VAT and the Sharing Economy

The sharing economy, underpinned by digital platforms like Airbnb and Uber, which pair individuals’ needs and wants, from accommodation to rides, is on the ascent. These new business models, where capital and labour are provided by several dispersed individuals rather than by a single centralized entity, defy the operational structure of comparable traditional activities. In the sharing economy, in fact, the personal and the professional spheres blur, and selfish motivations mingle with altruistic aims, while transactions span the whole market-to-gift spectrum. Against this background, in which the classification of individuals and transactions is less straightforward, the article intends to assess the practical feasibility of specific EU VAT notions such as “taxable persons” and “taxable transactions”, as interpreted by the ECJ and the VAT doctrine. In addition, the research seeks to test these concepts against a framework of selected tax principles.

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“… [t]he sharing economy – watch this space. This is powerful.”
(Thomas L. Friedman, New York Times columnist and Pulitzer Prize winner)

“The digital economy has become an intimate part of millions of individuals’ lives, but its value added is slipping through our grasp.”
(Pierre Collin and Nicolas Colin, respectively former Conseiller d’État and Inspecteur des finances of the French Republic)

1.  Introduction
This article intends to examine some of the tax issues that the sharing economy poses to the application of European Union value added tax (EU VAT). In particular, the article reviews the foundational concepts of “taxable persons” and “taxable transactions” enshrined in the EU VAT Directive, and their understanding by the Court of Justice of the European Union (ECJ) and the VAT doctrine. 3

Although the basic idea of “sharing” is anything but new, since, for instance, “limousines have been around for a long time and there have always been spare bedrooms that you could arrange to rent through friends”, the dazzling rise of digital platforms like Airbnb, 4 Uber, 5 Deliveroo 6 and TaskRabbit 7 – to name just a few of the major players in the sharing economy – has contributed to making “those markets thicker and quicker, bigger and less congested”. 8

By turning almost everything into an available commodity and by matching users’ haves and have-nots right away with the help of advances in information and communication technology (ICT), platforms – the gatekeepers of these virtual marketplaces – have forged new business models that distance themselves significantly from the way in which more conventional brick-and-mortar activities typically operate. While, in fact, the traditional business model is linear, in the sense that new value is created upstream by firms and flows downstream to the consumer, in these marketplaces, value creation instead occurs through the direct interaction of individuals, as facilitated by platforms. Through the use of platforms, an increasing number of people have thus turned into – even only part-time – entrepreneurs, since these new digital infrastructures enable them to avoid the costs and potential troubles of traditional intermediation and to reach a wider set of customers at speed and at their best convenience. Consumers, in turn, have an increased selection of goods and services at their fingertips, and – usually – for a lower price. Moreover, through rating systems, customers can easily compare competing offers based on their own preferences.

Rather than being confined to a single-sided phenomenon, the sharing economy encompasses different strings of business models. Indeed, various types of transactions occur in these marketplaces, almost as many as users’ scopes. Sharing, trading, lending, renting, bartering, swapping and gifting are, in fact, all activities that equally fall into the sharing economy’s domain.

The peer-to-peer paradigm underpinning the sharing economy raises several policy and regulatory concerns across different sectors, though. Taxation is certainly not an exception. The application of VAT is particularly ticklish. Given that users of digital platforms, whether suppliers or customers, can act either in a professional or private capacity, and by exploiting business as well as personal resources, it is not immediately straightforward to assess who is a taxable person and whether that person is acting in his professional or private capacity for VAT purposes. In addition, in case no monetary payment occurs between the two parties of a transaction, it becomes problematic to establish whether a consideration has nevertheless been paid in other forms and, further, if a sufficiently direct link between a supply and its consideration can be deemed to exist.

To dispel these and further qualms, this article is divided as follows. Section 2. provides a general background of the main features of the sharing economy. This part intends to

9. To a certain extent, this article encroaches upon the doctoral study of C. Trenta (Rethinking EU VAT for P2P Distribution (Kluwer Law International 2015)), who has analysed similar issues arising in the context of peer-to-peer (P2P) networks for the distribution of digital content. However, the analysis conducted hereinafter in the present article is narrower in its scope, since it specifically purports to examine the VAT issues posed by the sharing economy. Likewise, problems concerning the VAT treatment of crowdfunding will not be discussed in the following, although – admittedly – the VAT treatment of services related to intermediation provided by crowdfunding platforms shows some similarities with that accorded to services provided by sharing economy platforms to their users. For a discussion in this regard, see European Commission, Value Added Tax Committee, taxud.c.1(2015) 576037 – Working Paper 878, VAT Treatment of Crowdfunding, pp. 17-18 (6 Feb. 2015), available at https://circabc.europa.eu/sd/a/c9b4bb6f-3313-4c5d-8b5a-c8879f8c0175a/836 - VAT treatment of Crowdfunding.pdf (accessed 8 Apr. 2018).

10. Arts. 9(1) and 12(1) VAT Directive (2006/112).


12. Arts. 2(1)(c) and 24(1) VAT Directive (2006/112).

13. The fact that the concept of the supply of services effected for consideration presupposes the existence of a direct link between the service provided and the consideration received has been confirmed by the ECJ on many occasions. See, e.g., UK: ECJ, 8 Mar. 1988, Case 102/86, Apple and Pear Development Council v. Commissioners of Customs and Excise, para. 12, ECJ Case Law IBFD.
lay down the main drivers behind the surge of the economic models clutched under this umbrella term and to highlight the main departures from conventional business structures. Section 3. proposes a selection of tax principles for assessing whether and, eventually, to which extent the VAT treatment of persons and transactions in the sharing economy might be differentiated from that accorded to more conventional activities. In section 4., cornerstone concepts at the foundation of EU VAT, namely “taxable person”, “acting as such”, “economic activity”, “consideration” and “direct link”, are scrutinized and their understanding by the ECJ, the Advocates General, the VAT Committee and the VAT doctrine is reviewed. Drawing on such a compounded principle-based and rule-based approach, the final section (see section 5.) summarizes the main findings and conclusions concerning the practical feasibility to shoehorn the concepts of “taxable persons” and “taxable transactions” into the singularities of the sharing economy.

2. The Sharing Revolution

2.1. Welcome to the world of sharing

The past few years have seen the sensational rise of new models of production and consumption of goods and services, synthetically referred to as the “sharing economy”. Considered by Time as one of the “10 Ideas That Will Change the World”, the sharing economy is having a profound impact on people, businesses and institutions alike.

Digital platforms, like Airbnb, Uber, Deliveroo and TaskRabbit, just to name a few of “the Upstarts”, which should be familiar to everyone, have dramatically expanded the range of possibilities for businesses and consumers alike, both in terms of wage-earning opportunities and the availability of goods and services. Acting as matchmakers, platforms facilitate exchanges between individuals of almost all kinds of goods and services, from accommodation to rides. In such enlarged marketplaces, rather than from a single centralized entity, value is created through the interaction of many dispersed individuals.

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16. The advent of the sharing economy, along with artificial intelligence, Big Data and 3D printing, leads many to argue that we are just at the dawn of the Fourth Industrial Revolution. See, e.g., K. Schwab, The Fourth Industrial Revolution (Penguin UK 2017). A study conducted by PricewaterhouseCoopers estimates that five key sectors in the sharing economy (i.e. peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music/video streaming) have the potential to increase global revenues from around USD 15 billion now to around USD 335 billion by 2025. See PricewaterhouseCoopers, The Sharing Economy: How Will It Disrupt Your Business (2014), available at http://pwc.blogs.com/files/sharing-economy-final_0814.pdf (accessed 8 Apr. 2018).
18. However, not everyone “shares” the same enthusiasm for the sharing economy. See, e.g., J. Schor, Debating the Sharing Economy, 4 Journal of Self-Governance and Management Economics 3, pp. 7-22 (2016).
19. In the economics literature, markets such as those created by collaborative platforms are referred to as “two-sided markets”, because platforms provide network benefits to two distinct sets of individuals, i.e. service providers and final consumers. See, e.g., J.C. Rochet & J. Tirole, Platform Competition in Two-Sided Markets, 1 Journal of the European Economic Association 4, pp. 990-1029 (2003).
Suppliers can, in fact, exploit the idling capacity of their resources with an unprecedented degree of flexibility in terms of time and means. Customers, in turn, obtain access to a wider set of products, often in a more convenient way in terms of pricing and timing. Possibly, an individual may act either as a provider or a recipient of services and, indeed, the distinction between the personal and the professional spheres is not always clear-cut. 20

More than that, for suppliers, return might come indifferently in the form of monetary or non-monetary benefits and even in a combination of the two. The hybrid nature of the sharing economy is also reflected in that, rather than guided by the sole logic of profit-making, economic actors are moved by selfish, as well as more altruistic aims. 21 Some even argue that the sharing economy is just providing an early glimpse into the future of work, where conventional divisions, such as that between dependent employees and self-employed or that between work and leisure, will simply fade away. 22 In sum, all these factors combined contribute to generate the “creative destruction” against which both traditional intermediaries and businesses generally struggle to compete. 23

2.2. Sharing economy: What does it stand for?

Although it is almost clear that a radical shift is underway in today’s economy and society, nobody seems to know how exactly to name this ongoing change. 24 Equally referred to as the “collaborative economy”, 25 “collaborative consumption”, 26 “peer-to-peer economy”, 27 “gig economy”, 28 “on-demand economy”, 29 “platform economy”, 30 “1099 economy”, 31 or with

21. A. Sundararajan, The End of Employment and the Rise of Crowd-Based Capitalism p. 44 (MIT Press 2016); L. Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy p. 145 (Penguin 2009). A perfect example of the continuum existent between selfish and altruistic motivations is represented by the idea of “indirect reciprocity”, best epitomized by the expression “I will help you, someone else helps me”.
24. R. Botsman, The Sharing Economy: Dictionary of Commonly Used Terms (19 Oct. 2015), available at https://medium.com (accessed 8 Apr. 2018). Signally, in 2015, the term “sharing economy” was included in the Oxford Dictionary, under which it is defined as “an economic system in which assets or services are shared between private individuals, either free or for a fee, typically by means of the Internet”.
31. The term “1099 economy” is particularly popular in the United States, as it refers to the 1099-MISC, which is the form that businesses, non-profits and government agencies have to fill out when they pay someone USD 600 or more a year in non-employee compensation. See, e.g., E. Dourado & C. Koopman, Evaluating the Growth of the 1099 Workforce, Mercatus Center, George Mason University (2015), available at https://www.mercatus.org/publication/evaluating-growth-1099-workforce (accessed 8 Apr. 2018).
a handful of other synonyms, the sharing economy actually lacks a “shared” definition. Various proposals have been advanced in this respect, but none have reached some general consensus.

For the purposes of the present article, the author will equate the notion of “sharing economy” with the definition of “collaborative economy” spelt out by the European Commission in its Communication of 2 June 2016 titled “A European Agenda for the Collaborative Economy”. In its Communication, the Commission considers that

the term “collaborative economy” refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis (“peers”) or service providers acting in their professional capacity (“professional services providers”); (ii) users of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them (“collaborative platforms”). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.

The aforementioned definition appears sufficiently accurate, as it avoids either a loose or narrow understanding of the sharing economy. All relevant elements at the gist of sharing transactions – but without any further odd ingredients – are in fact included in the definition. From its wording, the author believes that it is possible to extract six key propositions, which constitute the “pillars” of the sharing economy. Each of them is singled out below.

First, the sharing economy entails innovative and yet divergent business models, all “sharing” some common traits and distancing themselves significantly from conventional businesses but, at the same time, with “fifty shades” on their insides, which render it rather difficult to position all of them in a single, straightforward category.

Second, sharing transactions take place in sized marketplaces intermediated by digital platforms, in which individuals allow or obtain access to the temporary usage of goods or services, while no change of ownership occurs.


It seems that, by turning products into services and adopting a post-ownership state of mind, an increasing span of consumers are realizing the merits of Aristotle’s notion, “on the whole you find wealth much more in use than in ownership”.

37. It seems that, by turning products into services and adopting a post-ownership state of mind, an increasing span of consumers are realizing the merits of Aristotle’s notion, “on the whole you find wealth much more in use than in ownership”.

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Third, three distinct economic actors are involved: an online platform operating a virtual marketplace; individuals supplying goods or services; and customers receiving temporary access to those products.

Fourth, while online platforms are generally professionals, both individuals supplying goods or services and customers might act either in a business or private capacity. Likewise, the goods and services provided may entail the exploitation of business as well as private assets.

Fifth, individuals in the sharing economy remain at liberty to perform their activities both on a habitual and occasional basis.

Sixth and lastly, economic activities can be carried out either for a profit or for free, but most often in a continuum between the two.

In order to further clarify the definition of the sharing economy, it is useful to complement the analysis above with some real-world examples. Taking the accommodation industry as a primer, the author finds that digital platforms such as Airbnb, where users rent out their premises in return for a fee; GuestToGuest, where accommodation providers receive credits from the platform for being hosted by other peers inside a community; and Couchsurfing, where users complete accommodation exchanges entirely for free, can all be brought back to the sharing economy’s domain. By contrast, an online marketplace such as Booking.com is not part of the sharing economy, since accommodation announcements are posted on that website mainly by hotels and other professional ventures. Likewise, taking the transportation sector into account, both Uber, where rides are provided in return for a fee, and BlaBlaCar, where users merely “share up” the costs of a trip, form part of the sharing economy. “Car-sharing” services directly operated by sized companies, such as Car2go and Enjoy, and with their own fleet of vehicles, should instead be excluded.

In the same vein, online marketplaces of goods, such as eBay and Alibaba, are to be placed outside the scope of the sharing economy. Although, arguably, they have some features in common with markets of the sharing economy, since, for instance, their users can act either in a professional or private capacity, on a habitual or occasional basis, for a monetary return or in exchange for other goods, and despite – to some extent – that they may rightly be considered as forerunners of collaborative platforms, by not providing users with access to any service, rather by merely promoting ownership exchanges, these online marketplaces ultimately lack one of the key components of sharing businesses.

2.3. Key drivers of sharing business models

The rise of the collaborative economy is propelled by a cocktail of technological, economic and societal factors.

From a technological perspective, advances in ICT have contributed to lower market entry barriers for service providers, thus reducing the cost and time of doing business. Moreover, by allowing ubiquitous connectivity, smartphones promote allocation efficiency and competitiveness in the market.

From an economic perspective, goods and services are no longer supplied to customers by a central single entity according to a linear supply chain. Rather, transactions occur directly between many dispersed individuals, though facilitated by a digital platform. Although the
peer-to-peer (P2P) infrastructure underpinning the sharing economy is essentially similar to that of other operators in the digital economy,\(^{38}\) collaborative platforms have stretched exchanges occurring in pre-existent marketplaces like eBay to further economic sectors (e.g. accommodation and transportation).\(^{39}\)

An important thrust of the sharing economy has equally come from societal factors. In particular, the advent of social media platforms, like Facebook and Twitter, has ushered in a change of attitude in the whole of society, increasing mutual trust amongst people. Moreover, the recent financial crisis has forced individuals to search for other sources of income, while lower need of capital investments is alluring to businesses.

### 2.4. Players in the sharing economy

The sharing economy involves three economic actors.

The leading role is assumed by collaborative platforms. They act as brokers that, through their digital infrastructures, facilitate the match between supply and demand of individuals for goods and services. Eventually, platforms may complement this intermediation activity with ancillary services, such as the facilitation of payments and insurance coverage.

The second category is that of individual service providers, who dispense resources (e.g. assets, time or skills) by means of a platform. They may equally act in a professional or private capacity, on a habitual or occasional basis.\(^{40}\) Possibly, individuals engaged in the sharing economy would constitute a new category of “micro-entrepreneurs”. After all, as the co-founder of Airbnb, Nathan Blecharczyk, puts it, becoming an entrepreneur in the sharing economy is so easy that “with the Internet and a spare room anyone can become an innkeeper”.\(^{41}\)

The third and last category includes service recipients, i.e. private individuals who receive services from both the platform and other users. Although, in general, they are just end consumers, in certain instances, they can even provide services in return. This is the case

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38. The collaborative economy is, in fact, a segment of the more comprehensive Commission’s Digital Single Market Strategy. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe, 6 May 2015, COM(2015) 192 final, paras. 3.3.1 and 3.3.2, EU Law IBFD.

39. To put it bluntly, “in this new economic reality, the world’s largest hospitality brand (Airbnb) owns not a single room or hotel. The world’s largest car service (Uber) owns not a single vehicle”. See Owyang & Samuel, supra n. 25, at p. 4.

40. The European Commission itself has acknowledged that distinguishing when a service provider is acting in his professional or personal capacity is not always clear-cut, since “EU legislation does not establish at what point a peer becomes a professional services provider in the collaborative economy”. See European Commission, supra n. 35, at p. 5. With the aim to shed some light, the European Economic and Social Committee has pleaded for the introduction of minimum income thresholds. See European Economic and Social Committee, Taxation of the Collaborative Economy – Analysis of Possible Tax Policies Faced with the Growth of the Collaborative Economy (Exploratory Opinion Requested by the Estonian Presidency), ECO/434, para. 5.8 (2017), EU Law IBFD. It should also be noted that the status of a person can change over time. With regard to the evolving concept of “consumer” in respect of the use of a Facebook account, see AT: ECJ, 25 Jan. 2018, Case C-498/16, Maximilian Schrems v. Facebook Ireland Limited, paras. 39-41.

41. Botsman & Rogers, supra n. 26, at p. XI. For a strikingly similar remark in the field of VAT, see DE: Opinion of Advocate General Wahl, 5 July 2017, Joined Cases C-374/16 and 375/16, Rockus Geissel; en Qualité de Mandataire Liquidateur de RGEX GmbH i.L. and Finanzamt Bergisch Gladbach v. Finanzamt Neuss and Igor Butin, para. 45, ECJ Case Law IBFD.
with barter exchanges among users or between a platform and its users. In these situations, there is no “private” consumption.

2.5. Types of sharing businesses

The sharing economy groups together distinct business models and spans across different industries. Two main typologies of businesses, which ultimately trace back to the two chief components of economic production, i.e. labour and capital, can be distinguished. For the sake of simplicity, more elaborated taxonomies are hereinafter avoided.

Labour platforms, like Uber and TaskRabbit, connect customers with a contingent workforce performing discrete projects. Assignments may equally consist in professional (Upwork), household (TaskRabbit, Handy), transportation (Uber, Lyft) or delivery services (Deliveroo). Capital platforms, such as Airbnb and Getaround, link customers with individuals willing to rent or barter their assets. Assets exploited can range from houses and rooms (Airbnb, HomeAway), vehicles (Getaround) or other spared items (NeighborGoods).

Admittedly, the aforementioned distinction is quite arbitrary. Indeed, platforms labelled as “labour platforms” may well require the exploitation by service providers of their personal assets. Notably, Uber X drivers use their own cars. Likewise, in the case of “capital platforms”, suppliers can provide services along with assets. This is the case with Airbnb hosts who prepare breakfast for their guests or clean their apartments at the end of a rent. Bearing this distinction in mind, the article will merely focus on the principal labour and capital platforms, i.e. those operating, respectively, in the transportation and accommodation sectors.

2.6. Types of sharing transactions

The sharing economy is not a single-sided phenomenon. Rather, the term covers a vast assortment of activities. Transactions can be concluded either in return for a fee or for free, with a continuum between the two extremes. In addition, different sets of activities equally pertain to the realm of the sharing economy, such as sharing, bartering, lending, trading, renting, swapping and gifting.

Four types of transactions can, in particular, be distinguished, based on whether they involve cash, barter, cost sharing or gratuitous arrangements. The accommodation sector constitutes a perfect example to illustrate each of them. Access to spare accommodation can, in fact, be provided either in return for monetary consideration (Airbnb), following a direct reciprocal swap (Nightswapping), through multiple indirect exchanges among members of the same community (GuestToGuest) or simply for free (Couchsurfing). Likewise, rides can be provided for a price (Uber), on a cost-sharing basis (BlaBlaCar) or merely by asking passengers to submit a “donation” (Lyft until 2013).

42. For a more elaborated taxonomy, see G. Beretta, The Taxation of the “Sharing Economy”, 70 Bull. Intl. Taxn. 11, secs. 2.2.-2.5. (2016), Journals IBFD.
2.7. Taxing the sharing economy

The sharing economy is rapidly taking off. However, its meteoric rise poses several policy and regulatory challenges, ranging from competition, intellectual property, consumer, insurance and labour to privacy laws.43

Taxation is no less problematic.44 Although existing tax categories are, in principle, clear, their practical application to the sharing economy is far from straightforward. As stated, most service providers in the sharing economy hardly fit into the rigid dichotomy of dependent and independent workers. Moreover, not every individual engages in sharing activities similarly. As seen, an individual can provide services through a platform either regularly or occasionally, for a profit or not. In certain instances, e.g. with reimbursements obtained by a driver operating through a ride-sharing platform like BlaBlaCar, classification as income of such sums may even be questionable. Difficulties equally muddle the administration and collection of taxes. Data, in fact, highlight that earnings from sharing activities are rarely reported, rarely controlled and, quite inevitably, even more rarely taxed.

Similar qualification uncertainties ripple the smooth application of VAT. Who is a taxable person; when that person is acting in his professional capacity; whether a transaction is taxable; in which instances a consideration is paid and a sufficiently direct link between a supply and its consideration established, are all questions that frequently leave VAT pundits in the lurch.45 Other challenges – although not specifically considered in the present contribution – range from the possible characterization of platforms as undisclosed agents,46 the qualification of services for place of supply rules,47 and the computation of the taxable amount,48 to the liability of platforms for assuring compliance and collection of the VAT due by their users, especially in cross-border situations.49


47. Uncertainties in this respect may attain to whether services provided by platforms to their users constitute “ordinary”, “intermediary” or “electronically supplied” services. See arts. 44, 45, 46 and 58 VAT Directive (2006/112).


The sharing economy, as just an angle of the digital economy, runs high in the current agenda of both the OECD and the European Union.\textsuperscript{50} It is not clear, however, how the several challenges posed by such new economic realities, which depart significantly from more conventional business threads, will, in effect, be tackled.\textsuperscript{51}

3. A Framework of Principles for the Application of VAT to the Sharing Economy

3.1. Introduction

In order to assess the practical feasibility to apply VAT (i.e. the law as it stands) to the sharing economy and, eventually, to consider possible departures from the treatment accorded to more conventional business activities, it is crucial to individualize and examine the main principles (at least some) that underpin such a tax.\textsuperscript{52} The framework of principles developed in the present section will in fact serve as a basis for analysing the research statement. Admittedly, this is not a “neutral” operation: based on the tax principles selected and the importance attached to each of them in a given situation, the assessment of the EU VAT provisions would, in fact, diverge significantly.\textsuperscript{53} Despite these constraints, reliance on a framework of principles remains simply unavoidable in order to capture the essence of a multifaced, fast-paced economic reality such as that ushered in by the sharing economy, which, as highlighted in the previous section (see section 2.), departs meaningfully from the material background based on which most VAT systems have been conceived.

A further note of caution is due at this juncture. Although the sharing economy is a global phenomenon, the following analysis is restricted to EU VAT. This choice was primarily made since EU VAT was the first modern VAT to be enacted\textsuperscript{54} and still constitutes the most widespread example of the kind.\textsuperscript{55} In addition, the ECJ having decided more than 900 cases, EU VAT can boast the most extensive case law. Further, EU VAT has been moulded under a relatively clear, coherent and stable legal framework, such as that provided by the European Union and its founding treaties.

\begin{itemize}
  \item European Economic and Social Committee on an Action Plan on VAT: Towards a Single EU VAT Area – Time to Decide, COM(2016) 148 final, para. 3.4, EU Law IBFD.
  \item For an outline of the major policy choices currently on the table, see e.g. W. Schön, Ten Questions about Why and How to Tax the Digitalized Economy, 72 Bull. Intl. Taxn. 4/5 (2018), Journals IBFD.
  \item T. Ecker, A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation ch. 6 (IBFD 2013), Online Books IBFD.
  \item This view is widely recognized in the literature. Indeed, even in a supposedly neutral setting such as that of a legal court, it is openly acknowledged that the methods of interpretation employed are influenced by the system of law in which that court operates. See, e.g., M. Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, 2 Eur J. Legal Studies 1, p. 3 (2007). Rather, what ultimately matters is to ensure that a preference for one method over another is fully disclosed at the outset and that the mechanism through which such principles are selected is verifiable. See, e.g., N. McCormick, Legal Reasoning and Legal Theory (Clarendon Press 1994).
  \item The first example of modern VAT (Taxe sur la Valeur Ajoutée) was introduced in France in 1954.
  \item This choice, however, does not imply that EU VAT should necessarily be considered best practice. Moreover, the primacy of EU VAT as the most widespread VAT-type system has recently been taken over by the new Indian Goods and Services Tax (GST), introduced during 2017.
\end{itemize}
In spite of all the above limitations, due to the fact that most VATs display the same basic design, it is submitted here that the framework of principles developed in the following sections may well serve to appraise the treatment of the sharing economy under other VAT systems.

3.2. VAT: An increasingly popular tax

Albeit consumption levies have, in the past, been associated with war and crises, VAT is now widely seen as a well-designed and relatively growth-friendly tax. The initiation of VAT by a relevant number of countries has indeed been considered one of the most remarkable achievements in the development of tax systems during the second half of the 20th century. Starting from the 1960s, VAT has in fact become the main consumption tax and source of indispensable fiscal revenue for more than 166 countries worldwide. Nearly all OECD member countries now have VAT, the only exception being the United States. Despite its popularity and increased interaction between different VAT systems due to the growth of cross-border trade, no international organization is currently responsible for supervising and monitoring the operation of VAT across different jurisdictions.

3.3. Basic design features of VAT

VAT aims to be a broad-based tax levied on final consumption. In the European Union, VAT was first implemented in 1967. At present, EU VAT is laid down in the Sixth Directive, as recast in 2006. To ensure a smooth application of the VAT Directive among Member


59. A.A. Tait, *Value Added Tax – International Practice and Problems* p. 3 (International Monetary Fund 1988) describes it as an “unparalleled tax phenomenon”. A. Schenk, V. Thuronyi & W. Cui, *Value Added Tax: A Comparative Approach* p. 33 (Cambridge University Press 2015) remark that “the VAT has been the most pervasive tax reform throughout the world during the second half of the twentieth century and into the twenty-first century, and has proved to be a major source of government revenue”. The term value added tax (VAT) is used in the present article to indicate equally value added tax (VAT) and general sales tax (GST). Indeed, also the OECD VAT/GST Guidelines employ the term “VAT” while referring in fact to “GST”. The difference in terminology is due to the diverse aspects of the tax considered. Whilst, in fact, the title value added tax (VAT) refers to the mechanics of the remittance system, the name goods and services tax (GST) instead points to the base on which the tax is levied. For a general discussion of the main characteristics of VAT, see D. Williams, *Chapter 6: Value-Added Tax*, in *Tax Law Design and Drafting* (V. Thuronyi ed., International Monetary Fund 1996).

60. In the accounts of Cnossen, *Global Trends and Issues in Value Added Taxation*, Int’l Tax & Pub. Finance, p. 413 (1998), “the VAT is a revenue workhouse”. VAT is in fact a high-yield tax. It enables governments to collect additional revenue smoothly by simply raising its rate(s). Among OECD member countries, revenue generated by VAT represents currently 6.8% of GDP and 20.1% of total revenue on average. See OECD, *supra* n. 58, at p. 11.

61. OECD, *supra* n. 58, at p. 19.

62. Nevertheless, the OECD, especially after the issuance of the VAT/GST Guidelines in 2015-17, seems to have claimed a more active role for itself in the international administration of VAT.


States, the VAT Implementing Regulation was enacted in 2011. Uniformity of interpretation and application of VAT provisions in all EU Member States is also sought through the case law of the ECJ, the opinion of the Advocates General and the guidelines prepared by the VAT Committee.

As article 1(2) of the VAT Directive stipulates, EU VAT is a general tax on consumption. The term “consumption” itself, however, is not defined in the VAT Directive. The author concurs that the expression should be understood as EU VAT being a tax on everything a private person consumes. The fact that some goods or services are consumed immediately, whereas others, like immovable property or works of art, can be exploited over a long period, is immaterial instead.

VAT targets all (and only) final consumption, i.e. expenditures made by private persons. It is the final consumer (and only him) who ultimately bears the burden of VAT. Administratively, however, VAT is levied on a transaction-by-transaction basis, and its collection takes place through a system of “fractional payments” made at each stage of the supply chain. Moreover, the tax is remitted by a person different than the end consumer. This helps to explain the inner paradox of VAT: “the VAT is a tax in which those who believe themselves exempt are taxed, and those who believe themselves taxed, are generally exempt”.

VAT intends to be neutral for businesses. The idea is that VAT shall not be a cost for taxable persons, who therefore have the right to deduct the VAT paid on their purchases from

66. The VAT Committee is an advisory committee, composed of representatives of the Member States and the European Commission, to which art. 398 VAT Directive assigns the task to examine questions concerning the application and interpretation of EU VAT provisions. Advocate General Kokott emphasized the importance of the guidelines issued by the VAT Committee, by describing them as a valid “aid to interpretation”. See PL: Opinion of Advocate General Kokott, 31 Jan. 2013, Case C-155/12, Minister Finansów v. RR Donnelley Global Turnkey Solutions Poland Sp. z o.o., paras. 46-51, ECJ Case Law IBFD.
67. On VAT being a tax on consumption, see, e.g., J. Englisch, VAT/GST and Direct Taxes: Different Purposes, in Value Added tax and Direct Taxation – Similarities and Differences (M. Lang, P. Melz & E. Kristoffersson eds., IBFD 2009).
68. M.E. van Hilten, The Legal Character of VAT, in Selected Issues in European Tax Law: The Legal Character of VAT and the Application of General Principles of Justice: Summary of an EFS Seminar in Honour of Fons Simons p. 3 (D. Albregtse & H. Kogels eds., Kluwer Law International 1999) notes that in EU VAT “what is not clear is how the term ‘consumption’ should be understood. Indeed, nowhere is it stated what ‘consumption’ is actually supposed to mean in a VAT context, although it is clear that consumption itself is not the taxable event. Some people, including me, regard VAT as a tax which essentially aims to tax actual private consumption. Others, however, take the view that since VAT is levied on consumer expenditure its primary purpose is to tax spending”.
69. This also reflects the legal character of VAT. See J. Reugebrink, The Sixth Directive for Harmonization of Value Added Tax, CML Rev., p. 309 (1978). A direct consequence of VAT being a general tax on consumption is that it should not discriminate between goods and services, since they are both forms of consumption that can often substitute each other. The fact that EU VAT is a general consumption tax has been affirmed by the ECJ several times. See, e.g., UK: ECJ, 24 Oct. 1996, Case C-317/94, Elida Gibbs Ltd v. Commissioners of Customs and Excise, para. 19, ECJ Case Law IBFD.
70. NL: ECJ, 1 Apr. 1982, Case C-89/81, Hong Kong Trade Development Council, paras. 9-10, ECJ Case Law IBFD.
71. See Englisch, supra n. 67. As the ECJ itself has repeatedly underlined, a supplier of goods or services acts as a “mere tax collector for the State and in the interest of the public exchequer”. See, e.g., DE: ECJ, 21 Feb. 2008, Case C-271/06, Netto Supermarkt GmbH & Co. OHG v. Finanzamt Malchin, para. 21, ECJ Case Law IBFD.
the VAT due for the furtherance of their business activity. As a result, each taxable person remits VAT only on the net balance between the VAT on his output and input transactions. This mechanism also ensures that the amount collected remains proportional to the final price paid by the end customer.

Ratione loci, EU VAT is governed by the territoriality principle. Moreover, for allocating taxing rights among different jurisdictions, like almost every VAT, EU VAT generally follows the destination principle, meaning that taxing rights accrue to the jurisdiction where consumption ultimately takes place. Under such a system, imported products are generally taxed, while exports are exempted (rectius: zero-rated with a right to deduct input VAT).

3.4. Selected tax principles of EU VAT

Many principles govern the functioning of EU VAT. The general principles of taxation, such as efficiency, equality and simplicity, are the first to be considered. A further set of principles stems directly from VAT being part of EU law. In VAT cases, the ECJ often refers to cornerstone EU law principles, as enshrined both in the Treaties and in the Charter of Fundamental Rights of the European Union (CFREU), viz. the principles of legal certainty, equal treatment, proportionality, transparency, the protection of legitimate expectations, the right of defence and to private life, the prohibition of bis in idem, abusive practices and tax fraud. Specific principles linked to the intimate nature of VAT can seamlessly apply, such as the territoriality and destination principles or the right to deduct.

A full elaboration on all the aforementioned principles is well beyond the purpose of this contribution. In the following, the analysis is thus limited to the principles that, in the author’s understanding, appears to be of most relevance for the VAT appraisal of the sharing economy. To this end, the author has chosen to structure the analysis based on the principles of neutrality, equality, simplicity and proportionality. This choice – which, as plainly acknowledged in section 3.1., is not neutral – reflects the most desirable aims that, according to the author, VAT should pursue while dealing with a new economic reality such as the sharing economy. Those aims equally attain to the theoretical design and to the practical implementation of VAT. Noteworthy is that these two sets of goals are not always aligned. Rather, they often need to be carefully balanced out. To put it into perspective, while commitment to the “theoretical” principles of neutrality and equality ensures that the VAT treatment of the sharing economy is not “ring-fenced” from that accorded to more conventional business activities, the more “practical” principles of simplicity and

73. In some instances, however, a country is allowed to levy VAT on services that take place partially outside its territory. See IT: ECJ, 23 Jan. 1986, Case 283/84, Trans Tirreno, ECJ Case Law IBFD.
74. These principles constitute the four canons of taxation (equality, certainty, convenience and economy) famously spelt out by Adam Smith. See A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Part Three “Of Taxes” (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Oxford University Press 1976). Noteworthy, also the Final Report of OECD/G20 BEPS Action 1 begins with an illustration in chapter 2 of some “fundamental principles of taxation”, i.e. neutrality, efficiency, certainty, simplicity effectiveness, fairness and flexibility. In particular, the OECD points out that “these principles, with modification, continue to be relevant in the digital economy”. See OECD, supra n. 36, at p. 20.
proportionality avoid that strict adherence to the former would ultimately translate into an inconvenient straitjacket.

As submitted, the selected principles will be used as benchmarks to evaluate the feasible application of EU VAT provisions to the novelty of the sharing economy. In the assessment, as considered, no single principle should be attributed priority over any other. Instead, a mindful trade-off is needed in their practical implementation, so that the evaluation of the application of VAT provisions to the sharing economy remains based on an overall consideration of the principles captured under the proposed framework.

### 3.4.1. Neutrality

Neutrality is central to the application of VAT. A fiscally neutral scenario is generally understood as that which least distorts taxpayers' choices. Under VAT, this rationale is further specified in that its levying should neither influence business decisions, nor affect consumer preferences.

Fiscal neutrality is not a principle of primary EU law. Nonetheless, the principle of neutrality is “the leading principle of VAT”, as confirmed by the preamble of the VAT Directive, which, in fact, holds that “the VAT system should attain the highest degree ... of neutrality”, as well as by numerous decisions of the ECJ.

The principle of neutrality has at least two dimensions, which reflect its external and internal orientation. While external neutrality relates to the international aspects of VAT, i.e.

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76. Mimicking the balanced approach set out by the OECD, *Electronic Commerce: Taxation Framework Conditions – A Report by the Committee on Fiscal Affairs* p. 3 (OECD 1998) to address the tax issues of electronic commerce, the selection of the tax principles made in the present contribution assumes that, while “the taxation principles which guide governments in relation to conventional commerce should also guide in relation to electronic commerce”, “new administrative or legislative measure, or changes to existing measures, relating to electronic commerce” are not precluded, in so far “those measures are intended to assist in the application of existing taxation principles”.

77. The need to balance out the chosen principles reflects the understanding that, contrary to positive norms, legal principles always require a certain degree of discretion in their application, so that they do not imply “an exact measurement, and the judgment that a particular principle ... is more important than another will often be a controversial one”. See R. Dworkin, *Taking Rights Seriously* p. 26 (Harvard University Press 1977).

78. In *Deutsche Bank* (DE: ECJ, 19 July 2012, Case C-44/11, Finanzamt Frankfurt am Main V-Höchst v. Deutsche Bank AG, para. 45, ECJ Case Law IBFD) and *Zimmerman* (DE: ECJ, 19 Nov. 2012, Case C-174/11, Finanzamt Steglitz v. Ines Zimmermann, para. 49, ECJ Case Law IBFD), the ECJ, in fact, considered that “fiscal neutrality” is not a rule of primary law but rather a principle of interpretation relevant in the field of VAT, with specific regard to the right to deduct.


80. Kogels, supra n. 79, at p. 230. The ECJ has held that the principle of fiscal neutrality precludes, inter alia, “economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned”. See, e.g., DE: ECJ, 10 Sept. 2002, Case C-141/00, *Ambulanter Pflegedienst Kügler GmbH v. Finanzamt für Körperschaften I in Berlin*, para. 30, ECJ Case Law IBFD.

the fact that the tax on importation shall not exceed the internal tax on like domestic goods and a refund on exportation shall be of the same amount of the tax that was levied, internal neutrality refers to the national aspects of levying an indirect tax.

This second dimension can be roughly divided into legal and economic neutrality. Legal neutrality aims to ensure that similar products are not discriminated against for VAT purposes, for instance, because they are subject to different tax rates. Similarly, the principle demands to treat taxable persons that are in similar situations equally.

Economic neutrality, instead, mandates that neither the productive capacity of the economy, nor the optimal allocation of overall wealth should be affected by the levying of the tax. With specific regard to VAT, this means that its application should neither affect the amount of tax that is ultimately placed upon the final consumer, nor lead to the concentration of businesses. Notably, under EU VAT, the latter goal is achieved by levying the tax on each transaction at every stage of the production and distribution chain and giving each taxable person the right to deduct the VAT paid on his purchases.

Neutrality also has implications with regard to the interpretation of VAT provisions. For instance, in order to delimit the scope of the application of exemptions, the ECJ employs a neutrality test whereby the different treatment of two or more supplies is assessed from the perspective of the final consumer. 82

3.4.2. Equality

Equality is a milestone of law. 83 It is even a general principle of EU law. 84 Sometimes also termed as the principle of non-discrimination, it responds to the general demand of tax fairness. Under its basic understanding, the principle requires treating the equal (persons as well as products) equally and the unequal (in proportion) unequally. 85 Notably, the notion of equality splits in two directions: vertical and horizontal.

Horizontal equality stipulates that individuals at the same level of well-being should face the same tax burden. 86 Under the EU VAT system, this objective is reached by means of its design structure, i.e. the fact that all products, both goods and services, are subject to

82. See, e.g., UK: ECJ, 10 Nov. 2011, Case C-259/10, Commissioners for Her Majesty’s Revenue and Customs v. The Rank Group plc, para. 58, ECJ Case Law IBFD. In a sense, reference to the principle of neutrality as a means to interpret VAT provisions can be considered as a form of systematic interpretation and a direct application of the effet utile doctrine. See Englisch, supra n. 67, p. 8.

83. The principle of equality is also enshrined in many international treaties, such as the European Convention of Human Rights (art. 14) and the International Covenant on Civil and Political Rights (art. 26).

84. Arts. 2 TEU and 20 CFREU.

85. See, e.g., UK: Opinion of Advocate General La Pergola, 3 July 1997, Case C-330/95, Goldsmiths (Jewellers) Ltd v. Commissioners of Customs & Excise, para. 19, ECJ Case Law IBFD.

86. In the field of VAT, the principle of equality means that “people with the same expenditure should also bear the same tax burden, and the tax burden of people with different expenditure should also differ correspondingly. Any deviation requires objective justification”. This represents “a VAT-specific manifestation of the ability-to-pay principle”. See J. Englisch, Chapter 11 – VAT and General Principles of EU Law, in Traditional and Alternative Routes to European Tax Integration: Primary Law, Secondary Law, Soft Law, Coordination, Comitology and their Relationship sec. 11.3.2 (D. Weber ed., IBFD 2010), Online Books IBFD. For a thorough discussion in this regard, see, e.g., E. Aumayr et al., Conference: Value Added Tax and Direct Taxation-Similarities and Differences, 37 Intertax 8/9, p. 499 et seq. (2009).
tax and that the levy is exactly proportional to the price of the products. Thus, equality is achieved at the level of the taxable person as well as of the taxable transaction. To put it bluntly, to the same price the same tax.

Although the principle of horizontal equity can, arguably, be equated to that of legal neutrality illustrated above,\textsuperscript{87} insomuch that, remarkably, even the Ottawa Framework developed by the OECD pairs the two concepts,\textsuperscript{88} it is contended here that the former is, in a sense, more limited in its scope, since it merely seeks to establish a comparison between businesses or products that find themselves in competition with each other.\textsuperscript{89} Instead, the principle of equality involves a broader evaluation, not necessarily restricted to a strict economic dimension but that may well serve as a guarantee against other kinds of discrimination.\textsuperscript{90} Further, from a more theoretical point of view, the concept of neutrality, as stated, does not share the same constitutional status as the principle of equality.

The concept of vertical equality entails that people in different circumstances should pay an appropriately different amount of tax, i.e. a heavier burden on persons who are better situated to bear it. Consumption taxes, however, are levied irrespective of the personal circumstances of the taxpayer. They are therefore referred to as regressive, since, moving up the income scale, the proportion between the tax burden and the income falls.

The application of the principle of equality is, however, not always feasible. Measures aimed at making an indirect tax system more equitable need in fact to be traded off with other principles, like that of simplicity.

3.4.3. Simplicity

Only 3 years after the enactment of VAT in France, Maurice Lauré pointed to the complexity of VAT as one of the intrinsic problems of the new tax: “la TVA ... est rongée par un mail sournois: la complexité”\textsuperscript{91}. The definition of simplicity naturally recalls that of its opposite, i.e. complexity, the avoidance of which is seen as a means to achieve economic neutrality.\textsuperscript{92} Measures to achieve this goal equally encompass legislative and administrative simplification.

\textsuperscript{87} The idea of a link between the principles of neutrality and equality emerges starkly from point 7 of the preamble of the VAT Directive (2006/112): “the common system of VAT should, even if rates and exemptions are not fully harmonized, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain”.

\textsuperscript{88} Under the heading of “neutrality”, the Ottawa Taxation Framework Conditions, in fact, stipulate that “taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce” (emphasis added). OECD, supra n. 76, at p. 4.


\textsuperscript{91} “VAT... is consumed by an insidious evil: complexity” (author’s unofficial translation). See M. Lauré, Au Secours de la TVA p. 48 (Presses universitaires de France 1957). A similar point was raised with respect to the US sales and use tax by J. Due, Sales Taxation p. 313 (University of Illinois Press 1957), according to whom “the US states have managed to transform this very simple levy into a byzantine complexity”.

\textsuperscript{92} A. van Doesum, H.W.M. van Kesteren & G.J. van Norden, Fundamentals of EU VAT Law p. 38 (Kluwer Law International 2016). Point 5 of the Preamble to the VAT Directive (2006/112) stipulates that a “VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible”.

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Simplicity, or the avoidance of unnecessary complexity, is measured in two ways, i.e. by looking at taxpayers’ compliance and tax authorities’ administrative costs. More precisely, compliance costs measure the time and money wasted by taxpayers to meet the obligation of a tax system. When tax rules are clear and simple, taxpayers can arguably understand in advance and in full the tax consequences of their transactions and, as a result, compliance costs are low. In the case of a tax such as VAT, for instance, it is important that taxpayers have a clear understanding of what is and what is not taxable.

To attain simplicity, it is also vital to reduce the costs for taxpayers to cope with the tax system (e.g. with respect to preparations of tax returns). Under VAT, a viable solution for reducing compliance costs is to rely on legal presumptions, general classification and lump-sum rules. Notably, articles 132-135 of the VAT Directive exclude the possibility to deduct VAT paid for supplies received for carrying out certain activities of public interest. Despite being justified by a simplification aim, similar measures mark a significant departure from the principles of fiscal neutrality and equality, which can indeed be questioned.

Administrative costs, instead, measure the time and money spent by the tax authorities to implement and operate a tax system. Administration costs depend on the number of taxpayers and on the extent of compliance obligations. Under VAT, the significant reduction of administrative costs can, for instance, be achieved by incrementing registration thresholds. However, the potential impact of this and other simplification measures needs to be attentively assessed, since it may lead to a distortion of business decisions.

In sum, despite displaying all the attractiveness of being the opposite of tax complexity, simplicity as a goal needs to be carefully balanced with other equally non-negligible objectives.

3.4.4. Proportionality

In the European Union, the principle of proportionality is enshrined in article 5(4) of the Treaty on European Union (TEU), as a limit for Union action, and in article 52(1) of the...
CFREU, with regard to criminal offences and penalties. It passed into EU legislation and case law from the German and French law traditions.\textsuperscript{100} The principle is understood as an “expression of the general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of public interest”.\textsuperscript{101} It covers both legislative and administrative action.

The principle comprises a two-step test: a test of suitability and a test of necessity. In applying it, the Court, in fact, first, seeks to evaluate whether the disputed measure is appropriate to attain its aims and, second, if the measure does not go beyond what is necessary to achieve those goals.\textsuperscript{102} Indeed, such an assessment also seems to imply a judgment of reasonableness.\textsuperscript{103}

Proportionality represents a principle in its own right and, in fact, the ECJ tends to consider it separately. In particular, the role of proportionality in the Court’s case law is twofold. First, it serves as an independent standard of review.\textsuperscript{104} More specifically, for VAT purposes, the principle of proportionality is mainly used to assess the consistency of administrative obligations, restrictions and penalties.\textsuperscript{105} In its second acceptance, the principle of proportionality instead represents a key instrument of judicial methodology, which serves to evaluate the opportunity to deviate from other principles, viz. the principles of neutrality, equality and simplicity, as well as a rational rule to solve conflicts among different principles.\textsuperscript{106}

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\textsuperscript{101} J. Schwarze, \textit{European Administrative Law} p. 690 (Sweet & Maxwell 1992). In the field of VAT, the principle of proportionality as set out in art. 5(4) TEU is recalled in recital 4 of the Implementing Regulation 282/2011 in the sense that "this Regulation does not go beyond what is necessary to achieve this objective".

\textsuperscript{102} See, e.g., UK: ECJ, 14 Dec. 2017, Case C-305/16, \textit{Avon Cosmetics Ltd v. The Commissioners for Her Majesty’s Revenue and Customs}, para. 44, ECJ Case Law IBFD.

\textsuperscript{103} Displaying such an understanding, see, e.g., DE: Opinion of Advocate General Trstenjak, 25 May 2011, Case C-539/09, \textit{European Commission v. Federal Republic of Germany}, paras. 91-92, ECJ Case Law IBFD.


\textsuperscript{106} Englisch, \textit{supra} n. 86, at sec. 11.2. The role of proportionality as a yardstick to evaluate other fundamental principles seems to be confirmed also by the OECD. See OECD, \textit{supra} n. 36, at p. 134, stipulating that “for purposes of evaluating the potential options, the TFDE agreed on a framework starting from the basic tax principles of neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility and sustainability, and in light of the overall proportionality of the changes in relation to the tax challenges they are intended to address”.

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3.5. **Interim conclusions**

The sharing economy is not intended as a VAT-free zone. Instead, the principles underpinning VAT should remain applicable to the sharing economy as well as to more conventional businesses.\(^{107}\)

Of course, difficulties come not with theoretical definitions, but with implementing those principles accurately and in a consistent manner, i.e. by appropriately balancing them in a specific economic reality. In spite of all its strains, as stipulated for e-commerce in the early 2000s and, more recently, for BEPS, rather than trying to reinvent the wheel, the only feasible approach seems to shoehorn the new phenomenon into the existing framework of tax principles.

In the author’s view, two reasons in particular support this approach. First, to insulate the sharing economy from the rest of the economy, besides violating the principles of neutrality and equality, would also require drawing whimsical lines between what is “sharing” and what is not. And indeed, as stated in section 2.2., the definition of “sharing economy” itself is far from settled. The second reason is that the proposed approach would consent to evaluate the dynamic functioning of the VAT system as a whole and its ability to keep up with a fast-paced economy in an ever-changing social landscape.

4. **VAT Analysis of the Sharing Economy**

4.1. **Introduction**

The VAT implications of the sharing economy have not been confronted yet and therefore call for clarification.

As stated, the VAT assessment of the sharing economy presents several challenges. The main issues relate to the application of basic VAT concepts, such as those of taxable persons, taxable transactions, place of taxation, taxable amount, as well as to the operation of various exemptions. In other terms, in the sharing economy, at least the following basic questions need to be answered: who (taxable person); what (taxable transaction); where (place of supply); how much (taxable amount); and, further, it is necessary to assess whether some exemptions might come into play. In the following analysis, which, however, focuses only on the EU VAT concepts of “taxable persons” and “taxable transactions”, the VAT Determination scheme, whose steps reflect the structure of the VAT Directive, is used.\(^{108}\)

Before bringing the VAT determination scheme into play, however, it is necessary to establish how many transactions are to be taken into account. As stated, in the sharing economy there are in fact three economic actors, i.e. a platform, a service provider and a service recipient. As a result, there are also three transactions: the first between the platform and its users; the second between the platform and the service recipient; and the last between the service provider and the service recipient. The author considers that the first two transactions, i.e. between the platforms and its users, can be examined jointly, as their VAT treatment does not present meaningful dissimilarities.

\(^{107}\) Notably, such approach is followed by the Australian Taxation Office (ATO), which applies the same rules for sharing economy and conventional businesses. See [AU: ATO, The Sharing Economy and Tax](https://www.ato.gov.au/General/The-sharing-economy-and-tax/) (accessed 8 Apr. 2018).

\(^{108}\) Van Doesum et al., *supra* n. 92, at pp. 43-45.
A certain degree of caution is, however, necessary. Given the wide variety of business models that one encounters in the sharing economy, in fact, it might well happen that a platform would end up performing not only the intermediation service, but also the underlying supply. This occurs where the individual service provider is not independent, but, rather, is – or is treated as – an employee of the platform. Such a result can follow either from a choice made at the outset by the platform in structuring its business model\textsuperscript{109} or, more frequently, from a subsequent judicial scrutiny recharacterizing service providers as employees of the platform, rather than self-employed contractors.\textsuperscript{110} In the event of this, the platform would also be deemed to perform the underlying supply through its users, to the extent that the individual service providers are recharacterized as employees of the platform. Thus, only transactions between the platform and its users would be relevant for VAT purposes. By contrast, transactions between the platform’s users would remain outside the VAT reach. Vice versa, as stated, should the individual providers be truly independent of the platform, then there would be two transactions for VAT purposes, i.e. the first between the platform and its users and the second between the platform’s users, i.e. the individual service provider and the recipient.

In the analysis that follows, the former situation is assumed. Nonetheless, the issue concerning the independence of service providers from sharing platforms remains far from settled and will be further examined while discussing the adverb “independently”, which is one of the conditions to be a taxable person under EU VAT.\textsuperscript{111}

4.2. **Taxable person**

The concept of a “taxable person” marks the external boundaries of VAT. Following article 9(1) of the VAT Directive, a taxable person is anyone “who independently carries out in any place any economic activity, whatever the purpose or result of that activity”. From this definition, the following elements can be singled out:

- any person;
- any place;
- economic activity; and
- independently.

In the specific context of the sharing economy, two of these aspects need, in particular, to be examined closely, i.e., first, whether there is an economic activity and, second, if it is performed by a person who is truly independent.

4.2.1. **Economic activity**

Only transactions that are carried out by “a taxable person acting as such” are subject to EU VAT. This implies the fulfilment of three distinct sets of requirements. First, the person shall possess the objective characteristics spelt out in article 9 of the VAT Directive. Second,
the person having a taxable person’s status must effectively act in that capacity. Third, provided either of the above conditions is met, the taxable person’s annual turnover needs to be checked. Where his turnover does not pass the registration threshold which might be established for small and medium-sized enterprises (SMEs), the taxable person, although formally retaining subjective liability to tax, is in fact ruled out from the VAT system.

4.2.1.1. Activity: “Economic”

Article 9(1), second paragraph, of the VAT Directive lists a series of activities (“any activity of producers, traders, person supplying services, including mining and agricultural activities and activities of the professions”) that shall be considered “economic activities” and notes, at the third paragraph, that the “exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis” is also taxable.

The expression “economic activity” is very wide and it has been interpreted in a broad manner by the ECJ. This is due to the fact of EU VAT being a general tax on consumption. Should the concept of economic activity be interpreted too narrowly, this goal will easily be frustrated.

In order to have an “economic activity” subject to VAT, the activity shall not necessarily be profitable. Article 9(1) of the VAT Directive, in fact, stipulates that persons who, independently, carry out economic activities, must be regarded as taxable persons “whatever the purpose or result of that activity”. In this respect, the wording of article 4 of the Second Directive was even more open, since it considered as a taxable person any person engaged in an economic activity, “whether or not for gain”.

The broad interpretation attributed to the expression, however, does not mean that all activities shall be considered “economic activities”. Activities performed free of charge remain, in fact, outside the scope of EU VAT. In Hong Kong, the ECJ clarified that “where a person’s activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the free services in question are not subject to value added tax”, since the application of EU VAT presupposes “the stipulation of a price or consideration”. In such an event – the Court concluded – “the person providing services must be assimilated to a final consumer because he is at the final stage of the production and distribution chain”.


113. The irrelevance of the “for profit” requirement is also demonstrated by the fact that the VAT Directive includes non-profit-making organizations among taxable persons, even if exempted under art. 132. See B.J.M. Terra & J. Kajus, Introduction to European VAT (Recast) p. 394 (IBFD 2017). In the same vein, NL: Opinion of Advocate General van Themaat, 2 Mar. 1982, Case 89/81, Hong Kong Trade Development Council, para. 3.3, ECJ Case Law IBFD.

114. Hong Kong (C-89/81), para. 10. The Court departed from the view taken by Advocate General Van Themaat, who instead considered as a decisive factor the economic nature of the activities rather than the economic reality points towards consumption. See also S. Pfeiffer, Written Comments to the Keynote Paper “Taxable Persons”, in ECJ – Recent Developments in Value Added Tax 2014 p. 96 (Lang. et al. eds., Linde 2015).
Further, the ECJ considers that there is no economic activity where only a symbolic payment is made. In Commission v. France, the Court reasoned that “because of the amount of the rent, the lease must necessarily be regarded as involving a concession and not as constituting an economic activity within the meaning of the Directive”. Similarly, in Weald Leasing, the CJEU held that unusually low payments not reflecting any economic reality run contrary to the VAT Directive. Despite that, the fact that the activity of an operator is financed through public subsidies has no bearing on whether the activity can be regarded as an “economic activity” or not. Conversely, a taxable person is entitled to deduct all the VAT paid in respect of his acquisitions, even where his supplies are made for a price lower than the cost price. These and other Court’s dicta suggest that an activity, such as the letting of immovable property, which, by its nature, would normally qualify as an economic activity, may not do so in some instances because of the particular circumstances in which the service is carried out.

It is, however, necessary to keep in mind that, in certain instances, even the performance of an activity free of charge can be relevant under VAT. This happens when a tainted relationship exists between the supplier and the customer, as shown by the deemed supply rules of arts. 16(1) and 26(1)(b) VAT Directive, concerning the supply of goods and services carried out free of charge by a taxable person for his private use, for that of his staff or, more broadly, for purposes other than those of his business.
Nonetheless, in *Danfoss AstraZeneca*, the ECJ narrowed the scope of application of these rules, holding that they are not intended to cover “the provision, free of charge, of meals in company canteens to business contacts in the course of meetings held on the company premises where objective evidence indicates … that those meals are provided for strictly business-related purposes”.[121]

Considering the transactions between a sharing economy platform and its users, it follows from the above that where the services are provided by that platform free of charge, they remain outside the scope of application of the VAT Directive.[122] This is, for instance, the case of a platform like Couchsurfing, which charges a fee only for premium services, or of small-size platforms operating at the local level, such as sharing libraries, to the extent that they maintain a not-for-profit orientation and serve only social or solidarity purposes.

The above analysis equally applies to transactions between users of a platform. Where a user provides a service to another peer free of charge, the activity thereof should not, in normal circumstances, carry any VAT. These transactions can, in fact, be equated to donations, not covered as such by the VAT Directive.[123] The situation, however, requires a different appraisal where the free of charge supply is made by a taxable person in the context of a business activity and that person performs other transactions that are relevant for VAT, as in *Danfoss AstraZeneca*. In this event, his free of charge output supplies would, in fact, be subject to VAT. Conversely, input VAT paid on acquisitions used for making free of charge supplies would be deductible. Taking Couchsurfing again as an example, a platform where users exchange accommodation free of charge, no VAT would be levied with respect to these transactions. Nevertheless, particular attention must be devoted to whether those services are effectively provided for free and, instead, a consideration is not otherwise paid, e.g. in kind. This issue will be discussed in more detail in section 4.3.3.

### 4.2.1.2. Activity: “Market participation”

Another condition, albeit not in the wording of article 9(1) of the VAT Directive, which must be satisfied for an activity being carried out for the purpose of obtaining income, is that the person participates in a market.[124] In *SPÖ*, the ECJ concluded that the activity carried out by a section of a political party could not be regarded as an “economic activity”

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123. Gifts and donations, in fact, remain outside the scope of VAT. See, e.g., NL: Opinion of Advocate General Sharpton, 18 Apr. 2013, Case C-26/12, *Fiscale eenheid PPG Holdings BV cs te Hoogezaand v. Inspecteur van de Belastingdienst/Noord/kantoor Groningen*, para. 30, ECJ Case Law IBFD.

because that political party did not participate in any market.\textsuperscript{125} In other circumstances, the Court has likewise found that public bodies did not ultimately carry out an economic activity, because there was no enough evidence either of market participation or the existence of a market to participate into.\textsuperscript{126} In order to assess if there is an “economic activity”, especially in the public sector, the Court takes a further look at whether that activity is carried out in the same way an analogous activity would be carried out in the private sector.

That being said, there seems to be little doubt that sharing platforms do indeed participate in a market. On closer inspection, it could even be argued that they create the market where their users meet. As stated, the sharing economy is a dual-sided market, one market being between the platform and its users, and the other between the platform’s users.

More elaboration instead requires providing an answer to the question of whether, in every instance, service providers participate in a market. In this regard, it seems undisputable that activities such as those performed by an Airbnb host or an Uber driver involve participation, respectively, in the accommodation and transportation markets. The answer is, however, less straightforward in the case of other businesses. One may think that there is no such thing as a market for a spot on another person’s sofa. A similar stance can equally be maintained with regard to a seat on another person’s car.\textsuperscript{127} Nevertheless, the sheer fact that platforms such as Couchsurfing and BlaBlaCar, providing precisely those kinds of services, exist, demonstrates that, in the sharing economy, almost everything, even a spot in another person’s house or a car seat, can be marketized. In the end, market participation does not appear to be the “killer” factor for demonstrating the existence of an “economic activity”. Rather, much more relevance assumes the distinction between the professional and the private spheres, as it will be elaborated in section 4.2.1.4.

4.2.1.3. Activity: “Continuity”

The notion of “economic activity” demands that supplies are made on a regular basis. Incidental supplies are, thus, in principle, excluded. This requirement can be inferred from various provisions contained in the VAT Directive. In fact, article 12(1) of the VAT Directive leaves Member States with an option to treat certain occasional suppliers, e.g. of building

\textsuperscript{125.} AT: ECJ, 6 Oct. 2009, Case C-267/08, SPÖ Landesorganisation Kärnten v. Finanzamt Klagenfurt, para. 24, ECJ Case Law IBFD. The concept of “market participation” seems to imply an inquiry into whether a consideration has been paid. In \textit{Hong Kong} (C-89/81, para. 10), concerning services provided by a cooperative free of charge, the ECJ highlighted that “the link between him [the cooperative] and the recipient of the goods or service does not fall within any category of contract likely to be the subject of tax harmonization giving rise to neutrality in competition; in those circumstances, services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, presuppose the stipulation of a price or consideration”.

\textsuperscript{126.} As art. 13(1) VAT Directive stipulates that public bodies are not taxable persons in respect of the activities or transactions in which they engage as public authorities, the Court is often asked to determine whether a transaction takes place in a market or outside the scope of any market. See, recently, IR: ECJ, 19 Jan. 2017, Case C-344/15, National Roads Authority v. The Revenue Commissioners, paras. 41-44, ECJ Case Law IBFD.

\textsuperscript{127.} In \textit{EDM} (PT: Opinion of Advocate General Leger, 12 Sept. 2002, Case C-77/01, Empresa de Desenvolvimento Mineiro SGPS SA (EDM) v. Fazenda Pública, para. 45, ECJ Case Law IBFD), Advocate General Leger argued that to constitute an economic activity for VAT purposes, loans made by a holding company “must be agreed on conditions which are comparable to the relevant market conditions, as though they had been agreed between a financial institution and its customers”.

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land, as taxable persons. Arguably, this provision would be superfluous if even incidental supplies were to be regarded as economic activities by default.\textsuperscript{128}

The concept of “continuity” needs to be related to the nature of the activity, which could even consist in the mere exploitation of a property. The third paragraph of article 9(1) of the VAT Directive, in fact, stipulates that the exploitation of tangible or intangible property, such as the granting of loans, the leasing of immovable or movable property and the licensing of patents, for the purposes of obtaining income therefrom on a continuing basis, must be regarded as an economic activity.\textsuperscript{129}

The concept of “exploitation” has been dealt with by the ECJ in a number of cases. In \textit{van Tiem}, the ECJ ruled that the granting of building rights, whereby the grantee was authorized to use the immovable property for a specified period of time in return of a consideration, constituted an economy activity.\textsuperscript{130} In \textit{Enkler}, concerning the hiring-out of a motor caravan, the ECJ specified that, in order to determine whether the activity is carried on for the purpose of obtaining income on a continuing basis, the actual length of the period for which the property is hired, the number of customer and the amount of earnings are all factors to be taken into account.\textsuperscript{131}

The author submits that the concepts of “economic activity” and “exploitation” are not synonyms. Although both terms require the activity to be repetitive, the continuity requirement is, in fact, less important for forms of exploitation, such as the purchase and immediate granting of building rights in \textit{van Tiem}, since for these types of economic activity the regularity aspect stems from the fact that the consideration is paid out on a continuing basis.\textsuperscript{132}

It is less important but not bluntly irrelevant. In \textit{Slaby}, the Court, in fact, considered that the simple acquisition and the mere sale of an asset cannot amount to an exploitation of that.

\begin{itemize}
\item\textsuperscript{128} Van Doesum et al., \textit{supra} n. 92, at p. 61. According to Terra & Kajus, \textit{supra} n. 113, at p. 404, however, the VAT Directive does not require that “activities must have a certain frequency in order to be qualified as relevant economic activities”. This latter stance seems indeed to find confirmation from a reading of the proposed new wording of art. 12(1) of the VAT Directive, pursuant to which “Member States may regard as a taxable person anyone who carries out, on an occasional basis, any of the following transactions” (emphasis added). \textit{See} European Commission, Proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final, p. 17, EU Law IBFD.
\item\textsuperscript{129} As Advocate General Kokott pointed out in \textit{Gemeente Borsele} (C-520/14, para. 60), “it is important … not to confuse the purpose of obtaining income with the intention to make a profit, which, according to case-law, is not a condition of assuming the presence of an economic activity.” \textit{See also} AT: ECJ, 20 June 2013, Case C-219/12, \textit{Finanzamt Freistadt Rohrbach v. Unabhängiger Finanzsenat Außenstelle Linz}, para. 25, ECJ Case Law IBFD.
\item\textsuperscript{130} NL: ECJ, 4 Dec. 1990, Case C-186/89, \textit{W.M. van Tiem v. Staatssecretaris van Financiën}, para. 20, ECJ Case Law IBFD.
\item\textsuperscript{131} DE: ECJ, 26 Sept. 1996, Case C-230/94, \textit{Renate Enkler v. Finanzamt Homburg}, para. 29, ECJ Case Law IBFD. Based on the fact of \textit{Enkler}, one may well conclude that “the threshold for taxability is fairly low as regard services carried out on a continuous basis”. \textit{See} Melz, \textit{supra} n. 112, at p. 164. \textit{See also} M. van de Leur, \textit{Watch Out, You May Be a Taxable Person!}, 24 Intl. VAT Monitor 5, p. 279 (2013), Journals IBFD, who notes that as soon as they “derive some form of regular income from their private assets, private individuals run the risk of qualifying as taxable persons. Their intention to be engaged in economic activities is less important and the question of whether they make a profit is irrelevant”. This is indeed an unfortunate result also for tax authorities, since bringing every small business into the system increases administrative costs substantially, while the additional VAT collected is largely absorbed by the costs of collecting the tax.
\item\textsuperscript{132} Van Doesum et al., \textit{supra} n. 92, at p. 61.
\end{itemize}
asset, intended to produce income on a continuing basis within the meaning of article 9(1) of the VAT Directive, as the only consideration for those transactions consisted of a possible profit on the sale of that asset.\textsuperscript{133}

What is, instead, irrelevant is the intended purpose for which an activity is conducted. In \textit{Rēdlihs}, the ECJ ruled that an economic activity exists even in the case of the sale of a property effected with a view to alleviating the consequence of a case of force majeure.\textsuperscript{134}

On the contrary, the decisive factor is whether the person takes active steps to market property by mobilizing resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of article 9(1) of the VAT Directive. This stance was consistently maintained by the Court in \textit{Slaby}\textsuperscript{135} and \textit{Rēdlihs}\.\textsuperscript{136} In his opinion in \textit{EDM}, concerning whether a holding company had a business or commercial purpose in the management of its participations, the Advocate General Leger considered that “the business purpose … involves a holding company introducing permanent human and logistical resources arranged in the same way as the resources of a credit institution and on a greater scale than the resources belonging to a private investor which are used merely for his own needs”.\textsuperscript{137} By contrast, the mere management of personal property does not amount to an economic activity for VAT purposes, even if it involves a large volume of sales.\textsuperscript{138}

From the above, it can fairly be maintained that sharing platforms do fulfill the requirement to supply services on a continuous basis. With regard to transactions between the platforms’ users, the VAT Committee submitted that the mere act of subscribing to a sharing platform, through which goods or services are provided, by itself implies some continuity.\textsuperscript{139} More specifically, the joining of a platform by an individual might be considered an “active step”, i.e. a mobilization of resources sufficient to trigger an economic activity. In fact, as the Advocate General Lenz noted in \textit{Wellcome Trust}, the requirement of continuity should not be understood as meaning that, in order to qualify as a taxable person, a person must necessarily enter into a series of transactions, since a transaction relevant for VAT purposes can even be concluded in a single day.\textsuperscript{140}

The assumption that the degree of continuity required is not that much can also be inferred from a systemic reading of article 12 of the VAT Directive, which leaves Member States with an option to consider as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the second subparagraph of article 9(1). In this regard, recital 13 of the VAT Directive states that, “in order to enhance the non-discriminatory nature of the tax, the term “taxable person” should be defined in such a way that the Member States may use it to cover persons who occasionally carry out certain transactions”. This stance has

\begin{enumerate}
\item \textsuperscript{133} PL: ECJ, 15 Sept. 2011, Cases C-180/10 and C-181/10, \textit{Jarosław Slaby v. Minister Finansów (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć v. Dyrektor Izby Skarbowej w Warszawie (C-181/10)}, para. 45, ECJ Case Law IBFD.
\item \textsuperscript{134} ECJ, 19 July 2012, C-263/11, \textit{Rēdlihs}, paras. 36-38.
\item \textsuperscript{135} \textit{Slaby and other (C-180/10 and C-181/10)}, para 39.
\item \textsuperscript{136} \textit{Rēdlihs (C-263/11)}, para. 36.
\item \textsuperscript{137} Advocate General’s Opinion in \textit{EDM (C-77/01)}, para. 44.
\item \textsuperscript{138} \textit{Wellcome Trust (C-155/94)}, paras. 35-37. \textit{See also NL: ECJ, 20 June 1991, Case C-60/90, Polysar Investments Netherlands BV v. Inspecteur der Invoerrechten en Accijnzen}, para. 14, ECJ Case Law IBFD.
\item \textsuperscript{139} European Commission, Value Added Tax Committee, \textit{supra} n. 122, at p. 6.
\item \textsuperscript{140} Advocate General’s Opinion in \textit{Wellcome Trust (C-155/94)}, para. 32. \textit{See A.M. Bal, The Vague Concept of “Taxable Person” in EU VAT Law}, 24 Intl. VAT Monitor 5, p. 295 (2013), Journals IBFD.
\end{enumerate}
found confirmation by the ECJ in Slaby and in Kostov. Notably, in Kostov, the Court held that a natural person who is already a taxable person for VAT purposes must be regarded as a taxable person in respect of any other economic activity carried out occasionally. \(^{141}\) As it has been observed, “Kostov thus makes it clear that the status of taxable person has knock-on effects”, i.e. the status of taxable person makes other occasional supplies carried out by that person fall within the scope of VAT, provided they constitute “economic activities”. \(^{142}\)

4.2.1.4. Person: “Acting as such”

Only supplies made by a taxable person “acting as such” in light of article 2(1) of the VAT Directive fall within the scope of EU VAT. It is therefore necessary to draw a line between supplies that a taxable person makes in the furtherance of his business and those, instead, pertaining to his non-business activities.

This distinction carries many implications. First, it is relevant to determine whether a taxable person is entitled to deduct the VAT paid on his purchases. From VAT being a tax on private consumption, it can be fairly maintained that “where taxable persons incur expenditures which are not business related they are acting as consumers rather than as traders, and as such should bear the VAT costs”. \(^{143}\) The deductibility of VAT on mixed assets or services purchases is governed by the Lennartz principle, according to which the acquirer has the discretion to allocate a capital good that is used for both business and private purposes fully, partly, or not at all to the business. \(^{144}\)

It follows from Kezic that where the person concerned has taken active steps to marketize a private property, i.e. carrying out preparatory works on a land to make development possible, an asset classified as private can be labelled as business. \(^{145}\) This, however, does not imply the inclusion of the management and administration of private assets, which constitutes the mere exercise of the right of ownership by their holder and does not amount to an economic activity. \(^{146}\)

A similar consideration can be found in Rēdlihs, where the Court observed that the fact that a person had acquired the forest for his own needs did not preclude that he subsequently used it for carrying on an economic activity, taking also into account that forests, by their nature, can be exploited on a commercial basis. \(^{147}\) Recalling its decision in Enkler, the ECJ pointed out that the determination of whether a person is acting as such is a question of fact, and the assessment should be determined based on an examination of all circumstances of the case, including the nature of the goods concerned, the period that elapsed between their acquisition and their use for the taxable person’s economic activities. \(^{148}\)

\(^{141}\) BG: ECJ, 13 June 2013, Case C-62/12, Galin Kostov v. Direktor na Direksia 'Obzhalvane I upravlenie na izpalnenieto' - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, para. 31, ECJ Case Law IBFD.

\(^{142}\) Henkow, supra n. 117, at 81.

\(^{143}\) R. de la Feria, The EU VAT System and the Internal Market p. 144 (IBFD 2008).

\(^{144}\) DE: ECJ, 11 July 1991, Case C-97/90, Hansgeorg Lennartz v. Finanzamt München III, ECJ Case Law IBFD. For a more complete exposition of the theory, see NL: ECJ, 14 July 2005, Case C-434/03, P. Charles and T. S. Charles-Tijmens v. Staatssecretaris van Financiën, ECJ Case Law IBFD.


\(^{146}\) Kezic (C-331/14), paras. 22-23.

\(^{147}\) Rēdlihs(C-263/11), paras. 37-39.

\(^{148}\) Enkler (C-230/94), para. 27.
Regarding the nature of the good concerned for the existence of an economic activity, the fact that a property is suitable only for economic exploitation would, in general, suffice. To determine whether, instead, a property is capable of being used for both economic and private purposes, it is necessary to carefully examine all the circumstances in which it is used in order to evaluate in which capacity the person is acting.\(^{149}\)

Where a single asset of a taxable person is used both in the course of his business and for personal use, an apportionment rule must be followed. As regards the method to follow in this respect, although generally left to the discretion of national legislations and courts, some guidance can be gleaned from Armbrecht, where the Court reasoned that the “apportionment between the part allocated to the taxable person’s business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division”.\(^{150}\)

In the end, it seems that, for determining whether a person is acting in his professional capacity, what is decisive, as for the requirement of “continuity”, is whether the person takes active steps to mobilize resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of article 9(1) of the VAT Directive.\(^{151}\)

Apparently, an individual does not have to take too many steps to become a taxable person. This emerges quite starkly from Fuchs. In Fuchs, the question was whether the operation of solar panels by an individual, installed on the roof of his home and plugged into the electricity network, constituted an economic activity subject to VAT. The Court ruled in the affirmative, despite the fact that all the electricity produced was supplied to the network and that, under the contract granting access to that network, no monetary remuneration was provided as consideration for that supply.\(^{152}\) The ECJ’s conclusion is even more surprising, given that the amount of electricity produced through solar panels was always lower than the amount consumed by the individual.\(^{153}\) The operation of such photovoltaic installations was, in fact, carried out to render the person energy self-sufficient and to decrease the costs of his own personal consumption of energy. From the previous ECJ case law, one should have assumed that an activity that is carried out merely to sustain personal consumption could by no means be considered an economic activity.\(^{154}\)

In light of the above, answering the question of what capacity a sharing economy platform performs its activities in seems to be quite straightforward. All activities of a platform are, in fact, performed in the course of its business. Moreover, even in the – quite rare – case of activities carried out for private or other purposes, one may safely conclude from Kostov that such activities are drawn into the management of its business by the platform.

\(^{149}\) Enkler (C-230/94), para. 27; Rēdlihs (C-263/11), para. 34.
\(^{150}\) Armbrecht (C-291/92), para. 21.
\(^{151}\) See sec. 4.2.1.3.
\(^{152}\) Fuchs (C-219/12), para. 22. In a sense, one can fairly argue that, in the case of solar panels installed on the roof or adjacent to a private dwelling, the connection between the economic and private spheres is, almost by definition, imminent. See Pfeiffer, supra n. 112, at p. 92. For an illustration of the case, see also T. Ehrke-Rabel & B. Gunacker-Slawitsch, Does the Running of a Photovoltaic Installation without a Power Storage Facility on or Adjacent to a Private Dwelling Constitute an “Economic Activity” within the VAT Directive?, 1 World Journal of VAT/GST Law 2, pp. 198-201 (2012).
\(^{153}\) Fuchs (C-219/12), para. 30.
\(^{154}\) Advocate General’s Opinion in SPÖ (C-267/08), para. 20.
More challenging is to determine in which capacity a service provider and a customer act. As stated, the answer largely depends on a thorough examination of all the circumstances of a case. Nonetheless, some indications can be gleaned from the ECJ’s case law. A distinction first has to be made between transactions concluded in return for a fee and those in which the service provider is, instead, only reimbursed the costs. Where an activity is carried out for a consideration, as in the case of that performed by an Airbnb host or an Uber driver, it is necessary to determine whether the asset, i.e. the apartment or the car, can only be used for business purposes. This is the case of a building earmarked as business property under cadastral rules or of a commercial vehicle. In these events, it is no longer necessary to dive into the rather detailed rules governing the allocation of private and business assets under VAT. The conclusion is completely different in the case of assets that can be used both for business and private purposes. Armbrecht made clear that, in such a situation, an apportionment rule must be followed and that the method adopted shall take into account all the circumstances of a case. The initial intention as well as the subsequent behaviour of the persons concerned might well play a role in the assessment. By contrast, the purpose for which a person commences an activity is irrelevant. It can therefore be concluded that rendering an apartment available for booking on Airbnb or becoming a part-time Uber driver to barely make ends meet, is not, per se, sufficient to rule out the existence of an economic activity for VAT purposes.

In the case of an activity involving a mere reimbursement of costs, such as that performed by a BlaBlaCar driver, this would amount to the mere management and administration of personal assets, as incidentally recognized by the ECJ in Kezic. Alternatively, it can be regarded as a private behaviour intended to decrease the costs of private consumption and therefore not a “true” economic activity. Moreover, qualifying such an activity as economic would mean to grant the person the possibility to deduct input taxes paid on those that are – in fact – private purchases, thus defying the ultimate goal of VAT, which is to tax household consumption.

The capacity in which a person acts must be assessed also with respect to the service recipient. If a service is provided by a taxable person and is purchased by the recipient for business purposes, the latter would be entitled to deduct the VAT charged to him by the former. By contrast, the recipient would not be able to recover input VAT where the supplier is not a taxable person and, therefore, does not charge any VAT (or, in addition, where his annual turnover remains beneath the registration threshold, as will be discussed in section 4.2.3.). If the service recipient is a taxable person acting as such, he would be left with unrecoverable VAT, and the output VAT would not be netted off with the VAT paid on inputs. 155

4.2.2. Person: “Independently”

To be a taxable person, article 9(1) of the VAT Directive requires that person to carry out an activity “independently”. The meaning of the adverb is further detailed in article 10 of the VAT Directive, according to which employed and other persons are excluded from VAT “in so far as they are bound to an employer by a contract of employment or by any other

155. The same conclusion can be reached in the case of any transfer from the private to the business sphere, which carries a penalty equal to the non-deductible input tax. This was well explained by Advocate General Sharpston in Puffer (AT: Opinion of Advocate General Sharpston, 11 Dec. 2008, Case C-460/07, Sandra Puffer v. Unabhängiger Finanzsenat, Außenstelle Linz, para. 50, ECJ Case Law IBFD).
legal tie creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability”.

Accordingly, employees are not taxable persons under VAT. The exclusion of employees from the scope of VAT seems to be motivated by practical and administrative reasons, i.e. to keep a relevant number of people outside the VAT system.156

Under EU law, the concept of “employee” has found specification in Lawrie-Blum (a non-VAT case), where it was held that “the term ‘worker’ covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship”. More specifically, an employee is a person that, for a certain period of time, “performs services for and under the direction of another person in return for which he receives remuneration”.157

Excluding employees from the reach of VAT is not, however, sufficient by itself. In fact, it is also necessary to determine whether a person effectively acts independently. In this respect, the Court considers that an activity has an independent character when (i) it is exercised by a person who is not organically integrated into an undertaking or an administration; (ii) the person has appropriate organizational freedom with regard to the human and material resources used in the exercise of the activity in question; and (iii) that person bears the economic risk entailed in the activity.

Such criteria have been applied consistently by the ECJ. In Commission v. Netherlands, for instance, the Court considered Dutch notaries and bailiffs to be independent for VAT purposes, as they were not integrated in the public administration, carried out their activities on their own account and responsibility, were free, even if subject to the limitations imposed by their statute, to arrange how to perform their work, and received from themselves the remuneration which made up their income. The existence of disciplinary control by the public authorities and the fact that their remuneration was determined by their statute did not suffice to reach an opposite conclusion.158 Similarly, in Recaudadores de Zonas, the Court found that, although tax collectors were appointed by and subject to the control of a municipality, they were nevertheless taxable persons under VAT, since they maintained their own offices, were responsible for recruiting their own staff, and their remuneration was based on the amount collected.159 The fact that the municipality was liable for the actions of the tax collectors was not enough to establish an employer-employee relationship. In van der Steen, a sole director-shareholder of a company was found to be in an employment relationship with his own company, and therefore not a taxable person for VAT purposes, on the ground

156. Excluding employees from the VAT system implies that “the value added produced by them will be taxed when their employers charge VAT on the sales of goods and services produced by them”. In this situation, the catching effect, occurring when the value added by a non-taxable person is not paid by that person but by the taxable person at the next stage of the production and distribution chain, “is considered desirable since the administrative advantages vastly outweigh the disadvantages of lost deductions”. See Melz, supra n. 112, at p. 160.


159. ES: ECJ, 25 July 1991, Case C-202/90, Ayuntamiento de Sevilla v. Recaudadores de Tributos de las Zonas primera y segunda, paras. 11-16, ECJ Case Law IBFD. As highlighted by Advocate General Tesauro in that case, “the tax collector bears the entire economic risk in so far as any taxes he fails to collect translates into a loss of earnings, which would not be the case if he were bound to the commune by a contract of employment since in that case he would still be paid whether or not he collected the taxes”. See the Advocate General’s Opinion in Recaudadores de Zonas (C-202/90), para. 6.
that he did not bear any economic risk but received a fixed monthly salary and an annual holiday payment from his company regardless of his company’s actual financial situation. In a sense, his salary depended on his company’s decisions.\textsuperscript{160}

As stated, the relationship between a sharing economy platform and its users is not, generally, that of employment.\textsuperscript{161} In principle, individual service providers are fully independent parties. The platform supplies them only intermediation services. By contrast, the underlying service (e.g. accommodation or transportation) is supplied to the final consumer exclusively by the individual service providers. As a result, three transactions occur: the first between the platform and the service provider, the second between the platform and the service recipient, and the third between the service provider and the final recipient of those services. At least, this is what most platforms claim in their own terms of service.\textsuperscript{162}

Economic reality, however, can easily displace contractual fiction. If, in fact, the actual relationship between a sharing economy platform and its users turns out to resemble more that existing between an employer and its employees, then the latter cannot be considered taxable persons for VAT purposes. Both the findings of the ECJ and the conclusions of the Advocate General Szpunar in the non-tax case \textit{Uber Systems Spain} point right in that direction.\textsuperscript{163} In particular, the Advocate General reasoned that “drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform, without which it would have no sense”, which translates into the fact that “Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services”.\textsuperscript{164} However, it seems that each specific business model needs to be examined on its own merits,\textsuperscript{165} i.e. following a case-by-case assessment

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\item[160] NL: ECJ, 18 Oct. 2007, Case C-355/06, J.A. van der Steen v. Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht, paras. 22-26, ECJ Case Law IBFD.
\item[161] European Commission, Value Added Tax Committee, \textit{supra} n. 122, at p. 7.
\item[162] For instance, in its terms of service (accessed 8 Apr. 2018), Uber claims the following (in capital letters): “you acknowledge that your ability to obtain transportation, logistics and/or delivery services through the use of the services does not establish Uber as a provider of transportation, logistics or delivery services or as a transportation carrier”.
\item[165] What has been found for Uber is not, in fact, necessarily applicable to other sharing economy platforms. Notably, the Spanish Commercial Courts found that Airbnb and BlaBlaCar were mere intermediaries that supply an electronic service to their users and that do not take part in the underlying service. See
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that considers cumulatively whether or not a service provider acts under the direction of a platform.166

The consequence of the application of this “primacy of facts” doctrine (i.e. a doctrine that looks more at “economic reality” rather than just at contractual obligations) is that not only the intermediation service, but also the underlying service would be recharacterized as if it were supplied directly by the sharing platform through its bogus independent contractors. The platform would therefore have to account for VAT also in respect of the underlying service. As stated above, under this scenario, there would be only two transactions (or, alternatively, a single composite supply), both of which between the platform and the end consumer: the first for the use of the app, the second for the underlying service. By contrast, no supply would exist between the platform and the individual service provider, since the relationship of employment makes it irrelevant for VAT purposes.

Moreover, where a similar recharacterization occurs, a question would arise in respect of the VAT originally charged by the platform to the individual service provider for the app service. As stated, this supply is to be disregarded for VAT purposes, since it does not entail “private” but “productive” consumption. Only the underlying service is therefore to be subject to VAT, since it is the sole operation involving a purchase made by a final consumer. This stand was taken by the ECJ in Fillibeck, in which the Court held that the provision of free transport by an employer to its employees was neither for the private use of its employees nor for purposes other than those of its business, given that the peculiar management of the firm required that. In addition, the Court found that “the personal benefits derived by employees from such transport appear to be of only secondary importance compared to the needs of the business”.167 From this, one might conclude that the app service is used in the context of a platform’s business or, at least, that the personal benefits derived from it by the service provider are negligible compared to the needs of the platform and, therefore, no VAT should be charged on that service.

Another significant drawback resulting from considering individual service providers as a platform’s employees is that the platform would be unable to deduct the input VAT on the purchases made by its users. In fact, assets through which sharing activities are carried out usually belong to the service providers. As employees, however, they are not taxable persons and therefore also not entitled to deduct any input VAT.168 This would generate a cumulative or cascade effect, which runs afool of a central tenet of VAT, i.e. that it should be neutral for

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168. Against this background, the platform might be able to rely on the ECJ’s case law, which, in certain situations, has considered two or more transactions to constitute a “distinct whole”. See, e.g., UK: ECJ, 13 Dec. 2011, Case C-235/00, Commissioner of Customs & Excise v. CSC Financial Services Ltd, para. 25, ECJ Case Law IBFD.
Non-recoverability of input VAT by a platform would, in fact, affect its business decision. Notably, in order to minimize its tax liability, a platform might be induced to restructure its business, e.g. by providing individual suppliers with the assets used in the furtherance of the underlying service.

4.2.3. Registration thresholds

Another key element to duly take into account attains to registration thresholds. Registration thresholds aim to set the minimum level of business activity that is relevant for VAT purposes. Only a person above that minimum has to register and account for VAT. A business that does not pass the threshold, instead, does not have to register, although it may generally opt to do so. In a sense, it is considered an exempt (rectius: out-of-scope) supplier, with the consequence that both its output and input supplies would be disregarded for VAT purposes. As a yardstick for measuring the level of business activity, a person’s annual turnover, exclusive of VAT, is generally used. Registration thresholds vary consistently among Member States, though. High registration thresholds are problematic from the point of view of neutrality. Moreover, the loss of revenue for the state can only partially be recouped by the savings in terms of administrative and compliance costs. Finally, differences in registration thresholds across Member States generate significant market distortions.

169. The “deduction system must be applied in such a way that its scope corresponds as far as possible to the sphere of the taxable person’s business activity”. See NL: ECJ, 8 Mar. 1988, Case C-165/86, Leesportefeule “Intiem” CV v. Staatssecretaris van Financiën, para. 14. This problem is acknowledged in almost every VAT system. For a discussion, see Schenk et al., supra n. 59, at p. 90.

170. This effect is called “vertical integration”. For instance, Uber might be VAT-induced to provide its drivers with the cars used for their rides or, in the long run, even to dispense with drivers altogether and veer toward autonomous vehicles. This contradicts the fact that VAT shall not affect business choices but treat economically equivalent situations in the same manner.

171. Eventually, small businesses may find it convenient to register if they make supplies to registered taxpayers, as the latter generally limit their acquisitions to those supplied by taxable persons in respect of which input tax can be claimed. The situation is opposite where a small business’s supplies are mainly made to final consumers.


173. For an overview, see F. Annacondia, VAT Registration Thresholds in Europe, 28 Intl. VAT Monitor 6 (2017), Journals IBFD.

174. This is, for instance, the case of the United Kingdom, which has a general threshold for SMEs of GBP 85,000 (approximately EUR 96,600) and of France, which has an equally high threshold (EUR 82,800) for suppliers in the accommodation sector.

175. Optimal tax administration analysis has, in fact, highlighted that the VAT registration threshold should be set by balancing out collection costs against the marginal value of additional tax revenues. See, e.g., M. Keen & J. Mintz, The Optimal Tax Threshold for Value-Added Tax, 88 Journal of Public Economics 3, pp. 557–596 (2004).

176. Notably, under the current VAT rules, as interpreted by the ECJ (AT: ECJ, 26 Oct. 2010, Case C-97/09, Ingrid Schmelz v. Finanzamt Waldviertel, para. 71, ECJ Case Law IBFD), SMEs cannot benefit from the exemption in Member States other than the one in which they are established. To put a remedy to this situation, the European Commission has recently launched a proposal that, inter alia, provides for a common definition of SMEs, applicable to all enterprises with an annual turnover no higher than EUR 2 million and sets a maximum exemption threshold common to all Member States equal to EUR 85,000. See European Commission, Proposal for a Council Directive amending Directive 2006/112/EC on the Common System of Value Added Tax as regards the Special Scheme for Small Enterprises, COM(2018) 21 final, EU Law IBFD.
In the sharing economy, the ability of an unregistered business to make de facto exempt supplies plays a critical role. Given the low amount of their annual turnover, in fact, many individual service providers often fall below the VAT registration threshold. This brings them substantial VAT savings and gives them an edge over brick-and-mortar businesses operating in the same sectors.\textsuperscript{177} The principles of fiscal neutrality and equality underlying the EU VAT system would, instead, require that a level playing field is established, in which the sharing economy and brick-and-mortar operators can fairly compete and where market distortions, both inside a country and across different Member States, are limited.\textsuperscript{178} Eventually, a different treatment might be justified by the need to simplify taxpayers’ obligations, but a rule of proportionality shall be valued anyway.\textsuperscript{179}

4.2.4. Interim conclusions

The above considerations show that, in almost every circumstance, sharing economy platforms would qualify as taxable persons for VAT purposes. The only exception in this regard might be constituted by small-sized platforms operating at the local level that do not perform any economic activity because either they provide services for free or there is no market to participate in.\textsuperscript{180}

Likewise, in most situations, with – perhaps – the sole notable exception of whether the service provider receives only a symbolic payment for his activity (but, as seen, the ECJ employs a quite rigorous standard of review in this regard), an individual supplying goods and services through a sharing economy platform would be regarded as a taxable person for VAT. All the conditions spelt out in article 9(1) of the VAT Directive seem in fact to be fulfilled: the individual service provider carries out, independently, an economic activity,

\begin{itemize}
\item \textsuperscript{177} According to the Financial Times, VAT and property tax differentials between sharing economy and conventional businesses in the accommodation sectors “can add up to roughly third of the extra cost of using a London hotel”. The financial newspaper highlights that “VAT and property taxes account for up to 17 per cent of the price of a typical London hotel room after the recovery of VAT paid on costs. The VAT on most Airbnb stays can be as little as 0.6 per cent because the UK only levies the tax when businesses sell more than £83,000 [now GBP 85,000] per year – a threshold reached by very few Airbnb hosts”. V. Houlder, \textit{Airbnb’s Edge on Room Prices Depends on Tax Advantages}, Financial Times (2 Jan. 2017). The use of registration thresholds (especially if high) might create a significant “bunching” of businesses whose turnover is just below the threshold, as a recent UK survey has shown. See UK: Office of Tax Simplification, \textit{Value Added Tax: Routes to Simplification. Presented to Parliament pursuant to Section 186(4)(b) of Finance Act 2016}, p. 6 (2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657213/Value_added_tax_routes_to_simplification_web.pdf (accessed 8 Apr. 2018).
\item \textsuperscript{178} A more levelled field between sharing and conventional businesses has been secured by a Tax Court decision in Australia that, equating Uber drivers to taxi drivers, impeded the former from using the general registration turnover threshold (AUD 75,000) to escape GST obligations. Under the Australian GST Act, business carrying on “taxi travel” are in fact required to register, despite the fact of being below the general registration turnover threshold (secs. 144-5(1) and 195-1 of the GST Act). This is true also with regard to all activities of the person providing taxi travel (being a taxi driver has therefore a sort of “knock-on” effect). See AU: Federal Court of Australia, 17 Feb. 2017, \textit{Uber B.V. v. Commissioner of Taxation}. For a comment, see R. Millar, \textit{UberX Drivers Supply Taxi Travel and so Must Be Registered for GST}, 6 World Journal of VAT/GST Law 1, pp. 47-54 (2017).
\item \textsuperscript{179} Mirrlees et al., \textit{supra} n. 57, at ch. 7.
\item \textsuperscript{180} It is submitted that the condition that the service is provided for free must be ascertained carefully. In fact, even in cases where the use of a platform is apparently free of any charge, as the recent scandal involving Facebook and Cambridge Analytica has shown, a platform might be making money either from publicity or from the secondary use of the users’ data, i.e. by compiling such data and making it available to other traders for the promotion of their own goods and services. See S. Pfeiffer, \textit{VAT on “Free” Electronic Services?}, 27 Intl. VAT Monitor 3 (2016), Journals IBFD.
\end{itemize}
irrespective of the purpose or results of that activity. The conclusion might eventually differ (i) where an individual is not to be found as sufficiently independent, so that not only the intermediation service, but also the underlying service, would be deemed to be supplied by the platform, (ii) where that individual does not act in his professional capacity or (iii) if his annual turnover remains below the registration threshold.

However, each specific situation needs to be examined carefully. In particular, it is necessary to ensure that differences in the VAT treatment provided to a sharing economy and a more conventional activity do not mark a break with the principles of neutrality and equality that lie at the foundation of both the European Union and its VAT system. Notably, the impossibility for a platform to deduct the input VAT on the purchases made by its users, following a recharacterization of the latter as employees of the former, might well be a source of market distortions and, at the same time, constitute a breach of the non-discrimination obligation. The same holds true with respect to a registration threshold, which might be exploited by a platform, relying on many individual service providers falling below it, to gain a competitive advantage over comparable conventional ventures. 181

A distinction between a sharing economy and a more conventional activity would eventually be justified only if and to the extent that the different treatment provided appears reasonable and proportionate, in the sense that it passes the tests of suitability and necessity, and it aims at simplifying the application of VAT, in terms of reducing administration and compliance costs. For instance, a measure of VAT simplification that, however, also cherishes the principles of neutrality and equality, is represented by the European Commission’s proposal, which aims to ease the VAT burden on SMEs involved in cross-border trade. Although its actual implementation would remain optional for Member States, the proposed provision is not, in fact, only designed for a specific sector of the economy (such as digital or sharing economy activities). Rather, simplification measures are extended to all enterprises fulfilling the objective requirements (i.e. the annual turnover) established therein.

Admittedly, striking the appropriate balance between such conflicting necessities is not, however, an easy task.

4.3. Taxable transactions

Under article 2(1) of the VAT Directive, four transactions are relevant for VAT:
(1) the supply of goods for consideration;
(2) the supply of services for consideration;
(3) the intra-Community acquisition of goods; and
(4) the importation of goods.

Each of these transactions is defined in articles 14 to 30 of the VAT Directive. Notably, article 14(1) defines a supply of goods as the transfer of the right to dispose of tangible property

181. The abusive character of a practice consisting in splitting up the activities performed by a single undertaking among several taxable persons, so that each of them would benefit from a special scheme, has long been acknowledged in the VAT literature. See, e.g., European Communities Commission, Explanatory Memorandum to the Proposal for a Sixth Council Directive on the Harmonization of Member States concerning Turnover Taxes – Common System of Value Added tax: Uniform Basis of Assessment, p. 8, COM(73) 950 final, 20 June 1973 (Bulletin of the European Communities, Supplement 11/73).
as owner. The supply of services is instead defined by article 24(1) of the VAT Directive only in the negative, i.e. as “any transaction which does not constitute a supply of goods”.

4.3.1. Electronically supplied services

A distinct category of services is constituted by electronically supplied services. Article 7(1) of Implementing Regulation 282/2011 contains a definition of electronically supplied services. The definition requires the fulfilment of four conditions:

1. the services need to be delivered over the Internet or an electronic network;
2. they have to be essentially automated;
3. they must involve minimal human intervention; and
4. they shall be impossible to carry out in the absence of information technology.

The second paragraph of article 7 and annex I of Implementing Regulation 282/2011 provide an illustrative list that, inter alia, includes: website hosting, distance maintenance of programmes, supplies of software and other digitalized products related to text, images, music, information and games. The list is not exhaustive, so that future technological developments can equally be taken into account.

Services provided by sharing economy platforms can well constitute electronically supplied services, since they are essentially automated, involve minimal human intervention and are impossible to ensure in the absence of information technology.\(^{182}\) In this respect, no general conclusion can be drawn, but each sharing economy model has to be considered on its own merit. As a result, while in Uber Systems Spain, the Advocate General Szpunar found that Uber does not carry out “an information society service”, but rather it provides a composite supply where the supply of transport “constitutes, from an economic perspective, the main component”,\(^{183}\) a different conclusion may be reached in the case of other sharing economy platforms, e.g. home-sharing platforms like Airbnb, whose business model seems to be more akin to that of a traditional intermediary. Notably, in its communication “a European Agenda for the Collaborative Economy”, the Commission pinpointed three criteria to draw this distinction, that is: (i) whether the platform sets the final price to be paid by users or merely recommend it; (ii) whether it drafts all the key contractual terms that determine the contractual relationship between the individual service providers and the recipients of that service; and (iii) whether it owns the key assets used to provide the underlying service. The Commission has thus concluded that all these “are strong indications that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service (in addition to an information society service)”. Other – although less

\(^{182}\) For the assessment of the notion of “minimal human intervention”, the VAT Guidelines stipulate that what counts is the involvement of the supplier and not that of the customer or even that of a third party linked with the service supplied by the former. See European Commission, Value Added Tax Committee, taxud.c.1(2016)922288 – Working Paper 896, Matters Concerning the Implementation of Recently Adopted EU VAT Provisions, p. 2 (9 Feb. 2016), available at https://circabc.europa.eu/sd/a/e263d4ea-78b8-426b-a548-c5d2d73ae4f6/896%20-%20Electronically%20supplied%20services;%20minimal%20human%20intervention.pdf (accessed 8 Apr. 2018). It is worth noting that whether the service provided by a platform is to be qualified as an “intermediary service” or, instead, an “electronically supplied service” is capable of triggering, in the case of a B2C transaction, the application of different place of supply rules. For a discussion, see M.M.W.D. Merkx, VAT and E-Services: When Human Intervention Is Minimal, 29 Intl. VAT Monitor 1 (2018), Journals IBFD.

\(^{183}\) Advocate General’s Opinion in Uber Systems Spain (C-434/15), paras. 71-72.
relevant – criteria may equally be taken into account, such as, for instance, “if the platform incurs the costs and assumes all the risks related to the provision of the underlying service” or “if an employment relationship exists between the collaborative platform and the person providing the service in question”.\textsuperscript{184} By contrast, the sheer fact that the platform assists the individual providers in the performance of the underlying service does not seem enough to hold that the platform is also performing that service.

\textbf{4.3.2. For consideration}

Article 2(1) (a) and (c) of the VAT Directive limits the application of VAT to supplies of goods and services effected “for consideration”. Accordingly, subject to a number of exceptions, a supply made other than for consideration falls outside the scope of VAT.\textsuperscript{185} In \textit{Hong Kong}, the ECJ held that a person who habitually provides services free of charge is not a taxable person at all. Instead, that person must be assimilated to a final consumer.\textsuperscript{186} A confirmation of this is given by articles 17 and 27 of the VAT Directive, which stipulate that certain supplies of goods and services that are not made for consideration must, nonetheless, be treated as if they were so effected.\textsuperscript{187} Likewise, a payment, not being the counterpart of an obligation, falls outside the scope of VAT.\textsuperscript{188} Indemnities constitute a notable exam-
ple of payments made in the absence of a supply. In Société thermale, concerning advance payments made by clients for reserving hotel rooms and retained by the hotelier as fixed compensation for the loss incurred following a client’s “no-show”, the ECJ ruled that such “deposits in the hotel sector … serve … to mark the conclusion of the contract, to encourage its performance and, as the case may be, to provide fixed compensation. […] Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes”.

VAT is in fact based on the *quid pro quo* principle, i.e. on reciprocal synallagmatic performances.

Lastly, in order to determine whether an amount paid qualifies as a consideration for a supply, it must be examined whether “consumption”, as envisaged in the VAT Directive, has occurred. In Mohr, the ECJ ruled that there is no consumption in the case of “an undertaking given by a farmer that he will discontinue his milk production.”

That being said, the VAT Directive does not, however, provide a definition of what “consideration” really means. In the absence of a definition of “consideration”, the Court has therefore been strained to find one. In Coöperatieve Aardappelenbewaarplaats, the ECJ clarified that “consideration” is an independent concept of EU law. It also ruled that, in order to be subject to VAT, (i) a direct link must exist between the service provided and the consideration received; and that (ii) the consideration must be capable of being expressed in money and constitute a “subjective value”, that is to say, the value actually received by a party, and not a value estimated according to objective criteria.

Neither does the VAT Directive explain what a “direct link” is. The concept of “direct link” is only mentioned passim in article 73 of the VAT Directive, which determines whether or not subsidies should be included in the taxable amount. Nonetheless, the need to establish a direct link between the service provided and the consideration received has been confirmed by the ECJ. In Apple and Pear, concerning activities carried out by a council funded by mandatory charges imposed upon commercial growers of apples and pears, the ECJ considered that there was no direct link between the benefits received by the individual customers and the benefits accrued generally to the sector or the industry as a whole. In his opinion,

189. FR: ECJ, 18 July 2007, Case C-277/05, Société thermale d’Eugénie-les-Bains v. Ministère de l’Économie, des Finances et de l’Industrie, paras. 31-32, ECJ Case Law IBFD. The ECJ, however, reached a different conclusion in Lubbock Fine (UK: ECJ, 15 Dec. 1993, Case C-63/92, Lubbock Fine & Co. v. Commissioners of Customs and Excise, ECJ Case Law IBFD), although involving a similar situation. For a critical comparison of the two decisions, see J. Swinkels, *Cancellation Charges and Compensations under EU VAT*, 19 Int. Vat Monitor 6, pp. 430-437 (2008). In Air France – KLM (FR: ECJ, 23 Dec. 2015, Cases C-250/14 and C-289/14, Air France-KLM and Hop!-Brit Air SAS v. Ministère des Finances et des Comptes Publics, ECJ Case Law IBFD), the Court ruled that payments made by customers for a flight that they did not take were not to be treated as a compensation for damages, which is not subject to VAT, but rather constituted the consideration for a taxable supply.

190. In Société thermale (C-277/05), para. 15, Advocate General Maduro made reference to the “reciprocal synallagmatic link between the service and the payment made by the customer”.


192. Coöperatieve Aardappelenbewaarplaats (154/80), paras. 12-13. The fact that the price constitutes a subjective value is a direct consequence of the legal aspect of the neutrality principle as enshrined in art. 1(2) VAT Directive, i.e. VAT being “exactly proportional to the price of the goods and services”. This circumstance consents to include under the scope of VAT also goods and services supplied for a “political price”.


194. Apple and Pear (102/86), para. 14. According to Simons, supra n. 191, at p. 90, in both Coöperatieve Aardappelenbewaarplaats and Apple and Pear, “the verdicts would be better argued and more understandable if they were based on the absence of any kind of consumption by the receiver”. Against this
the Advocate General Slynn found two indications that the levy was not, in any real sense, a payment directly linked to the service provided. The first indication was the lack of any consensual element in the payment of the levy to the council. The second stemmed from the lack of control by the individual grower over the activity of the council. Notably, the council was not in the position to ensure that those who did not pay did not also benefit, even though it was in a position to demand payment. Apple and Pear shows that activities carried out in the general interest, rather than in the interest of an identifiable group of recipients, are not subject to VAT.

In Tolsma, the ECJ further refined the concept of “direct link”, holding that a supply is “for consideration” only if a legal relationship exists between the provider of the service and the recipient, in a way that the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient. Thus, “if a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them”. Moreover, the Court contends that, for a direct link to exist between the services provided and the consideration received, the payment does not have to be related to a personalized supply of services at a specific time carried out at the quest of a customer. Such a clarification is provided, inter alia, in Kennemer Golf, La Rayon d’Or and Asparuhovo, where the fact that the services performed were neither defined in advance nor personalized, and that the payment was made in the form of a lump sum, did not impede the Court to establish a direct link between the supply of services made and the consideration received, since its amount was determined in advance on the basis of specific criteria. It can therefore be held that a transaction is not outside the scope of VAT simply because the consideration is paid on a subscription basis. Indeed, nor does the VAT Directive contain any disposition providing different treatment for flat-rate periodic and one-time payments.

Eventually, this conclusion can be altered when no correlation exists between the size of the levy and the benefits received. Notably, in Apple and Pear, the Court found that “no relationship existed between the level of the benefit which individual growers obtained from

remark, Van Hilten, supra n. 68, at p. 6, instead argues that “in the Apple and Pear case … consumption does in fact takes place for VAT purpose”, since, “although the subscribers/contributors may benefit as a group rather than as individuals form the activities of the organization they subscribe, consumption can … be deemed to occur because of the group of the beneficiaries being limited and, therefore, identifiable”.

197. NL: ECJ, 3 Mar. 1994, Case C-16/93, R.J. Tolsma tegen Inspecteur der Omzetbelasting Leeuwarden, para. 14, ECJ Case Law IBFD. Later on, however, the Court observed that making the existence of a legal relationship in the Tolsma sense depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of VAT, in that it would have the consequence that transactions subject to VAT could vary from one Member State to another because of the different legal understanding of the notion of reciprocal performance. See UK: ECJ, 17 Sept. 2002, Case C-498/99, Town & County Factors Ltd v. Commissioners of Customs & Excise, ECJ Case Law IBFD.
198. Tolsma (C-16/93), para. 16.
the services provided by the council and the mandatory charges they were obliged to pay”.

A similar reasoning was applied by the ECJ in *Commission v. Finland*, where no direct link was found between the legal aid services provided by public offices and the payment to be made by the recipients, since “although this part payment represents a portion of the fees, its amount is not calculated solely on the basis of those fees, but also depends upon the recipient’s income and assets. Thus, it is the level of the latter – and not, for example, the number of hours worked by the public offices or the complexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible. [...] The part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient’s income and assets, the less strong the link with that value will be”.

In light of the foregoing, it might therefore be concluded that an imbalance in the taxable amount of two transactions matters. However, distinguishing between when there is a consideration, although calculated on a lump-sum basis, from when, instead, no consideration exists because the supply and the amount of the remuneration received are imbalanced, is admittedly not clear-cut. This emerges quite starkly from *Geraets-Smits*, a case involving payments for medical services covered by a social security scheme, where the findings of the Advocate General Colomer and those of the Court in this regard diverged. The Advocate General in fact contended that no consideration was paid since the charge was calculated on a generic arithmetical formula. By contrast, the ECJ concluded for the existence of a consideration, although calculated on a flat-basis.

For a direct link to exist, a timing difference between the supply of a service and its payment is irrelevant. In *Serebryannay vek EOOD*, concerning a barter transaction where a taxable person assumed the obligation to fit out and refurnish an apartment in return for the right to use the apartment for a certain period, the ECJ indeed held that “the fact that the supply of services in question will benefit the owner of the apartment at issue only after the contract has expired does not alter anything in that regard”.

The above case law shows that, for a transaction being subject to VAT, a consideration either in money or in kind must be present. First taking into account the intermediation

200. *Apple and Pear* (102/86), para. 15. Similarly, in *Fillibeck* (C-258/95), para. 16, the Court considered that "since the work to be performed and the wages received are independent of the use or otherwise by employees of the transport provided to them by their employer, it is not possible to regard a proportion of the work performed as being consideration for the transport services”.

201. FI: ECJ, 29 Oct. 2009, Case C-246/08, *Commission of the European Communities v. Republic of Finland*, paras. 48-49, ECJ Case Law IBFD. In its opinion, Advocate General Colomer held that “there is therefore a certain connection between the service and the amounts” paid by the recipient of the legal aid, “but that link is neither direct nor does it have the intensity which the case-law requires in order to identify a service effected for consideration, because it is ‘contaminated’ by the taking account of the client’s income and assets. The more modest the person’s income, the less direct the aforementioned link will be”. See the Advocate General’s Opinion in *Commission v. Finland* (C-246/08), para. 49.


204. BG: ECJ, 26 Sept. 2013, Case C-283/12, *Serebryannay vek EOOD v. Direktor na Direktsia “Obzhalvane i upravlenie na izpalnenieto” – Varna pri Tsentralno upravlenie na Nationalna agentzia za prihodite*, para. 41, ECJ Case Law IBFD. For a comment, see H. van Kesteren, *Taxable Transactions*, in *CJEU – Recent Developments in Value Added Tax*, pp. 111-114 (M. Lang et al. eds., Linde 2014). A peculiarity of this case was that, initially, the parties agreed to make two reciprocal supplies for free and, only later, they concluded a barter contract.
service provided by a sharing platform, it is safe to conclude that, almost in every case, such a service would be subject to VAT. Only where the platform does not charge any fee for its services, the conclusion may eventually differ. As clarified in Hong Kong, where a supplier provides its services free of charge, that supply remains outside the scope of VAT. Eventually, whether a service is effectively supplied by a platform for free may be difficult to assess, especially where users agree to give that platform access to their personal data.\textsuperscript{205} In this situation, even if a sufficiently direct link is established, not least since, according to article 25 of the VAT Directive, the supply of a service can be concluded through an “obligation to refrain from an act, or to tolerate an act or situation”, the transaction might not eventually be subject to VAT. Where, in fact, users (i) do not share personal information on a social media platform; (ii) do not upload pictures; or (iii) restrict the use of personal data by technical means, it can be deemed that no direct link exists, since the consideration paid is not calculated on the supply received.\textsuperscript{206}

As for the transactions between users, it is necessary to split the analysis into different layers. As a preliminary point, it can be assumed that supplies of goods and services provided free of charge, i.e. without remuneration, paid either in money or in kind, shall not be subject to VAT. Only when a consideration is present, the transaction would in fact be relevant for VAT purposes. Further, the consideration can equally be monetary, as in the case of Uber and Airbnb transactions, or consist in an exchange of goods and services. In the case of barter exchanges, the transactions can be concluded based on two different schemes, either in a direct form, where goods or services are exchanged between users directly in return for other goods or services, so that there would be two transactions at the users’ level, both of which are relevant for VAT, or through a pool arrangement, whereby goods or services are contributed by individual users into the common pool with the right to receive other products provided into that same pool by other users. In the first scenario, arguably, a direct link can be deemed to exist between the two supplies. Still, such a direct link would be broken where the benefits are “clearly unrelated to the amount of contribution, as in the case of a holiday home exchange relating to homes for which the market renting fees clearly do not match.”\textsuperscript{207} In the case of a pool arrangement, the assessment is less straightforward instead. Following Tolsma, the establishment of a direct link depends on the existence of a legal relationship between the service provider and the customer. In a pool arrangement, such as that occurring on a platform like GuesttoGuest, where a user, by hosting another peer, receives a credit spendable inside the same community of users, it can be maintained

\textsuperscript{205} OECD, supra n. 36, at p. 99, underlines the difficulty “to characterize for tax purposes a person or entity’s supply of data in a transaction”, i.e. “as a free supply of a good, as a barter transaction, or some other way”. According to Advocate General van Gerven in Empire Stores (UK: Opinion of Advocate General van Gerven, 16 Mar. 1994, Case C-33/93, Empire Stores Ltd v. Commissioners of Customs and Excise, para. 15, ECJ Case Law IBFD), the consideration received by a supplier can well consist in “the obtaining of personal … information concerning the customer”. Against this understanding, Farmer & Iyal, supra n. 114, at p. 123 argued that “in the absence of other factors the mere fact of agreeing to be a customer cannot constitute additional consideration over and above the price paid for any supplies”. Nevertheless, the Advocate General’s remarks seem to be supported by further evidences. For instance, the draft of the Digital Economy Directive stipulates that remuneration does exist even where “a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data”. See European Commission, Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, pp. 24-25, COM(2015) 634 final.

\textsuperscript{206} See Pfeiffer, supra n. 180; European Commission, Value Added Tax Committee, supra n. 122, at pp. 9-10.

\textsuperscript{207} European Commission, Value Added Tax Committee, supra n. 122, at pp. 9-10.
that no direct link exists. Against this conclusion, it, however, needs to be observed, in line with the considerations laid down by the ECJ in *Town & County Factors*, that making the existence of a legal relationship depend on the obligations of the provider of the service being legally enforceable would ultimately undermine the effectiveness of VAT. In the end, it seems that, in order to establish whether a transaction shall be subject to VAT, one cannot escape carefully examining all the circumstances of a given situation.

### 4.3.3. Barter transactions

As stated, payments for goods and services do not necessarily have to be monetary.\(^ {208}\) Even where a consideration is constituted by the supply of goods and services, that supply would be subject to VAT. After all, barter involves expenditure.\(^ {209}\) More than that, the neutrality of VAT would have been undermined if a barter payment did not qualify as consideration.\(^ {210}\) While the value of the products supplied must be capable of being expressed in money,\(^ {211}\) ascertaining it is a distinct and subsequent exercise. It is worth noting that, in a barter transaction, the two different supplies must be considered separately for the purposes of VAT, so that each of them is subject to the tax independent of the other. The rationale for splitting a single transaction in two separate and independent supplies can be explained by the need to grant each party the opportunity to deduct its input tax.\(^ {212}\)

That being said, in the sharing economy, three situations can be distinguished with regard to barter transactions. If both persons engaged in a barter transaction are taxable persons, each party has to account for VAT. Where, instead, a transaction is concluded between a taxable person and a non-taxable person, only the taxable person has to do that. Notably, this might occur where the app services are provided by a platform to its users in return for obtaining access to their personal data. Under the third and last scenario, a transaction might take place between two non-taxable persons. In this event, neither of them has to account for VAT. In fact, their supplies remain outside the scope of VAT. This might be the case of a service swap between two final consumers, where, for instance, the former agrees to cut the grass of his neighbour while the latter, in turn, paints a room in the former’s house.

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\(^ {208}\) The word “payment” in art. 2 Second Directive was replaced by the term “consideration” in art. 2 VAT Directive (2006/112). Apparently, however, such an amendment, which was confined to the English text, did not involved any substantive change and was probably intended only to make it clear that non-monetary payments also needed to be included. In this respect, see the Advocate General’s Opinion in *Apple and Pear* (102/86).

\(^ {209}\) Van Hilten, supra n. 68, at p. 7.


\(^ {211}\) *Coöperatieve Aardappelenbewaarplaats* (154/80), para. 13.

\(^ {212}\) Where a non-monetary transaction occurs between two taxable persons, who are therefore entitled to full input tax credits, the VAT on the non-monetary consideration provided by each party is effectively cancelled out by the input credits allowed to the other. Should the VAT be excessive, even the input credit will be so. A similar circumstance does not occur in respect of transactions in which a party is a non-taxable person, because this person cannot account for VAT on the non-monetary consideration he supplies. This can potentially generate a cascading effect, i.e. VAT charged on an amount including VAT. See R. Millar, *Illusory Supplies and Unacknowledged Discounts: VAT and Valuation in Consumer Transaction*, British Tax Review 2, p. 154 (2003).
4.3.4. Interim conclusions

Various conclusions can be drawn from the above analysis of sharing transactions.

The first conclusion is that the nature of a sharing service largely depends on the economic sector in which a platform operates (Uber is not Airbnb), the business model adopted by that platform (Uber differs from BlaBlaCar just as Airbnb differs from Couchsurfing), and, finally, the peculiar legal and factual conditions under which a business is conducted (the specific relationship between Uber and its drivers or Airbnb and its hosts). Depending on each of these factors, a sharing service might be classified either as an electronically supplied service or, instead, as a service pertaining to a specific economic cluster (e.g. accommodation or transportation). \[213\]

The second remark is that, to be subject to VAT, sharing transactions must be secured in return for a consideration and that, to this effect, a sufficiently direct link needs to be established between a supply and its consideration. In most cases, both conditions would be satisfied. Indeed, a consideration might exist even if users granted a platform access to their personal data (if still in doubt, just look at Facebook’s profit returns). Nevertheless, the link between the supply and its consideration not only needs to be direct, but also sufficiently tight, a condition that might not be fulfilled where, as found by the ECJ in Apple and Pear, the benefits provided are clearly imbalanced or in the case of indirect exchanges in the form of pool arrangement, as it may happen on a platform like Nightswapping.

The third and final consideration is that, especially in the case of barter transactions, a cascading effect (VAT charged on an amount inclusive of VAT) might arise where one of the parties is not a taxable person, due to the circumstance that such a person cannot account for VAT on his supply and, therefore, neither can the taxable person receiving the supply deduct his input VAT, which thus remains “hidden” in the higher price paid by the subsequent customer.

5. Conclusions

Fuelled by the smart technologies that empower the Fourth Industrial Revolution, the sharing economy has quickly emerged as a collection of entirely new but, nonetheless, distinct economic models, which allow individuals to tap into large retail marketplaces as well as to exploit new wage-earning opportunities.

Such a meteoric rise, however, poses several legal challenges. Taxation, in particular, stands out as one of the major areas where current regulations appear to be outpaced or – at the very least – not fully adequate to accommodate such new business realities. Notably, a specific sector of tax law where the application of existing rules is nebulous is VAT. The sharing economy in fact raises several dilemmas in the VAT field, especially with regard to the classification of individuals and transactions.

With an aim to assess the practical feasibility to apply VAT to the sharing economy, the article has first endeavoured to compose a framework of selected tax principles. In particular, in order to apply the EU VAT concepts of “taxable persons” and “taxable transactions” to the sharing economy, the author has relied upon the principles of neutrality, equality, simplicity

\[213\] As stated, specific issues concerning the qualification of services for the application of place of supply rules are not discussed in the present article.
and proportionality. The principle-based analysis conducted above has confirmed the need to apply those basic VAT concepts to the sharing economy and conventional businesses alike, but it has also highlighted the necessity to implement them accurately and in a consistent manner.

The article has then conducted a *de lege lata* analysis of the VAT treatment of the sharing economy, by reviewing the EU VAT concepts of “taxable persons” and “taxable transactions”, and their understanding by the ECJ, the Advocates General, the VAT Committee and the VAT doctrine.

In particular, as regards the determination of “taxable persons” under EU VAT, the analysis has shown that, while platforms generally qualify as such, for individuals supplying goods and services through them, it becomes necessary instead to examine carefully whether they effectively carry out, independently, an economic activity. More specifically, an individual service provider cannot be regarded as a taxable person where his relationship with a platform shows a lack of independence. Should this be the case, then not only the intermediation service, but also the underlying service would be considered as if it is supplied by the platform. The contribution has also highlighted that an individual service provider cannot be considered a taxable person where either his activity is merely occasional or he does not act in a professional capacity, both conditions to be assessed in light of all the facts and circumstances of the case. Eventually, it might even happen that a business, although in principle subject to VAT, is de facto exempt because its annual turnover rests below the registration threshold.

For being subject to VAT, a consideration, either in money or in kind, needs to be paid. However, in a concrete situation, assessing the fulfilment of this condition might not be so clear-cut as stipulated theoretically, as shown by the case of an intermediation service provided by a sharing platform in return of access to the personal data of its users or in the case of a concealed barter transaction. Eventually, the circumstance that the consideration for the services provided by the platform is not calculated on the basis of the actual use of those services by the platform’s subscribers might lead to exclude that a transaction shall be subject to VAT. Additional doubts arise in the case of swaps of products between users. Especially in situations involving a pool arrangement, it is in fact doubtful whether a sufficiently direct link is established between a supply and its consideration. Indeed, there is no one-size-fits-all approach in this regard, rather all the circumstances of a case need to be carefully examined.

In the end, the article has demonstrated that the seeds of change have already been sown. As seen, the 21st century economic and social landscapes are evolving at a fast pace. The sharing economy, which is part of the ongoing digital shift, is set to stay. Even VAT pundits had better prepare themselves and keep watching this – growing – space.