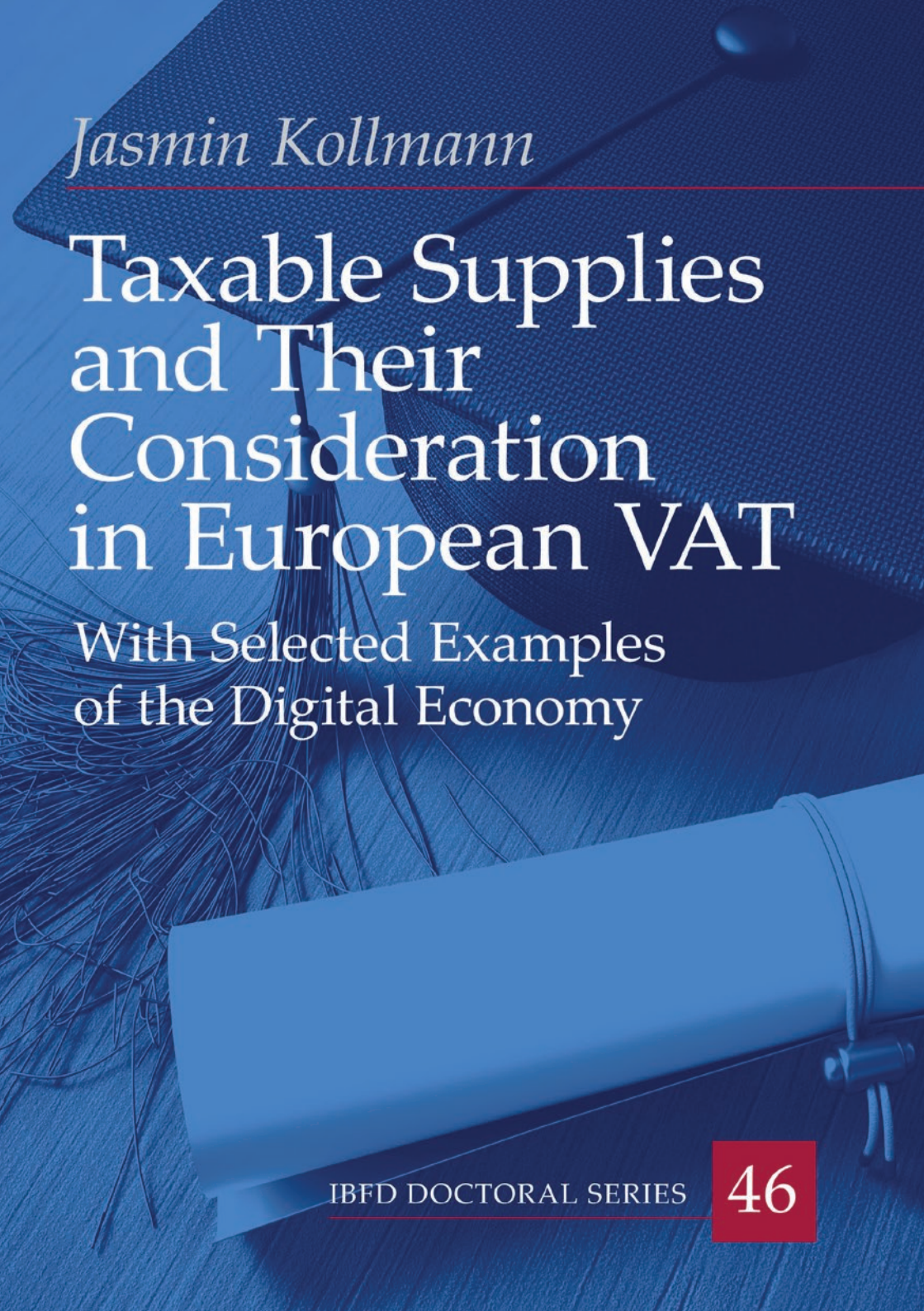
Jasmin Kollmann

Taxable Supplies and Their Consideration in European VAT

With Selected Examples of the Digital Economy



IBFD DOCTORAL SERIES 46

Taxable Supplies and their Consideration in European VAT

Why this book?
The current economy is changing. Not only the intensively researched phenomenon of globalization but also digitalization, as well as Information and Communication Technology, is becoming more and more influential. As a result, completely new business models based on technology have emerged. However, ensuring effective taxation of the digital economy presents challenges, one of the major concerns being how to administer the VAT system for digital transactions. Nevertheless, before answering how VAT should be applied in the digital economy, the question must be posed whether specific transactions through virtual channels should be subject to VAT at all.

This book provides an analysis of the application of basic concepts of the present European VAT system to transactions in the digital economy, therefore aiming to measure how well or poorly these transactions are captured. It examines whether the current VAT system has any impact on the growth of the digital economy, i.e. whether it stimulates or hinders digital transactions. Furthermore, by comparing transactions in the digital economy with transactions in the traditional economy, potential privileges or discriminations can be underlined. Finally, the book tackles the important issue of assessing whether amendments to the current rules are necessary to deal with the challenges of the digital economy. To answer this question, the author takes into account the development of jurisprudence by the Court of Justice of the European Union and relevant literature in this field.

Winner of the 2018 Maurice Lauré Prize awarded by the International Fiscal Association (IFA).

Title:	Taxable Supplies and their Consideration in European VAT
Subtitle:	With selected Examples of the Digital Economy
Author(s):	Jasmin Kollmann
Date of publication:	February 2019
ISBN:	978-90-8722-500-1 (print/online), 978-90-8722-498-1 (ePub), 978-90-8722-499-8 (PDF)
Type of publication:	Book
Number of pages:	288
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 105 / USD 125 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 84 / USD 100 (VAT excl.)

Order information
To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform

IBFD

Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Fax: 31-20-622 8658
www.ibfd.org

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

ISBN 978-90-8722-500-1 (print)
ISBN 978-90-8722-498-1 (eBook, ePub); 978-90-8722-499-8 (eBook, PDF)
ISSN 1570-7164 (print)
NUR 826

Table of Contents

Sample Content

Chapter 1

Introduction

1.1. Research questions and methodology

1.1.1. Research objectives and structure

The European system of value added tax (VAT) was developed in the 1950s, at a time when only brick-and-mortar shops existed. Therefore, the system was designed in such a way that the majority of transactions involved the supply of goods, and suppliers and consumers used to meet face by face. This commercial reality does not hold true for business models in the digital economy. Presently, it is also possible for transactions in business models involving online portals and social networks to take place often on a consumer-to-consumer basis.[1]

It is commonly known that ensuring effective VAT for transactions in the digital economy presents challenges. At this point, it must be acknowledged that one of the major concerns regarding taxation of the digital economy is the administrability of the tax system. Nevertheless, before addressing how the tax system should be administered in the digital economy, the question needs to be posed of whether specific transactions taking place in virtual channels should be taxed at all. The challenges regarding tax assessment and collection in the digital economy will therefore not form part of this book, as such an analysis would be beyond the scope.

This book aims at providing an analysis of the application of basic concepts of the European VAT system to transactions in the digital economy. First, an overview of the requirements for conducting taxable supplies will be given. This overview is important for the reader to understand that even though the most basic question is whether a supply exists or not, there are nonetheless further requirements for performing taxable supplies. These elements are also relevant for transactions taking place in the digital economy, but they will not be the major focus of this book.

1. The analysis of specific transactions of the digital economy does not presuppose that all transactions take place between businesses and consumers. The purpose of this book is to evaluate whether a specific transaction is a suitable supply with a suitable consideration at all. Other prerequisites for supplies are described in brief before the actual analysis is conducted, but focusing also on further criteria would be out of scope.

The substantive chapters deal with a comprehensive legal analysis of the characteristics of supplies and their consideration from the perspective of VAT. In order to do so, first, a special focus will be placed on the conditions for the existence of a supply.[2] Second, the question of what could serve as the consideration for a supply will be examined.[3] Additionally, a detailed analysis of the characteristics of the legal relationship, which connects the supply with the consideration, and the direct link between these two elements, will be made.[4] The research on this general part of the European legislation on VAT and the corresponding jurisprudence of the European Court of Justice (ECJ) will subsequently be used to answer the question of which prerequisites are necessary criteria for the existence of a taxable supply.

The above-mentioned examination, which aims to filter out general criteria that are necessary prerequisites for every taxable supply, is not an end in itself. This general analysis in chapters 2 to 4 serves as a basis for chapter 5, in which digital examples are analysed. Several features of the digital economy, such as e-vouchers, virtual money and online portals, will be examined in the light of the criteria for taxable supplies. Therefore, this book aims at measuring how well or how poorly the present European VAT system can capture transactions taking place in the digital economy. The author will assess whether the current system has any impact on the growth of the digital economy, e.g. whether it stimulates or hinders digital transactions. Furthermore, by comparing transactions in the digital economy with transactions in the traditional economy, potential privileges or discrimination can be underlined. Finally, yet importantly, it will be assessed whether amendments to the present rules are needed to deal with the challenges of the digital economy. The book aims to prove that the current rules regarding the determination of taxable supplies are flexible enough to cover new types of supplies and business models.

1.1.2. Methodology

The methodological approach will reflect the division of the analysis into two parts. In order to achieve the first analytical, descriptive and explanatory purpose, the existing rules of the European VAT Directive[5] and the case law of the ECJ shall be examined. The historical development and the existing

2. *See* ch. 3.
3. *See* ch. 4.
4. *See* sec. 4.2.
5. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, pp. 1-118, (hereinafter VAT Directive).

legal situation form the core of the analysis. Therefore, the relevant provisions will be outlined and examined and focus will be placed on their interpretation in jurisprudence. If necessary, e.g. in cases where jurisprudence in some Member States is substantially different or where the Member States' jurisprudence explains and applies the judgments of the ECJ, Austrian and German national case law will also be referred to. This is done because of the author's background in Austrian and German law. This analysis is conducted in order to extract all relevant criteria for taxable supplies and to systematize them.[6]

In brief, the first part of this book, chapters 2 to 4, contends itself with the formulation of statements *de lege lata*, therefore widely following a descriptive purpose.[7] The central issue is to understand the content and the purpose of the law. In cases where the law is ambiguous or formulated quite vaguely, interpretative conclusions are necessary in order to eliminate gaps. The object of such an interpretation is the relevant provisions of the VAT Directive. To achieve this, all methods of interpretation will be applied: a grammatical, historical, systematic and teleological interpretation will be necessary to find the appropriate solutions.[8]

The ECJ generally follows the commonly accepted principles of interpretation.[9] This means that concepts of EU law must be determined starting from the common meaning of the terms in their context and in the light of the objectives of EU law. Therefore, all conventional interpretation methods are applied in interpreting EU law.[10] Because of the peculiarities of the European Community's legal order, the classical methods of interpretation,

6. *See*, e.g., Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind of Discipline?*, in Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), pp. 4 et seq.
7. Mackor, *Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously*, in Van Hoecke (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), p. 63.
8. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Springer 2011), pp. 436 et seq.
9. "There is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions. Rather, any general theory of legal reasoning … could account for the ECJ's decision-making." *See* Bengoetxea et al., *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, in Burca & Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001), p. 48. Compare also Weiler, *The Court of Justice on Trial*, Common Market Law Review (1987), p. 568.
10. Lenz & Ehrhard, *Das Gemeinschaftsrecht-System, Entstehung, Anwendung*, in Lenz (ed.), *EG-Handbuch: Recht im Binnenmarkt* (nwb 1994), pp. 85 et seq.

however, are weighted differently than in the interpretation of national law. In addition, specific methods for the interpretation of EU law can be applied.

Generally, the literal, grammatical interpretation is based on the wording of the legislation, thus on the meaning of the words itself and their meaning in the context of the other words. While the grammatical interpretation will always be the first step towards finding the meaning of a clause, it will mostly allow several interpretational results. Especially because the legislation of the European Union in the field of VAT has many different language versions, these versions might differ slightly. Even though each language version is binding, but no version has priority over others, a clear interpretation might not be possible in any case.[11] Therefore, the systematic and teleological interpretation will be used to reach a result.

The systematic method is based on the context of the relevant provision, which means that the interpretation outcome that fits the other provisions of the treaty best will be used. Even though criticism could be voiced that the law of the European Union is an incomplete system, and therefore it could be argued that a systematic interpretation will not be applied, this criticism cannot be followed. While it is true that the legal system of the European Union is not a complete whole,[12] a rather high density of norms was reached in the area of indirect taxes. In addition, the ECJ contributes to the fact that EU law can function as a legal system, because the court treats its case law as one coherent system and developed general principles of EU law.[13] Since the ECJ establishes a connection to previous case law in its decisions, this approach proves that a systematic interpretation method plays an important role.

The teleological method aims to identify the aim of the rule, which might be, for instance, the aim of taxing expenditure for consumption for the European VAT Directive. It plays a dominant role in the case law of the ECJ, as it contributes to the coherence and consistency of the law.[14] The teleological method is closely linked to the systematic method. It does not exclusively examine the aim of a single norm, but also takes into account the broader context of the norm. This means that not only the purpose of

11. Birkenfeld, *Mehrwertsteuer der EU: Die 6. USt-Richtlinie mit Erläuterungen* (Erich Schmidt 2001), p. 21.
12. Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), pp. 7 et seq.
13. Id., p. 9.
14. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, European Journal of Legal Studies (2007), pp. 139 et seq.

a single norm, but also the purpose of the broader context of a norm is relevant. For example, in the *CILFIT* judgment, the ECJ stated that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".[15] The teleological method seems to be the preferential method of interpretation of the ECJ, even though there is no official hierarchy of the methods of interpretation.[16]

It is true that the ECJ generally refers to the "spirit", the "wording" and the "scheme of the system" as factors for interpreting EU law.[17] This means that the three main methods for interpreting EU law are the teleological interpretation (spirit), the grammatical literal interpretation (wording) and the systematic interpretation (scheme of the system). Nevertheless, also historical materials can be used to determine the intention of the legislator,[18] as they are sometimes used as an additional way for putting forward further legal reasoning.[19] It follows that even though the historical method of interpretation might not be understood as an independent way of interpreting provisions of EU law, it can serve as a supportive method. This is because the legislation of the European Union is the outcome of a political compromise; therefore, it is difficult to determine the authentic will of the legislator, as different Member States may have different aims regarding the specific legislation. Therefore, not the intention of the contracting parties should be explored, but the objectified will of the Member States, which is expressed in the contract norms.[20]

Finally, it is important to consider that EU law is an independent system of rules. Especially for the VAT Directive, the ECJ keeps emphasizing that no

15. ECJ, C-283/81 *CILFIT v. Ministero della Sanità*, ECLI:EU:C:1982:335, 6 Oct. 1982, para. 20.
16. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012), pp. 19 et seq.
17. Indicated first by the ECJ in the judgment C-26/62 *van Gend en Loos*, ECLI:EU:C:1963:1, 5 Feb. 1963.
18. It is true that the historical materials are not available for all European acts, e.g. it is not possible to rely on the *travaux preparatoires* for the Treaties of the European Union. Nevertheless, it might be possible to rely on legislative history in some other form, like an earlier legislative proposal from the European Commission. Compare Fennelly, *Legal Interpretation at the European Court of Justice*, Fordham International Law Journal (1996), p. 666.
19. Maduro, European Journal of Legal Studies (2007), p. 145.
20. Lenz & Ehrhard, in Lenz (ed.), *EG-Handbuch: Recht im Binnenmarkt* (1994), pp. 85 et seq.

reference to national legal systems is allowed.[21] Such a reference would be contrary to a uniform application of the VAT Directive in all EU Member States. Still, for reasons of comparative interpretation, in certain cases reference will be made to national legislation and jurisprudence.

Because of the dynamic and disruptive nature of the digital economy, a slightly different approach is necessary to apply the VAT legislation to selected scenarios of the digital economy. It is not sufficient only to analyse the law as it reads in a variety of legal sources, but a dynamic approach needs to be taken in order to extract and apply the core principles.[22] Thus, the concepts extracted in chapter 2 to 4 will be brought into action by applying an exploratory approach regarding transactions in the digital economy.[23] An exploratory approach is necessary because certain types of transactions in the digital economy have attracted only limited attention of tax law research.

However, applying tax law concepts to new economic realities in the digital world first requires an understanding of the digital world. This means resorting to resources that help to fully understand digital transactions, such as specific literature on information technology or information provided on web pages. Only then can new types of digital transactions be subsumed under current patterns of analysis and an assessment be made of whether new legislation or a different interpretation should be proposed.

As a result, the legal research methodology may vary greatly, depending on the specific topic of examination. Indeed, the approach of analysing the law as it exists is always adopted. Regarding the specific scenarios of the digital economy, this law needs, however, to be applied by means of exploring what the content of the specific rules intends to cover.

---

21. *See*, among others, ECJ, C-305/01 *MGK-Kraftfahrzeuge-Factoring*, ECLI:EU:C:2003:377, 26 June 2003, para. 38; C-320/88 *Staatssecretaris van Financiën v. Shipping and Forwarding Enterprise Safe*, ECLI:EU:C:1990:61, 8 Feb. 1990, para. 8; C-186/89 *WM van Tiem v. Staatssecretaris van Financien*, ECLI:EU:C:1990:429, 4 Dec. 1990, paras. 25 et seq.; C-291/92 *Finanzamt Uelzen v. Armbrecht*, ECLI:EU:C:1995:304, 4 Oct. 1995, paras. 13 et seq.; C-185/01 *Auto Lease Holland*, ECLI:EU:C:2003:73, 6 Feb. 2003, para. 32.
22. Łętowska, *Transformations in Law Interpretation: Towards a Universal Approach – The Phenomenon, Causes and Symptoms*, in Jemielniak & Mikłaszewicz (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010), pp. 31 et seq.
23. Van Hoecke, in Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011), pp. 4 et seq.

1.2. The digital economy – Challenges ahead for VAT?

1.2.1. Functioning and impact of the digital economy

The current economy is changing. Not only the already intensively researched phenomenon of globalization, but also digitalization as well as Information and Communication Technology, is becoming more and more influential, thereby deeply affecting all sectors of the economy.[24] For example, in the traditional economy, physical presence was indispensable to produce and sell goods or to provide a service. Therefore, consumers and suppliers could easily identify which transaction they conducted and who was their contracting partner. In the digital economy this is no longer true, because the digital economy is characterized by mobility of suppliers and consumers, network effects and the use of data.[25] In this regard, scholars have already identified a variety of challenges and issues for the tax system.[26]

The constantly changing technology and the ongoing diffusion of the digital economy within the whole economy leads to a continuous evolution of the digital economy.[27] Since the digital economy can hardly be understood as a separate economic sector, a unique definition does not exist. The digital economy is integrated in all sectors of the economy and allows even small businesses to operate beyond the borders of their countries.[28]

---

24. OECD, *Addressing the Tax Challenges of the Digital Economy,* OEDC/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2014), p. 52.
25. European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), p. 11.
26. Lang & Lejeune (eds.), *VAT/GST in a Global Digital Economy* (Wolters Kluwer 2015); Lamensch, *European Value Added Tax in the Digital Era: A Critical Analysis and Proposals for Reform* (IBFD 2015); Van Brederode, *The Impact of Science and Technology on Taxation*, Intertax (2013), pp. 628 et seq.; DeWilde, *Some Thoughts on Fair Allocation of Corporate Tax in a Globalizing Economy*, Intertax (2010), pp. 281 et seq.; Eicker, *Tax Efficient Structures for Electronic Business: The Challenge for Corporate Structures and Business Models*, Intertax (2000), pp. 120 et seq.; Quaratino, *New Provisions Regarding the Taxation of the Digital Economy*, European Taxation (2014), pp. 211 et seq.; Basu, *Implementing ecommerce tax policy*, British Tax Review (2014), pp. 46 et seq.; Hinnekens, *VAT Policies in the Digital Age*, EC Tax Review (2001), pp. 116 et seq.
27. OECD, *Addressing the Tax Challenges of the Digital Economy*, OEDC/G20 Base Erosion and Profit Shifting Project (2014), p. 12; European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), p. 11.
28. European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), pp. 5 and 11; OECD, *Addressing the Tax Challenges of the Digital Economy*, OEDC/G20 Base Erosion and Profit Shifting Project (2014), pp. 71 et seq.

However, it is possible to pinpoint a few key features of the digital economy: As a broadly used medium, the Internet greatly facilitates international trade without the need to meet personally with a trading partner at a certain location. It is constrained neither by time nor by geography, thus, as a broadly accepted medium, it provides an endless number of business opportunities. Due to low entry barriers in digital markets, competition is increasing; thus innovative business models are key to success. Switching costs are low for consumers, which means that even small improvements can cause consumers to change their behaviour.[29] As a result, network effects may cause short-term monopolies and high volatility.[30] Network effects imply that one group of users is directly affected in a positive or negative way by the decisions of other users, so this phenomenon can lead to the "winner-takes-it-all" model.[31]

Furthermore, because of increased automatization, human intervention is not necessary for conducting transactions any more. As a result, businesses are able to increase substantially in size and reach, without increasing human resources.[32] On the other hand, networks whereby groups of users interact with each other – so called peer-to-peer networks – are becoming increasingly popular.[33] Additionally, users' behaviour on the Internet generates an enormous amount of data, which online portal providers can collect, analyse and sell.[34] Hence, data is said to be the currency of the digital economy,[35] but, in fact, a variety of other types of virtual currencies also are becoming increasingly popular.

As a result of the developments of the digital economy, completely new business models based on technology have emerged. The digital economy has not only led to an extension of the market reach but has also changed the way of doing business. Companies like Airbnb, Uber, Facebook and

29. OECD, *Addressing the Tax Challenges of the Digital Economy*, OEDC/G20 Base Erosion and Profit Shifting Project (2014), p. 94.
30. European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), p. 12.
31. Id.
32. OECD, *Addressing the Tax Challenges of the Digital Economy*, OEDC/G20 Base Erosion and Profit Shifting Project (2014), pp. 85 et seq.
33. European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), p. 12.
34. Id., p. 13.
35. Curtis, *How much is your personal data worth?*, The Telegraph (23 November 2015), available at http://www.telegraph.co.uk/technology/news/12012191/How-much-is-your-personal-data-worth.html (last accessed on 27 June 2016); Greengard, *Data Is The New Currency*, Baseline Magazine (1 June 2015), available at http://www.baselinemag.com/blogs/data-is-the-new-currency.html (last accessed on 27 June 2016).

Alibaba, but also other virtual realities, such as Second Life, Planet Entropia and others, did not exist until the last decade or two. Today, they have quickly become not only a significant part of the daily lives of citizens around the world but also a possibility for business opportunities with millions of customers worldwide. These aforementioned examples are not exceptions but rather a selection of an ever-increasing part of the whole global economy.

The digital economy could have the effect of a digital revolution, challenging the traditional concept of value creation.[36] The fast development of technology and business models, built around and based on technology, seems to have outpaced the development of international taxation standards. Given that industrial revolutions have in all cases led to a transformation of the tax system, the question needs to be posed of whether it is likely that digital economy will also have an impact on taxation.[37] Therefore, it is absolutely crucial to elaborate upon the issue of taxation of the digital economy, especially from the perspective of VAT.

1.2.2. Legislative approach to covering the digital economy

The digital economy is by no means a place without legislation. The application of tax law to the digital economy was already discussed in 1998, within the framework of the OECD ministers meeting in Ottawa.[38] The report's main conclusion was that "taxation principles which guide governments in relation to conventional commerce should also guide them in relation to electronic commerce".[39] This means that the intention was to apply existing tax rules to transactions of the digital economy. Furthermore, new legislation or changes in existing legislation related to the digital economy are not intended to differentiate between the traditional economy and the digital economy, so that a discriminatory treatment could be the result.[40]

36. Collin & Colin, *Report to the Minister for the Economy and Finance, the Minister for Industrial Recovery, the Minister Delegate for the Budget and the Minister Delegate for Small and Medium-Sized Enterprises, Innovation and the Digital Economy*, Task Force on Taxation of the Digital Economy (2013), p. 1.
37. *See* id.
38. OECD, *Electronic Commerce: Taxation Framework Conditions*, A Report by the OECD Committee on Fiscal Affairs, as presented to Ministers at the OECD Ministerial Conference, A Borderless World: Realising the Potential of Electronic Commerce (8 Oct. 1998).
39. Id., p. 3.
40. Id., p. 3.

Subsequently, implementing guidelines concretizing the tax treatment of electronic commerce followed.[41] The major concern of the implementing documents regarding consumption taxes was not to establish new rules on electronic commerce but to ensure a treatment of supplies of digitalized products in accordance with the existing rules on supplies, enabling taxation at the place of consumption and a proper collection of revenues.[42] The guidance given by the OECD became broadly accepted and serves as an international standard for the taxation of the digital economy.[43]

The European Union, which operates a harmonized VAT system, followed the guidance of the OECD when it put emphasis on ensuring a clear and neutral tax treatment of digital supplies and suggested implementing tax rules that avoid market distortion.[44] The main guidelines of the European Union were that the digital supply of goods or services should be treated in the same way as services;[45] that the services to consumers in the European Union should be taxed in the European Union, regardless from which

41. OECD, *Consumption Tax Aspects of Electronic Commerce*, A Report from Working Party No. 9 on Consumption Taxes to the Committee on Fiscal Affairs (February 2001); OECD, *Taxation and Electronic Commerce*, Implementing the Ottawa Taxation Framework Conditions (2001); OECD, *Implementation of the Ottawa Taxation Framework Conditions*, The 2003 Report (2003).

42. OECD, A Report from Working Party No. 9 on Consumption Taxes to the Committee on Fiscal Affairs (February 2001), pp. 7 et seq.; OECD, Implementing the Ottawa Taxation Framework Conditions (2001), pp. 18 et seq.; OECD, The 2003 Report (2003), pp. 19 et seq. Further guidelines, either commenting on the previous work or giving more detailed guidance followed. The three papers of the Consumption Tax Guidance Series based on the work on electronic commerce: OECD, Centre for Tax Policy and Administration, *Electronic Commerce – Commentary on the Place of Consumption for Business to Business Supplies (Business presence)*, Consumption Tax Guidance Series: Paper No. 1 (2003); OECD, Centre for Tax Policy and Administration, *Electronic Commerce - Simplified Registration Guidance*, Consumption Tax Guidance Series: Paper No. 2 (2003); OECD, Centre for Tax Policy and Administration, *Verification of Customer Status and Jurisdiction*, Consumption Tax Guidance Series: Paper No. 3 (2003). *See also* OECD, Centre for Tax Policy and Administration, *Electronic Commerce:*, *Facilitating Collection of Consumption Taxes on Business-To-Consumer Cross-Border E-Commerce Transactions* (2003).

43. Lamensch, *European Value Added Tax in the Digital Era* (IBFD 2015), sec. 1.1.

44. European Commission, *A European Initiative in Electronic Commerce*, COM(97)157 final (16 Apr. 1997).

45. As regards this book, transactions taking place in the digital economy shall be analysed. For the purpose of VAT – if the conclusion is drawn that a supply exists – these transactions are in most cases covered by the definition of "electronically supplied services". However, this book is not exclusively devoted to electronically supplied services. The analysis of transactions taking place in connection with the digital economy could also include other supplies of goods or services. For a detailed analysis of electronically supplied services, *see* Lamensch, *European Value Added Tax in the Digital Era* (IBFD 2015).

country they are performed; and that VAT compliance with respect to e-commerce should be as simple as possible.[46]

Accordingly, the OECD recommendations were implemented in the European Union by means of amending the VAT Directive and by subsequent implementing regulations.[47] In order not to distort competition, these rules mainly focus on the taxation at the place of consumption and how this place can be identified.[48] Additionally, the registration, declaration and payment of VAT due on electronically supplied services are simplified because of the Mini One-Stop Shop (MOSS) principle.[49] Further intentions to make VAT more suitable for the digital economy aim at harmonizing rates and simplifying compliance.[50] Additionally, it is envisaged that the MOSS could be applied at a broader base, and to also cover other types of transactions.[51] These policy considerations, however, do not directly relate to the subject of this analysis. This book asks a more basic question, namely whether a taxable supply for consideration does exist at all. That is why the answer to the question of whether a supply exists necessarily needs to be the first step of an analysis.

46. *See*, in detail, European Commission, *Electronic commerce and indirect taxation*, COM(98)0374 final (17 June 1998).
47. Council Directive 2002/38/EC of 7 May 2002 amending and 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, OJ 2002 L 128, pp. 41-44. This directive was put into practice by several implementing regulations: Council Regulation 1777/2005/EC of 17 October 2005 laying down implementing measures for Council Directive 77/388/EEC on the common system of value added tax, OJ 2005 L 288/1; Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, OJ 2008 L 44/11; Council Regulation 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ 2011 L 77/1; Council Regulation 967/2012 of 9 October 2012 amending Implementing Regulation (EU) No 282/2011 as regards the special schemes for non- established taxable persons supplying telecommunications services, broadcasting services or electronic services to non-taxable persons, OJ 2011 L 290/1; Council Regulation 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No. 282/2011 as regards the place of supply of services, OJ 2013 L 284/1.
48. European Commission, *Report of the Commission Expert Group on Taxation of the Digital Economy* (28 May 2014), pp. 32 et seq.
49. Id., p. 33.
50. Id., pp. 36 and 39 et seq.
51. Id., p. 37. Currently MOSS only applies to electronically supplied services. Another option is to remove the exemption for small consignments. *See also* Kogels, *Making VAT Fit for the Digital World*, International VAT Monitor (2015), pp. 157 et seq.

Chapter 2

The European Value Added Tax System

This chapter provides an overview of the value added tax (VAT) system in place within the European Union. It will provide the reader with sufficient background information for the following chapters, where the supply, the consideration and selected examples will be analysed in detail. Section 2.1. deals with the development of the VAT Directive, explaining the origin and historical particularities of the European VAT system, and how these particularities influence the application of the VAT Directive.

Section 2.2. deals with the aim and purpose of VAT. This analysis aims to show what characterizes the functioning of the VAT system as a whole and provides some guidance with the interpretation of the VAT Directive. Especially for transactions in the digital economy, there is no settled case law, nor a well-established opinion on how to apply the VAT Directive. Thus, it is necessary to refer to the aim and purpose of the European VAT system, in order to understand the functioning of the system and accordingly be able to apply it to new transactions.

Section 2.3. focuses on the content of the VAT Directive. Criteria that are necessary for the performance of taxable supplies are described. The characteristics of taxable persons and economic activities are of crucial importance to understand the concept of supplies, as they are a prerequisite for the performance of taxable supplies. Nevertheless, as the main focus lies on the analysis of taxable supplies, an in-depth analysis of all further criteria is beyond the scope of this book, hence only a brief description is possible.

2.1. Development

Most countries around the world apply a value added tax or general sales tax (GST) system of some kind. It can generally be characterized as a tax on consumption or, probably more appropriately, as a tax on expenditure.[52] VAT is due on certain transactions. In the European Union, this is generally the case with supplies of goods and services made for consideration. VAT is one of the younger forms of taxes, having been introduced to tax

52. *See* sec. 2.2.

consumption in France in 1954, and it remained confined to a few countries during the 1960s.[53]

In the following years, more and more countries introduced a VAT of some kind. From the early 1990s onwards, a gradual shift from personal income taxes to VAT has taken place globally. Having been introduced because governments needed to fill their budgets, VAT nowadays constitutes the most important source of revenue in certain countries.[54] More and more countries introduce a VAT/GST or increase their rates, leading to higher revenues arising from indirect taxes.[55] This is also the case in the European Union. When entering the European Union, every new Member State needs to implement the current European VAT legislation into its national tax laws. Also in the European Union, over the last few years, a shift from direct taxation to indirect taxation has been taking place, in order to both reduce national budget deficits[56] and meet the EU's Lisbon Treaty objectives of increasing the labour participation rate.[57]

Within the European Union, VAT is a harmonized tax. This is a necessary consequence of the establishment of a common market, which is one of the most important objectives of the European Union.[58] For the purpose of a common market, obstacles to the free movement of goods, persons, services and capital between Member States have to be abolished. Therefore, a VAT system must not distort conditions of competition or hinder the free movement of goods and services.[59] It needs to eliminate factors that may distort conditions of competition, in order to guarantee neutrality in competition, so that similar goods or services bear the same burden of tax.[60]

---

53. Ebrill et al., *The Modern VAT* (IMF 2001), pp. 4 et seq.
54. Lejeune et al., *The Balance Has Shifted to Consumption Taxes - Lessons Learned and Best Practices for VAT*, in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (IBDF 2009), p. 60; IMF, OECD & World Bank, *The Value Added Tax – Experiences and Issues* (International Tax Dialogue 2005) pp. 8 et seq.
55. PwC, *Shifting the balance from direct to indirect taxes – How is it managed by Multinational Companies?* (2008), available at https://globalvatonline.pwc.com.
56. Charlet & Owens, *An International Perspective on VAT*, Tax Notes International (2010) pp. 951 et seq.
57. Lejeune et al., in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (2009), p. 73.
58. *See* art. 3(3) TEU (Treaty on European Union - Consolidated version of 26 October 2012, OJ 2012 C 326.).
59. *See* recital four of the Preamble of the current VAT Directive.
60. *See* recital seven of the Preamble of the current VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, pp. 1-118).

In the European Community, the First and the Second Directive on VAT, adopted in 1967,[61] established a comprehensive framework of VAT. With the implementation of the First Directive, the European VAT system was born. The first recital in the Preamble of the First Directive already pointed out the necessity for this common framework in order not to distort competition or hinder the common market. However, the low levels of legislative detail of these two Directives meant that the VAT systems of the Member States were still substantially different from each other.[62]

The Sixth Directive[63] harmonized the European VAT system by increasing the level of detail in the Directive, leading to less regulatory freedom granted to the Member States. This harmonization became necessary for the establishment of the internal market of the European Union in 1993. The internal market is defined in article 26 of the Treaty on the Functioning of the European Union (TFEU) as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".[64] To achieve this aim of the internal market, significant amendments were already made in 1991.[65] These amendments were mainly directed at removing the tax frontiers of the internal market.[66] The idea was that the VAT system applicable at that time was intended to be a transitional system and only in place for a period of 4 years after the establishment of the internal market in 1993.[67]

By summer 1996, the Commission presented a work programme for the adoption of the definitive VAT system.[68] However, as discussions between

61. First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, OJ 1967, 71 p. 1301; Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, OJ 1967, 71 p. 1303.
62. Easson, *Taxation in the European Community*, European Community Law Series, London & Atlantic Highlands, (NJ: The Athlone Press 1993), p. 101.
63. Sixth 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, OJ 1977 L 145 p. 1.
64. Treaty on the Functioning of the European Union - Consolidated version of 26 October 2012, OJ 2012 C 326.
65. Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, OJ 1991 L 376 p. 1.
66. *See also*: Conclusions of the Presidency of the ad hoc Working Party on the Abolition of Fiscal Frontiers, also known as the "Lemierre Report".
67. *See* e.g. Conclusions of the ECOFIN Council meeting of 9 October 1989.
68. *See* European Commission, *A common system of VAT - A Programme for the Single Market* COM(96) 328 final (22 July 1996).

Member States proved difficult, it was impossible to reach an agreement. Only little progress was made and in 1998 the Commission withdrew the proposal for implementing a definitive VAT system.[69] This led to a change of the Commission's VAT strategy. From 2000 onwards, the focus was no longer on introducing a new VAT system based on the origin principle but rather on identifying and improving the shortcomings of the VAT system in place.[70] From that point on, the main focus of work was on simplifying and the modernizing the VAT rules in force at that time, together with aiming at a more uniform application as well as a closer administrative cooperation.[71] Viewed retrospectively, according to the Commission, this approach proved to be more successful.[72] The most important measure was the approval of a recast of the Sixth Directive,[73] which also constitutes the current VAT legislation in place. As a result, European VAT law is currently regulated by Council Directive 2006/112/EC (VAT Directive),[74] comprising all the provisions relevant for VAT that were previously found in separate legal acts.

Today, VAT is imposed in 28 EU Member States, which means that more than 500 million EU citizens are confronted with VAT on a daily basis. However, it seems that the European VAT system is fragmented into many different national legal systems, forming an obstacle to effective intra-EU trade and to the single market.[75] Up to now, harmonization is still only partly achieved due to the fact that exemptions, standard rates[76] and reduced rates[77] may differ between Member States. This is still the case under the most

69. De la Feria, *The EU VAT System and the internal market* (IBFD 2009), p. 82.
70. European Commission, *A strategy to improve the operation of the VAT system within the context of the Internal Market* COM(2000) 348 final (7 June 2000).
71. Id, p. 5.
72. *See* European Commission, *Review and update of VAT strategy priorities*, COM(2003) 614 final (10 Oct. 2003), p. 20: "Since the new strategy was initiated some three years ago, the Council has adopted nine proposals on VAT. This suggests that the pragmatic approach has succeeded in one very important aim - giving fresh impetus to discussion of VAT within the Council."
73. European Commission, *Proposal for a Council Directive on the common system of value added tax (Recast)* COM(2004) 246 final, (15 Apr. 2004).
74. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, pp. 1-118.
75. *See* European Commission, *Green Paper on the Future of VAT: Towards a simpler, more robust and efficient VAT system* COM(2010) 695 final (1 Dec. 2010).
76. Art 97 VAT Directive only requires a minimum rate of 15%.
77. *See*, e.g. European Commission, *VAT Rates Applied in the Member States of the European Union* Taxud.c.1 (2015) – EN (1 Jan. 2015), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf (last accessed on 26 Mar. 2015).

recent version of the VAT Directive and especially holds true for transactions taking place in the digital economy.[78]

On the other hand, the European Court of Justice (ECJ)[79] has a monopoly to decide over interpretational issues of the VAT Directive. If national courts of Member States have doubts about the interpretation of provisions of the VAT Directive, which they had to implement into their national law, they can ask the ECJ for guidance for the correct interpretation. Thanks to the VAT Directive, which needs to be implemented uniformly in all EU Member States, but also because of the harmonizing effects of the jurisprudence of the ECJ, the common system of VAT has become a truly European tax.[80] Even though an overall harmonization has not yet been achieved, the ECJ keeps repeating that the national legislations implementing the Directive need to be interpreted uniformly and in conformity with EU law.[81] Therefore, national courts and tax administrations need to stick to EU law and the jurisprudence of the ECJ when applying their national VAT legislation.

2.2. Aim and purpose of VAT

After this brief overview of the development of VAT, now the focus will be placed on the aim and purpose of VAT. The common purpose of taxation is to raise revenue in order to meet government expenditure. For VAT, being a European harmonized tax, this also holds true. Moreover, part of the revenue that is raised is used to fund expenditures of the European Union at the supranational level.[82] Apart from this obvious purpose, one can further ask

78. *See*, e.g. an empirical study involving eleven European Member States as well as Switzerland and the United States. This study was conducted within the framework of the EUCOTAX Wintercourse 2015 in Barcelona. *See* https://www.tilburguniversity.edu/students/studying/additional-education/eucotax_wintercourse.htm (last accessed on 27 July 2016). The final paper was not published.

79. The abbreviation ECJ is used for both the Court of Justice of the European Union (as it has been since the entry into force of the Treaty of Lisbon on 1 December 2009) and the Court of Justice of the European Communities (as used previously to the Treaty of Lisbon).

80. This especially holds true for Germany. *See* Englisch, *Development of the EU VAT System* in Lang et al. (eds.), *ECJ – Recent Developments in Value Added Tax* (Linde 2014), pp. 23 et seq.

81. *See*, for example, ECJ, C-327/82 *Ekro*, ECLI:EU:C:1984:11, 18 Jan. 1984, para. 11; C-287/98 *Linster,* ECLI:EU:C:2000:468, 19 Sept. 2000, para. 43; C-433/08, *Yaesu Europe BV*, ECLI:EU:C:2009:750, 3 Dec. 2009, para. 18.

82. This function was introduced by the Council Decision of 21 April 1970 (EEC, ECSC, Euratom) 70/243, OJ 1970 L 94 p. 19 S 1970 (I) p. 224, based on which the budget of the European Communities had to be wholly financed by its own resources.

what is the characteristic aim of VAT and what differentiates VAT from other taxes. This distinction can help with the interpretation of the VAT Directive.

2.2.1. VAT as a tax on transactions or as tax on consumption?

When reading article 9(1) of the VAT Directive, one could think that VAT is designed to be a tax on value added for persons independently carrying out economic activities. However, VAT is designed as an indirect tax, where the final tax burden is shifted from the supplier, carrying out the economic activities, to the person receiving the goods or services.[83] Thus, the taxable person liable to remit the tax is different from the final taxpayer.[84]

For a long time it was questionable whether VAT primarily served as a tax on transactions or on consumption.[85] In this regard, it can hardly be denied that the taxable event leading to a VAT liability is the conduction of a transaction. Nevertheless, due to input VAT deduction, VAT as indirect tax is predominantly borne by individuals, being the final consumers. It can hence be concluded that the European-styled VAT aims to tax private consumption, i.e. taxing consumption by end-users.[86] As to whether VAT is a tax on transactions or on consumption, this should not be regarded as mutually exclusive but, as the following sections will describe, the aim and purpose of the European styled VAT is best described as a combination of both criteria.

Certain transactions trigger VAT liability. More precisely, only transactions involving consumption are relevant for VAT. The question remains what should be understood as consumption for the purposes of the VAT Directive. In the general use of language, consumption can be defined as the act of

---

These resources include, among other things, a percentage of VAT receipts calculated on a uniform basis throughout the Member States. Recital eight of the Preamble of the EC VAT Directive also refers to this principle. This function is called the "VAT-based own resources", according to which a uniform rate of 0.3 % is levied on the harmonized VAT base of each Member State. Between 2014 and 2020, reduced VAT call rates for Sweden, the Netherlands and Germany are fixed at 0.15 %.

83. *See* art. 1(2) VAT Directive, *see also* OECD, *International VAT/GST Guidelines,* (OECD 2014), p. 6.

84. Englisch, *VAT/GST and Direct Taxes: Different Purposes*, in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (IBFD 2009). p. 1.

85. Englisch, in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (2009), pp. 14 et seq.

86. Hemels, *Influence of Different Purposes of Value Added Tax and Personal Income Tax on an Effective and Efficient Use of Tax Incentives: Taking Tax Incentives for the Arts and Culture as an Example* in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (IBFD 2009), p. 37.

using or using up specific goods or services.[87] For the purposes of VAT, it needs to be kept in mind that, in general, the term consumption can only cover final personal use.[88] Therefore, only a benefit that accrues to the end-user can be deemed consumption in the meaning of the VAT Directive.[89] But does consumption mean that the goods or services need to be consumed in practice?

According to the literature, consumption can be defined as "direct utility rendered to consumers or other users of goods and services".[90] Therefore, if a consumer does not make use of the goods or service he bought, but loses or destroys them, gives them away as a present or causes them to lapse, such an event is irrelevant for VAT. It follows that it is not the event of consumption that fulfills the VAT definition of consumption, but rather the aim that the goods or service are intended to be consumed.[91]

VAT is an impersonal tax,[92] because tax liability accrues when goods or services are supplied for consideration. In order to only tax the final consumer, input VAT deduction is, in principle, allowed at each preceding stage to relieve businesses from the VAT burden.[93] This follows as a necessary consequence of any business supply chain, so that the burden of VAT does not rest on the supplier of the goods or services.[94] Thus, the procedure of input VAT deduction ensures that, in principle, VAT is neutral within the production chain and only the final consumer has to bear a tax burden.[95] However, this very general principle of input VAT deduction does not unanimously

87. Compare e.g. the Definition by Collins Dictionary, available at http://www.collinsdictionary.com/dictionary/english/consumption (last accessed on 23 June 2016).
88. Final personal use does not only cover consumption by private individuals, but it can also extend to legal entities. *See* e.g. art. 16 and art. 26 VAT Directive. On the other hand, consumption can also mean the use of goods or services for the purposes of their own business in order to generate added value. Input VAT deduction is most often possible in such scenarios, because taxable output transactions will be conducted. Therefore these scenarios do not imply final consumption and, for the purposes of this book, will not be covered by the meaning of consumption.
89. Henkow, *Financial Activities in European VAT – A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities* (Kluwer Law International 2008), p. 75.
90. Id.
91. Heber, *Gesellschaften und ihre Gesellschafter in der Umsatzsteuer: ein europäischer Lösungsansatz* (Verl. Österreich 2013), p. 32. *See also* sec. 2.2.4.
92. Hemels, in Lang et al., *Value Added Tax and Direct Taxation* (2009), p. 42.
93. *See* Title X of the VAT Directive.
94. OECD, *International VAT/GST Guidelines,* p. 6.
95. Lejeune & Daou, *VAT Neutrality from an EU Perspective*, in Lang et al. (eds.), *Improving VAT/GST: Designing a Simple and Fraud-Proof Tax System* (IBFD 2014), p. 464.

apply to all businesses or to all types of economic activities of a business,[96] thereby possibly conflicting with the principle that VAT should be neutral for businesses.[97]

Not every scenario where VAT is levied implies a final consumption by end-users.[98] Nevertheless, the transactions need to be connected to some kind of intention of consumption.[99] The fact that VAT should be a tax on consumption can be derived from article 1(2) of the VAT Directive,[100] which stipulates that "[t]he principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services […]".[101] Similarly, the ECJ consistently repeats in its jurisprudence that VAT is an indirect tax on final consumption.[102] Accordingly, it can be argued that the aim of the European VAT Directive is to tax the final consumer.[103] Thus, when interpreting the provisions of the VAT Directive, it is necessary to keep in mind that not businesses but consumers are the target of VAT.

2.2.2. VAT and the neutrality principle

The aim of taxing the final consumer is in line with a further purpose of the VAT Directive, namely fiscal neutrality. The principle of fiscal neutrality is understood by the VAT Directive and the ECJ to mean guaranteeing an equal tax burden for competing supplies of goods or services, and, consequently,

96. E.g. if the business only carries out exempt supplies, as outlined in Title IX of the VAT Directive, no input VAT deduction is possible.
97. OECD, *International VAT/GST Guidelines,* p. 7.
98. E.g. input transactions of exempt entities can be subject to VAT. However, in general, the exempt taxable person will ultimately aim at conducting output transactions for either final consumers or which become part of other businesses' added value.
99. Trenta, *VAT in Peer-to-peer Content Distribution – Towards a Tax Proposal for Decentralized Networks*, (JIBS Dissertation Series 2013), p. 225.
100. In connection with Title X of the VAT Directive.
101. Such a definition can already be found in the previous versions of the VAT Directive. Compare art. 1 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, OJ 1967, 71 p. 1301. Accordingly, the fact that the phrase "tax on consumption" is used cannot be a coincidence and should be given significant weight when interpreting the VAT Directive.
102. *See* among other judgments ECJ, C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise*, ECLI:EU:C:1996:400, 24 Oct. 1996, para. 19; C-409/04 *Teleos and Others*, ECLI:EU:C:2007:548, 27 Sept. 2007, para. 60.
103. Englisch, in Lang et al. (eds.), *Value Added Tax and Direct Taxation* (2009) pp. 19 et seq.

for competing suppliers or market operators.[104] An equal tax burden can, however, only be guaranteed when there is a mechanism that allows the participants of a supply chain relief from input VAT. Otherwise, VAT would accumulate and the VAT burden would depend on the number of passed production and sales levels.[105]

On the other hand, the OECD first and foremost interprets the neutrality principle as meaning not to impose the burden of paying VAT on businesses.[106] Similar to the OECD, the ECJ has also recognized that businesses, being the supplier of goods or services, merely act as a tax collector for the government and hence should not themselves bear the burden of VAT.[107] Therefore, besides ensuring that the same goods and services bear the same tax burden, the neutrality principle aims at ensuring that VAT only taxes consumption by the final consumers. This means that VAT itself must not be a burden on businesses engaged in taxed transactions as it is intended to "flow through" the businesses.[108]

The question remains whether fiscal neutrality is the ultimate purpose of VAT. With the principle of fiscal neutrality being explicitly mentioned in recital seven of the Preamble of the VAT Directive, it is indeed of major importance for the design and the application of the VAT system. Nevertheless, the principle of fiscal neutrality is mainly important for suppliers, as they wish to have a functioning system of input VAT deduction.[109] With VAT focusing on the taxation of end-users, the final consumers might not be concerned with the issue of input VAT deduction. In the end, for consumers, all that matters is the price of the goods. Thus, when there is a functioning system of input VAT deduction, the length of the production and distribution chain does not matter as the amount of tax burden only depends on the value of the goods.[110] One important aspect of VAT neutrality is therefore that VAT may not influence the decision at which stage of

104. Recital seven of the Preamble VAT Directive; ECJ, C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise*, para. 20. Compare also Herbain, *VAT Neutrality* (Larcier Promoculture 2015).
105. OECD, *International VAT/GST Guidelines,* p. 12.
106. Id, p. 10.
107. ECJ, C-10/92 *Balocchi v. Ministero delle finanze dello Stato,* ECLI:EU:C:1993:846, 20 Oct. 1993, para. 25; C-317/94 *Elida Gibbs v. Commissioners of Customs and Excise*, paras. 20 et seq.
108. OECD, *International VAT/GST Guidelines,* p. 7.
109. Reiß, *Der Verbraucher als Steuerträger der Umsatzsteuer im Europäischen Binnenmarkt*, in Lang (ed.), *Festschrift für Klaus Tipke* (Schmidt 1995), p. 440.
110. Lejeune & Daou, in Lang et al. (eds.), *Improving VAT/GST: Designing a Simple and Fraud-proof Tax System* (2014), p. 461; *see also* art. 1 VAT Directive; recital seven of the Preamble of the VAT Directive.

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org

IBFD, Your Portal to Cross-Border Tax Expertise