

International Association of Tax Judges (IATJ) 14TH ASSEMBLY

Session on Recent VAT/GST Case Law on Digital Platform Services

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Paris, France

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VAT UNIT

OECD CENTRE FOR TAX POLICY AND
ADMINISTRATION



OECD International VAT/GST Guidelines

A global standard



- The **global standard** for the application of VAT/GST to international trade in services and intangibles
- Agreed principles for determining the place of taxation by reference to the **destination principle**
- Builds on **inclusive international dialogue** among OECD/G20 countries and other OECD Partner countries plus the global business community and academia
- **Endorsed by participants in the 2015 Global Forum on VAT** representing **over 100 jurisdictions and international and regional organisations**
- **Soft law** – Not legally binding



Levying VAT/GST on international supplies of services and intangibles

Allocating the right to tax – Collecting the tax from non-residents

- Creating an **effective legal basis for the right to levy VAT/GST** on international business-to-consumer (B2C) supplies of services and intangibles:

Guideline 3.6

- The jurisdiction in which the customer has its **usual residence** has the taxing rights over B2C supplies of services and intangibles
- Except: on-the-spot supplies (Guideline 3.5); “specific rules” (Guideline 3.7); immovable property (Guideline 3.8)

- Collecting VAT/GST on international B2C supplies of services and intangibles **where the supplier is not located in the jurisdiction of taxation:**

Recommended collection mechanism

- **Non-resident supplier/digital platform to register and remit VAT/GST** in the jurisdiction of taxation
- Simplified VAT/GST registration and compliance regime



The central role of digital platforms to support the VAT/GST collection on online sales



Collecting VAT/GST on B2C supplies by non-resident suppliers

The central role of digital platforms

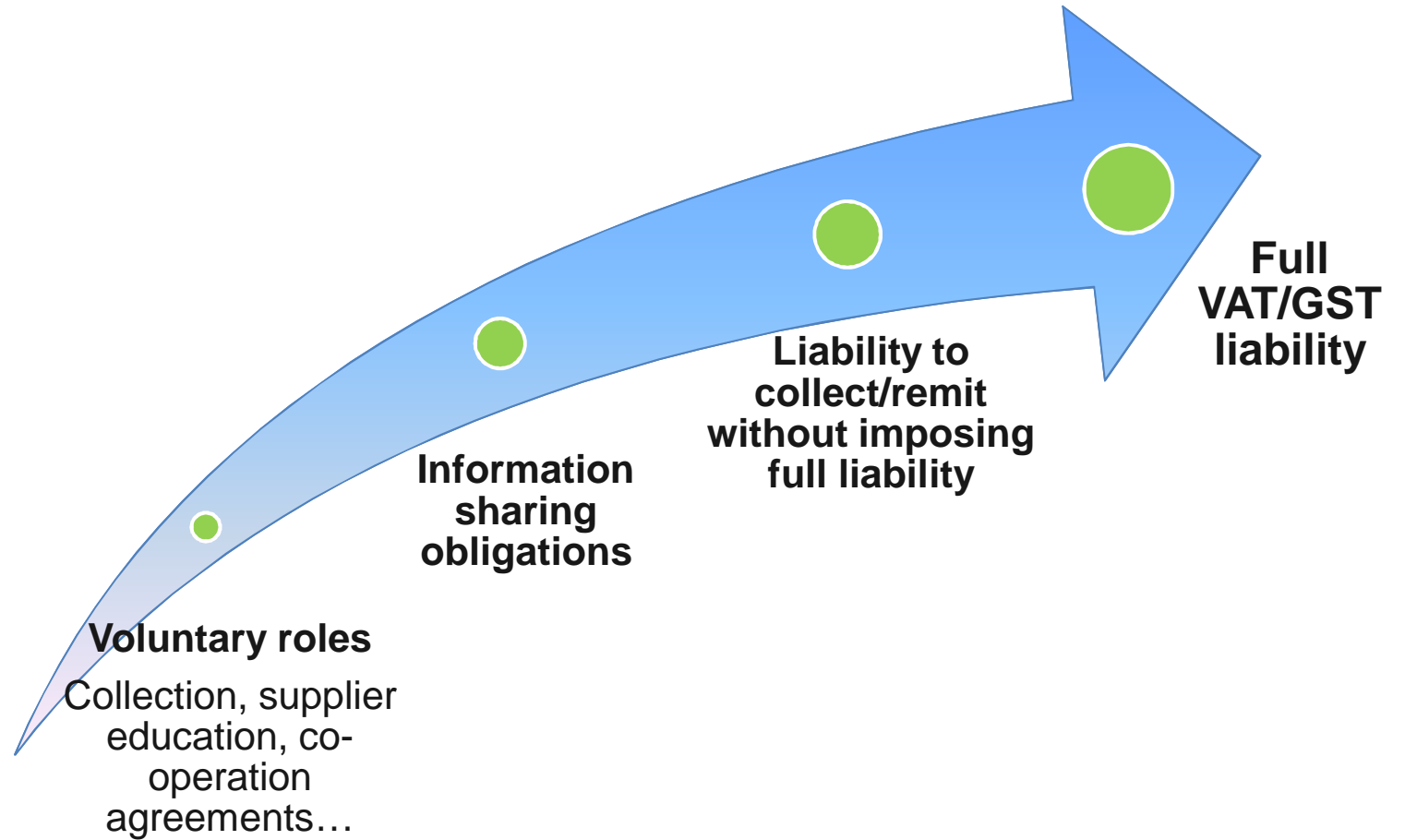
- Rise of digital platforms has been a **key driver of e-commerce growth**
 - ❑ “Multi-sided platforms” enable, by electronic means, direct interaction between two or more customers or participant groups (typically buyers and sellers)
- **Large majority of cross-border e-commerce sales** are made via a **few very large digital platforms**
 - ❑ Three biggest digital platforms accounted for 55% of global cross-border sales of goods (*source: Cross-Border E-Commerce Shopper Survey 2021 by International Post Corporation*)
- These platforms hold/collect or are capable of holding/collecting **vast amounts of data**, incl. VAT/GST-relevant information

Significant potential to enhance and facilitate VAT/GST compliance and administration by enlisting digital platforms in VAT/GST collection on B2C e-commerce



Collecting VAT/GST on B2C supplies by non-resident suppliers

Roles for digital platforms to support the VAT/GST collection

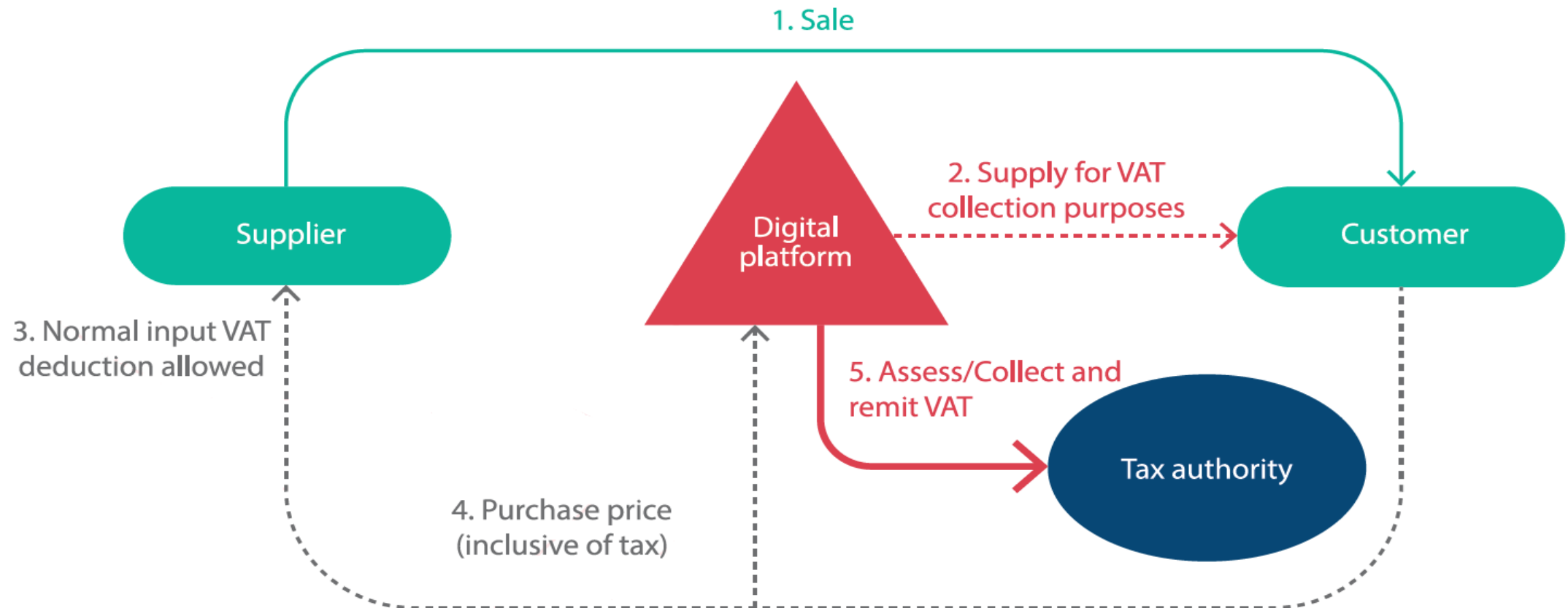


Often a combination in practice...



Full VAT/GST liability regime for digital platforms (FLR)

Illustration of the basic operation



* The sequence of numbers assigned in the diagram is for identification only. It is not intended to indicate the timing of a specific step in chronological order.



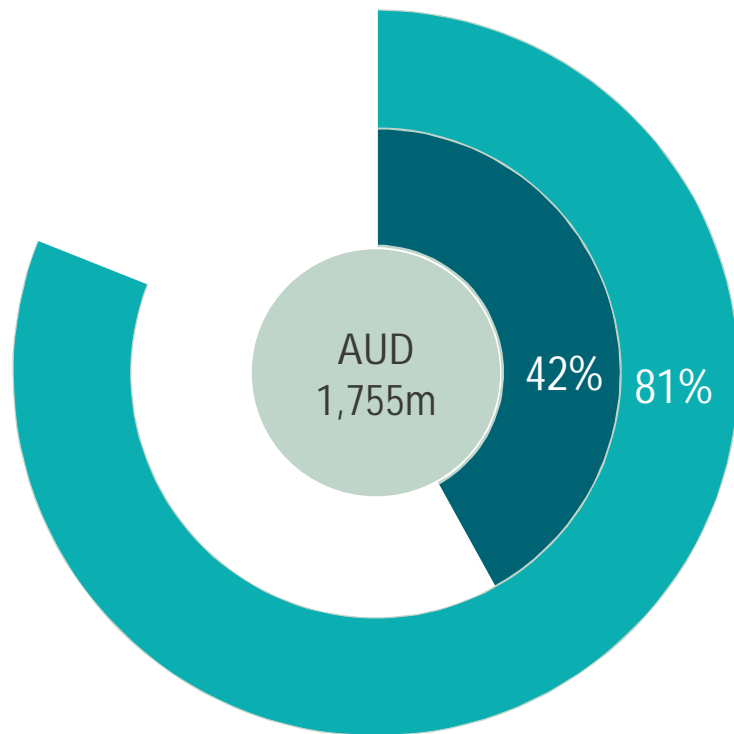
Full VAT/GST liability regime for digital platforms (FLR)

Main advantages of the full VAT/GST liability regime

- Reduce the costs and risks of administering, policing and collecting VAT/GST by drawing on the relatively limited number of platforms
- Potentially reduce compliance costs for the underlying suppliers faced with multi-jurisdictional obligations



Full VAT/GST liability regime for digital platforms (FLR) *Example: revenue effect in Australia*



Australia – GST collected on digital products and services

- From 1 July 2017 to 30 June 2021
- **42%** of revenue collected by the **top 5 platform** entities
- **81%** of revenue collected by the **top 30 entities** (11 platforms + 19 merchants)

Source: Australian Taxation Office



Full VAT/GST liability regime for digital platforms (FLR)

Design considerations

- **Key design considerations** include:
 - ☐ Functional criteria
 - ✓ Possess or have access to sufficient and accurate information to make the appropriate VAT/GST determination, and
 - ✓ Have practical means to collect the VAT/GST on the supply
 - ☐ Residence of the underlying suppliers



Full VAT/GST liability regime for digital platforms (FLR)

Example of primary legislation – Australia

In Australia, the Goods and Services Act 1999 provides the legal basis for the full GST liability of digital platform operators on the supplies by non-resident suppliers selling through their platforms.

- **Section 84-55 Operator of electronic distribution platform treated as supplier, paragraph (1),** states:

If an inbound intangible consumer supply is made through an electronic distribution platform, the operator of the platform, instead of the supplier, is treated, for the purposes of the GST law:

- (a) as being the supplier of, and as making, the supply; and
- (b) as having made the supply for the consideration for which it was made; and
- (c) as having made the supply in the course or furtherance of an enterprise that the operator carries on



Full VAT/GST liability regime for digital platforms (FLR)

Example of primary legislation – Australia

- **Subsection 84-55(4)** qualifies **84-55(1)** to explain the relatively limited set of circumstances in which a digital platform would not be liable for GST as the supplier of the digital products sold through it. This would include, among several other criteria, an agreement with the underlying non-resident supplier explicitly acknowledging the latter's responsibility for collecting and accounting for the GST due.
- **Section 84-65 Meaning of inbound intangible consumer supply** defines the relevant inbound intangible consumer supplies to make it clear they encompass virtually all international supplies of services and intangibles by non-resident businesses to Australian consumers.
- **Section 84-70 Meaning of electronic distribution platform** defines an electronic distribution platform (EDP) to capture the business models of almost all digital platforms and online marketplaces that enable third-party suppliers to make supplies of services and intangibles (including 'digital products') to consumers through the platform. Where non-resident suppliers generate sales through the platform, any intangibles must be supplied to the consumer by means of electronic communication in order for the platform to qualify as an EDP.

Source: Australian Government, A New Tax System (Goods and Services Tax) Act 1999, law as amended and in force on 1 October 2020, at <https://www.legislation.gov.au/Details/C2020C00334>.



Full VAT/GST liability regime for digital platforms (FLR)

Example – Singapore

Electronic marketplace operators are regarded as the supplier of the imported low-value goods or remote services, if *any* of these conditions are met:

- 1. The marketplace *authorises the charge* to the customer**
 - Communicates the liability to pay to the customer
 - Influences whether or at what time the customer pays
- 2. The marketplace *authorises the delivery of supply* to the customer**
 - Delivers an item itself or sends approval to commence delivery
- 3. The marketplace *sets the terms and conditions under which the supply is made***
 - Influences pricing, specifies payment/delivery methods
 - Provides customer support or owns customer data



Full VAT/GST liability regime for digital platforms (FLR)

Example – Singapore

Electronic marketplace operators are regarded as the supplier of the imported low-value goods or remote services, if *any* of these conditions are met:

4. **Documentation issued to customer *identifies the supply as made by the marketplace***
 - Receipts, invoices, or information displayed on marketplace's website
5. **The marketplace and merchant *contractually agree that the marketplace is responsible for GST obligations***



Collecting VAT/GST on B2C supplies by non-resident suppliers

Additional roles for digital platforms

Additional roles for digital platforms to support VAT/GST collection

- Imposing **information reporting and sharing obligations**
- Encouraging or requiring platforms to **educate the underlying suppliers** operating through them
- Entering into **formal agreements** with digital platforms based on the co-operative compliance concept
- Authorising digital platforms to operate as **a voluntary intermediary** for VAT/GST collection on behalf of underlying suppliers
- Imposing **joint and several liability** upon platforms and their suppliers



Possible cases of circumventing jurisdiction's FLR
for digital platforms & Use of Exchange of
Information (EOI) to address enforcement
challenges



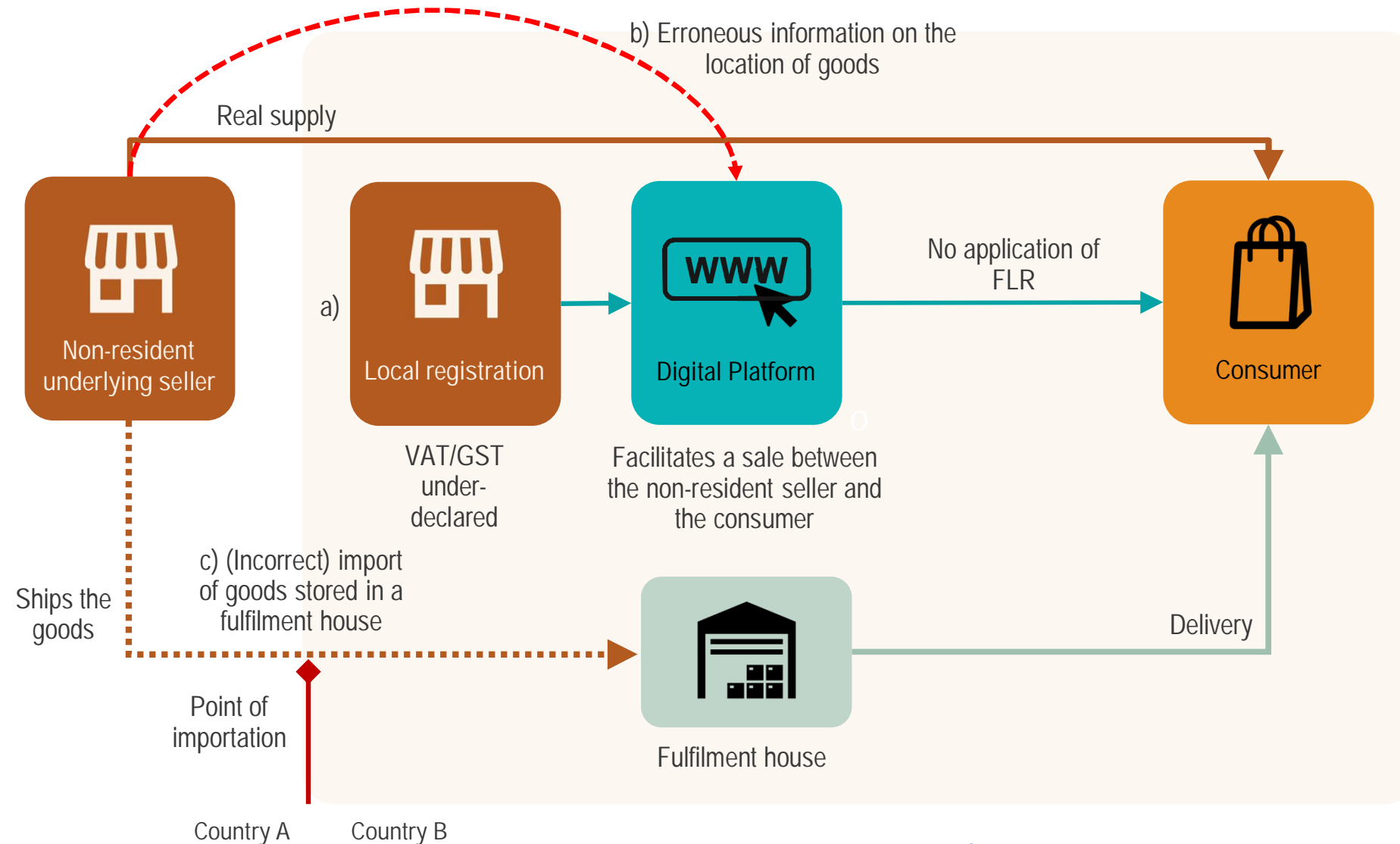
Threats to Platform FLR

- Fraud:
 - ☐ Misrepresenting customer location or status (business vs. consumer), or location of goods
 - ☐ Misrepresenting supplier's residence as a domestic supplier through local registration (supplier is actually non-resident)
- Legal 'loopholes' - legislative drafting:
 - ☐ Use of undefined terms such as "authorize", "control", and "influence"
- Restructuring business models:
 - ☐ Function splitting



Circumventing the FLR – Fraudulent schemes

Generic description



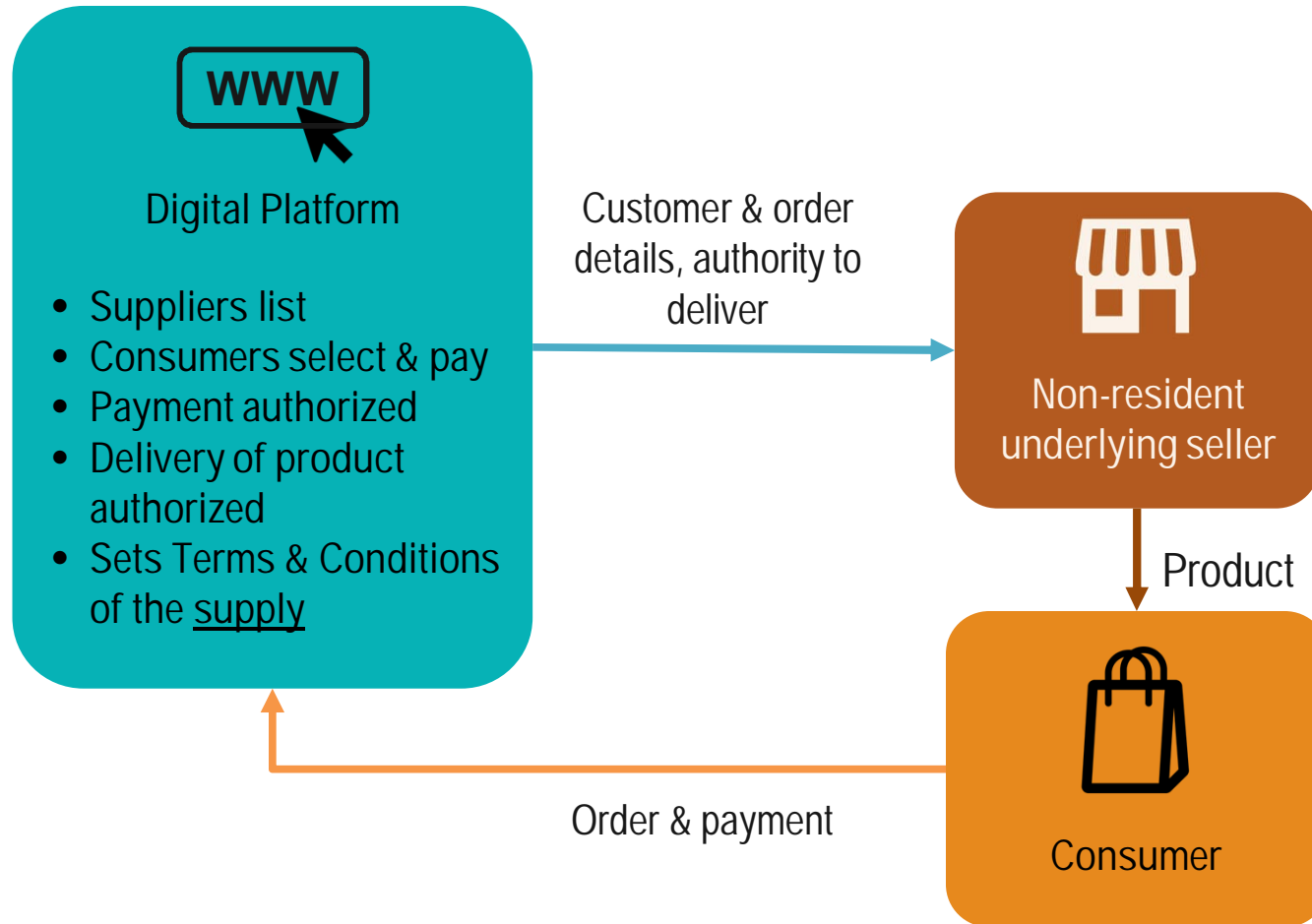
Generic forms of fraudulent schemes with several variations.

Fraudulent schemes for a particular jurisdiction will **depend on the scope of its FLR for digital platforms.**



Circumventing the FLR – Function Splitting

Platform Liability – Before Function Splitting



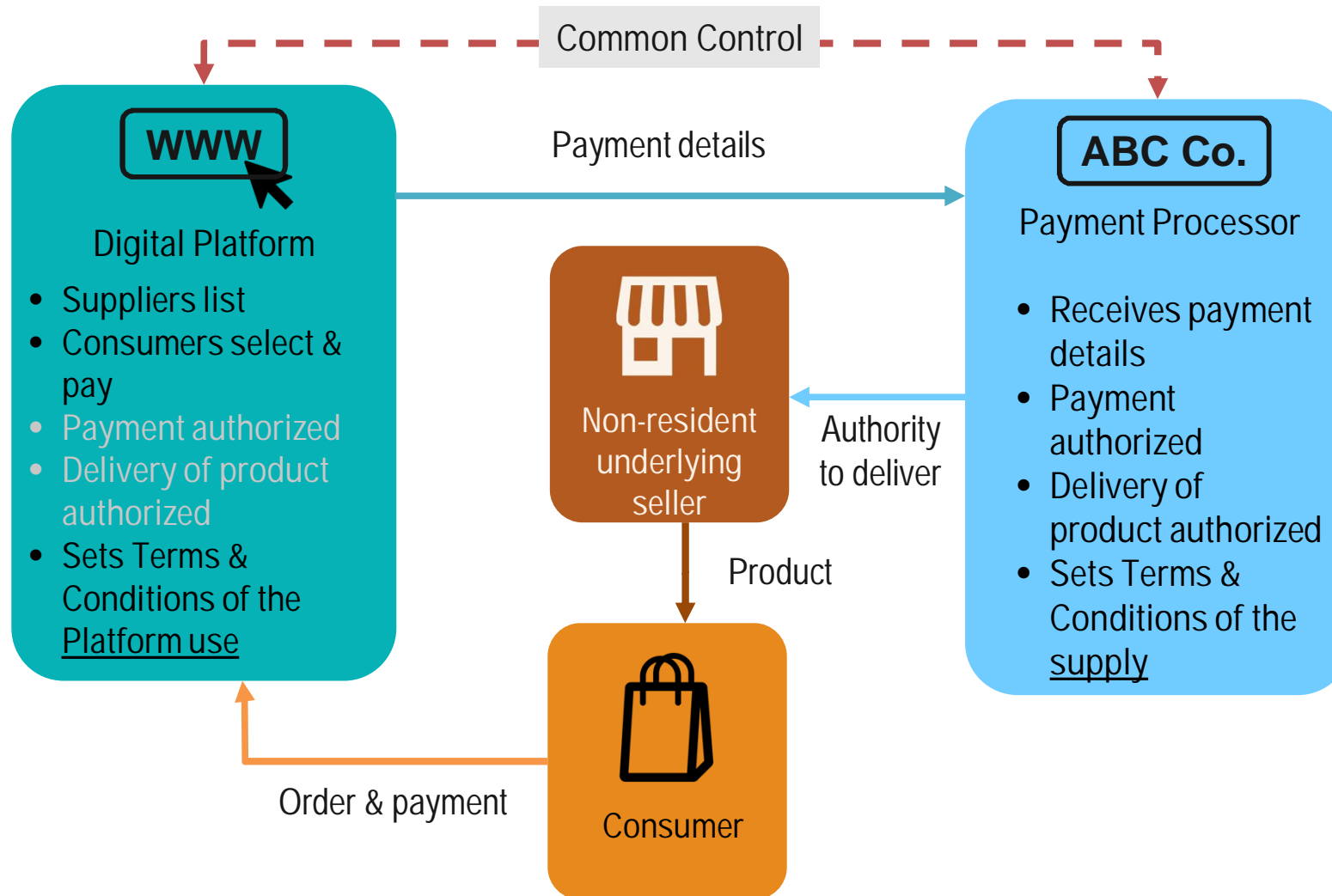
Digital Platform

- Allows suppliers to make products available to consumers
- Sets terms & conditions
- Authorises payment
- Authorises delivery



Circumventing the FLR – Function Splitting

Platform - Two Entity Structure



Digital Platform

- Allows suppliers to make products available to consumers
- Sets Terms & Conditions of use of the Platform
- Authorises payment
- Authorises delivery

Payment Processor

- Receives payment details
- Authorises payment
- Authorises delivery
- Sets Terms & Conditions of the supply



Administrative co-operation and exchange of information

- *International VAT/GST Guidelines* recommend [greater use of existing legal instruments](#) to strengthen international administrative co-operation to support the effective VAT/GST collection in the context of the digital economy
 - ❑ [Multilateral Convention on Mutual Administrative Assistance in Tax Matters \(MAAC\)](#) - the most comprehensive multilateral instrument available for all forms of tax co-operation to address tax evasion and avoidance
 - ✓ **Exchange of information:** MAAC allows information to be exchanged upon request, automatically or spontaneously.
 - ❑ Articles 26 and 27 of the OECD or UN Model Conventions
 - ❑ Regional frameworks: EU Directives and regulations, Nordic Convention, African Tax Administration Forum (ATAF), Inter-American Center of Tax Administrations (CIAT), West African Economic and Monetary Union (WAEMU), etc.
 - ❑ Tax information exchange agreements (TIEAs)



Questions?





Global impact of the OECD standard setting and capacity building work on VAT/GST and e-commerce

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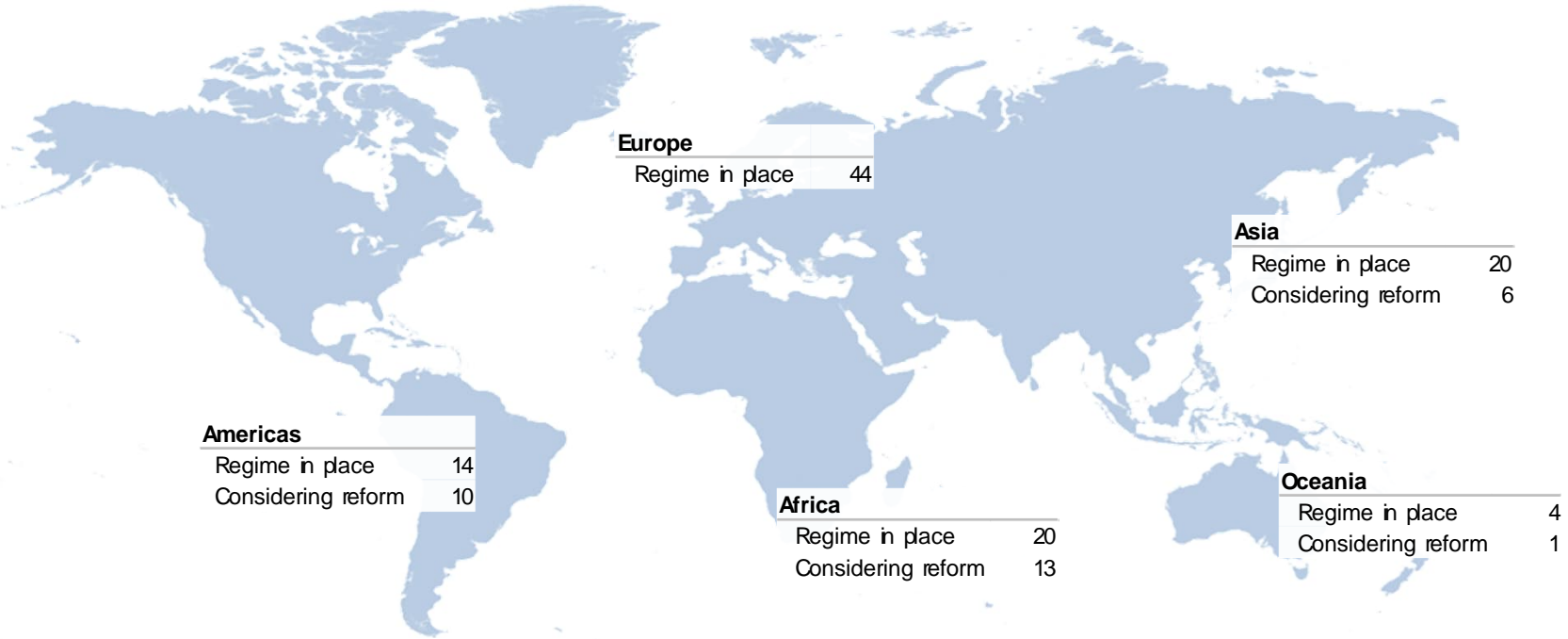
Jurisdictions have implemented VAT/GST reform directed at digital trade

30

Are considering reform

~36

Introduced a full VAT/GST liability regime for digital platforms



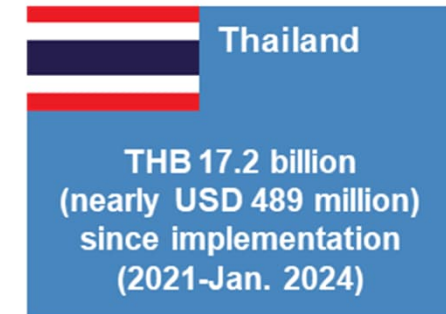
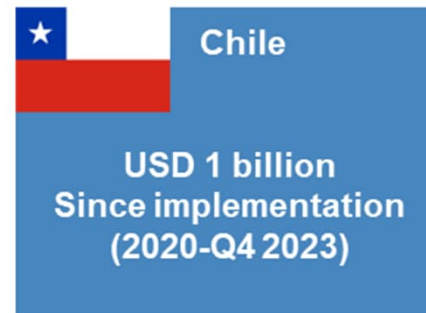
Australia, Egypt, European Union (27), Georgia, New Zealand, Norway, Singapore, South Africa, Thailand, United Kingdom + more are considering



State of play: digital products, services and intangibles

Over 100 jurisdictions have implemented the recommended solutions for VAT/GST collection on cross-border international supplies of services and intangibles.

(Very) positive results in terms of compliance and (new) revenue collected.





State of play: low-value imported goods

A growing number of jurisdictions is now extending its regime for e-services to low-value imported goods

(Very) positive results reported by first movers

- **Australia** (July 2018): USD 1.7 billion in the first five years
- **New Zealand** (December 2019): USD 669 million (2019 - Q1 2024)
- **European Union** (July 2021): USD 3.8 billion in the first 1.5 years
- **Norway** (April 2020); USD 322 million since implementation (2020 - Q1 2024)
- **United Kingdom** (January 2021): USD 3.6 billion in first two fiscal years
- **Singapore** (January 2023), **Nigeria** (January 2024), **Chile**, **Thailand** under consideration



International Association of Tax Judges

Recent VAT Cases on Digital Platform Services in South Korea

Ulsan District Court

Presiding judge Jungeun Sul

Overview

- **Measures for collecting VAT on taxable supplies by Non-resident without domestic place of business**

Consumer	Taxable persons (B2B Transaction)	Non-taxable persons (B2C Transaction)
Supply of services (excluding electronic services)	Reverse Charge Mechanism (excluding when supplied to a taxable business)	Reverse Charge Mechanism (practically ineffective)
Supply of electronic services		Simplified Business Registration

Korean Value Added Tax Act – general provisions

- **VAT Art 20(1)** The place of supply of services shall be the any of the following places: 1. **The place where services are supplied** or facilities, rights, or other goods are used;
- **VAT Art 52(1)** A person who receives the supply of services or rights (hereinafter “services, etc.”) in the Republic of Korea from any of the following persons **shall collect VAT from the person receiving the payment for such services, etc. at the time of making such payment (excluding where the services, etc. supplied are delivered to a taxable business)**;
 1. A nonresident or a foreign corporation that has **no domestic place of business**
 2. A nonresident or a foreign corporation that has a domestic place of business (limited to supply of services, etc. **with no relation to the domestic place of business** of the nonresident or foreign corporation, as prescribed by Presidential Decree)

Korean Value Added Tax Act – special provisions

- **VAT Art 53(1) If a foreign entrepreneur supplies services, etc. in the Republic of Korea through any of the following persons (hereinafter referred to as “commission agent, etc.”), the services, etc. shall be deemed to be supplied by the commission agent, etc.:** (introduced 12. 31. 2011. apply to supplies from 7. 1. 2012.)
 1. A commission agent;
 2. A quasi-commission agent;
 3. An agent;
- Amended 12. 20. 2016. to **include “4. An Intermediary.** (only applicable to where he or she collects a transaction price from a purchaser and pays it to seller)” coming into effective from January 1, 2017.

Korean Value Added Tax Act – special provisions

- **VAT Art 53-2(2)** Where a foreign entrepreneur supplies any electronic services to consumers in the Republic of Korea through any of the following **third persons** (including any nonresident or foreign corporation referred to in any of the subparagraphs of Art 52(1)), **the third person shall be deemed to supply the electronic services in the Republic of Korea, and the third party shall file for simplified business registration** within 20 days after commencing the business: (introduced 12. 23. 2014.)
 1. A person **who operates an open market** or others similar thereto to **provide services to enable electronic services transactions** through an information and communications network, etc.;
 2. A person **who acts as an intermediary, etc. in electronic services transactions** in a manner that collects the payment from the purchaser and pays it to the seller;

Korean Value Added Tax Act – special provisions

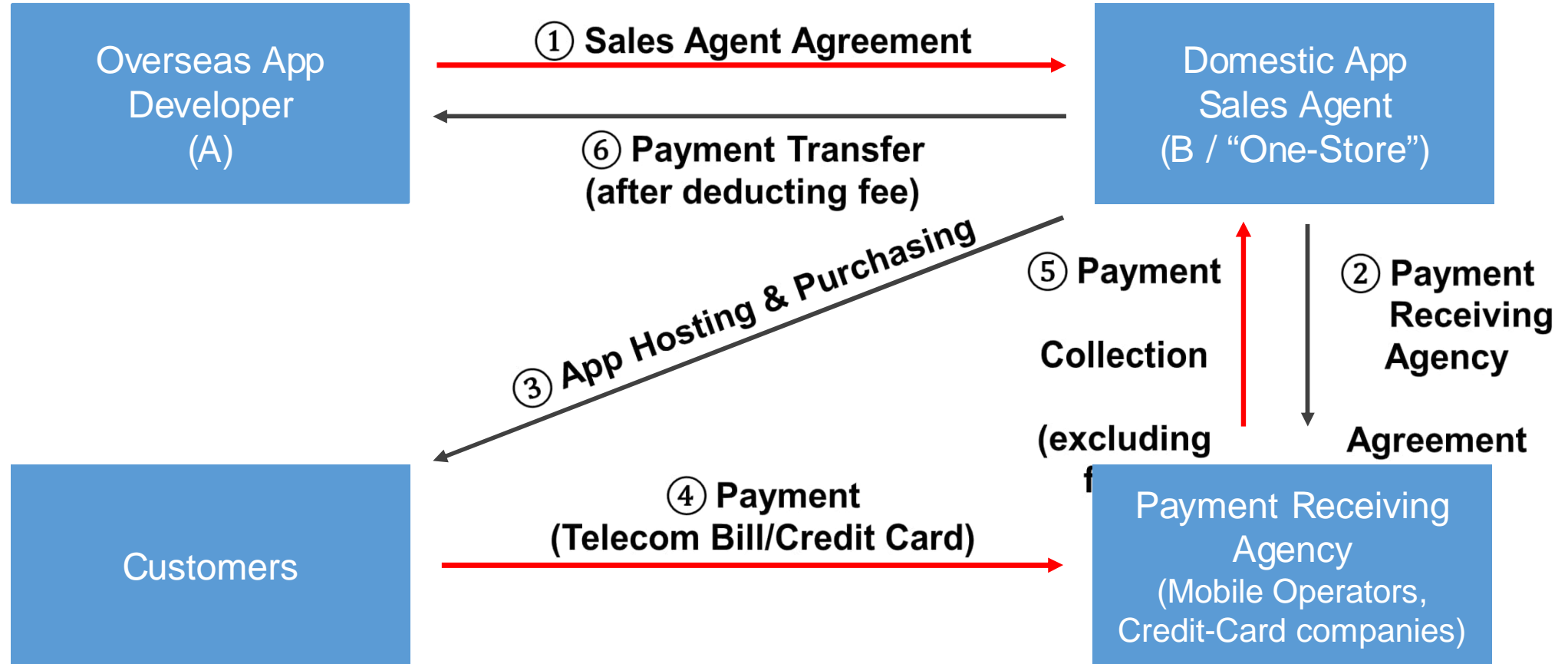
→ Amended on December 20. 2021, VAT Art 20(1). 3.; **the place of supply of electronic services** under Art 53-2(1) shall be “**the location of the place of business, domicile or residence of a person who is supplied with such services.**”, coming into force on January 1. 2021.

Consumer	Taxable persons (B2B Transaction)	Non-taxable persons (B2C Transaction)
Supply of services (excluding electronic services)	Reverse Charge Mechanism (excluding when supplied to a taxable business)	Reverse Charge Mechanism (practically ineffective)
Supply of electronic services		Simplified Business Registration

Supreme Court Case (1)

- **Fact Summary**

- ✓ The taxpayer (SK-planet co.) is a corporation that operates “**One-Store**”, which provide mobile app usage rights, and received 30% of the sales price as a commission from foreign developers.
- ✓ The defendant (Tax authority) claimed that the “One-Store” supplied app usage rights to consumers in Korea as a quasi-commission agent, or an agent of a foreign developer without a domestic place of business. Consequently, the defendant imposed VAT on these transactions from 2012 to 2015 between foreign supplies from overseas developers to Korean consumers.



Supreme Court Case (2)

- **Issue: Is the One-Store a quasi-commission agent or an agent under Art 53(1)?**
- ✓ Considering the operational system, contents of terms and conditions, One-Store cannot be said to be a quasi-commission agent or an agent.

“One-store only provides a transaction system based on the website, and the member is responsible for the products registered by the member and information related thereto. If a dispute arises regarding a transaction with a buyer, the plaintiff does not intervene in the dispute. All responsibility resulting from the dispute shall be borne by the member.”
(Taxpayer won)
- ✓ Supreme Court January 28. 2021. 20du51204 affirmed.
- ✓ VAT on Commission?
- ✓ Amended Art 53(1).4 and Art 53-2(2).2 will apply after January 2017.

Pending Case (1)

- **Fact Summary**

- ✓ Google Asia-Pacific Pte Ltd. (hereinafter “GAPL”) based in Singapore, acts as a distributor for Google Play in the Asia-Pacific region, collecting commissions from domestic game developers. GAPL does not have a PE in Korea.
- ✓ The tax authority determined that the five domestic locations of Google Korea Ltd., Google Payment Korea Ltd, the cash server, call center, and Google Campus Seoul collectively constituted a PE. The tax office also argued that even if a physical PE is not recognized, a DAPE could still be established.
- ✓ Consequently, the tax office considered the commissions for the entire transaction of Korean users purchasing applications from Korean developers as the value supplied by the Korean PE and imposed VAT on it.

Pending Case (2)

- **Fact Summary**

- ✓ Meta Platforms Ireland Limited (MIL) is a foreign corporation based in Ireland that engages in the business of selling advertising space on the Facebook platform in Korea. Facebook Korea Limited (FK) is an entity established in Korea to provide sales support and marketing services to Facebook Groups.
- ✓ The tax authority determined that the MIL had established a PE at FK's place of business in Korea and supplied advertising services in Korea, and imposed VAT on the payment for advertising services received from Korean advertisers.

Pending Case (3)

- **Issue**

- ✓ Does GAPL or MIL have PE or DAPE in Korea?
 - ✓ Were the services supplied domestically? (VAT Art 20(1)3. 53-2 do not apply)
 - ✓ How to calculate the normal price for advertising services in relation to viewings that occurred overseas (MIL case)
-
- Seoul Administration Court 2023guhap65648 (GAPL case), 2024guhap52496 (MIL case) – will be concluded next year

Thank you for your listening.

European Union

Court of Justice (CJEU)



Legal background



- Article 28 of the VAT Directive: Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself
 - commissionaire model = *legal fiction*: intermediary service transforms purchase + supply
- Article 9a(1) of the Implementing Regulation, first and third subparagraphs:
 - For the application of Art. 28 of the VAT Dir., where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.
 - For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.



- Online video platform, operated by Fenix International Ltd, based in UK, used primarily by sex workers who produce pornography
- Subscribers pay creators in monthly instalments, in one-time tips, or via pay-per-view. The company takes 20% of these fees.
- As of May 2023, OnlyFans had 3 million registered creators and 220 million registered consumers.

Source: Wikipedia

- CJEU (Grand Chamber) *Fenix, C-695/20*: Invalidity of the special rule for electronically supplied services of the Implementing Regulation? Had the Council, by accepting the Regulation, supplemented or amended Article 28 of the VAT Directive, thus exceeding the implementing powers conferred on it by that directive?

"Creator"



"Fan"



Platform

 **OnlyFans**



80 €

100 €

VAT liability for
100 € or $(100 - 80) = 20$ €?

Fenix, C-695/20, taxpayer's view

- Fenix claimed not to be responsible to pay VAT on all of the sum received from a fan but only on the 20% of that sum which it levied by way of remuneration
- Argument: Article 9a of Implementing Regulation has the effect of amending and/or supplementing Article 28 of the VAT Directive by adding new rules to it. The Implementing Regulation goes beyond the VAT Directive by providing that an agent who takes part in a supply of services by electronic means is to be deemed to have received and supplied those services, even though the identity of the provider, who is the principal, is known. Such a provision fundamentally alters the liability of the agent in the field of VAT by transferring the tax burden on platforms operated on the internet, since it proves impossible, in practice, to rebut the presumption laid down in the third subparagraph of Article 9a(1) of Implementing Regulation.

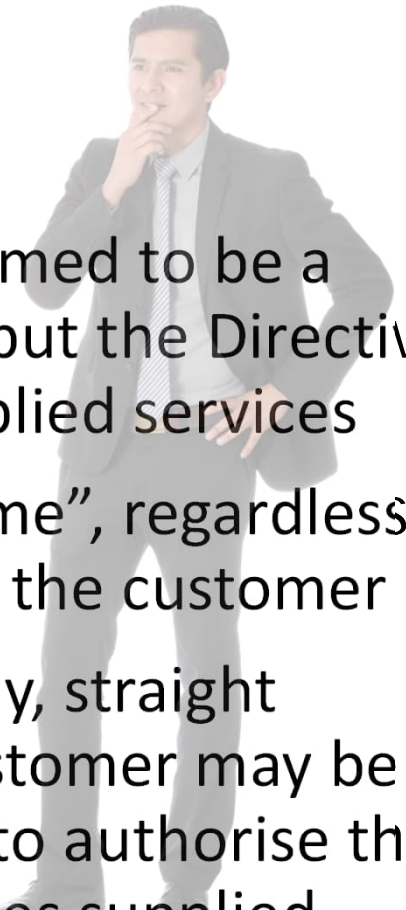
Fenix, C-695/20, judgment 28 February 2023



- CJEU: no finding affecting the validity of Implementing Regulation
 - (83) Where a taxable person, who takes part in the supply of a service by electronic means, by operating, for example, an online social network platform, has the power to authorise the supply of that service, or to charge for it, or to lay down the general terms and conditions of such a supply, that taxable person may unilaterally define essential elements relating to the supply, namely the provision of that service and the time at which it will take place, or the conditions under which the consideration will be payable, or the rules forming the general framework of that service. In such circumstances, and having regard to the economic and commercial reality reflected by them, the taxable person must be regarded as being the supplier of services, pursuant to Article 28 of the VAT Directive

Fenix, C-695/20, conclusions

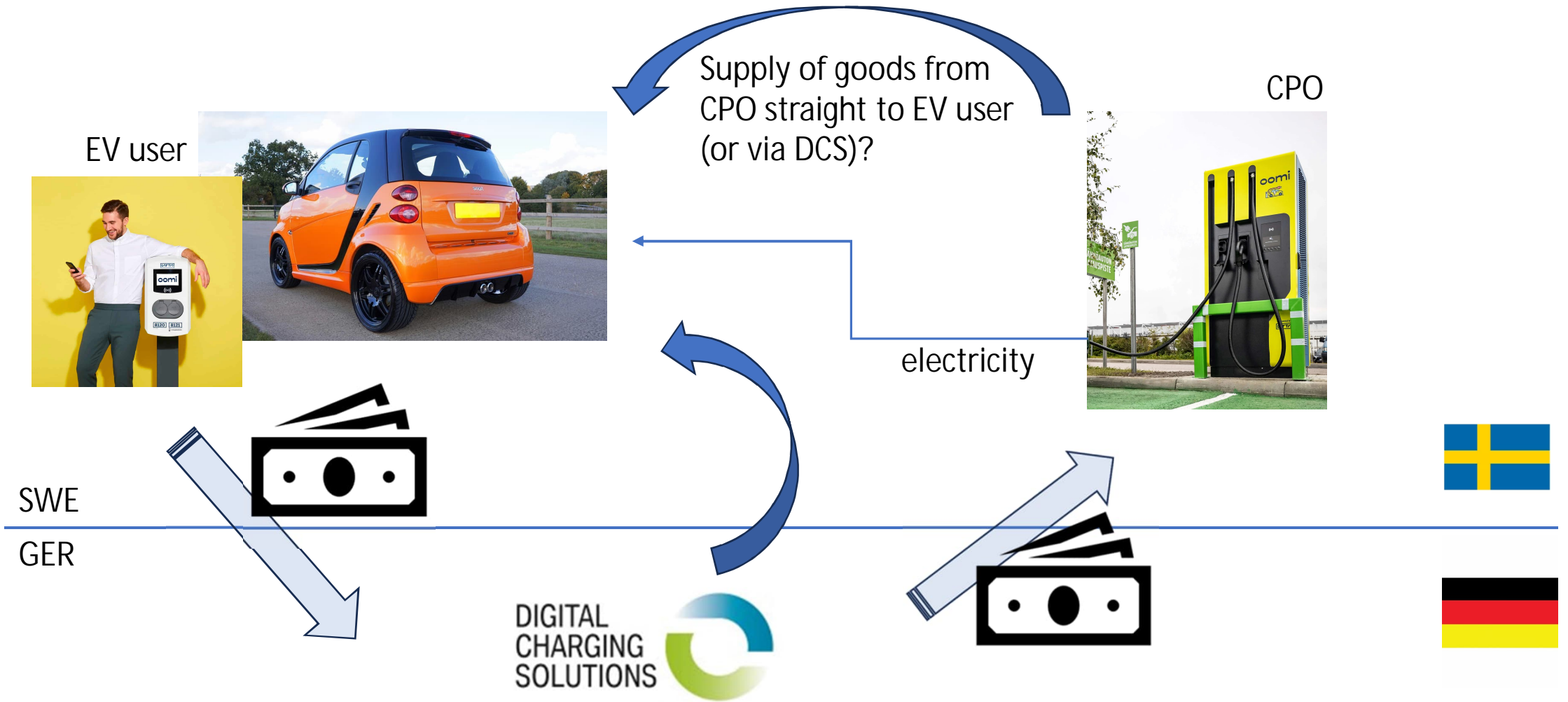
- Reasoning of the Court suggests that *Fenix* would have deemed to be a supplier when applying not only Implementing Regulation but the Directive itself → the case is relevant also outside electronically supplied services
- A network platform operator may be “acting in his own name”, regardless of that the identity of the actual service producer is known to the customer
- Even when digitally ordered services are delivered physically, straight (human) contact between the service producer and the customer may be missing, and especially in such cases the operator’s power to authorise the supply or to charge for it may be seen as crucial as in services supplied electronically
- Platforms in many cases responsible for VAT already according to the current legislation in the EU?



CJEU: *DCS*, C-60/23 (pending)



- DCS, based in Germany, supplies electric vehicles (EV) users with access to a network of charging points globally in several markets
- The charging points are operated by charge-point operators (CPOs) with which DCS has entered into contracts. DCS provides EV users with a card and an application for authentication to enable them to charge their vehicles at the charging points. When the card or application is used, a CPO invoices DCS for that charging session.
- VAT directive: electricity shall be treated as tangible property
- Request for a preliminary ruling from Sweden: Is a supply of goods to be deemed to be present at all stages of a chain of transactions?



DCS's supply to EV user:

- a) only a service = access to the network of charging points + granting some form of credit *or*
- b) (deemed) supply of goods (electricity) in Sweden?

DCS, C-60/23 (pending)

- According to the CJEU praxis commissionaire model is applied in same way to goods as to services: Art 28 (services) = Art 14(2)(c) (goods)



- Opinion of Advocate General *Tamara Ćapeta*, 25 April 2024
 - (35) [One] possibility is to understand the transactions involved as being based on a commission model under Article 14(2)(c) of the VAT Directive. That option, despite not being raised by either the reference for a preliminary ruling or the participants in the written part of the procedure, was discussed at the hearing. Said option is, to my mind, the most appropriate characterisation of the transactions involved in the present case.
 - DCS acts as a commissionaire and is deemed to sell goods in Sweden
- CJEU: ??



International Association of Tax Judges