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MADRID • SPAIN



SEMINAR G: VAT and Direct Taxation of Digital Economy

Chair: Rita de la Feria (University of Leeds, UK)

Panellists: Joachim Englisch (Muenster University, Germany); Charlene Herbain (Université Catholique de Louvain, Belgium); Richard Krever (Monash University, Australia); Edoardo Traversa (Catholic University of Louvain / Liedekerke, Belgium)

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28 September 2016

Agenda

- ***Taxing the digital economy: overview and challenges***
- ***Allocation of taxing powers***
- ***Tax collection issues***



Taxing the digital economy: overview and challenges

What are the key features of the digital economy?

Digital supplies sold to customers

Goods via platform?

Websites (revenue from third party advertisers)

IP component of supplies?

Services via platform (shared economy)?

Centralized management?

Allocation of taxing powers

How to tackle the erosion of the tax base resulting from the digital economy?

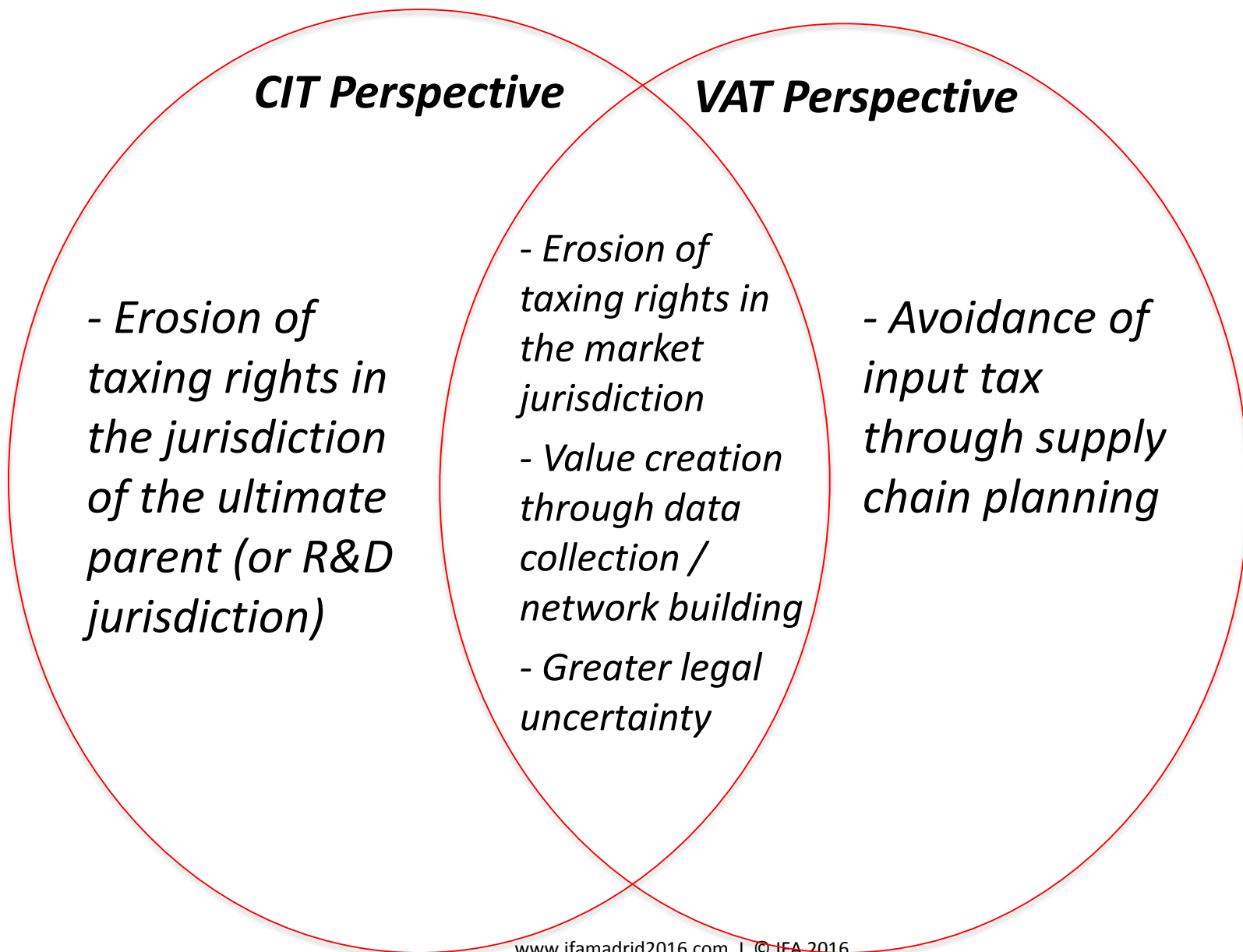
CIT Perspective

VAT Perspective

- 1. Current Allocation of Taxing Rights*
- 2. Case Studies*
- 3. Future of Allocation of Taxing Rights*



VAT and CIT implications of the digital economy



CIT Perspective

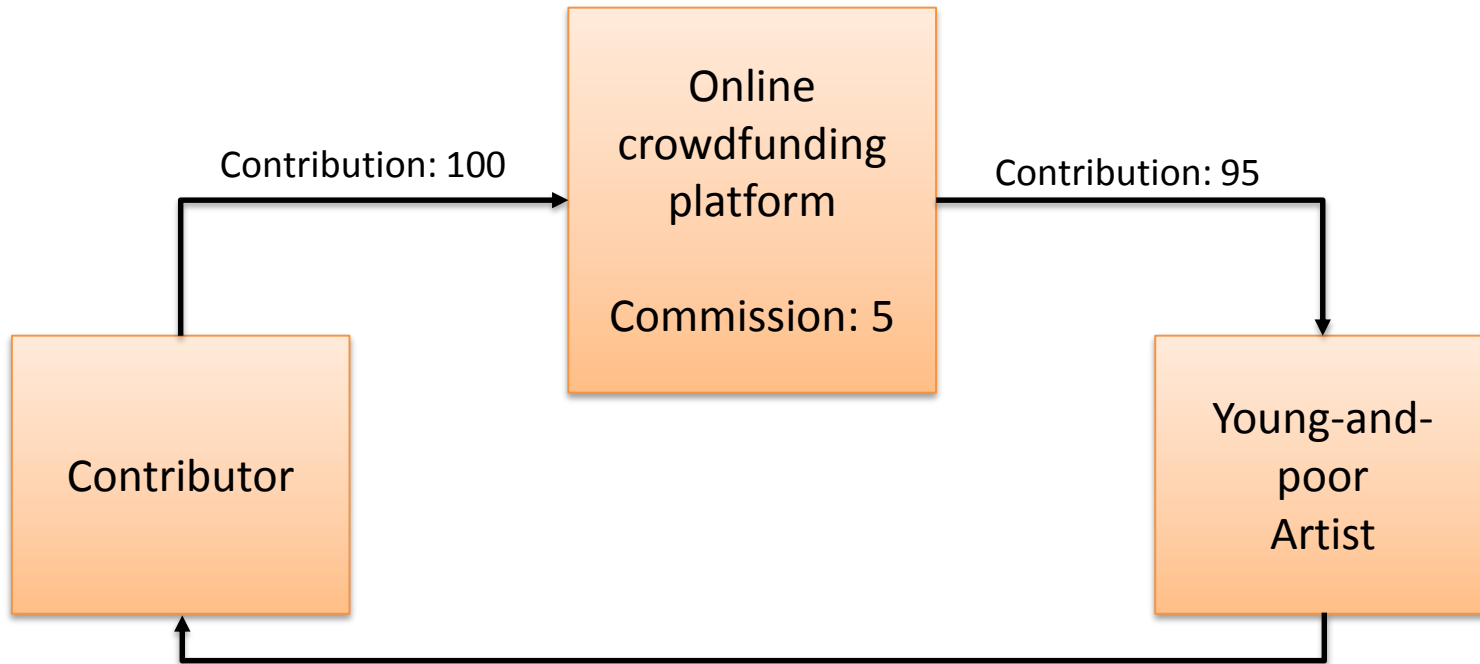
- Erosion of taxing rights in the jurisdiction of the ultimate parent (or R&D jurisdiction)

VAT Perspective

- Avoidance of input tax through supply chain planning

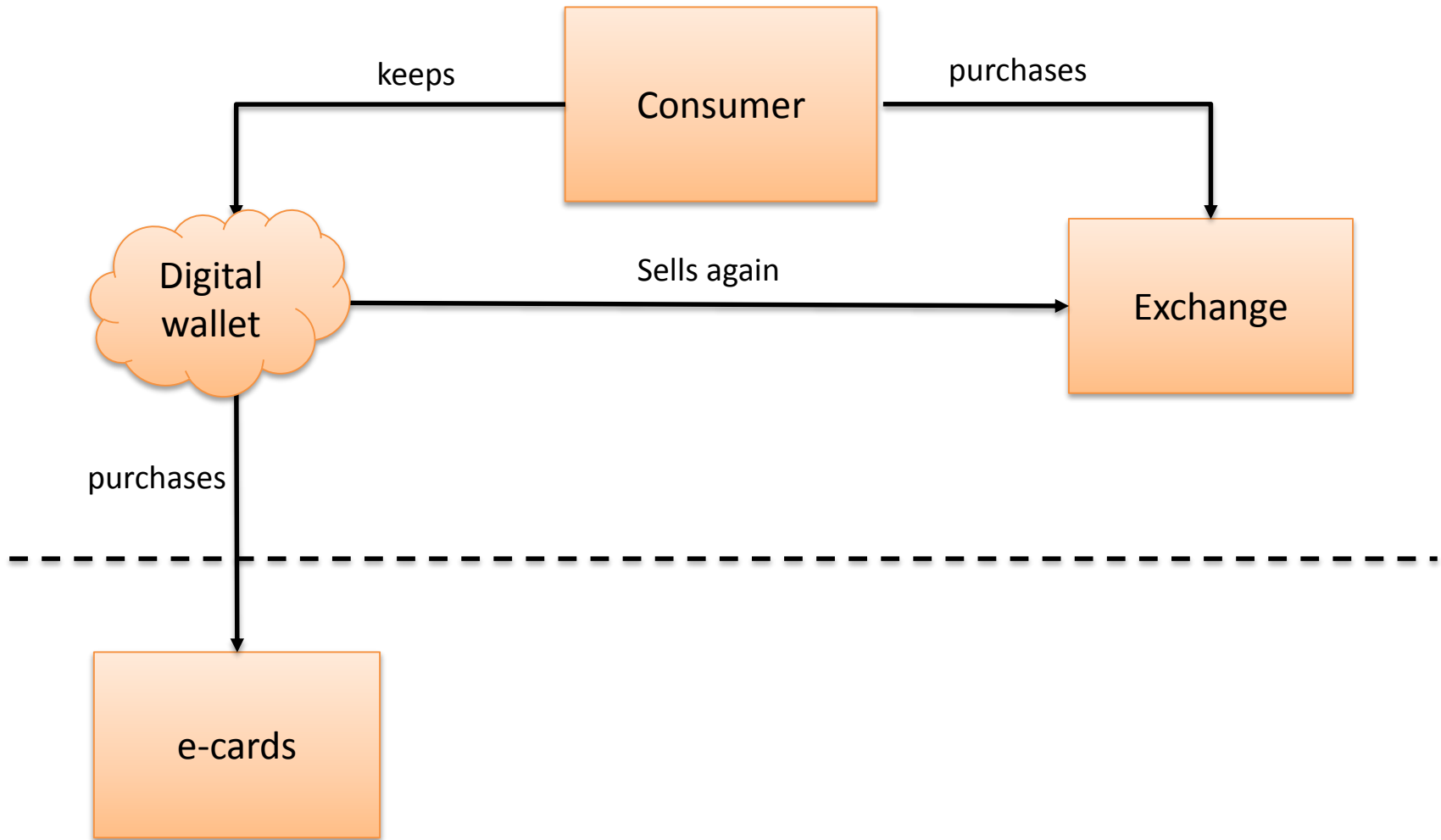
- Erosion of taxing rights in the market jurisdiction*
- Value creation through data collection / network building*
- Greater legal uncertainty*

Case study: VAT and CIT treatment of revenues from digital goods and crowdfunding



Reward: Access online music
Value : 25

Case study: Bitcoins





Drivers for reform

CIT

- *Media attention*
- *Budget deficit and austerity measures*
- *Public anger against MNE*
- *Strengthening the global influence of the OECD and its members while protecting the status quo*

VAT

- *Spread of VAT*
- *Explosion of cross border transactions and e-commerce*
- *Securing level playing field SMEs*
- *Protecting revenues*



G20/OECD reaction

CIT

- *Conservative approach*
- *Marginal modifications of existing regimes*
- *No consensus on fundamental changes*

VAT

- *Bold reaction*
- *Uncompromising adoption of new regimes*
- *Current challenges: compliance and collection*

Intensification of int'l EoI / admin. Assistance

But for different reasons...



VAT Model Convention

Is the time right for a Model VAT Convention?

YES (GREEN CARD)

NO (RED CARD)

VOTE NOW



VAT Model Convention

Arguments supporting different views

In favour of model convention

- Already have convergence on fundamental principles
- We need exchange of information (EoI)
- Existing template in OECD guidelines
- Avoid double taxation

Against of model convention

- Already have convergence on fundamental principles
- We already have incorporated VAT EoI in income tax treaties
- Existing template in OECD guidelines

VOTE NOW

Current Allocation of Taxing Rights

Should residence influence VAT liability similarly to Income Tax liability?

YES (GREEN CARD)

*Residence is a meaningful
criteria for determining VAT
liability*

NO (RED CARD)

*VAT liability should be
determined on the basis of
other criterion*

VOTE NOW

Current Allocation of Taxing Rights

Connecting factor: RESIDENCE

CIT Perspective

- *Main criterion for (worldwide) income tax liability*
 - *Determines access to DTCs*
 - *Allocates taxing rights for most categories of active and passive income*
 - *May rather formal (place of incorporation, head office) and disconnected from economic substance*
- ⇒ *Strong incentive to (re)locate residence for tax reasons, but...*

VAT Perspective

- *VAT liability is based on the place of consumption (destination principles)*
 - *Residence may be used as a proxy to determine the place of supply of taxable transactions*
 - *Digital services in the EU: residence of the customer*
- ⇒ *Lesser incentive to (re)locate for tax reasons, but...*

VOTE NOW

Current Allocation of Taxing Rights

Connecting factor: PE

CIT Perspective

- *PE, Art 5 OECD Model Convention*
- *BEPS and concept broadening*
- *Still some physicality persists*
- *Digital presence not enough*

VAT Perspective

- *FE, EU Directive, national legislations*
- *EU/CJEU: Welmory*
- *Still some physicality persists*
- *Digital presence not enough (hardware)*

Do we need a PE concept?

Current Allocation of Taxing Rights

Is Fixed Establishment (VAT) the same as a Permanent Establishment (CIT)?

YES (GREEN CARD)

If deemed to have a PE, there is an FE, and vice-versa

NO (RED CARD)

Having a PE, does not mean there is an FE, and vice-versa

VOTE NOW

Current Allocation of Taxing Rights

Arguments supporting different views

In favour of similarity of concepts

- *Much commonality between the two concepts (objectives and practicalities)*
- *Legislative function of secondary establishment criterion under CIT and VAT not different*
- *Regarded similar*
- *Simplicity*

Against similarity of concepts

- *Proxies used for different purposes (consumption vs source)*
- *EU legislator has consistently, and over a significant time period, used different terms in EN*
- *This terminological discrepancy is not present in every language*
- *Equity (double taxation)*

VOTE NOW



Where is the place of supply / consumption / enjoyment?

Porn actress in small town in Alberta, Canada films herself and uploads to her pay website. Subscribers are in the United States.

Dawn's Place 2006 FCA 349
(Canada)

US dating website provides links and customers include German customers.

XI R29/14 (Germany)

Hungarian company owns website in Madeira that links customers to "actresses" located in other jurisdictions.

WebMindLicenses Kft Case
C-419/14 (EU)

US Company supply IT services to Swedish FE of UK Company.

Future of Allocation of Taxing Rights

Strengthening Market Jurisdiction in VAT/CIT

CIT Perspective

- *Not (yet) a fundamental principle*
- *Amendment of the PE concept*
- *Increased relevance of relevant people functions under the ALS*
- *Enhancement of the profit split method*

VAT Perspective

- *Corresponds with ideal of taxation at destination*
- *Taxing all B2C remote trade in services in state of presumed consumption*
- *Preference for recharge method in B2B trade*
- *taxation of small value imports*

Future of Allocation of Taxing Rights

Legitimacy considerations in a digital world

Should VAT influence CIT?

- *CIT currently based on residence and source principles*
- *Stronger source rules seen as more legitimate*
- *In a globalised, digital, economy, where is source?*
- *The cat and mouse game: BEPS, and tax avoidance rules*
- *Destination principle (sales) is as legitimate as source principle, but easier to apply*



Tax collection issues

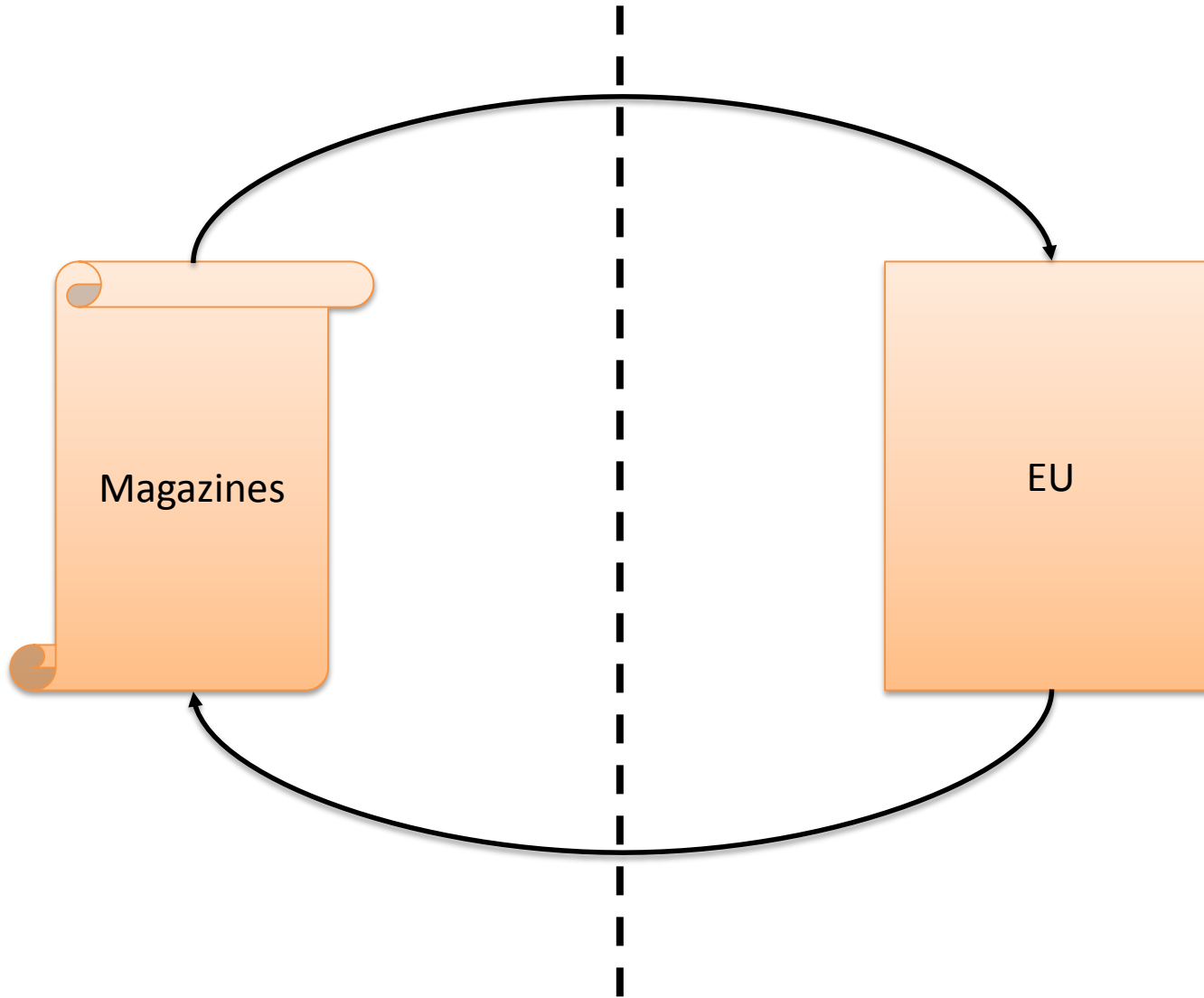
How to collect taxes in a digital economy?

CIT Perspective

VAT Perspective

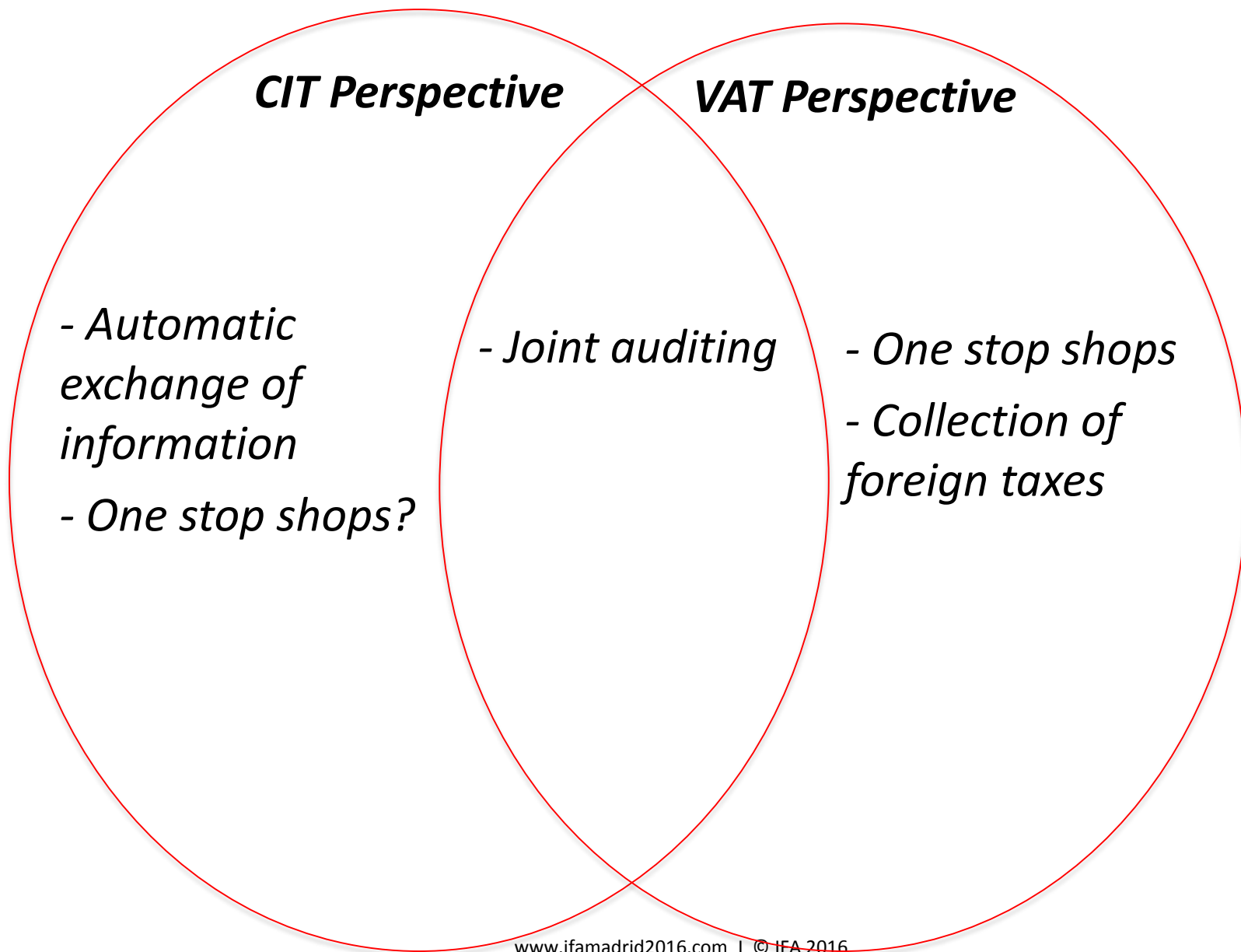
- 1. Case study*
- 2. International cooperation*
- 3. Unilateral actions*

Case study – Low Value Consignment Relief (LVCR)





Tax collection issues: progressive demise of revenue rule





Tax collection issues: unilateral actions

Is third-party liability the solution?

CIT perspective

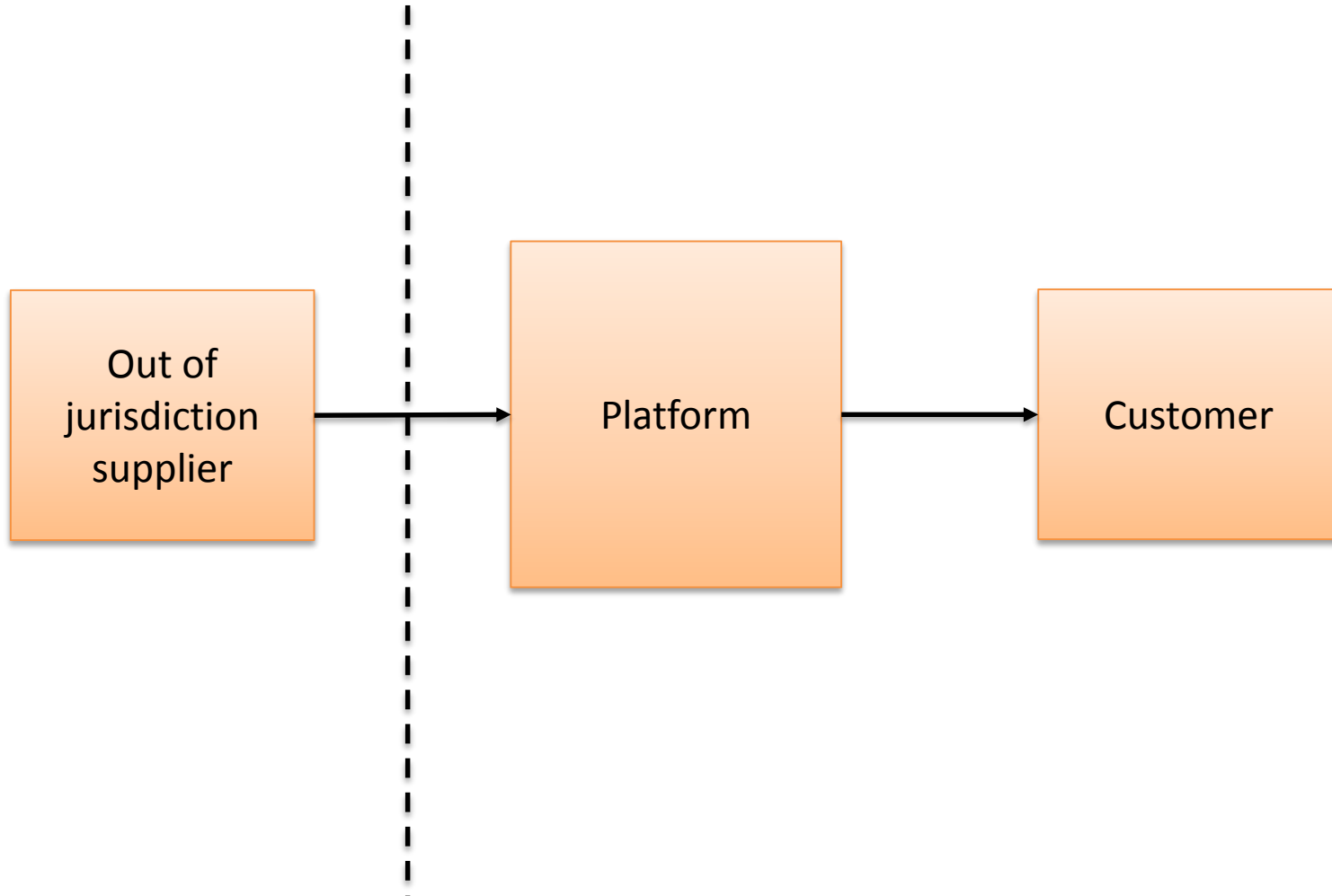
- *Third-party liability is not new (withholding tax)*
- *Money laundering legislation*
- *Trend intensifying: auditors, consultants, lawyers*

VAT perspective

- *Third-party liability is new*
- *Enforcement problems in a digital world*
- *New legislation in many EU countries*
- *And in non-EU countries too (Brazil, Australia, etc.)*



Case study: should platform be liable for unpaid VAT (or PIT or CIT)?





THANK YOU