

Recent developments in international VAT/GST tax policy

Riccardo Scandroglio

- I. Introduction: an international perspective on VAT/GST**
- II. The EU framework on VAT**
 - A. The new place of supply rules
 - B. The green paper on the future of VAT
 - C. The second invoicing Directive and electronic invoicing
 - D. Measures to tackle fraud schemes
 - E. The proposal for a standard VAT return
 - F. Taxation of Telecommunication, Broadcasting and Electronic Services
- III. OECD international VAT/GST guidelines**
 - A. Events leading up to the implementation of the VAT/GST guidelines
 - B. Legal force of the VAT/GST guidelines and their core features
 - C. Neutrality, services and intangibles: features of the guidelines
- IV. Concluding remarks**

I. Introduction: an international perspective on VAT/GST

In the modern era of globalization, local and international consumption of goods and services has reached unprecedented peaks. Consequently, indirect taxation on consumption¹ has become a significant and increasingly relevant source of revenue. Local governments and supranational institutions have thus become more and more involved in indirect tax policy.

According to official data recently published by the Organisation for Economic Cooperation and Development², VAT has been implemented in more than 150 countries around the world. Thirty-three of the thirty-four OECD member countries have a VAT or GST system. The exception is the United States. Moreover, in the OECD countries, VAT represents 6.6 % of GDP and 19.5 % of total taxation³. The trend, also, indicates a steady increase since 1965, the starting year of the sample considered by the OECD⁴.

VAT was introduced in the EU by the First and the Second Directives⁵, in order to replace national turnover taxes. Following the policy-making role of the European Economic Community in the second half of the last century, other supranational institutions have been involved in the VAT/GST implementation process. On the one side, the OECD has been involved in a constant work on the international aspects and on the neutrality issues of VAT/GST, while on the other side, the International Monetary Fund⁶ in the last decades has been advising its members on how to design and implement VAT systems.

The thesis aims at analyzing the recent developments in international VAT/GST tax policy from a legal standpoint. Therefore, for the purpose of the thesis, the focus is on the EU and OECD's policy-making role, since the IMF's contribution has covered aspects that are more relevant from a macroeconomics viewpoint. After the introduction, section two of the thesis presents the recent and most impactful activities of the EU on VAT. Section three is devoted to the recent work of OECD in the development of an international standard regarding practices to be adopted by local governments while legislating on VAT. Finally, in section four the merits and drawbacks of the EU and OECD activities are highlighted.

1 Either in the form of "Value Added Tax" (VAT) or "Goods and Service Tax" (GST), for reasons of simplicity, both will be referred to as "VAT" or "VAT/GST" in this paper.

2 Organisation for Economic Cooperation and Development (OECD hereinafter), *Consumption tax trends*, 2014, p. 18.

3 OECD, *Consumption tax trends*, 2014, pp. 39-40.

4 OECD, *Consumption tax trends*, 2014, pp. 39-40.

5 Council Directive 67/227/EEC, pp. 1301-1303, Council Directive 67/228/EEC on the harmonisation of legislation of Member States concerning turnover taxes – structure and procedures for application of the common system of valued added tax, O.J. 71, 14.04.1967, pp. 1303-1312.

6 Hereinafter IMF.

II. The EU framework on VAT

A. The new place of supply rules

Based on Directive 2008/8/EC⁷, a new set of rules⁸ regarding where services are deemed to be supplied for VAT purposes were introduced into the Directive on the common system of VAT⁹. In this regard, for EU VAT purposes, one of the main distinctions which has to be made is between supply of goods and supply of services, since they have different place-of-supply rules. Accordingly, Art. 24 of the VAT Directive states that a “supply of services shall mean any transaction which does not constitute a supply of goods”.

With that having been said, the place-of-supply rules in force before Directive 2008/8/EC were based on the old version of Art. 43 of the VAT Directive which stated that: “the place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied”.

According to the “new” rules, instead, the first distinction to be drawn is on the characterization of the customer. If the transaction takes place between taxable persons – “Business to Business” or “B2B” transactions – according to Art. 44 of the VAT Directive, the place of supply of the service is the place where the customer has established his business. If, instead, the transaction is between non-taxable persons – “Business to Consumer” or “B2C” transactions – according to Art. 45 of the VAT Directive, the place of supply of the service is the place where the supplier has established his business.

Moreover, regarding supplies provided towards EU customers, the “VAT Information Exchange System”, or “VIES”, was recently implemented. In order to be treated as a taxable person, the supplier has to register with VIES, this way giving proof to the customer of its status, so that the application of the B2B place-of-supply rules is possible.

Focussing more specifically on services supplied to taxable persons, the new place-of-supply rules consist in a broad general rule, under Art. 44 of the VAT Directive, and a detailed set of specific provisions, waiving the general rule. In other words, the general rule applies only if the service is not covered by one of the specific exceptions, giving sometimes rise to interpretation issues when, for example, the service consists in many different ones to which different specific

7 Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, O.J. L. 44, 20.02.2008, pp. 11-22.

8 Applicable from 1 January 2010.

9 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, O.J. L. 347, 11.12.2006, pp. 1-118, VAT Directive hereinafter.

provisions are applicable¹⁰. In this regard, the European Court of Justice¹¹ in its consistent case law¹² considers a supply to be a “single” one when one or more elements have to be considered as the principal supply, and one or more additional elements are regarded as ancillary, also being treated like the main supply.

For the specific provisions which waive the general rule, the main ones can be summarized as follows:

- according to Art. 47 of the VAT Directive, the place of supply of services connected with immovable property, including, for example, the services of experts and estate agents, the provision of accommodation in the hotel sector, the granting of rights to use immovable property and services for the preparation and coordination of construction work, is the place where the immovable property is located.
- according to Art. 53 of the VAT Directive, “the place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person, shall be the place where those events actually take place”.
- according to Art. 56 of the VAT Directive, “the place of short-term hiring of a means of transport shall be the place where the means of transport is actually put at the disposal of the customer”.

B. The green paper on the future of VAT

On 1 December 2010, the EU Commission adopted a communication, in the form of an open debate¹³ called “The green paper on the future of VAT”. In the years leading up to this communication the EU Commission had become more and more aware that the VAT system needed to be enhanced, simplified and modernized¹⁴.

10 Ine Lejeune/Silvia Kotanidis/Sofie Van Doninck, ‘The new EU place-of-supply rules from a business perspective’, *International VAT monitor* (2009), p. 100 (pp. 102-103).

11 Hereinafter ECJ.

12 See, *inter alia*, ECJ, 25 January 2001, C-429/97, *Commission of the European Communities v. French Republic* [1997], ECR I-00637, paragraphs 46-50; ECJ, 2 May 1996, C-231/94, *Faaborg Gelting Linien A/S v. Finanzamt Flensburg*, ECR I-2395, paragraphs 13-14.

13 European Commission, GREEN PAPER on the Future of VAT: towards a simpler, more robust and efficient VAT system tailored to the single market, COM(2010)695, 1 December 2010 (hereinafter Green Paper), followed by European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, Towards a simpler, more robust and efficient VAT system tailored to the single market, COM(2011)851, 6 December 2011, that basically encompassed thousands of contributions from the stakeholders in relation to COM(2010)/695.

14 The Green Paper aimed at tackling many drawbacks, such as the lasting differences in national legislations on issues like deductions, rates and administrative procedures to which taxpayers were subjected. Other highlighted drawbacks were related to the use of technology in VAT administration, collection and fraud tackling.

With these goals in mind, the Green Paper was seen as an occasion to shift public opinion's focus to VAT matters: "After some 40 years, the time has come to have a critical look at the VAT system with a view to strengthening its coherence with the single market, its capacity as a revenue raiser by improving its economic efficiency and robustness, and its contribution to other policies whilst reducing the cost of compliance and of collection"¹⁵.

In the Green Paper¹⁶, the EU Commission identified the main factors which indicated the urgency of launching such a broad debate on the future of VAT:

- *the complexity of the system*, which resulted in huge administrative costs above all for small and medium-sized enterprises. Particular areas of concern included obligations, deduction and rates;
- *the need for improvement of the single market functioning*, which could be obtained by reducing the differences, from a VAT treatment perspective, which existed between domestic and intra-EU transactions;
- *the need to tackle frauds and maximizing revenue*;
- *the changes in technology and economic environment*.

Bearing these urgent matters in mind, the main issues to be addressed in the green paper were divided in two broad groups:

- the principles of taxation of intra-EU transactions;
- a series of miscellaneous other issues which needed attention irrespective of any choice made in consequence of the previous point.

In relation to the principles of taxation of intra-EU transactions, the EU Commission has always supported the taxation at origin approach as was stipulated in the first VAT legislation by the Member States¹⁷. In brief, taxation at origin provides that both supplies of goods and supplies of services are taxed where the supplier has established his business, irrespective of whether the customer is a taxable person or not. This approach has never been fully implemented because of the resistances from Member States, mainly centered on the difficulties in the implementation, such as the need for a close harmonization of VAT rates and the need to establish a clearing system between Member States to collect VAT revenue. The current VAT system nonetheless is basically a very technical and transitional system based sometimes on the origin principle and sometimes on the destination principle. In the Green Paper, the EU Commission still maintained its preference for the origin principle but at the same time recognized that the difficulties of its implementation could be hard to overcome.

Meanwhile, the main problem with a full implementation of the destination principle is that there must be consistency between the treatment of domestic and in-

15 European Commission, GREEN PAPER, COM(2010)695, p. 3.

16 European Commission, GREEN PAPER, COM(2010)695, pp. 4-6.

17 European Commission, GREEN PAPER, COM(2010)695, p. 6.

tra-EU transactions. The EU Commission suggested that consistency could be achieved by also taxing B2C intra-EU transactions at the rate and under the rules of the Member State of destination, opening the way to the implementation of a one-stop-shop mechanism in the Member State of origin in order to deal with VAT liabilities in Member States other than those in which the supplier is established¹⁸.

Moreover, the Green Paper also identified a series of other miscellaneous issues which needed to be addressed in order to establish a more solid, simpler and efficient VAT system. The main ones are listed as follows:

- ensuring the neutrality of the VAT system;
- reducing the impact of bureaucracy;
- making the system more robust – i.e. fraud-proof, namely improving the way VAT is collected;
- improving the administration of the VAT system, both on a local and on a supranational basis.

The conclusions of the EU Commission were addressed in COM(2011)851, and the main ones are the following:

- the implementation of the origin principle is a task which is no longer politically achievable. So the Commission has made a commitment to channel all efforts to find the most efficient ways to implement a full destination principle;
- the main taxpayers' need is simplification. The EU Commission identified different practical actions in order to fight the complexity of the system such as the implementation of a one-stop-shop mechanism in order to cope with the difficulties of companies trading in different Member States, the improvement of the VAT governance on a EU level by enhancing public involvement and transparency – i.e. the launch of the EU VAT forum in 2012 and the standardization of VAT obligations, namely the introduction of a common VAT return;
- increased efficiency of the VAT system. The EU Commission, as for this issue, identified some actions, such as broadening the taxable base in relation to public bodies and reviewing the whole system of exemptions from the tax base, as well as reviewing the whole rates structure. In particular, the aim was a progressive elimination of the reduced rates which are no longer economically or politically justified or which are related to goods and services whose consumption is discouraged by EU policies;
- a more robust and fraud-proof VAT system. The EU Commission, in relation to this topic, aimed at tabling a quick reaction mechanism proposal against fraud, providing Member States with a legal base to take immediate national measures against the “ultimate” fraudulent practices. At the same time, the fo-

18 European Commission, COM(2011)851, p. 7.

cus was on supervising that all the measures approved reached definitive implementation, establishing a new set of benchmarks in order to measure the performance of each tax administration in combating fraud and continuing the research on the hypothetical different mechanisms to improve the way VAT is collected and monitored (i.e., the “split-payment model¹⁹” and the “data warehouse model²⁰”);

- the VAT system needs to be tailored to the single market. The current transitional VAT arrangements for intra-EU B2B transactions, based on taxation at destination along with the reverse charge mechanism, have not been welcomed by the EU Commission as a definitive regime. Nevertheless, the implementation of a full destination-based regime in which the supplier charges VAT on intra-EU transaction, would have a huge impact: cross-border cash flow would be enormous and taxpayers liable for the payments of the tax would no longer be established in the Member State where the tax is due. According to the EU Commission, at any rate, it is clear that for such a system to be effective the implementation of a comprehensive one-stop-shop system would be of essence, like many other measures to secure the revenues. In relation to this issue, the EU Commission aimed at proceeding with in-depth technical work and a broadly-based dialogue with Member States and other stakeholders, thereby examining the different possible ways to implement the destination principle.

C. The second invoicing Directive and electronic invoicing

After a study had been commissioned in 2008 and a public consultation took place²¹, on 28 January 2009 the EU Commission published a proposal for a second invoicing Directive²². The proposal (at that time) was warmly welcomed by businesses because it basically suggested:

- removing any difference in the treatment between paper and electronic invoices;
- setting a common deadline for the issuing of invoices;
- setting a common period for the storage of invoices.

After a long political negotiation, on 13 July 2010, the EU Council reached an agreement on the EU Commission’s proposal and adopted Directive 2010/45/

19 A model in which VAT is collected through a series of payments made to blocked VAT bank accounts.

20 A model whereby the taxable person uploads predefined transaction data in an agreed format into a secured VAT data warehouse maintained by the taxable person and accessible to the tax authorities.

21 Price Waterhouse Coopers, a study on the invoicing Directive (2001/115/EC), TAXUD/2007/AO-009, 3 November 2008.

22 European Commission, Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the rules of invoicing, COM(2009)21, 28 January 2009.

EU²³. Many radical changes were made in the EU Commission's proposal during the negotiation: the main ones are described below along with the most significant features of Directive 2010/45/EU.

The definition of electronic invoice is given by the new Art. 217 of the VAT Directive, an electronic invoice is defined as "an invoice that contains the information required in this Directive, and which has been issued and received in any electronic form". The previous version of Art. 217 did not provide a definition of electronic invoice but rather defined the transmission of an invoice "by electronic means" as "transmission or provision to the addressee of data using electronic equipment for processing (including digital compression) and storage, and employing wire, radio, optical or other electro-magnetic means".

As for the acceptance of the recipient, the EU Commission in its proposal initially had agreed to abolish the condition that the use of electronic invoice had to be subject to acceptance by the recipient (currently provided by Art. 232 of the VAT Directive). Mainly because it is useful for audit purposes²⁴, Member States did not agree to drop the acceptance, so the condition was maintained.

In relation to authenticity, integrity and legibility of invoices the EU Commission had initially proposed to amend the requirement that, for electronic invoices, the authenticity of their origin and the integrity of their content had to be guaranteed. At any rate, that requirement was not only maintained in Directive 2010/45/EU but even extended to paper invoices. Accordingly, current Art. 233 of the VAT Directive states: "The authenticity of the origin, the integrity of the content and the legibility of an invoice, whether on paper or in electronic form, shall be ensured from the point in time of issue until the end of the period for storage of the invoice".

As for the deadline for issuing invoices, currently, the time limits for issuing invoices vary a lot throughout Member States²⁵, leading sometimes to a very heavy administrative burden on multinational enterprises which operate in different Member States. In response to suggestions from businesses, the EU Commission had proposed to introduce a uniform time limit expiring on the 15th day of the month following the one in which the taxable event occurs²⁶. However, the EU Commission proposal was rejected and the above-mentioned time limit was only extended to cross-border services subject to the reverse charge mechanism²⁷.

23 The new rules adopted by Directive 2010/45/EU had to be adopted by Member States not later than 1 January 2013.

24 Wouter Brackx/Ine Lejeune, 'Equal treatment of paper and electronic invoices in the European Union – Finally!', *International VAT monitor* (2010), p. 260 (p. 261).

25 Gorka Echevarria Zubeldia, 'The second EU invoicing Directive: a missed opportunity', *International VAT monitor* (2010), p. 417 (p. 418).

26 That time frame was the deadline at the time imposed on intra-community supply of goods according to the then in force Art. 67 of the VAT Directive.

27 See Art. 222 of the VAT Directive as amended by Directive 2010/45/EU.

The storage of invoices is governed by Art. 247(1) of the VAT Directive, which states: “Each Member State shall determine the period throughout which taxable persons must ensure the storage of invoices relating to the supply of goods or services in its territory and invoices received by taxable persons established in its territory”. Accordingly, this provision has the effect that businesses involved in the supply of cross-border services, which are generally deemed to be supplied in the state of the customer, must store the related invoices for the storage period applicable in the country of the customer. The EU Commission had proposed to harmonize the storage period under all circumstances to six years. Nonetheless, Art. 247(1) remained unchanged after the adoption of Directive 2010/45/EU.

D. Measures to tackle fraud schemes

In tax matters, and even more so in a harmonized tax as VAT, tax fraud can usually be prevented, or at least fought, through improving existing laws or enhancing administrative cooperation. In the past few years, the institutions inside European Union have shown they coherently stick to this pattern.

As related to administrative cooperation, on 7 October 2003 the EU Council adopted a Regulation²⁸ on administrative cooperation regarding VAT that was later recast in another Regulation²⁹. Both of the Regulations had the aim of improving the legal framework governing administrative cooperation in the VAT field and acting as a tool in the fight against VAT fraud.

The core of both Regulations was the methods of exchanging information between Member States’ tax authorities. Regarding this point, the Regulations provide the following:

- *exchanges on request*. Any information that may assist the VAT authorities to make a correct VAT assessment may be exchanged on request. Under this arrangement, the VAT authorities may also agree that officials of other EU Member States are present during administrative enquiries in their own EU Member States, although foreign officials may not exercise a power of inspection outside their own jurisdiction. Through local officials, the officials of others EU Member States may access the same premises and documents as local officials. Two or more EU Member States may also undertake simultaneous controls in their territories;
- *spontaneous exchanges*. By automatic or structured exchange, the VAT authorities may forward information that may assist the authorities of other EU Member States in making a correct VAT assessment if the place of supply is in

28 Council Regulation 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation 218/92, O.J. L. 264, 15.10.2003, pp. 1-11.

29 Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, O.J. L. 268, 12.10.2010, pp. 1-18.

the latter EU Member State, if a breach of VAT legislation has been or may be committed, or if there is the risk of a tax loss in another EU Member State;

- *exchanges regarding intra-community transactions*. EU Member States must maintain a complete and accurate electronic database of details relating to the intra-community trades in goods and services (the database is known among operators as “intrastat”³⁰).

Focusing more specifically on Regulation 904/2010, it introduced some important arrangements relating to:

- the quality of the information provided in the databases, which has been slightly improved;
- the setting-up of the “Eurofisc” network providing for multilateral, swift and targeted exchange of information relating to VAT fraud;
- the introduction of a feedback mechanism;
- automated access to databases of other Member States.

With respect to modifications and enhancements of existing Regulations, two of the most important measures were adopted on 22 July 2013. On that day, indeed, the EU Council approved two Directives³¹ that should enable Member States to better combat VAT fraud, facilitating rapid reaction and allowing specific measures to tackle the notorious “carousel frauds”.

Until those two Directives, fraud schemes in VAT field had been tackled either by amendments or through derogations from the VAT Directive.

In brief, the Directives adopted on 22 July 2013 provide relief on this issue by amending the VAT Directive:

- Directive 2013/42/EU is aimed at enabling immediate measures to be taken in cases of sudden and massive VAT fraud (“quick reaction mechanism”). Specifically, an accelerated procedure will enable Member States to apply a “reverse charge” mechanism to specific supplies of goods and services for a short period of time, by derogation from the provisions of the VAT Directive;
- Directive 2013/43/EU allows Member States to apply, on an optional and temporary basis, a reversal of liability for the payment of VAT (“reverse charge

30 Though a uniform and all-at-once accessible platform does not exist across the EU, the common features of the communications that operators must periodically submit to the Intrastat system are provided by Council Regulation 638/2004 of 31 March 2004 on Community statistics relating to the trading of goods between Member States and repealing Council Regulation 3330/91, O.J. L. 102, 07.04.2004, pp. 1-8.

31 Council Directive 2013/42/EU of 22 July 2013 amending Directive 2006/112/EC on the common system of value added tax, as regards a Quick Reaction Mechanism against VAT fraud, O.J. L. 201, 26.07.2013, Council Directive 2013/43/EU of 22 July 2013 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud, O.J. L. 201, 26.07.2013.

mechanism”), with the aim of closing off certain types of known fraud, in particular carousel schemes. The “reverse charge” mechanism will now potentially apply to the following sectors: mobile phones, integrated circuit devices, supplies of gas and electricity, telecoms services, game consoles, tablet PCs and laptops, cereals and industrial crops and raw and semi-finished metals.

E. The proposal for a standard VAT return

In early 2007, the EU Commission launched a very broad action program³² that had the ultimate goal to reduce administrative burdens on businesses.

In fact, part of the existing burden is caused by the lack of a common European set of rules regarding VAT returns. Therefore, after launching the recalled action program, the EU Commission appointed one of the world’s most important advisory firms to perform a study on the feasibility of a common VAT return³³. On 27 February 2013 the results of the study were presented to the EU Commission: one of the most important aspects of the study is the one related to the calculation of the impact of the introduction of a common VAT return on the compliance costs of businesses as compared to the contemporary compliance costs³⁴. On 23 October 2013, the EU Commission published a proposal for a Council Directive, broadly in line to the study and its proposals, introducing a common VAT return³⁵.

As for the technicalities of the proposal for a common VAT return, the following are the most relevant features which the EU Commission suggested:

- the new arts. 250 and 251 of the VAT Directive set out all the information that the taxpayers would have to provide in the common VAT return. Nonetheless, according to the new Art. 251, Member States will have the possibility to request a lot of additional information;
- the new Art. 252 of the VAT Directive would deal with the deadlines of the common VAT return. The standard would be the one of monthly VAT returns to be submitted in a period included between a month and two months after the end of the month of the return. For small taxpayers³⁶, however, it is

32 European Commission, Action Programme for reducing administrative burdens in the European Union, COM(2007)23, 24 January 2007.

33 Price Waterhouse Coopers, Study on the feasibility and impact of a common EU standard VAT return, Specific Contract no. 9, TAXUD/2011/DE/329, 27 February 2013.

34 In the best-case scenario the introduction of the common VAT return could lead to total costs savings for business of EUR 20.6 billion (0,16% of EU GDP in 2011), Price Waterhouse Coopers, Study on the feasibility and impact of a common EU standard VAT return, Specific Contract no. 9, TAXUD/2011/DE/329, 27 February 2013, p. 92.

35 European Commission, Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards a standard VAT return, COM(2013)721, 23 October 2013.

36 Whose turnover is less than EUR 2 million.

provided that Member States could allow a taxable period of three calendar months;

- the new Art. 252a of the VAT Directive would require Member States to accept and encourage e-filing for common VAT returns, thus including the possibility to use electronic file transfer. Moreover, according to the new Art. 252a, “standard VAT returns submitted by electronic means shall be accepted by Member States when the authenticity of origin and the integrity of their content are ensured by an advanced electronic signature[...]or by other methods offering a similar level of security”³⁷.

F. Taxation of Telecommunication, Broadcasting and Electronic Services

In a very complex and “immaterial” business as the one related to telecommunication, broadcasting and electronic services³⁸, VAT regimes have always proved to be, as will be shown, equally complex. In an effort to simplify and modernize those regimes, some new rules have recently been implemented and will be analyzed in this section.

The very complex rules that were repealed starting from 1 January 2015 are as follows:

- telecommunication services: at the beginning of 1997, the Council authorized³⁹ the Member States to shift telecommunications services to Art. 9(2)(e) of Directive 77/388/EEC⁴⁰. In consequence of the Council Decision, telecommunications services:
 - supplied to all customers resident outside the European Union were outside the scope of VAT;
 - supplied to taxable persons established inside the European Union were subject to VAT in the customer’s Member State⁴¹;
 - supplied to non-taxable persons resident within the European Union were deemed to be supplied at the place where the service provider was established⁴², even though Member State were authorized, whereas the provider

37 European Commission, COM(2013)721, p. 14.

38 Hereinafter TBE services.

39 Council Decisions 97/200 to 97/214 of 17 March 1997, O.J. L.86 of 28 March 1997, pp. 5-34.

40 Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, O.J. L. 145, 13.06.1977, according to which whereas the customer was a taxable person or was established outside the European Union, the services were deemed to be supplied at the place where the customer was established.

41 In the hands of the customer with utilization of the reverse charge mechanism.

42 Even though Member State were authorized, whereas the provider was established outside the European Union, to apply the “effective-use-and-enjoyment” criterion, provided by Art. 9(3)(b) of Directive 77/388/EEC.

was established outside the European Union, to apply the “effective-use-and-enjoyment” criterion⁴³;

- broadcasting and electronic services: on 1 July 2003, special temporary provisions came into effect as regards to cross-border broadcasting and electronic services⁴⁴. Basically, broadcasting and electronic services followed the rules that applied to telecommunication services, with the exception of electronic services supplied by providers established outside the European Union to non-taxable persons established within the European Union. The latter services, as a general rule⁴⁵, were deemed to be supplied in the Member State where the customer was resident. Nonetheless, as a means of attracting foreign suppliers of electronic services within the borders of the European Union, Art. 26(c) of Directive 77/388/EEC contained a special scheme (“one-stop-shop scheme”) according to which the services providers had the possibility to register for VAT purposes in a web portal in a single Member State and electronically account for and pay VAT there in respect of all electronic services supplied throughout the European Union to non-taxable persons. Initially applied for a period of three years, the special scheme was extended to 31 December 2014.

With the aim to harmonize, whenever possible, the taxation of services at the place where they were actually exploited, Council Directive 2008/8/EC, which amended the VAT Directive as regards to the place of supply of services, was implemented as part of the “VAT package”. Art. 58 of the VAT Directive, in fact, as repealed by Art. 5 of Directive 2008/8/EC, states that as of 1 January 2015 all telecommunication, broadcasting and electronic services, provided to a non-taxable person, are taxable at the place where the consumer is established. Further provisions under Art. 5 of Directive 2008/8/EC require, in order to facilitate VAT compliance by businesses, a special scheme to be set up to enable businesses to have a single point of electronic contact for VAT identification, declaration and payment purposes; this scheme requires the use of an electronic interface, referred to as “mini one-stop-shop scheme”.

The main effect of the new rules is that, regardless of whether the service providers are established within or outside the European Union, TBE services rendered to non-taxable customers are, under all circumstances, deemed to be supplied at the place where the customer is established.

43 Provided by Art. 59(a)(b) of the VAT Directive, according to which Member States can be authorized to tax a supply whereas it is exploited. The customers being non-taxable persons, the suppliers, under this provision, had to register to the Member State VAT system in order to account for the VAT.

44 Council Directive 2002/38/EC of 7 May 2002 amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, O.J. L.128 of 15 May 2002, pp. 41-44.

45 Art. 9(2)(f) of Directive 77/388/EEC.

Some of the most remarkable features of the new scheme that have not already been dealt with previously are the following:

- status of the customer: according to the new rules, providers of TBE services have to establish the VAT status of their customers solely on the basis of whether or not the latter have given their VAT identification number. In absence of a valid VAT identification number, the supplier has to treat the customer as a non-taxable person for the purposes of the new TBE services regime. It is of great importance to the supplier, then, to utilize the VIES;
- location of the customer: once determined that the customer is a non-taxable person, the biggest challenge for TBE services providers is to determine what the Member State of residence of the customer is. In order to find a legal solution to the foreseeable issues, the new rules provide a series of rebuttable presumptions⁴⁶. Nonetheless, the provider can rebut the presumptions on the basis of the “items of non-contradictory evidence”⁴⁷.
- non-compulsory scheme: it is important to point out, finally, that the “mini one-stop-shop scheme” though being highly recommended by the EU Commission, is optional in the sense that businesses can also opt for VAT registration in every EU Member State in which they have non-taxable customers. It goes without saying that the volume of the operations and the diversification of the customers will be the two most important drivers in businesses’ decisions processes to adopt the new scheme.

III. OECD international VAT/GST guidelines

A. Events leading up to the implementation of the VAT/GST guidelines

In the past 15 to 20 years, with the emergence of the globalized economy, the flow of goods and services has experienced an unprecedented growth. Electronic commerce has enabled consumers and small enterprises to operate beyond national boundaries. The distance between producers and consumers has steadily shrunk. It is natural, then, that differences in treatment of cross-border supplies of services and intangibles have become apparent and costly. Moreover, the resulting

46 For example: in the supply of TBE services provided through a wi-fi hotspot, the customer is deemed to be resident at the place where the hot-spot is located; in the supply of TBE services on a ship, aircraft or train, the customer is deemed to be resident where the transport has begun; in the supply of TBE services through a mobile network, the customer is presumed to be resident in the Member State of the country code of the SIM card utilized.

47 According to Art. 24(d)(1) of the VAT implementing Regulation, Council implementing Regulation 1042/2013 of 7 October 2013 amending Implementing Regulation 282/2011 as regards the place of supply of services, O.J. L. 284, 26.10.2013, pp. 1-9, the supplier has the possibility to rebut the presumptions according to the customer’s billing or IP address, the location of the bank account, or any other relevant commercial information.

need to tackle the differences in order to avoid double taxation and double non-taxation became apparent from both the national governments' and the taxpayers' standpoint.

With the aim of mitigating double-(non)-taxation, the OECD's work on VAT started with the OECD Ottawa Conference on electronic commerce in 1998⁴⁸. At the Ottawa Conference the main question was how to implement tax policies and procedures without distorting the new and traditional economies. Many approaches were discussed and the one that prevailed was probably the most logical one. The OECD's view emerging after the Ottawa Conference was that electronic commerce's taxation should in principle be the same as traditional commerce.

As a result, the Governments agreed on the Ottawa Taxation Framework Conditions⁴⁹, which, among many other things, provided the following guidelines as to consumption taxes:

- rules for the consumption taxation of cross-border trades should result in taxation in the jurisdiction where consumption takes place and an international consensus should be sought on the circumstances under which supplies are held to be consumed in a jurisdiction;
- for the purposes of consumption taxes, the supply of digitized products should not be treated as a supply of goods;
- where business and other organizations within a country acquire services and intangible property from suppliers outside the country, countries should examine the use of reverse-charge, self-assessment or other equivalent mechanisms which would give immediate protection of their revenue base and of the competitiveness of domestic suppliers.

As a natural continuation of the 1998 Ottawa conference, the OECD Committee on Fiscal Affairs adopted in 2001 the "guidelines on consumption taxation of cross-border services and intangible property in the context of e-commerce"⁵⁰. The main provisions of the guidelines were the following:

- for B2B transactions, the place of consumption is deemed to be in the jurisdiction where the recipient has established its business presence;
- for B2C transactions, the place of consumption is deemed to be in the jurisdiction where the recipient has his usual place of residence.

At any rate, notwithstanding all the work OECD undertook since 1998, it had become increasingly clear that many problems still surrounded the application of

48 A borderless world: realising the potential of electronic commerce, Ottawa, 7-9 October 1998.

49 Electronic commerce: taxation framework conditions, A report by the Committee on fiscal affairs, as presented to Ministers at the OECD Ministerial conference "A borderless world: realising the potential of electronic commerce", Ottawa, 7-9 October 1998.

50 OECD, Guidelines on Consumption Taxation of Cross-Border Services and Intangible Property in the Context of E-Commerce, 2001.

VAT in cross-border situations. Both the 2004 and 2005 OECD's "Report on the application of consumption taxes"⁵¹ showed that differences remained among local jurisdictions mainly in the treatment of services and intangibles. It was also stated that those had the potential to obstruct business activity, hinder economic growth and distort competition⁵².

As a result, in 2006 OECD started working on a set of specific guidelines on VAT in cross-border transactions⁵³ and in 2011 on a set of guidelines on VAT neutrality⁵⁴.

A further effort to harmonize the guidelines was undertaken in February 2013, when the OECD published a draft consolidated version of the International VAT/GST guidelines, merging both the cross-border and the neutrality guidelines⁵⁵.

B. Legal force of the VAT/GST guidelines and their core features

Preliminarily, it is important to describe the legal framework of the VAT/GST guidelines. They are in fact drafted as recommendations. Therefore, they do not impose legally binding VAT/GST rules on countries or prescribe legislative approaches. They are intended to serve as a basis/guidance for countries to frame their own national laws. Moreover, the VAT/GST guidelines have been developed in stages, and the output from each stage is a building block contributing to the complete guidelines. They have not been completed yet: OECD is still working on a broader project⁵⁶.

Moreover, the VAT/GST guidelines are built on two core principles that were adopted by the OECD's Committee on Fiscal Affairs in 2006, when the work on the first set of guidelines began⁵⁷:

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- 51 OECD, Report on the Application of Consumption Taxes to the Trade in International Services and Intangibles, 2004; OECD, Report on the Application of Consumption Taxes to the Trade in International Services and Intangibles – Progress Report and Draft Principles, 2005.
 - 52 OECD, Report on the Application of Consumption Taxes to the Trade in International Services and Intangibles, 2004, p.4.
 - 53 OECD, Committee on Fiscal Affairs – Working Party n. 9 on Consumption Taxes, International VAT/GST guidelines, 2006.
 - 54 OECD, Committee on Fiscal Affairs – Working Party n. 9 on Consumption Taxes, International VAT/GST guidelines – Guidelines on Neutrality, 2011.
 - 55 OECD, Committee on Fiscal Affairs – Working Party n. 9 on Consumption Taxes, International VAT/GST guidelines – Draft Consolidated Version, 2013. Evidently, any successive reference to the "guidelines", if not otherwise stated, refers to the draft consolidated version of 2013.
 - 56 The Committee on Fiscal Affairs still intends to develop Guidelines on the place of taxation for cross-border supplies of services and intangibles to final consumers (B2C) as well as anti-abuse provisions and provisions on mutual cooperation and dispute resolution.
 - 57 OECD, International VAT/GST guidelines, 2006, pp. 8-9.

- the *neutrality principle*, whereby VAT is a tax on final consumption that should be neutral for business;
- the *destination principle*, whereby internationally traded services and intangibles should be subject to VAT in the jurisdiction of consumption.

More specifically focused on the technicalities of the guidelines, the first part highlights the most important features of an “ideal” value added tax⁵⁸ with a specific focus on international trade. The most important features can be summarized as follows:

- a VAT is a broad-based tax on final consumption: this is the overarching purpose of a VAT and the necessary corollary to that is that the burden of VAT should not rest on businesses;
- a VAT is designed with a staged collection process: this, in turn, requires a mechanism for relieving businesses from the burden of the VAT they pay when they acquire goods, services or intangibles;
- the principle for cross-border transactions should be the destination one: it is the one that guarantees neutrality in international trade, since with the origin principle the revenue from VAT would not necessarily accrue where final consumption takes place and it could cause a harmful VAT/GST rate competition among jurisdictions;
- the implementation of the destination principle for goods is straightforward due to the presence of border controls: the goods are taxed when they are delivered, the exported goods are free of VAT and imports are subject to the same VAT as equivalent domestic goods in the purchaser’s jurisdiction;
- the implementation of the destination principle for services and intangibles should be guaranteed by the reverse charge mechanism.

C. Neutrality, services and intangibles: features of the guidelines

According to the guidelines⁵⁹, the definition of neutrality in VAT “has a number of dimensions, including the absence of discrimination in a tax environment that is unbiased and impartial and the elimination of undue tax burdens and disproportionate or inappropriate compliance costs for businesses”.

The guidelines developed by the OECD with regards to neutrality have the aim to give governments a basis and some technical suggestions in order to preserve neutrality in cross-border trades. The latter goal is achieved by the destination principle, so that supplies are taxed where they are used by the business customer in order to make onward supplies. The implementation of a reverse-charge mech-

58 Apparently, “ideal” in the eyes of the OECD.

59 OECD, International VAT/GST guidelines, p. 15.

anism (or a similar one) should ensure that the customer itself accounts for the VAT/GST, this way preventing the supplier from registering in the country of destination.

This structure, however, does not ensure that complete neutrality is always achieved: there might be circumstances in which local territoriality rules “entails that business are taxed [...] in a country which is not the country of destination and where they may not have a business establishment”⁶⁰. Therefore, there may be cases when taxpayers could incur a foreign VAT/GST. Countries have implemented mechanisms to allow foreign taxpayers to recover VAT/GST, “but this is not always the case—especially in developing countries where budgetary constraints are such that implementing a refund mechanism [...] is not feasible”⁶¹.

The lack of consistency in the national legislations and their complexity, then, may represent a huge compliance and administrative burden for businesses and tax administrations. The OECD, in answering these issues, implemented a set of guidelines of neutrality of VAT/GST.

According to Guideline 1 “The burden of value added taxes themselves should not lie on taxable businesses except where explicitly provided for in legislation”. The sentence “except where explicitly provided” means that countries may legitimately place a value added tax burden on business: this is the case when, for example, transactions made by businesses are exempt because the tax base of the output is difficult to assess (i.e. many financial services) or for policy reasons (i.e. health care, education, culture)⁶². The tax burden in such cases is, obviously, represented by the impossibility to deduct input VAT.

Guideline 2 states that “Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation”.

According to Guideline 3 “VAT rules should be framed in such a way that they are not the primary influence on business decisions”. This guideline has two consequences: VAT should not be the main or one of the main drivers in business decisions and VAT rules should be accessible, clear and consistent.

Guideline 4 states that “With respect to the level of taxation, foreign businesses should not be disadvantaged nor advantaged compared to domestic businesses in the jurisdiction where the tax may be due or paid”.

Guideline 5 deals with the possible solutions in order to ensure that foreign businesses do not incur irrecoverable VAT. Accordingly, it states that “To ensure foreign businesses do not incur irrecoverable VAT, governments may choose from a

60 Alain Charlet/Stéphane Buydens, ‘The OECD International VAT/GST Guidelines: past and future developments’, *World Journal of VAT/GST Law* (2012), p. 175 (p. 182).

61 Alain Charlet/Stéphane Buydens, *World Journal of VAT/GST Law* (2012), p. 182.

62 OECD, International VAT/GST guidelines, p. 15.

number of approaches”. More specifically, according to the guidelines⁶³, the approaches that countries could adopt in order to ensure that foreign businesses do not incur irrecoverable VAT include:

- the operation of a system of applying for direct refunds of local VAT incurred;
- making supplies free of VAT;
- enabling refunds through local VAT registration;
- shifting the responsibility on to locally registered suppliers/customers;
- granting purchase exemptions certificates.

Guidelines 6 is aimed at lightening the potential administrative burden by stating that “Where specific administrative requirements for foreign businesses are deemed necessary, they should not create a disproportionate or inappropriate compliance burden for businesses”. The guidelines admits that dealing with foreign businesses with no “legal” presence in a jurisdiction inevitably brings an element of risk but nonetheless, specific measures applicable to foreign businesses should not result in a disguised form of discrimination⁶⁴.

VAT neutrality in international trade is generally achieved by the use of the destination principle. Implementing the destination principle with respect to services and intangibles is more difficult than with respect to international trade in goods, since customs controls are largely ineffective for confirming exportation of services and intangibles⁶⁵.

For this reason, the guidelines for cross-border supplies of services and intangibles developed by the OECD reflect the destination principle while ensuring that⁶⁶:

- international neutrality is maintained;
- compliance by businesses involved in these supplies is kept as simple as possible;
- clarity and certainty are provided for both businesses and tax administrations;
- the costs involved in compliance and administering the tax are minimal;
- barriers to fraud and other abuses are sufficiently robust.

In this context, considering that not all countries utilize the same proxy to apply the destination principle, so that opportunities for double-(non)-taxation arise, the work of the OECD on these guidelines is even more remarkable.

According to Guideline 1 “For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption”. Guideline 1 clearly expresses the desire of the OECD to ensure

63 OECD, International VAT/GST guidelines, p. 17.

64 OECD, International VAT/GST guidelines, p. 18.

65 OECD, International VAT/GST guidelines, p. 28.

66 OECD, International VAT/GST guidelines, p. 28.

tax neutrality according to the destination principle. Although the fundamental purpose of the destination principle is to ensure that all revenue accrues to the jurisdiction where the supply to the final consumer occurs, according to the guidelines the principle should not be limited to B2C supplies. Then, even though B2B supplies do not involve final consumption, the application of the destination principle facilitates the ultimate goal of ensuring that the tax is paid and revenue accrues to the jurisdiction where the supply to the final consumer takes place⁶⁷.

The necessary corollary to Guideline 1 is Guideline 2, according to which “For business to business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles”.

Guideline 3, on the other hand, introduces the concept of identity of the customer and accordingly states that “The identity of the customer is normally determined by references to the business agreement”. When supplies takes place between separate legal entities with single locations only, the location of the customer should be known once its identity is determined. Moreover, for the purposes of the OECD guidelines, the term “business agreement” has to be properly defined: “business agreements consist of the elements that identify the parties to a supply and the rights and obligations with respect to that supply. They are generally based on mutual understanding”⁶⁸. Relevant elements of the business agreement have many forms and include, for example, general correspondence, service level agreements, purchase orders, invoices, payment instruments and receipts.

Understood that the first three guidelines represent the cornerstones of the guidelines on the place of taxation for cross-border supplies for services and intangibles, Guideline 4, Guideline 5, Guideline 6 and Guideline 7 provide guidance for some more practical issues, mainly related to the quest for the right proxies, useful to achieve the most efficient tax allocation among different jurisdictions.

According to Guideline 4, in fact, “When the customer has establishments in more than one jurisdiction, the taxing rights accrue to the jurisdiction(s) where the establishment(s) using the service or intangible is (are) located”. Evidently, the term “use of a service or intangible” means the use of a service or an intangible by a business for the purpose of its business operations.

According to Guideline 5 “In those cases where the services are used by one or more establishments other than the establishment that entered into the business agreement, the taxing rights are allocated in two steps. In the first step, taxing rights are allocated to the jurisdiction where the customer establishment that enters into the business agreement is located. In the second step, taxing rights are allocated to the jurisdiction where the customer establishment that uses the service

67 OECD, International VAT/GST guidelines, p. 29.

68 OECD, International VAT/GST guidelines, p. 31.

or intangible under a recharge arrangement is located”. According to the guidelines⁶⁹, in line with normal business practices, the establishment of use will be charged for the service or the intangible on the basis of internal recharge arrangements, in accordance with corporate tax, accounting or other regulatory requirements. Moreover, in situations in which such recharge is not made, according to the OECD, VAT will in principle be applied as if a recharge arrangement was in place so as to ensure that taxing rights accrue to the jurisdiction of use.

Guideline 6 deals specifically with the concept of proxy and states that “The taxing rights over internationally traded services or intangibles supplied between businesses may be allocated by reference to a proxy other than customer location as laid down in guideline 2, when both the following conditions are met:

- The allocation of taxing rights by reference to customer location does not lead to an appropriate result when considered under the following criteria: neutrality, efficiency of compliance and administration, certainty and simplicity, effectiveness, fairness.
- “A proxy other than customer location would lead to a significantly better result when considered under the same criteria”. Examples of other proxies could be the supplier’s location, the place of performance, the location of immovable property. In any case, according to the guidelines⁷⁰, any such specific rule should be supported by clear criteria and should be limited to the greatest extent possible.

The last of the Guidelines on international supply of services and intangibles is Guideline 7, which states that “For internationally traded business-to-business supplies of services and intangibles directly connected with immovable property, the taxing rights may be allocated to the jurisdiction where the immovable property is located”. The most common supplies that could fall under this rule are⁷¹:

- the transfer, sale, lease or the right to use, occupy, enjoy or exploit immovable property;
- supplies of services that are physically carried out on immovable property itself, such as constructing, altering and maintaining the immovable property;
- other supplies of services and intangible that do not fall within the first two categories but where there is a very close, clear and obvious link or association with the immovable property.

69 OECD, International VAT/GST guidelines, p. 32.

70 OECD, International VAT/GST guidelines, p. 45.

71 OECD, International VAT/GST guidelines, p. 48.

IV. Concluding remarks

In recent years the EU as well as the OECD plainly assumed the role of international standard setters in the VAT/GST field. Differences in their work, nonetheless, do exist and involve both the legal framework in which they operate, the legal force of their work and the objectives they pursue.

The OECD has operated in between its “moral suasion” power and the relative binding force of its activities: the product of this dichotomy is the legal hybrid often referred as “soft law”⁷². The role of the OECD in the VAT/GST field is then naturally more “confined” to advising on policies on supra-national issues, its guidelines not constituting binding rules not even for OECD members. The EU, instead, being a political institution in a very broad sense, has taken a slightly different role than that of the OECD. The EU in fact has focused more on trying to reduce administrative burdens for taxpayers in daily activities, on enhancing administrative cooperation among Member States and on tackling tax evasion and tax avoidance. The EU, in other words, is interpreting its role in the VAT field as one of a political, every-day, rules-maker. Moreover, as far as the objectives pursued are concerned, the OECD has embraced a more “programmatic” role than the EU. The cornerstone of the OECD’s work, in fact, is represented by some guidelines which mainly deal with the fundamental points of the implementation of a VAT/GST. The EU, instead, relying on its wider legal force, is focused on improving the common system of an advanced VAT system, rather than focusing on the “philosophical” cornerstones of VAT. The EU’s activity is, in fact, directed to its Member States, which all have an advanced VAT system, whilst the OECD activity is also aimed at giving developing countries which do not have a VAT/GST some instruments to implement one. Nonetheless, it is has to be highlighted that it is probably easier for OECD Member countries to agree on OECD recommendations, since they represent a form of “soft law”, as described previously. In contrast, for Member States of the EU implementing EU rules is a much more complex process, often involving, as in the case of council Directives, national parliaments.

The recent activity of both the OECD and the EU, at any rate, has to be praised: finally, through the focus on VAT/GST neutrality and administrative efficiency, the taxpayer was put back at the center of attention. In fact, both the Green Paper on the Future of VAT issued by the EU and OECD guidelines aim at trying to reduce administrative burdens and local legislative differences while vigorously fighting the ones that try to exploit the loopholes that remain in the different jurisdictions. In the EU, many measures dating from the Green Paper have already been implemented and have reached their goals; others are going to be imple-

72 Klaus Vogel, ‘Introductory comments: the OECD, its Model Convention and its Commentaries’, *op. post.*, unpublished.

mented soon: the implementation of a full destination principle will reduce harmful competition among EU jurisdictions on the basis of VAT rates; the reverse-charge mechanism for “sensitive” business sectors has become one of the biggest means for tackling frauds; TBEs services finally have a clear and comprehensive regime on which all the operators can rely; electronic invoicing features have been disclosed; the VAT standard return is on the cusp of being implemented, and so on. At the same time, the OECD was the first institution to stimulate an international debate on VAT treatment for e-commerce, and some of the principles underlying the EU mini-one-stop-shop scheme possibly derive from the OECD’s work. Moreover, the OECD’s constant work on refining the guidelines regarding neutrality and taxation of cross-border transactions of services and intangibles has enhanced their role as a useful tool to improve/implement local GSTs/VATs⁷³. Yet the legislative pace could have possibly been even faster⁷⁴ and sometimes, above all the demanding, everyday activity of the EU, could have been sharper⁷⁵. Still, the direction undertaken and the recent developments in the policies of the OECD and the EU are indisputably the right ones. In fact, both in the OECD and in the EU policy decisions, the trends have been basically four: facilitating taxpayers’ compliance by reducing administrative burdens, restructuring VATs/GSTs in a more neutral fashion, strengthening VAT/GST collection mechanisms and fighting legislative loopholes.

Only time will tell whether the OECD and the EU will win their battle for a more efficient and neutral VAT/GST.

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73 It is well-known that both India and Egypt are the latest example of countries planning to introduce a GST/VAT shaped on the OECD guidelines.

74 The legislative process in the EU has often been slowed by the qualified majority/unanimity required in the European Council while in the OECD Member countries, unanimity has often slowed the expansion of new measures.

75 See section 2.3.

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