration towards a taxpayer, including a possibility of blocking a taxpayer’s bank account or cancel the VAT registration.

Other big data advanced analytical tools, not unknown to the Member States, have also started paving their way on the level of EU. Transaction network analysis (TNA) was launched in the EU, in May 2019, within the framework of Eurofisc. TNA is a centralised IT data retention system connecting national tax IT platforms for sharing cross-border transaction data by the Member States. Although participation in TNA is voluntary, currently all the Member States participate in TNA, and the system has been playing an important role in detecting cross-border fraud.⁴¹ The efficiency of TNA depends on the amount, type and frequency of data collected on a national level, and thus, more and more Member States can benefit from introducing structured e-invoicing and real-time reporting.⁴² The scope of data being shared between tax administrations will increase in the near future. This will be due to the legislative developments at the level of the EU, including new reporting obligations for payment services providers, as of 1 January 2024, transferring information on certain cross border transfers, which is meant to prevent fraud relating to the new e-commerce VAT rules.⁴³ Also, DAC 7,⁴⁴ which will enter into force on 1 January 2023, will introduce new obligations for digital platforms to report income earned by sellers. Although Directive 2011/16/EU, which DAC 7 is amending, concerns administrative cooperation in direct tax

39 System Teleinformatyczny Izby Rozliczeniowej (‘The Communication and Information System of the Clearing House’; translation by the author).

40 For analysis of legal challenges of the existence and functioning of STIR see M. Rojszczak, *Compliance of Automatic Tax Fraud Detection Systems with the Right to Privacy Standards Based on the Polish Experience of the STIR System*, Intertax 2021, p. 39; M. Papis-Almansa, *The Polish Clearing House System: A ‘Stir’ring Example of the Use of New Technologies in Ensuring VAT Compliance in Poland and Selected Legal Challenges*, EC Tax Review 2019, p. 43.

41 European Commission’s official webpage https://ec.europa.eu/taxation_customs/taxation-1/vat-and-administrative-cooperation_en, accessed at 2 February 2022.

42 M. Lamensch, & E. Ceci, *VAT fraud: Economic impact, challenges and policy issues*, Study requested by the European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/626076/IPOL_STU\(2018\)626076_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/626076/IPOL_STU(2018)626076_EN.pdf), accessed at 10 December 2021.

43 Directive 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers.

44 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation. See also OECD, *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy*, Paris, 2020, on which has served as a basis and inspiration for DAC 7: www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.htm, accessed at 10 December 2021.

matters,⁴⁵ the scope of DAC 7 extends to VAT, as the information reported by the digital platforms may be used for assessment, administration and enforcement of VAT, and other indirect tax purposes.⁴⁶

Technology VAT tools, used by Member States, also include split-payment mechanisms, which ensure automated payment of VAT by a paying customer either directly to tax authorities or to a special tax account of the supplier.⁴⁷ Furthermore, block chain technology, alongside smart contracts and automated taxation, although not yet being used in practice to that end, is being theoretically considered as potentially capable of solving the problem of VAT fraud.⁴⁸

2.3. Advantages and disadvantages of the current state of play

One of the major drawbacks of the technology VAT tools used in tax administrations nowadays is the lack of a harmonized approach in the EU. Member States adopt them individually. That leads to fragmentation of regulation and significantly increases costs for businesses trading cross-border, who might have to comply with different reporting and other obligations in different Member States. This can even create incentives for businesses to establish, in Member States, with less stringent reporting obligations, where compliance is less burdensome.

Additionally, the proper functioning and fraud resistance of the newly adopted, in forced as of 1 July 2021, e-commerce VAT package rules depends, to a large extent, on efficient administrative cooperation and access to transaction data by the Member States. The potential of national technology VAT tools to address the problem of VAT fraud is currently not fully exploited, due to a jurisdictional limitation of their application. As this problem has been acknowledged in the international debate, and theoretical models for a common approach started emerging, it can be expected that in the future, the EU could work out a harmonized technology-based system.⁴⁹

45 For administrative cooperation in the field of VAT Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax applies instead.

46 Council Directive (EU) 2021/514, preamble paras. 8 and 30.

47 For an overview of split-payment models across the EU see for example B. Gryziak, *Split Payment across the European Union – Review and Analysis*, International VAT Monitor 2020, pp. 24-31.

48 M. Merkkx, *VAT and Blockchain: Challenges and Opportunities Ahead*, EC Tax Review 2019, p. 93; M. Ołowska, *Fighting cross border VAT fraud using mandatory electronic invoicing and blockchain technology*, doctoral dissertation, 2022 (forthcoming), Institute of Austrian and International Tax Law.

49 European Commission, *Communication from the Commission to the European Parliament and the Council, An action Plan for Fair and Simple Taxation Supporting the Recovery Strategy*, COM(2020)312 final, Brussels, 15 July 2020, available at: https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf accessed on 10 December 2021. Peppol's initiative on a harmonized transaction control system: <https://peppol.eu/wp-content/uploads/2021/09/Peppol-CTC-Reference-Document-v1.0.pdf>, accessed at 10 December 2021. For a broader policy perspective and analysis see J. Owens & R. Risse (eds.), *Tax Law and Digitalization: The New Frontier for Government and Business. Principles, Use Cases and Outlook* (Alphen aan den Rijn: Kluwer Law International, 2021).