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**How should peer-to-peer housing and  
transportation services provided via sharing  
economy platforms be treated under the VAT  
directive?**

by

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## **Abstract**

Over the last ten years, sharing economy has become very popular among European citizens. A tremendous transaction value is generated with peers providing their services through sharing economy platforms, such as Uber and Airbnb. Due to this, the line between service providers and service recipients has become blurred, which raises challenges to the treatment of those services under the VAT Directive.

The present research is examining specific questions arising from the application of the VAT Directive to peer provided services. The relevant provisions from the VAT Directive are discussed in detail and interpreted with the help of jurisprudence. This interpretation is then applied to five different sharing economy platforms in the transportation and accommodation sector.

## **Preface**

I would like to thank my supervisor Marta Papis-Almansa for her helpful feedback during the process of writing this thesis and for the guidance and knowledge she has provided us within the last academic year.

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Last but not least, I want to express my gratitude to Devid and my family, for their unconditional support, faith and inspiration during the last year.

## Abbreviation list

CJEU	Court of Justice of the European Union
e.g.	for example
EU	European Union
ff.	and the following (pages/paragraphs)
para.	paragraph
paras.	paragraphs
pg.	page(s)
EC	European Commission
sec.	section
MS	Member State(s)
subpara.	Subparagraph
the Court	Court of Justice of the European Union
VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347 of 11 December 2006

# 1. Introduction

## 1.1. Background

With the introduction of the world wide web in the mid 1990s, the door was opened for new business models and commercial ideas. It was the technological evolution and the economic development in the 2000s shaped by the economic crisis, but also the political movement towards more de-politicised states added by the change in consumer behaviour to a more and more ‘sharing is caring’ mentality, which made the success of sharing economy possible.<sup>1</sup>

Today, the range of services offered via various sharing economy platforms is extensive. They reach from household services, transportation and accommodation services up to raising funds for new business ideas, in the sense of crowdfunding. In 2015, the participation on sharing economy platforms was approximately 5%<sup>2</sup> but a more recent study from 2017 has shown that 27.8%<sup>3</sup> of the European population have used sharing economy platforms as service recipients and/or providers. This immense growth in user base is also seen in the estimated transaction value for the sharing economy sector. In 2015, the total transaction value amounted to €28 billion<sup>4</sup> in the five sharing economy key sectors<sup>5</sup>, but it is estimated to reach €570 billion<sup>6</sup> by 2025.

The sharing economy sector has, however, given rise to several questions. Traditionally, there was a strict separation between service providers, acting as economic operators, and consumers, who receive the services. Nowadays,

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<sup>1</sup> Myriam Ertz, Fabien Durif and Manon Arcand, ‘An Analysis of the Origins of Collaborative Consumption and Its Implications for Marketing’ (2017) *Academy of Marketing Studies Journal* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2799862](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799862)> accessed 8 May 2018, pg. 5 ff.

<sup>2</sup> Ipsos on behalf of ING, ‘What’s mine is yours – for a price. Rapid growth tipped for the sharing economy’ (2015) <[https://www.economics.com/ing\\_international\\_surveys/sharing\\_economy\\_2015/](https://www.economics.com/ing_international_surveys/sharing_economy_2015/)> accessed 8 May 2018, pg. 4.

<sup>3</sup> Alberta Andreotti, Guido Anselmi, Thomas Eichhorn, Christian Pieter Hoffmann, Sebastian Jürss and Marina Micheli, ‘European Perspectives on Participation in the Sharing Economy’ (2017) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3046550](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046550)> accessed 8 May 2018, pg. 96.

<sup>4</sup> Robert Vaughan and Raphael Daverio, ‘Assessing the size and presence of the collaborative economy in Europe’ (2016) <<http://ec.europa.eu/DocsRoom/documents/16952/attachments/1/translations>> accessed 8 May 2018, pg. 7.

<sup>5</sup> Namely peer to peer accommodation and transportation, on-demand household and professional services and collaborative finance; see: Vaughan and Daverio (n. 4), pg. 7.

<sup>6</sup> PWC ‘Europe’s five key sharing economy sectors could deliver €570 billion by 2025’ (PWC, 27 June 2016) <<https://press.pwc.com/News-releases/europe-s-five-key-sharing-economy-sectors-could-deliver--570-billion-by-2025/s/45858e92-e1a7-4466-a011-a7f6b9bb488f>> accessed 8 May 2018.

due to the sharing economy, anyone can become a service provider by using their private properties to earn some extra income. These blurred lines raise challenges for certain areas of law, mainly competition law and labour law, but also direct and indirect tax law.<sup>7</sup>

In the Member States (*MS*) of the European Union (*EU*) the consumption taxes represent 28.7% of the overall tax revenue.<sup>8</sup> Of this amount, over 50% is derived from the value added tax (*VAT*).<sup>9</sup> The nature of VAT, being a general tax on consumption with the goal to tax all end-consumption, has been causing difficulties in the assessment on how to treat the services provided via sharing economy platforms. The arising problem is that anybody can become a service provider but at the same time acts, when purchasing the product, as an end-consumer. This double-sided participation in the market raises the question on how to treat the services for VAT purposes, also under consideration of the general principle of fiscal neutrality.<sup>10</sup> Nevertheless, taxation should not hinder new technologies or business ideas, but rather be supportive of entrepreneurship.

The question of how, and to what extent, people providing services via sharing economy platforms fall into the scope of the VAT Directive has already been discussed by the European Commission (*EC*)<sup>11</sup>, the VAT Committee<sup>12</sup> and the European and Social Committee<sup>13</sup>. The outcome of these

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<sup>7</sup> For the treatment of sharing economy in other fields of law and direct taxation see e.g.: Vassilis Hatzopoulos and Sofia Roma, 'Caring for sharing? The collaborative economy under EU law' (2017) 54 *Common Market Law Review*, 81; Giorgio Beretta, 'Taxation of Individuals in the Sharing Economy' (2017) 45 *INTERTAX*, 2; Martijn Schippers and Constantijn Verhaeren, 'Taxation in a Digitizing World: Solutions for Corporate Income Tax and Value Added Tax' (2018) 1 *EC Tax Review*, 61; Nangel Kwong, 'The Taxation of 'Sharing Economy' Activities' in Ina Kerschner and Maryte Somare (eds.), *Taxation in a Global Digital Economy* (Linde Verlag 2017); Katerina Pantazatou, 'Taxation of the Sharing Economy in the European Union' in Nestor Davidson, Michèle Finck, and John Infranca (eds.), *The Cambridge Handbook of Law and Regulation of the Sharing Economy* (forthcoming) (Cambridge University Press 2018) <<https://ssrn.com/abstract=3091281>> accessed 14 March 2018.

<sup>8</sup> European Commission, 'Taxation Trends in the European Union' (2017) <[https://ec.europa.eu/taxation\\_customs/node/968\\_en](https://ec.europa.eu/taxation_customs/node/968_en)> accessed 10 May 2018, pg. 22.

<sup>9</sup> European Commission, 'Taxation Trends in the European Union', pg. 22 ff.

<sup>10</sup> The principle of neutrality has two sides: On the one hand, enterprises should be relieved entirely of the VAT burden payable or paid in the course of their economic activity. On the other hand it means that goods and services, which are similar and with that in competition with each other, cannot be treated differently for VAT purposes. See Preambles 7 and 30 of the VAT Directive and e.g. Judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paras. 47+48.

<sup>11</sup> European Commission, Value Added Tax Committee, 'VAT treatment of sharing economy' taxud.c.1(2015)4370160 - Working Paper 878; see also European Commission, Value Added Tax Committee, 'VAT treatment of crowdfunding' taxud.c.1(2015)576037 - Working Paper 836.

<sup>12</sup> VAT Committee, 'VAT treatment of sharing economy', taxud.c.1(2016)1162824 – 889.

<sup>13</sup> European Economic and Social Committee, 'Taxation of the collaborative economy', ECO/434-EESC-2017-02946-00-00-ac-tra.

discussions is that the treatment of the services depends on the characteristics of the platform used and how the transaction is fulfilled.

## 1.2. Aim

The purpose of this thesis is to investigate and analyse how peers providing services via sharing economy platforms should be treated under the VAT Directive. The focus is set on services in the accommodation and transportation sector, since these are two of the most used sharing economy sectors in the EU.<sup>14</sup> The provided guidance by the EC and the VAT Committee is very general and only touches upon the different sharing economy services, without going into the specifics or differences between them. This is why the aim of this thesis is to apply the legislation of the VAT Directive<sup>15</sup> with the interpretation guidance, which the Court of Justice of the European Union (*CJEU*) has provided in its past rulings, to specific sharing economy platforms, and to analyse how the chosen platforms should be treated under the VAT Directive.

## 1.3. Method and material

To achieve the aim of this thesis, the traditional legal dogmatic method<sup>16</sup> is applied. The basis for the analysis is the current sources of law, especially the current VAT Directive. The legislation is interpreted with the guidance of the judicial practice, primarily by applying the CJEU's case law, and under consideration of the legal opinions of different EU bodies<sup>17</sup>. Furthermore, also legal doctrine in form of articles, published papers, textbooks and commentaries are consulted and analysed to give a more comprehensive point of view on the legal questions arising. The basis for this thesis is EU law, but national legislations and judgements are consulted when necessary to provide a comprehensive legal analysis of the research question.

## 1.4. Delimitation

Firstly, this thesis was conducted under the assumption that the reader has a background in tax law and VAT, so that the basic concepts of VAT law are not explained and discussed in detail. Secondly, since the research question concentrates on the VAT Directive and to what extent providers of services via sharing economy platforms should be treated under the current EU legislation, national legislations will only be discussed exemplarily. Thirdly, the thesis concentrates mainly on the VAT treatment of peers providing

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<sup>14</sup> Vaughan and Daverio (n. 4), pg. 7.

<sup>15</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347 of 11 December 2006.

<sup>16</sup> See Sjoerd Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014), pg. 17 ff.

<sup>17</sup> Especially concerning the EC, the VAT Committee and the European Economic and Social Committee.

services via very specific accommodation and transportation sharing economy platforms. In this sense, the results drawn from this thesis can only be applied with caution to the different platforms, which were not in the scope of this thesis. Further research should be done on how to simplify the current VAT system for peer service providers, since this is only touched upon in the concluding chapter. Lastly, the issues discussed have been chosen thoughtfully, for being able to investigate the most complex legal issues arising with sharing economy platforms. Accordingly, subsequent legal problems or issues following from the legal qualification of the peers or sharing economy platforms are not discussed.<sup>18</sup>

## 1.5. Outline

To achieve the purpose of this thesis, the following chapter describes how sharing economy platforms work in general. In addition, the specific characteristics of the chosen transportation and accommodation platforms are discussed. In chapter three, the requirements for becoming a taxable person under the VAT Directive are explained, followed by an analysis of the peers providing services via the sharing economy platform and if they can be considered to be taxable persons. Chapter four discusses the taxable transactions with a focus on the role of the sharing economy platforms as intermediaries. Also, the question of whether the accommodation and transportation services, provided by the peers, and the connecting services, provided by the platforms, should be considered as one composite supply is analysed. The following chapter discusses the taxable amount and examines the requirement of consideration by also focusing on barter transactions. In chapter six, the analysis of the treatment of the different sharing economy services is summarised and finally, chapter seven concludes the findings of the thesis.

## 2. What are sharing economy services and how do they work?

### 2.1. General definition and the essential criteria of the sharing economy

The EC has defined sharing economy<sup>19</sup> in its Communication concerning the European agenda for the collaborative economy as being:

*‘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*

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<sup>18</sup> For example: the discussion of how to deduct the input VAT when the car or accommodation is used for private and economic activities is not part of this thesis.

<sup>19</sup> The EC uses the term collaborative economy. These two terms are interchangeable.

*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.'*<sup>20</sup>

In this sense, sharing economy platforms provide individuals an opportunity to offer their services to others. In general, the service providers sign up to the platform and describe the service they want to offer. Normally, the service provider also has the freedom to decide on the price and availability of the service. The offer is published on the sharing economy platform and made available to the public. If a person is interested in purchasing the service, the service provider can be contacted through the platform. Once the two peers have agreed on the exact terms and conditions, the consideration is either paid to the platform, and then transferred to the service provider through the platform, or instantly paid from the service receiver to the service provider. Afterwards, traditionally both peers have the opportunity to review and rate the other party of the transaction, which should help both, prospective service providers and recipients, with their decision if they can also trust the service provider or the service recipient. Consequently, the system itself ensures that the users obey the rules and are trustworthy.

## 2.2. Sharing economy models

### 2.2.1. Uber

Uber<sup>21</sup> was founded in 2009 in the United States of America and is a peer to peer ridesharing platform. Today, Uber is represented in more than 800 cities worldwide.<sup>22</sup> For service recipients, or as Uber calls them, 'riders', to use Uber they have to sign up to the platform and download the mobile application. When they are looking for a ride, their location and the destination they want to go to are typed into the application and Uber recognises the closest driver. An estimation of the fare, which is calculated with a dynamic price model set by Uber, is shown before ordering the ride. In the following the driver has a limited time to accept or decline the ride. With the acceptance, the rider sees the location of the driver, his or her profile and the estimated arrival time. Once the ride is completed, the fare is charged to the bank card deposited by the rider and a receipt is sent to him or her from

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<sup>20</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions – A European agenda for the collaborative economy' COM(2016) 356 final, pg. 3.

<sup>21</sup> 'Get there' (Uber) <<https://www.uber.com/en-AT/>> accessed 26 April 2018.

<sup>22</sup> 'Uber Cities' (Uber Estimator) <<https://uberestimator.com/cities>> accessed 16 May 2018.

Uber, but in the name of the driver, which also includes the local VAT rate. Uber deducts its share, which is approximately 20% of the fee paid by the rider, and pays out the remaining amount to the driver on a weekly basis.

### 2.2.2. Blablacar

Blablacar<sup>23</sup>, founded in 2003 in France, is a carpooling platform which connects over 18 million travellers every quarter.<sup>24</sup> People travelling by car from one destination to another can offer their rides on Blablacar to find passengers. The rides offered via Blablacar mainly cover far distances.<sup>25</sup> The driver decides the remuneration he or she wants to receive from the passenger. Blablacar's policy is that the drivers only charge the costs actually incurring to them to make the trip.<sup>26</sup> When the ride is posted online, the other members and potential passengers searching for rides can contact the driver for details or directly book it. Once the drive is completed, the passengers pay the driver in cash. Blablacar charges the passengers a service fee including VAT. The amount of the service fee depends on the cost contribution that is paid to the drivers.<sup>27</sup>

### 2.2.3. Airbnb

Airbnb<sup>28</sup> is an American company that was founded in 2008 and provides (mostly) short term accommodation rentals. It has almost five million listings in more than 190 countries and has counted more than 300 million arrived guests.<sup>29</sup> Airbnb brings people wanting to rent rooms, houses or apartments together with people having a spare room and wanting to earn some extra money. People who want to rent out their places can sign up to Airbnb for free and list their housing. It is up to the hosts to decide on the price, the applicable house rules and availability. If somebody is interested in renting the accommodation, the host can revise the potential renter's profile and decide if he or she wants to rent out the listed accommodation to the interested person. When the host agrees to the guest and the accommodation is booked, Airbnb collects the payment from the guest via the deposited bank card and forwards it to the host after the check-in of the guest, with a deduction of 3%,

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<sup>23</sup> 'Emma. Blabla. Mum.' (*Blablacar*) <<https://www.blablacar.co.uk/>> accessed 26 April 2018.

<sup>24</sup> 'About Us' (*Blablacar*) <<https://www.blablacar.com/about-us>> accessed 26 April 2018.

<sup>25</sup> 'Frequently Asked Questiona' (*Blablacar*) <<https://www.blablacar.co.uk/faq/question/can-i-commute-with-blablacar>> accessed 10 May 2018.

<sup>26</sup> 'Terms & Conditions' (*Blablacar*) <<https://www.blablacar.co.uk/about-us/terms-and-conditions>> accessed 26 April 2018.

<sup>27</sup> 'Service Fees' (*Blablacar*) <<https://www.blablacar.co.uk/blablalife/lp/service-fees>> accessed 26 April 2018.

<sup>28</sup> 'Explore Airbnb' (*Airbnb*) <<https://www.airbnb.com/?logo=1>> accessed 26 April 2018.

<sup>29</sup> 'Fast Facts' (*Airbnb*) <<https://press.airbnb.com/fast-facts/>> accessed 26 April 2018.

which is the service fee Airbnb charges the hosts.<sup>30</sup> However, also the guest pays a, on the invoice separately indicated, service fee to Airbnb. Airbnb is charging VAT on their service fees depending on the jurisdiction of the host or guest.<sup>31</sup>

#### 2.2.4. LoveHomeSwap

LoveHomeSwap<sup>32</sup>, launched in 2011 in the United Kingdom, is one of the many platforms providing home exchanges.<sup>33</sup> This sharing platform charges a monthly fee including VAT to its members for the usage of the site.<sup>34</sup> Once the fee is paid, members can offer their housing online and start looking for accommodations interesting for them. LoveHomeSwap offers two different systems: the first option is a classical house swap, where people exchange their houses during an agreed time.<sup>35</sup> If the user finds a house of interest, he or she can contact the owner and they can have a private conversation about the convenience of the dates and location of the listings for both parties. Once they have agreed on the dates and terms, they press the 'AGREE' button and the swap is finalised. However, in the second option, users also have the opportunity to rent out their houses to earn points.<sup>36</sup> Persons who want to rent out their accommodations decide for how many points they want to rent it out for. Each time another user is renting the accommodation, the earned points are received onto the lessor's account. These points can later be exchanged for renting accommodation through the platform.

#### 2.2.5. Couchsurfing

Couchsurfing<sup>37</sup> was founded in 2004 in the United States of America and is a platform arranging homestays. Couchsurfing has twelve million members and

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<sup>30</sup> 'How to be an Airbnb host' (*Airbnb*) <[https://www.airbnb.com/host/homes?from\\_nav=1](https://www.airbnb.com/host/homes?from_nav=1)> accessed 25 April 2018.

<sup>31</sup> 'What is VAT and how does it apply to me?' (*Airbnb*) <<https://www.airbnb.com/help/article/436/what-is-vat-and-how-does-it-apply-to-me>> accessed 25 April 2018.

<sup>32</sup> 'Welcome to the world's simplest holiday idea' (*LoveHomeSwap*) <<https://www.lovehomeswap.com/>> accessed 25 April 2018.

<sup>33</sup> For further examples see: Rhiannon Cosslett '10 of the best home-swap and home-sharing websites' (*The Guardian*, 7 December 2015) <<https://www.theguardian.com/travel/2015/dec/07/10-best-home-swap-home-sharing-websites>> accessed 25 April 2018.

<sup>34</sup> 'Choose a membership option to start your free trial' (*LoveHomeSwap*) <<https://www.lovehomeswap.com/choose>> accessed 25 April 2018; see also 'Love Home Swap – Service Terms and Conditions' (*LoveHomeSwap*), <<https://www.lovehomeswap.com/terms-and-conditions>> accessed 26 April 2018.

<sup>35</sup> 'FAQs' (*LoveHomeSwap*) <<https://www.lovehomeswap.com/faqs/general>> accessed 26 April 2018.

<sup>36</sup> 'FAQs' (*LoveHomeSwap*) <<https://www.lovehomeswap.com/faqs/swap-points>> accessed 26 April 2018.

<sup>37</sup> 'Meet and Stay with Locals All Over the World' (*Couchsurfing*) <<https://www.couchsurfing.com/>> accessed 25 April 2018.

is represented in more than 200.000 cities all around the world.<sup>38</sup> It brings together people travelling the world, who are looking for a free accommodation to stay at in the place they are visiting. If a user finds a couch of interest, he or she can contact the owner and they agree on further details. The travellers can, but are not obligated to, also list their couch on the platform. The business idea of Couchsurfing is to make travelling and finding new friends all over the world possible for anybody, so that the hosts are, according to the platform, not paid.<sup>39</sup> The joining of the Couchsurfing platform is also free of charge, although it is up to the members to pay a fee in order to become a verified member and enjoy some extra benefits.

### 3. Taxable persons

#### 3.1. The definition of taxable persons according to Article 9 (1) VAT Directive

According to Article 2 VAT Directive, in order to fall within the scope of the directive, one of the requirements is that the supply of the service is provided by a taxable person acting as such. Article 9 (1) VAT Directive provides further explanations on who is considered to be a taxable person. In this sense, a taxable person is ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’<sup>40</sup>. From the formulation of this definition it can be derived that the legal form of the acting person does not matter; the term taxable person includes natural persons as much as any forms of legal persons.<sup>41</sup> Furthermore, it represents a global concept according to which it is irrelevant, which residency or place of business the taxable person has, as long as it is supplying goods or services within the EU.<sup>42</sup>

The concept of a taxable person is an EU term and has to be interpreted autonomously for being able to provide a common system throughout the EU. Therefore, national laws, like definitions in national commercial or labour law, should only be taken into consideration cautiously when interpreting the term ‘taxable person’.<sup>43</sup> Since VAT is a consumption tax, the taxable person is not to be confused with the person actually carrying the tax burden or

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<sup>38</sup> ‘About us’ (*Couchsurfing*) < <http://www.couchsurfing.com/about/about-us/>> accessed 25 April 2018.

<sup>39</sup> Couchsurfing ‘I heard of someone charging for a couch. Is that OK?’ (*Couchsurfing*) <<https://support.couchsurfing.org/hc/en-us/articles/200639420-I-heard-of-someone-charging-for-a-couch-Is-that-OK->> accessed 25 April 2018.

<sup>40</sup> Article 9 (1) VAT Directive.

<sup>41</sup> Ben Terra and Julie Kajus, *Introduction to European VAT (Recast)* available at IBFD research platform, sec. 9.1.1 Any person in any place.

<sup>42</sup> Terra and Kajus, *Introduction to European VAT (Recast)* (n. 41), sec. 9.1.1 Any person in any place.

<sup>43</sup> Cristina Trenta, *VAT in Peer-to-peer Content Distribution* (JIBS Dissertation Series No. 90 2013) 83.

having to pay the tax to the state, but rather defining the supplier of goods and services whose economic activities are subject to VAT.<sup>44</sup> The criterion to become subject to VAT, in general, is that the person supplying the good or service is a taxable person. However, the VAT Directive also provides some exceptions when transactions from non-taxable persons can become liable to VAT.<sup>45</sup>

### 3.2. The economic activity criterion

The economic activity is, alongside with the independency criterion<sup>46</sup>, the determining factor if a person is considered to be a taxable person; the existence of the economic activity establishes the status of a taxable person.<sup>47</sup> Article 9 (1) subpara. 2 provides the definition that ‘any activity of producers, traders or persons supplying services (...) shall be regarded as “economic activity”<sup>48</sup>. Based on this definition, the CJEU has repeatedly held that the term ‘economic activity’ is a very broad concept, which leaves a lot of space for interpretation.<sup>49</sup> Moreover, the decision, whether somebody is a taxable person and provides economic activities, is not based on subjective elements, but is objective in its character, meaning that the economic activity as such has to be considered, disregarding the purpose or result the taxable person is aiming for. In line with these interpretation guidelines, the question arises what is actually meant with ‘economic activity’? The CJEU has provided guidance to separate economic activities from other, non-economic, activities.

The CJEU has repeatedly held that activities, which are of an economic nature, are covered by the scope of the VAT Directive.<sup>50</sup> Furthermore, the VAT Directive itself provides some guidance, according to which in particular ‘the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall (...) be regarded as

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<sup>44</sup> See also Oskar Henkow, ‘Taxable Persons’ in Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Donato Raponi (eds.), *ECJ - Recent Developments in Value Added Tax* (Linde 2014) 70; and the comment to this keynote by Sebastian Pfeiffer, ‘Written Comment to the keynote paper ‘Taxable persons’ in Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Donato Raponi (eds.), *ECJ - Recent Developments in Value Added Tax* (Linde 2014) 89.

<sup>45</sup> See Articles 2 (1) (b) (ii) and (iii), 2 (1) (d) and 203.

<sup>46</sup> See chapter 3.3 The independency criterion.

<sup>47</sup> Judgment of 3 March 2005, *Fini H*, C-32/03, EU:C:2005:128, para. 19.

<sup>48</sup> Article 9 (1) subpara. 2 VAT Directive.

<sup>49</sup> Judgment of 26 March 1987, *Commission v Netherlands*, C-235/85, EU:C:1987:161, para. 8; Judgment of 15 June 1989, *Stichting Uitvoering Financiële Acties*, C-348/87, EU:C:1989:246, para. 10; Judgment of 4 December 1990, *Van Tiem*, C-186/89, EU:C:1990:429, para. 17; Judgment of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243, para. 31; Judgment of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243, para. 47; Judgment of 6 October 2009, *SPÖ Landesorganisation Kärnten*, C-267/08, EU:C:2009:619, para. 19.

<sup>50</sup> Judgment of 11 July 1996, *Régie dauphinoise*, C-306/94, EU:C:1996:290, para 15; *EDM* (n. 49), para. 47.

an economic activity<sup>51</sup>. Important to notice is that this definition does not limit economic activities to the exploitation of property, but shows how far reaching the term ‘economic activity’ is. Since the main idea of sharing economy is to exploit tangible or intangible property, the requirements for this definition must be discussed more closely.<sup>52</sup> In this sense, the CJEU has, for example in its *Enkler*<sup>53</sup>, *Rēdlihs*<sup>54</sup> and *Slaby and Others*<sup>55</sup> cases, described the exploitation of tangible or intangible property and, especially, the determining factors of when an activity is considered as a private activity and when as an economic activity. It should be noted that consistent with the principle of neutrality, the exploitation of tangible or intangible property includes all kinds of transactions, regardless of the legal form in which they might appear, as long as they are sought to obtain income on a continuing basis from the transaction.<sup>56</sup>

In *Enkler*, the CJEU was confronted with deciding if Mrs. Enkler, was considered to be a taxable person. Mrs. Enkler was renting out her motor caravan, which was primarily used for private purposes, sporadically, over the time of three years, to her husband’s tax consultancy business and also twice to third parties.

The case *Rēdlihs* concerned Mr. Rēdlihs, who carried out 37 timber supplies over the time span of two years without charging VAT for those supplies. Mr. Rēdlihs argued that he should not be considered to be a taxable person, since the sales were neither carried out systematically, nor independently. Moreover, he argued the timber was not sold for profit but to indemnify the damage a storm has caused.

The Court held in both cases that if the property is only suitable for its economical exploitation, it can be assumed that the owner is actually carrying out an economic activity.<sup>57</sup> The economical exploitation is not that obvious if the property in question can also be used for private purposes, as it was the case in these judgments. Therefore, the CJEU established that all circumstances have to be taken into consideration to determine if the exploitation of property was pursued to obtain income on a continuing basis or not.<sup>58</sup> Circumstances, which might help for this determination, are, for example, the length and periods the property is exploited, the number of

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<sup>51</sup> Article 9 (1) subpara. 2 last sentence VAT Directive.

<sup>52</sup> See chapter 3.4.2 The peers providing economic activities.

<sup>53</sup> Judgment of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352.

<sup>54</sup> Judgment of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497.

<sup>55</sup> Judgment of 15 September 2011, *Slaby and Others*, Joined Cases C-180/10 and C-181/10, EU:C:2011:589.

<sup>56</sup> *Van Tiem* (n. 49), para. 18; *Régie dauphinoise* (n. 50) para. 15; *EDM* (n. 49), para. 48; Judgment of 21 October 2004, *BBL*, C-8/03, EU:C:2004:650, para. 36.

<sup>57</sup> *Enkler* (n. 53), para. 27; *Rēdlihs* (n. 54), para. 37.

<sup>58</sup> *Enkler* (n. 53), para. 27; *Rēdlihs* (n. 54), para. 37.

customers and the total earnings made from it.<sup>59</sup> Based on this guidance, the Court left it up to the national courts to decide, whether Mrs. Enkler and Mr. Rēdlihs were carrying out economic activities or acting as private persons.

*Slaby and Others* concerned Mr. Slaby, who, as a natural person, bought land for agricultural purposes and also used the land for those purposes. Due to a zone plan change, the land was earmarked as a holiday home development, so that Mr. Slaby divided the land into 64 plots and gradually sold it to numerous different natural persons. Mr. Slaby assumed that he was acting as a private person, so he did not charge VAT on the sales, but the Minister Finansów decided that the sale of the land was deemed to be an economic activity. Similarly, also Mr. and Mrs. Kuć were owners of agricultural land, which was used by them for ten years for agricultural purposes. Following a change in the urban management plan, the land in question became earmarked as a residential and service development and Mr. and Mrs. Kuć sold parts of the land occasionally. They charged VAT on the sales, but argued that they should not have been subject to VAT. The CJEU decided that if persons are selling the land within the management of their private property, in other words, simply using their right of ownership, they cannot be considered to be a taxable person, since the requirement of supplying an economic activity is not fulfilled.<sup>60</sup> On the contrary, if persons take active steps to market their products and mobilise resources, then the activity must be considered to be an economic activity.<sup>61</sup>

Likewise, the CJEU was asked to elaborate in *SPÖ Landesorganisation Kärnten*<sup>62</sup> on the question if public relation activities, especially the sale of advertising materials by a division of a political party to other subdivisions, are considered to constitute an economic activity. Similar to what the CJEU also held in *Slaby and Others* and then repeated in *Rēdlihs*, the SPÖ Landesorganisation must be participating in a market for their activity to constitute an economic activity.<sup>63</sup> Therefore, the sale of advertising materials in this case could not have been considered as an economic activity.<sup>64</sup>

Concerning financial transactions, the CJEU has decided that dealing with shares can be considered as an economic activity. The Court held that when the purpose of a holding company is to purchase other companies without being directly or indirectly involved in the management of the undertakings, it is not an exploitation of property with the aim to obtain income, since it is

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<sup>59</sup> *Enkler* (n. 53), para. 29.

<sup>60</sup> *Slaby and Others* (n. 55), paras. 35+36.

<sup>61</sup> *Slaby and Others* (n. 55), para. 39; which was repeated later in *Rēdlihs* (n. 54), para. 36.

<sup>62</sup> *SPÖ Landesorganisation Kärnten* (n. 49).

<sup>63</sup> *SPÖ Landesorganisation Kärnten* (n. 49), para. 24.

<sup>64</sup> *SPÖ Landesorganisation Kärnten* (n. 49), para. 25.

simply the result of ownership.<sup>65</sup> Furthermore, also when the share dealing is considered to be part of a commercial share dealing activity, it is an economic activity.<sup>66</sup> At the same time, the scale of shares and the amount of specifically hired employees to help with the sale of shares are not considered to be determining factors.<sup>67</sup> These cases show that also the exploitation of shares requires a case-by-case analysis to determine if persons are acting as taxable persons.

It seems that if the activity in question is the offering of services or goods, which could also be considered their private property, an essential criterion is that the person is taking active steps to become part of a market, whereas the sole owning, buying and selling of goods and shares, cannot be considered to be enough in order to fulfil the requirement of an economic activity.

Furthermore, the exploitation of property must be carried out with the purpose ‘to obtain *income* (...) on a *continuing* basis’<sup>68</sup>. From this sequence, there are two terms which need further analysis: the meaning of income and continuing.

The expression ‘income’<sup>69</sup> can be defined as the remuneration which is received as the consideration for the exploitation of the property.<sup>70</sup> From this explanation by the CJEU it can be seen that the term income from Article 9 (1) subpara. 2 VAT Directive is, to some extent, connected to the term ‘consideration’ in Article 2 (1) VAT Directive. Notable is that these two terms are requirements for different aspects of a supply being subject to VAT. On the one hand, the aim to obtain income is one of the requirements, when persons are exploiting their property, to become a taxable person. On the other hand, the term ‘consideration’ is a different requirement used to decide if a transaction falls into the scope of the VAT Directive; in the following, it is also important for deciding the taxable amount of a supply.<sup>71</sup> Taking into consideration the case law concerning the term ‘income’ from Article 9 (1) subpara. 2 VAT Directive, it can be seen that the CJEU itself is not very clear on differentiating the term from ‘consideration’ Article 2 (1) VAT Directive.

In the very early case of *Hong-Kong Trade*<sup>72</sup>, where a company provided free information and advice on the trade with Hongkong, the Court decided that a

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<sup>65</sup> Judgment of 20 June 1991, *Polysar*, C-60/90, EU:C:1991:268, para. 13; see also *EDM* (n. 49), paras. 57+59 and *BBL* (n. 56), para. 41, where CJEU held that, the simple acquisition and sale of shares cannot be considered as an economic activity.

<sup>66</sup> *Wellcome Trust* (n. 49), para. 35.

<sup>67</sup> *Wellcome Trust* (n. 49), para. 37; *EDM* (n. 49), para. 61.

<sup>68</sup> Article 9 (1) subpara. 2 last sentence VAT Directive, emphasis added.

<sup>69</sup> Article 9 (1) subpara. 2 last sentence VAT Directive.

<sup>70</sup> Judgment of 20 June 2013, *Finanzamt Freistadt Rohrbach Urfahr*, C-219/12, EU:C:2013:413, para. 23.

<sup>71</sup> See chapter 5.1 The supply is provided for consideration.

<sup>72</sup> Judgment of 1 April 1982, *Hong-Kong Trade*, C-89/81, EU:C:1982:121.

person providing free services cannot be considered a taxable person.<sup>73</sup> The CJEU also touched upon the relationship of (now) Article 9 (1) subpara. 2 and Article 2 (1) VAT Directive, by emphasising that the requirement of taxable transactions being effected against consideration is confirmed by the requirement of taxable persons acting with the aim to obtain income.<sup>74</sup>

In *Commission v Finland*<sup>75</sup> the CJEU had to elaborate, if legal public services, where the persons requiring the legal service would, depending on their income, pay between 0% and 75% of the actual costs incurred, are considered to be economic activities. In this case the Court held that the payments cannot be regarded to be consideration but are a fee, since approximately 8% of the costs were actually covered by the payments made from people using the legal services.<sup>76</sup> The CJEU concluded that in the given case, the services provided are not an economic activity, due to the reason that the payment for the legal aid services is not sufficiently direct and accordingly, it cannot be regarded as consideration.<sup>77</sup>

Similarly, the Court had to decide in *Gemeente Borsele*<sup>78</sup>, whether it is an economic activity if parents only pay 3% of the overall costs for the service of school buses driving their kids. It concluded that also this amount is only a fee and with that the municipality cannot be considered to be carrying out an economic activity.<sup>79</sup> It based this conclusion on the lack of symmetry, thus, that there was no genuine link between the fees and the services provided.<sup>80</sup>

The judgments of *Commission v Finland* and *Gemeente Borsele*, show how the CJEU is confusing the terms income and consideration with each other, by supporting the ‘aim to obtain income’ with the direct link test. In contrast to these decisions, the outcome in *Lajvér*<sup>81</sup> was very different. This case concerned companies providing agricultural engineering works, for which the companies received, for a predetermined period of eight years, a modest fee; the main costs were covered by public subsidies. The CJEU decided that the services provided are considered to be an economic activity in the meaning of Article 9 (1) VAT Directive, despite of only charging the service recipient

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<sup>73</sup> *Hong-Kong Trade* (n. 72), para. 12.

<sup>74</sup> *Hong-Kong Trade* (n. 72), para. 11.

<sup>75</sup> Judgment of 29 October 2009, *Commission v Finland*, C-246/08, EU:C:2009:671; see also Joep Swinkels, ‘Economic Activities under EU VAT Law’ (2010) 21 *International VAT Monitor*, 124.

<sup>76</sup> *Commission v Finland* (n. 75), para. 50.

<sup>77</sup> *Commission v Finland* (n. 75), para. 51.

<sup>78</sup> Judgment of 12 May 2016, *Gemeente Borsele*, C-520/14, EU:C:2016:334, see also Roland Ismer, ‘Case C-520/14, ECLI:EU:C:2016:334 – Gemeente Borsele; C-263/15, ECLI:EU:C:2016:392 – Lajvér; C-11/15, ECLI:EU:C:2016:470 – Český rozhlas on the concept of consideration for the supply of services and on the concept of economic activity by public bodies and entities receiving public funding’ (2016) 5 *World Journal of VAT/GST Law*, 111.

<sup>79</sup> *Gemeente Borsele* (n. 78), para. 33.

<sup>80</sup> *Gemeente Borsele* (n. 78), para. 34.

<sup>81</sup> Judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392; see also Ismer (n. 78).

a modest fee.<sup>82</sup> It further held that it is up to the referring court to decide, if the direct link test is fulfilled and accordingly if the service is provided for consideration.<sup>83</sup> The case of *Lajvér* is different, since the Court decided that, although there was only a modest fee paid, the activity were still an economic activity and with that the companies providing the services were considered to be taxable persons. This case does not provide any insight into how much the modest fee was covering from the incurring costs, so that it is difficult to provide a further comparison.

The term ‘income’ from Article 9 (1) subpara. 2 VAT Directive is confusing, since the CJEU seems to differentiate it from the term ‘consideration’ to that extent as where there is a payment in form of a very little percentage of the costs occurred, or no payment at all, the person providing the service is not considered to be a taxable person. For the assessment of where the line is on how much of the incurred cost can be covered to not be considered a taxable person, the CJEU does not provide any limitations. Mantovani’s<sup>84</sup> conclusion of the analysis of the presented case law is that, if persons are always charging below the operating costs of the services they are providing, the criterion of being a taxable person is not fulfilled.<sup>85</sup> This conclusion is reaching far, since in the given cases the payments did not even cover 10% of the operating costs, when the Court decided that the service providers cannot be regarded to be taxable persons. If the person, who is providing services for the price of the operating costs is not considered to be a taxable person, the door opens for possibilities of circumventing paying VAT by just charging the operating costs to the service or good recipients.

In addition, if other language versions are taken into consideration it seems like the meaning of ‘income’ is not meant to be literally read as ‘income’ but rather as ‘revenue’.<sup>86</sup> The difference between income and revenue is that revenue represents the amount a person is generating from supplying the goods or services, whereas the net profits are considered to be income.<sup>87</sup> Indeed, the CJEU is supporting this understanding. In *Finanzamt Freistadt Rohrbach Urfahr*<sup>88</sup> the CJEU had to elaborate if the operation of Mr. Fuchs’

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<sup>82</sup> *Lajvér* (n. 81), para. 51.

<sup>83</sup> *Lajvér* (n. 81), para. 49.

<sup>84</sup> Matteo Mantovani, ‘When does the carrying out of transactions for consideration give rise to an economic activity relevant for VAT purposes? An insight into the relationship between the notions of consideration and income according to the Court of Justice of the EU’ (2017) 6 World Journal of VAT/GST Law, 1.

<sup>85</sup> Mantovani (n. 84), 17.

<sup>86</sup> See e.g.: the French version: ‘recettes’; the Italian version: ‘introiti’; the German version: ‘Einnahmen’ or the Swedish version: ‘intäkter’.

<sup>87</sup> Claire Boyte-White, ‘What is the difference between revenue and income?’ (*Inverstopedia*, 22 May 2017) <<https://www.investopedia.com/ask/answers/122214/what-difference-between-revenue-and-income.asp>> accessed 27 March 2018.

<sup>88</sup> *Finanzamt Freistadt Rohrbach Urfahr* (n. 70); see also Tina Ehrke-Rabel and Barbara 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

solar panels on his property is considered to be an economic activity. Since Mr. Fuchs did not have any possibilities of storing the energy produced, it was fed into the electricity network. For this supply, he received remuneration in form of a reduction of his electricity bill for the energy he supplied to the network. Notable was that Mr. Fuchs had never produced more energy than he consumed, so that he actually never received a profit. The CJEU concluded that for the requirement of aiming to obtain income on a continuing basis, it is irrelevant if the exploitation is intended to make profit or not.<sup>89</sup> Accordingly, Mr. Fuchs was engaged in an economic activity.<sup>90</sup>

Moreover, an activity can still be considered an economic activity, if a company is making losses, since the actual outcome of the activity is irrelevant to the classification as an economic activity.<sup>91</sup> Furthermore, the CJEU also considered preparatory acts to be part of the economic activity, even if the taxable person never carries out taxable transactions and started the economic activity to actually decide if the taxable transaction will be a profitable one.<sup>92</sup>

It can be seen that the meaning of ‘income’ is not yet defined conclusively by the CJEU and there are still some questions to be answered. Especially persons providing services far below the operating costs may, based on the case law decided, not fulfil the requirement of being a taxable person. In general, it can be said that also persons providing services below the operating costs, thus, persons who do not gain any profit from their economic activity, still can become taxable persons, since the term ‘income’ cannot be interpreted as profit, but should rather be read as revenue.

The second expression, which needs further evaluation is ‘continuing’. First, it needs to be pointed out that the ‘continuing basis’<sup>93</sup> is not concerning the activity itself, but refers to the obtaining of income. In *Van Tiem*<sup>94</sup>, where Mr. van Tiem granted a company building rights on his plots for the time span of 18 years and received in exchange for these annual payments, the CJEU decided that this is considered to be an exploitation of the property on a continuing basis.<sup>95</sup> The significant take-away from this case is that with one contract Mr. van Tiem was becoming a taxable person, since he received income on a continuing basis, to be more precise, over 18 years. Despite of

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Directive?’ (2015) 1 World Journal of VAT/GST Law, 198; Michael van de Leur, ‘Watch Out, You May Be a Taxable Person!’ (2013) 24 International VAT Monitor, 279.

<sup>89</sup> *Finanzamt Freistadt Rohrbach Urfahr* (n. 70), para. 25; see also *Lajvér* (n. 81), para. 35.

<sup>90</sup> *Finanzamt Freistadt Rohrbach Urfahr* (n. 70), para. 37.

<sup>91</sup> Alexander Bal, ‘The Vague Concept of “Taxable Person” in EU VAT Law’ (2013) 24 International VAT Monitor, 294, 295 with reference to *Enkler* (n. 53).

<sup>92</sup> Judgment of 29 February 1996, *INZO*, C-110/94, EU:C:1996:67, para. 20; for preparatory acts see also Judgment of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, para. 22.

<sup>93</sup> Article 9 (1) subpara. 2 last sentence VAT Directive.

<sup>94</sup> *Van Tiem* (n. 49).

<sup>95</sup> *Van Tiem* (n. 49), para. 19.

these 18 years, the CJEU decided in *Lajvér* that already the receiving of income over eight years is considered to be continuing.<sup>96</sup> Furthermore, in *Finanzamt Freistadt Rohrbach Urfahr* the CJEU held that, since Mr. Fuchs' contract with the electricity firm was for an indefinite duration, the exploitation of property takes place on a continuing and not just on an occasional basis.<sup>97</sup> These judgments confirmed that the concept of 'economic activity' does not include activities carried out on an occasional basis, which was already decided in *Enkler*.<sup>98</sup> This takes the analysis to another, in doctrine widely discussed issue:<sup>99</sup> the question to what extent the term 'continuing basis'<sup>100</sup> should be interpreted in comparison to Article 12 VAT Directive.

According to Article 12 VAT Directive the MS have the option to consider 'anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9 (1) (...)'<sup>101</sup> also as a taxable person.<sup>102</sup> The CJEU elaborated on the relationship between these two articles in its *Kostov*<sup>103</sup> judgment. *Kostov* was a case revolving around a self-employed private plaintiff, who was acting for a company as an intermediary and bought land in three auctions for the company. The Court decided that Article 12 VAT Directive is only applicable to persons who are, with their main economic activities, not to be regarded as taxable persons yet.<sup>104</sup> Since Mr. Kostov was with his main activity, as a plaintiff, a taxable person, also other occasional supplies, which are economic activities, fall into the scope of VAT.

The fact that the VAT Directive provides the MS with the option in Article 12 to implement a rule, so that also occasional transactions become taxable transactions implies that there has to be an element of consistency of the income received in interpreting Article 9 (1) VAT Directive.<sup>105</sup> This can also be seen from comparing the different language versions of the VAT Directive. Although they use several words to replace 'continuing', all language versions have in common that the chosen word represents an element of a

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<sup>96</sup> *Lajvér* (n. 81), para. 33.

<sup>97</sup> *Finanzamt Freistadt Rohrbach Urfahr* (n. 70), para. 27.

<sup>98</sup> *Enkler* (n. 53), para. 20.

<sup>99</sup> See e.g.: Terra and Kajus, *Introduction to European VAT (Recast)* (n. 41) sec. 9.2.2 Occasional Activities; Trenta (n. 43) 102; Henkow (n. 44) 80; Bal (n. 91) 295.

<sup>100</sup> Article 9 (1) subpara. 2 last sentence VAT Directive.

<sup>101</sup> Article 12 (1) VAT Directive.

<sup>102</sup> Note that, in case of the adaption of the 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, Article 12 VAT Directive would be limited to (a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands; and (b) the supply of building land. Therefore, Article 12 VAT Directive would not be applicable to the presented sharing economy scenarios anymore.

<sup>103</sup> Judgment of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391.

<sup>104</sup> *Kostov* (n. 103), para. 30.

<sup>105</sup> Another opinion: Terra and Kajus, *Introduction to European VAT (Recast)* (n. 41) sec. 9.2.2 Occasional Activities.

longer term, not including a transaction just taking place once, and, thus, also the income is received just once.<sup>106</sup> In this sense, the Court has also held that a person supplying services only occasionally, cannot, in principle, be considered to be a taxable person.<sup>107</sup> Accordingly, for a transaction to be considered an economic activity, there should also be an element of continuance given. Article 12 is applicable, if the person supplying the transaction is not considered to be a taxable person, however, since it is carrying out occasional transactions, it still comes within the scope of the VAT Directive, if the MS in question has availed the implementation of Article 12.

### 3.3. The independency criterion

The definition of what is considered to be independent, can be found in Article 10 VAT Directive. According to this provision, persons who are employed in form of an employment contract, or in form of another legal relationship, which includes the regulation of the working conditions, the payment and the liability of the employer are considered to be excluded from VAT.<sup>108</sup> Also for this criterion the CJEU case law provides some guidance. According to the case law, for persons to act independently, they should act in their own name, on their own behalf, in their own responsibility and they must bear the economic risk of the activity.<sup>109</sup>

In *Commission v Netherlands*<sup>110</sup> the CJEU had to decide, if notaries and bailiffs, who supplied official services against remuneration, are taxable persons. The independency of the notaries and bailiffs was questioned since firstly, they were appointed by the crown, secondly, they were subject to disciplinary controls and lastly, their work conditions and remuneration was governed by a statute. The Court held in this case that if the persons are free to arrange the performance of their work, but certain limits and disciplinary controls are imposed by another person, their independence is not influenced.<sup>111</sup> Also the fact that the payment is based on a statute did not change their status of independency.<sup>112</sup>

Furthermore, in *van der Steen*<sup>113</sup> the CJEU had to elaborate on Mr. van der Steen, who was the director and sole shareholder of a limited company

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<sup>106</sup> See e.g.: the French version: ‘permanence’; the Spanish version: ‘continuados’; the Italian version: ‘stabilita’; the German version: ‘nachhaltigen’.

<sup>107</sup> *Kostov* (n. 103), para. 28.

<sup>108</sup> Article 10 VAT Directive.

<sup>109</sup> *Commission v Netherlands* (n. 49), para. 14; Judgment of 27 January 2000, *Heerma*, C-23/98, EU:C:2000:46, para. 18; Judgment of 18 October 2007, *van der Steen*, C-355/06, EU:C:2007:615, paras. 23+24; Judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, para. 34.

<sup>110</sup> *Commission v Netherlands* (n. 49).

<sup>111</sup> *Commission v Netherlands* (n. 49), para. 14.

<sup>112</sup> *Commission v Netherlands* (n. 49), para. 14.

<sup>113</sup> *van der Steen* (n. 109).

providing cleaning services. The question, if Mr. van der Steen himself was a taxable person, was answered to the negative by the Court, since it was the company receiving the remuneration for the economic activity and it was also the company being the contract partner for the clients.<sup>114</sup> Furthermore, Mr. van der Steen was paid out a monthly salary including holiday payments and the company also paid the income tax and social security fees, so that Mr. van der Steen could not be considered to be acting independently.<sup>115</sup>

The CJEU case law shows that all circumstances have to be taken into consideration, when determining if persons are acting independently or if the company they supply the services for is the taxable person.

### 3.4. The identification of taxable persons providing the housing and transportation services in the different scenarios

#### 3.4.1. The internet platforms as taxable persons

In the presented scenarios<sup>116</sup>, the difficult question of being a taxable person is not represented by the activities of the internet platforms connecting the peers to each other, but the actual providers of the transportation and housing. Concerning the internet platforms, it is undeniable that the services they provide are economic activities and that they are acting independently, since they are supplying the services of connecting people and doing this with the aim to obtain an income on a regular basis.

#### 3.4.2. The peers providing economic activities

When evaluating the persons providing services over the described sharing economy platforms and deciding if they are providing economic activities, it must be recognised that the property, their personal cars, houses and apartments, can be used for private and economical exploitation. As already established<sup>117</sup>, in these cases all of the different aspects have to be considered when deciding if using the cars to drive people or renting out property is an economic activity. Remarkable is the fact that, according to the CJEU, one of the main points of separating a private from an economic activity is the marketing of, in the given case, the service, since private persons would not have any reasons to market their services or accommodations. In this line of argument, the EC decided in its working paper that already the signing up to the sharing platforms is considered an economic activity.<sup>118</sup> This is a far-reaching conclusion. With signing up to sharing economy platforms a person

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<sup>114</sup> *van der Steen* (n. 109), para. 22.

<sup>115</sup> *van der Steen* (n. 109), para. 22.

<sup>116</sup> See chapter 2.2 Sharing economy models.

<sup>117</sup> See chapter 3.2 The economic activity criterion.

<sup>118</sup> European Commission, 'VAT treatment of sharing economy' (n. 11), pg. 6; see also Ivo Grlica, 'How the Sharing Economy Is Challenging the EU VAT System' (2017) 28 *International VAT Monitor*, 124, 128.

might just want to use the services as a consumer or, out of curiosity, have a look at the system and find out how it works and not actually offer or market any services. If the person starts offering their driving services or their housing for rent online, only then it can be assumed that the person is exploiting its property to gain income from it.<sup>119</sup> This line of thought can be applied to all the provided scenarios.

Despite of the activity being an exploitation of property, the aim of the economic activity has to be to receive income continuously. This is one requirement which causes many problems in the sharing economy sector in general, especially concerning the services provided via Uber and Airbnb, since, the person providing the service could decide after the first time that they do not want to repeat it. For an income to be received on a continuous basis, the CJEU has held that contracts where an income is received for an indefinite time frame<sup>120</sup>, for eight<sup>121</sup> or eighteen<sup>122</sup> years fulfil this criterion, but not services which are provided occasionally and therefore also the income would only be occasionally received.<sup>123</sup> Depending on a case-to-case analysis, the driver or person renting out their apartment can be generating income on a continuous or on an occasional basis. On the one hand, if the service is provided on a continuous basis and the person also generates a continuous income from the service, it is considered to be a taxable person. On the other hand, if it is the case of an occasional service, then the providers can be considered to become taxable persons and liable for VAT based on Article 12 (1) VAT Directive. Since it is up to the decision of the MS if they want to implement Article 12 (1) VAT Directive, the application of this Article results in a different treatment of the provided services within all the MS. The differentiation between these two possibilities has to be considered for the application of the special scheme for small enterprises.<sup>124</sup>

The scenario of Blablacar differentiates from the described categorization to the extent that the drivers do not drive with the purpose of gaining any income. They are offering their services online to find passengers who need to go to the same destination as they are driving to. For the service of driving passengers, the drivers receive, as the payment, a part of their operating costs incurred for the ride. Following the approach of Mantovani<sup>125</sup>, drivers offering rides via Blablacar should not be considered to be carrying out an economic activity in the sense of Article 9 (1) subpara. 2 VAT Directive. In contrast to this opinion, the term ‘income’ should be interpreted as ‘revenue’ and therefore there should not be a differentiation, concerning the economic

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<sup>119</sup> Pantazatou (n. 7), pg. 7.

<sup>120</sup> *Finanzamt Freistadt Rohrbach Urfahr* (n. 70), para. 27.

<sup>121</sup> *Lajvér* (n. 81), para. 33.

<sup>122</sup> *Van Tiem* (n. 49), para. 19.

<sup>123</sup> *Kostov* (n. 103), para. 28.

<sup>124</sup> See chapter 3.5 The special scheme for small enterprises.

<sup>125</sup> Mantovani (n. 84).

activity criterion, between the services provided by Uber or Blablacar.<sup>126</sup> Furthermore, also the fact that the person offering the ride is going anyhow to the desired destination should be considered. In this sense, any additional person they give a ride, is an income, which they would not have received, if they were not to use Blablacar. This is also the reason why drivers via Blablacar are more likely to just think about the additional income they can receive, and leave aside the expenses they have had, since those would incur anyhow.<sup>127</sup> The interpretation of being a taxable person is a broad principle, which is also emphasized by the law saying that the purpose and the outcome of the transaction are irrelevant and, accordingly, also peers offering services via Blablacar should be fulfilling the economic activity criterion.<sup>128</sup> The problem of continuity is given to the same extent as with Uber and Airbnb.

Following the argumentation and classification from Blablacar as being an economic activity, the same line of thought is also applicable to the system of LoveHomeSwap. The EC points out in its working paper, that with barter transactions the purpose of obtaining income is questionable.<sup>129</sup> Since the income can also be provided in kind, the aim to obtain income can be fulfilled.<sup>130</sup> The big question in analysing LoveHomeSwap is, if the aim to obtain income is on a continuing basis, since in this scenario it is more likely that persons just use the homepage for one holiday each year. On the other hand, if they, for example, rent out their apartment on a regular basis to collect points, so in the following they can rent their dream house for the holiday period over LoveHomeSwap, then the criterion of continuity can be fulfilled, since the income would be obtained on a continuous basis in form of the points the person is receiving to rent out the house. The question the EC arises, whether the persons could simply rent out their house via Airbnb if they want to obtain income<sup>131</sup>, cannot be accepted as a valid argument. It should be left to the persons renting out their places, which sharing economy platform they want to use. In light of the principle of neutrality, if the renting out is done with the aim to continuously obtain income, these lessors can also become taxable persons.

In contrast to the already discussed scenarios, Couchsurfing is evidently different. When providing housing via Couchsurfing, there is no payment of any sort involved. People hosting guests via Couchsurfing do not receive

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<sup>126</sup> See the discussion on the interpretation of ‘income’ in chapter 3.2 The economic activity criterion.

<sup>127</sup> Francesco Cannas, ‘Sharing economy: Everyone can be an entrepreneur for two days ... but what about a VAT taxable person?’ (2018) World Journal of VAT/GST Law <<https://doi.org/10.1080/20488432.2018.1455026>> accessed 11 May 2018, pg. 6.

<sup>128</sup> Article 9 (1) VAT Directive.

<sup>129</sup> European Commission, ‘VAT treatment of sharing economy’ (n. 11), pg. 8.

<sup>130</sup> See also chapter 5.2 The determination of the taxable amount of services provided via sharing economy platforms with a special analysis on how the taxable amount of services provided via LoveHomeSwap is to be determined.

<sup>131</sup> European Commission, ‘VAT treatment of sharing economy’ (n. 11), pg. 8.

money, nor the right to stay at the guest's house, nor points, which they might use in the future to rent an accommodation. In this sense, the people providing services via Couchsurfing cannot be considered to be providing economic activities, due to the reason that they do not provide their housing with the purpose to obtain income.

### 3.4.3. The independency criterion concerning the peers

The criterion of independency raises questions in the sharing economy, especially concerning Uber. Although the drivers are officially not considered to be employees, it can be argued that they have a legal relationship with Uber, which is similar to an employment contract.

Looking at the criteria set out in the case law, it is notable that Uber drivers act on their own behalf and in their own name, but always through the Uber app. Any communication, complaints and even the payments go through Uber and are then forwarded to the driver. Furthermore, in most occasions it is not the drivers, who are bearing the economic risk, but Uber. This can be seen from the fact that if a person pays with a stolen credit card, and the amount is bounced from the account, Uber still pays the drivers the fee they have earned.<sup>132</sup> Furthermore, the price charged to the person taking the ride is not decided by the drivers, but set by Uber. Although, as decided in *Commission v Netherlands*, where for VAT purposes the fact that the price was set by a statute did not influence the status of acting independently,<sup>133</sup> there should be a difference to when the price is set by a company, since the providing of driving services, as done by Uber, is not a public service. Within the private economy the prices should be set by the persons actually providing the services. Moreover, although Uber drivers do not get paid on a monthly basis, they also do not receive their share of the fare when they complete a drive. The money they have earned for driving for Uber is paid weekly.<sup>134</sup> This also shows that Uber is not just an intermediary, such as Airbnb for example, who passes on the money straight forward to the person providing the service, but that this payment method could be seen as a sort of 'weekly salary'.

In spite of the fact that national definitions cannot directly be applied for defining who is considered to be an employee in the VAT Directive, they can still be taken into account as an interpretation help. In this sense, the majority of judgments in the United Kingdom and the United States of America have found that Uber drivers are considered to be employees due to the influence

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<sup>132</sup> 'Uber policy for credit/debit card non-payment' (*UberPeople.NET*, 22 September 2017) <<https://uberpeople.net/threads/uber-policy-for-credit-debit-card-non-payment.204355/>> accessed 6 April 2018.

<sup>133</sup> *Commission v Netherlands* (n. 49), para. 14.

<sup>134</sup> 'When am I paid each week?' (*Uber Help*) <<https://help.uber.com/h/42973e65-45a8-4aaf-90d5-d3e97ab61267>> accessed 6 April 2018.

Uber has on its drivers.<sup>135</sup> It can be seen that the assessment of the independency criterion for VAT purposes is difficult due to the complex construction Uber is applying to its drivers, however, there can be made profound arguments that Uber drivers are not acting independently. This results in Uber being the actual provider of the drive services and not the drivers, due to their lack of independency.

Blablacar, Airbnb and LoveHomeSwap differ concerning the independency criterion to the extent that the people providing the services are acting in their own name, on their own behalf and they bear the risk of the economic activity. Also, the payment is paid directly to the person, when the service is supplied, not in a predefined time interval. In these scenarios, the platform does not have much influence on the persons providing the services, but serves rather as an intermediary connecting people.

### 3.5. The special scheme for small enterprises

The VAT Directive provides special schemes for small enterprises in Articles 281-292. Since small enterprises might find it difficult, due to their size and organisation, to apply the normal VAT rules, the MS can apply simplified procedures.<sup>136</sup> Furthermore, the VAT Directive provides the MS with different regulations of which annual turnover is required by the taxable person for an exemption or a graduate relief for small enterprises to become applicable. This threshold is dependent on when the MS has joined the EU. For MS, which were already members when the Sixth Directive was adopted, on 17 May 1997, and had a special exemption for small enterprises under €5,000, they could keep this exemption or raise the threshold to €5,000.<sup>137</sup> Also countries which did not provide an exemption for small enterprises could introduce one with a cap of €5,000.<sup>138</sup> MS that had an exemption for turnovers of more than €5,000 could raise the ceiling to keep the value of the

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<sup>135</sup> *Aslam and Farrar and others v Uber BV, Uber London Ltd and Uber Britannia Ltd* [2016] Employment Tribunal 2202550/2015; *Uber Technologies, Inc., A Delaware Cooperation v Barbara Berwick* [2015] Superior Court of California County of San Francisco CGC-15-546378; *Jeffrey Shepherd, Levon Aleksanian and Jakir Hossain v Uber Technologies Inc.* [2017] State of New York Unemployment Insurance Appeal Board 016-23858; there has been one judgment in the United States of America that Uber drivers are not employees: *Darren McGillis v Department of Economic Opportunity and Rasier LLC, d/b/a Uber* [2017] Third District Court of Appeal of Florida 3D15-2758; furthermore, see also the expert assessment in Switzerland stating that Uber drivers are employees: Kurt Pärli, ‘Gutachten “Arbeits- und sozialversicherungsrechtliche Fragen bei Uber Taxifahrer/innen”’ (10 July 2016) <[https://www.unia.ch/uploads/tx\\_news/2016-08-29-Gutachten-Arbeitsrecht-Sozialversicherungsrecht-Uber-Taxifahrer-innen-Professor-Kurt-P%C3%A4rli.pdf](https://www.unia.ch/uploads/tx_news/2016-08-29-Gutachten-Arbeitsrecht-Sozialversicherungsrecht-Uber-Taxifahrer-innen-Professor-Kurt-P%C3%A4rli.pdf)> accessed 6 April 2018; and the opposing expert opinion by Bettina Kahil-Wolff: Erich Aschwanden, ‘Uber Schweiz kämpft für seine Fahrer’ (*NZZ*, 5 July 2017) <<https://www.nzz.ch/schweiz/kampf-ums-arbeitsrecht-uber-schweiz-kaempft-fuer-seine-fahrer-ld.1304474>> accessed 6 April 2018.

<sup>136</sup> Article 281 VAT Directive.

<sup>137</sup> Article 284 (2) VAT Directive.

<sup>138</sup> Article 285 VAT Directive.

exemption in real terms.<sup>139</sup> For MS that have joined the EU later, special thresholds were introduced.<sup>140</sup> Notable is that these legislations are ‘may’ rules with the result that it is up to the MS to decide if they want to implement a special scheme for small enterprises or not.<sup>141</sup> The exemption being a ‘may’ rule also results in MS being allowed to implement an opt-in option for small enterprises to still charge VAT, although they are below the threshold.<sup>142</sup>

Moreover, since the peers providing the services through a sharing economy platform might come into the scope of Article 12 VAT Directive<sup>143</sup>, it is important to note that according to Article 283 (1) (a) VAT Directive the special scheme for small enterprises is not applicable for occasionally provided activities.

## 4. Taxable transactions

### 4.1. The supplying of services and the role of the intermediaries

Article 24 (1) VAT Directive stipulates that ‘any transaction which does not constitute a supply of goods’<sup>144</sup> shall mean a supply of service. Since the renting out of apartments and driving people does not ‘transfer the right to dispose of tangible property as owner’<sup>145</sup>, the supplied services have to be considered to be services according to Article 24 (1) VAT Directive.<sup>146</sup>

In contrast to this, the role of the platforms acting as an intermediary, raises doubts to that extent, as, on the one hand, they are paid for their services in form of a commission, but, on the other hand, they are also acting as an intermediary to bring the parties together. With the role of being an intermediary the question arises if the platforms have to be considered as being undisclosed agents. Article 28 VAT Directive stipulates the following: ‘Where a taxable person acting *in his own name but on behalf of another person* takes part in a *supply of services*, he shall be deemed to have received and supplied those services himself.’<sup>147</sup> From the wording of this article one

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<sup>139</sup> Article 286 VAT Directive.

<sup>140</sup> Article 287 VAT Directive.

<sup>141</sup> For an overview of the actual applicable thresholds as of October 2017 see Fabiola Annacondia, ‘VAT Registration Thresholds in Europe’ (2017) 28 International VAT Monitor, 474, 475.

<sup>142</sup> Article 290 VAT Directive; States where this is applicable are e.g.: Austria, Bulgaria, Greece, Lithuania, Luxembourg.

<sup>143</sup> See 3.2 The economic activity criterion.

<sup>144</sup> Article 24 (1) VAT Directive.

<sup>145</sup> Article 14 (1) VAT Directive.

<sup>146</sup> When deciding how the services are treated under the VAT Directive also the exemption for letting of immovable property in Article 135 (1) (l) VAT Directive and the reduced rate for the transportation of passengers in Article 98 (2) and Annex III (5) have to be taken into consideration.

<sup>147</sup> Article 28 VAT Directive, emphasis added; note that the described scenarios are not intermediaries in a digital service context (Article 9a Council Implementing Regulation 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC

of the necessary requirements, for being considered an undisclosed agent, is that the platforms are acting in their own name. In the case of the described sharing economy platforms this requirement is not fulfilled. The platforms do not act in their own name but in the name of the peer who is, in the end, also providing the service. In all the presented scenarios, the person taking an Uber, sharing the ride with somebody on Blablacar or renting or switching an apartment via Airbnb or LoveHomeSwap knows who the person providing the service is. The platforms help with connecting the supply and demand and securing a safe process of the service. For this separate service, they are paid a commission, either from the person providing the service or from the service receiver or from both. Consequently, the platforms are not undisclosed agents, but have to be considered being disclosed agents.<sup>148</sup> This interpretation is supported by the purpose of Article 28 VAT Directive. This article provides an option of not revealing the principal, who is supplying the main service, on the invoice, but using the name of the undisclosed agent instead and the principal staying anonymously to the final consumer.<sup>149</sup>

#### 4.2. The composite supply problematic and its treatment in the different sharing economy scenarios

Assumingly, if Uber itself is providing the services, since the drivers cannot be considered to be taxable persons due to the non-fulfilment of the independency criterion<sup>150</sup>, then the examination is appropriate, whether Uber is providing two different services, in form of the intermediary service and the driving service, or if this is one composite supply. This distinction is important due to the fact that for passenger transportation the MS may introduce a reduced tax rate.<sup>151</sup> For the question on how to treat composite supplies the CJEU has provided guidance in its case law.

In *CPP*<sup>152</sup> the CJEU had to elaborate on a case revolving around a credit card provider who also offered, via a block insurance, to protect its clients against

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on the common system of value added tax [2011] OJ L 77 of 23 March 2011), since the service supplied, which the platforms are intermediaries for, are the accommodation and transportation services and accordingly not digital services. For the treatment of intermediaries in electronically supplied services see e.g.: Sophie Claessens and Tom Corbett, 'Intermediated Delivery and Third-Party Billing: Implications for the Operation of VAT Systems around the World' in Michael Lang and Ine Lejeune (eds.), *VAT/GST in a Global Digital Economy* (Kluwer 2015); Marie Lamensch, *European Value Added Tax in the Digital Era - A Critical Analysis and Proposals for Reform* (IBFD 2015), pg. 159 ff.

<sup>148</sup> Matteo Giulio Testa, 'VAT treatment of E-commerce intermediaries' (Master Thesis, Lund University, 2017), pg. 34.

<sup>149</sup> Ben Terra and Julie Kajus, *A Guide to the Recast VAT Directive* available at IBFD research platform, sec. 4.3.3 Commission; note the Judgment of 4 May 2017, *Commission v Luxembourg*, C-274/15, EU:C:2017:333, paras. 85 ff., where the CJEU used the same reasoning for the application of Articles 14 (2) (c) VAT Directive and 28 VAT Directive, which allows the analogy that both Articles should have the same purpose.

<sup>150</sup> See chapter 3.4.3 The independency criterion concerning the peers.

<sup>151</sup> Article 98 (2) and Annex III (5) VAT Directive.

<sup>152</sup> Judgment of 25 February 1999, *CPP*, C-349/96, EU:C:1999:93.

the loss of their credit card with a third insurance provider. Similarly, in *BGŻ Leasing*<sup>153</sup>, where a leasing company also offered their clients insurances, which were re invoiced from the insurance company, the CJEU also had to discuss the composite supply. In both cases the question was, if the companies were supplying insurance transactions and, accordingly, their services would be exempt, or if the insurance is meant to be part of the main supply, in *CPP* the credit card service and in *BGŻ Leasing* the leasing services. As a general rule, which the CJEU derives from Article 2 (1) (a) and (c) VAT Directive, every supply must be regarded as being independent, distinct and follows its own VAT destiny.<sup>154</sup> However, the Court also held that this general rule is limited to that extent that a supply cannot be split artificially, if it constitutes a single supply from an economical point of view.<sup>155</sup> Furthermore, incidental or ancillary services, which help the enjoyment of the principal service, are considered to be part of the principal service and form one transaction.<sup>156</sup> For being able to distinguish the nature of the supply, either being a composite supply with ancillary services or two separate supplies, the characteristic elements of the transaction must be taken into consideration.<sup>157</sup> The Court decided in *BGŻ Leasing* that the supply must, in principal, be regarded as two separate supplies and, therefore, the exemption would be applicable. In both cases, *CPP* and *BGŻ Leasing*, the CJEU left the final decision, whether the supplies constitute independent supplies or one composite supply, to the national courts, which should take into consideration the specific circumstances of the cases.

Applying this case law to the Uber scenario, it seems that the consumers using the application want to use the transportation services and get from one destination to another. The intermediation service through the application of connecting the two parties and providing a platform for rating the drivers and to handle the payment seem to be an ancillary service, which, based on the business model of Uber, is necessary to provide the transportation service. As a result, any additional services Uber provides would have to be seen as ancillary services and accordingly also come within the reduced VAT rate. This interpretation is also supported by the *Asociación Profesional Elite Taxi*<sup>158</sup> judgment. In this case the CJEU was asked to decide whether the

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<sup>153</sup> Judgment of 17 January 2013, *BGŻ Leasing*, C-224/11, EU:C:2013:15.

<sup>154</sup> *CPP* (n. 152), para. 29; *BGŻ Leasing* (n. 153), para. 29.

<sup>155</sup> *CPP* (n. 152), para. 29; *BGŻ Leasing* (n. 153), para. 30; see also Judgment of 27 October 2005, *Levob Verzekeringen and OV Bank*, C-41/04, EU:C:2005:649, para. 22.

<sup>156</sup> Judgment of 3 July 2001, *Bertelsmann*, C-380/99, EU:C:2001:372, para. 21; Judgment of 22 October 1998, *Madgett and Baldwin*, Joined cases C-308/96 and C-94/97, EU:C:1998:496, para. 24; *CPP* (n. 152), para. 30; *BGŻ Leasing* (n. 153), paras. 30+41.

<sup>157</sup> *CPP* (n. 152), para. 29; *BGŻ Leasing* (n. 153), para. 32; *Levob Verzekeringen and OV Bank* (n. 155), para. 20.

<sup>158</sup> Judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981; see also Judgment of 10 April 2018, *Uber France*, C-320/16, EU:C:2018:221, where the Court confirmed what it held in *Asociación Profesional Elite Taxi*.

services provided by Uber are considered to be transportation services or information society services. The CJEU held that the service Uber is providing is more than connecting the people in form of an intermediation service.<sup>159</sup> Furthermore, the Court decided that the main component is the transportation service and that the intermediation service forms an integral part of the overall service.<sup>160</sup> Although this judgment did not have any tax issues to be resolved, it can help with the interpretation of the qualification of the services provided by Uber and gives some guidance on how the CJEU classifies the different components of the service Uber is providing.

Moreover, in the judgment of *Mapfre asistencia and Mapfre warranty*<sup>161</sup>, the Court was asked to decide whether insurances for second hand vehicles, provided with the sale of the vehicle, should be considered to be one supply or two distinct supplies. The CJEU held that it is up to the national court to decide this, based under consideration of all the circumstances of the case; but the CJEU also held that based on the information provided to the Court the services are not closely enough linked.<sup>162</sup> Remarkable in this ruling was that the services were provided by two suppliers, the insurance company and the car dealer. Accordingly, with this judgment the Court potentially opened the door that also two suppliers could, under certain circumstances, provide one composite service.<sup>163</sup>

Applying this judgment to the other sharing economy platforms, it could be argued that also Airbnb, Blablacar and LoveHomeSwap are providing one distinct supply. This assumption though is premature. The other sharing economy platforms differ from Uber in several ways. First of all, taking into consideration Airbnb, the consumer is charged a fee for their intermediation services, which is, on the receipt, separately stated.<sup>164</sup> Also, Blablacar charges a separate fee, which is payable directly to the platform, whereas the riding price is paid to the driver himself. The concept of LoveHomeSwap is in general different as people wanting to join the platform have to pay a membership fee, which guarantees them to use the platform for a predefined time. Therefore, in all these scenarios the influence the platform has on the process and details of the agreement between the two peers is not as extended as with Uber. In this sense, when using the other platforms, the users actually

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<sup>159</sup> *Asociación Profesional Elite Taxi* (n. 158), para. 37.

<sup>160</sup> *Asociación Profesional Elite Taxi* (n. 158), para. 39.

<sup>161</sup> Judgment of 16 July 2015, *Mapfre asistencia and Mapfre warranty*, C-584/13, EU:C:2015:488.

<sup>162</sup> *Mapfre asistencia and Mapfre warranty* (n. 161), paras. 57+58.

<sup>163</sup> See also Judgment of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paras. 54+55, where the Court held that, due to the prohibition of abuse of law, supplies provided by different suppliers may be treated as one composite supply. The CJEU left this to the national court to decide.

<sup>164</sup> The CJEU has held repeatedly that a separate invoicing and pricing supports the view that the provided services are independent; see *CPP* (n. 152), para. 31; *Levob* (n. 155), para. 25; *BGZ Leasing* (n. 153), para. 44.

realise that they are purchasing two distinct supplies, the intermediation service on the one hand and the transportation or accommodation service on the other hand, and, thus, they should also be treated, under the VAT Directive, as two distinct supplies.

## 5. Taxable amount

### 5.1. The supply is provided for consideration

According to Article 2 VAT Directive, the supply of goods and services has to be provided for consideration to be subject of VAT. In the following, in Article 73 VAT Directive, the legislator defines what should be included in the taxable amount: ‘the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party’<sup>165</sup>. Also, on the provisions of consideration the CJEU has provided explanations and further criteria in its case law.

Already in 1981 the Court has held in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats*<sup>166</sup> that the concept of consideration is a European concept and should be interpreted autonomously to determine its meaning and scope.<sup>167</sup> Furthermore, the CJEU has held that there has to be a direct link between the service provided and the consideration received, which can also be derived from the expression ‘in return for a supply’ in Article 73 VAT Directive.<sup>168</sup> Moreover, the consideration must be capable of being expressed in money and is based on a subjective value, depending on the amount the taxable person is actually receiving and not based on an objective market price criterion.<sup>169</sup> This judgment gave a first insight into the requirements for a payment being a consideration for a supply of services or goods, but it still left questions unanswered to the extent, as to what should be understood under direct link and if there is a limit to the subjective value.<sup>170</sup>

In *Apple and Pear Development Council*<sup>171</sup>, where the CJEU had to decide whether statutory payments from farmers to a council taking actions

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<sup>165</sup> Article 73 VAT Directive.

<sup>166</sup> Judgment of 5 February 1981, *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats*, C-154/80, EU:C:1981:38.

<sup>167</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (n. 166), para. 9.

<sup>168</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (n. 166), para. 12; see also Judgment of 8 March 1988, *Apple and Pear Development Council*, C-102/86, EU:C:1988:120, paras. 11+12; Judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, para. 13.

<sup>169</sup> *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (n. 166), para. 13.

<sup>170</sup> For the direct link see also Deborah Butler, ‘The usefulness of the ‘direct link’ test in determining consideration for VAT purposes’ (2004) 3 EC Tax Review, 92.

<sup>171</sup> *Apple and Pear Development Council* (n. 168).

(advertisement, promotions) to improve product quality, were considered as a consideration for the provided service or not, the CJEU adjusted the direct link test. It held that, firstly, the benefits from the services were received by the whole industry and not specific farmers.<sup>172</sup> Secondly, it held that there was no relationship between the benefits individual farmers received and the fee they paid, so that the fee did not constitute a direct link to the benefits and as a result it could not be a supply of services for consideration.<sup>173</sup> From this decision it cannot be derived that memberships, in general, are not services for consideration.

In *Kennemer Golf*<sup>174</sup> the CJEU concluded that the direct link is fulfilled, if members of a golf club pay an annual fee and the golf club makes the sports facilities available to its members.<sup>175</sup> The difference between *Apple and Pear Development Council* and *Kennemer Golf* is that in joining voluntarily a sports club, the members can firstly decide which golf club they want to join. It is their decision, if they want to join a club with higher membership fees or lower ones and, furthermore, they can also decide how often they want to make use of the service they pay for. Contrarily, in the case of *Apple and Pear Development Council*, the price of the service was statutory, which meant that the farmers had an obligation to pay the fee. Additionally, the farmers could not influence the benefit they received from paying the fee.

Finally, in *Tolsma*<sup>176</sup>, which was a case revolving around the donations street musicians receive, the CJEU held that a service is only provided for consideration, if there is a legal relationship between the service provider and the recipient.<sup>177</sup> With this judgment the CJEU has taken the direct link test one step further by introducing the new criterion that for the reciprocal performance a legal relationship is required, thus, it can be considered to be a consideration in return of the supply.

The subjective value to determine the taxable amount means that anything that is paid for the services, even if it is below the market price, is consideration for the supply; this finds its support in the principle of fiscal neutrality.<sup>178</sup> This general understanding is also confirmed by the CJEU's case law. In the judgment of *Hotel Scandic Gåsabäck*<sup>179</sup>, a case revolving around the supply of meals from a hotel to its employees, the Court decided that it is irrelevant for a transaction effected for consideration if the price paid

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<sup>172</sup> *Apple and Pear Development Council* (n. 168), para. 14.

<sup>173</sup> *Apple and Pear Development Council* (n. 168), paras. 15+16.

<sup>174</sup> Judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200.

<sup>175</sup> *Kennemer Golf* (n. 174), para. 40.

<sup>176</sup> *Tolsma* (n. 168).

<sup>177</sup> *Tolsma* (n. 168), para. 14.

<sup>178</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 23 November 2004, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2004:746, para. 36.

<sup>179</sup> Judgment of 20 January 2005, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, para. 22.

for the meals is higher or lower than the cost price.<sup>180</sup> Accordingly, the fact that the price is below the cost price is not effecting the direct link test. This statement was also confirmed in later decided judgments.<sup>181</sup> In spite of the general rule of applying the subjective value, the VAT Directive also provides an exception when the open market value, in other words an objective value, is used to determine the taxable amount.<sup>182</sup> This exception, though, is only applicable to supplies of connected parties.<sup>183</sup>

## 5.2. The determination of the taxable amount of services provided via sharing economy platforms with a special analysis on how the taxable amount of services provided via LoveHomeSwap is to be determined

Applying this direct link test to the different scenarios, it can be seen that concerning Uber and Airbnb, where the persons are renting a house or are driven from one destination to another and directly pay for the service received, the direct link test is fulfilled. Furthermore, there is also a legal relationship between the parties, since the customer is obliged to pay for the service received. According to the key message from *Hotel Scandic Gåsabäck*, also the consideration peers receive through the rides offered via Blablacar, where only the operating costs are charged, are a taxable transaction provided for consideration. The direct link test is not affected due to the fact that only the basic operational costs are charged.

The sharing economy platform which raises questions is LoveHomeSwap. The difficulty with this platform when compared to others is that there is no consideration exchanged in money. It provides the peers with the option of two people switching their houses or one person renting out the house to gain credits from LoveHomeSwap, which can later be exchanged for the service of renting another accommodation. These two scenarios have to be analysed separately, but in a first step it is described, how barter transactions are treated under the VAT Directive and how the taxable amount is determined for them.

Already in 1997, the CJEU concluded in *Goldsmiths v Commissioners of Customs & Excise*<sup>184</sup> that, based on the neutrality principle, it does not matter if the consideration is received in cash or in kind and therefore barter

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<sup>180</sup> *Hotel Scandic Gåsabäck* (n. 179), para. 22.

<sup>181</sup> Judgment of 9 June 2011, *Campsa Estaciones de Servicio*, C-285/10, EU:C:2011:381, para. 27; Judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, para. 37.

<sup>182</sup> See Articles 72 and 80 VAT Directive.

<sup>183</sup> Article 80 (1) VAT Directive.

<sup>184</sup> Judgment of 3 July 1997, *Goldsmiths v Commissioners of Customs & Excise*, C-330/95, EU:C:1997:339.

transactions are treated the same as other transactions under the VAT Directive.<sup>185</sup>

In *Naturally Yours*<sup>186</sup>, the Court had to decide on the question of how to determine the taxable amount of a provided service. In this case, Naturally Yours was selling beauty products to consultants, who were then selling the products, through hostesses, to end-consumers. The reward for the hostesses was one of the products on sale, which the consultants would buy for a reduced price from Naturally Yours, if used for rewarding purposes. In this case the CJEU reminded, that the consideration is based on a subjective value.<sup>187</sup> It further held that the taxable amount of the service provided by the consultants is possible to ascertain in a monetary value, consisting of the difference between the reduced price and the normal resale price.<sup>188</sup>

In *Empire Stores v Commissioners of Customs and Excise*<sup>189</sup>, the Court was asked to decide whether the taxable amount for free goods sent to customers through different schemes<sup>190</sup> has to be based on the cost price, or if a mark-up should be added to the cost price. The Court concluded that the price of the goods given out for free in return for the services of getting new customers has to be based on the subjective amount, which, in the given case, is the price the supplier paid for the goods.<sup>191</sup> This judgment has provided guidance on the subjective value for goods, but it leaves the question, if this cost price is also applicable to barter transactions involving services.

In *Orfey Bulgaria*<sup>192</sup> the question was if, when the service of establishing a building right was exchanged for the service of constructing a building, the open market value according to Article 80 VAT Directive could be applied. The Court dismissed this understanding by the Bulgarian state and emphasized that the subjective value should be applied to taxable transactions and that Article 80 VAT Directive has the purpose to prevent tax evasion as well as avoidance and is only applicable to transaction between family companies or other companies having close personal ties.<sup>193</sup>

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<sup>185</sup> *Goldsmiths v Commissioners of Customs & Excise* (n. 184), paras. 23 ff.; see also Judgment of 26 September 2013, *Serebryannay vek*, C-283/12, EU:C:2013:599, para. 39.

<sup>186</sup> Judgment of 23 November 1988, *Naturally Yours Cosmetics*, C-230/87, EU:C:1988:508.

<sup>187</sup> *Naturally Yours Cosmetics* (n. 186), para. 16.

<sup>188</sup> *Naturally Yours Cosmetics* (n. 186), para. 17.

<sup>189</sup> Judgment of 2 June 1994, *Empire Stores v Commissioners of Customs and Excise*, C-33/93, EU:C:1994:225.

<sup>190</sup> On the one hand they were sent to new customers to attract them and on the other hand to established customers who would introduce new customers to Empire Stores.

<sup>191</sup> *Empire Stores v Commissioners of Customs and Excise* (n. 189), para. 19.

<sup>192</sup> Judgment of 19 December 2012, *Orfey Bulgaria*, C-549/11, EU:C:2012:832.

<sup>193</sup> *Orfey Bulgaria* (n. 192), paras. 44 ff..

In this sense, following the judgment of *Goldsmiths v Commissioners of Customs & Excise*, also barter transactions, such as those provided via LoveHomeSwap, can be taxable transactions for consideration.

For the business model of LoveHomeSwap in the form that two people exchange their homes, the direct link test is fulfilled. Since one person changes the house with the other, the reciprocal performance based on the legal relationship, is given, because the houses are exchanged. Accordingly, both persons involved in this exchange are, on the one hand, a taxable person (the one renting out its accommodation) and, on the other hand, the end-consumer (the one renting the accommodation). The application of the case law shows the difficulty of the determination of the taxable amount concerning the exchange of services. Firstly, *Naturally Yours* is not applicable, since in the given case there is no subjective monetary value, which can be used as a guidance. Secondly, *Empire Stores v Commissioners of Customs and Excise* concerned the determination of the taxable amount of goods and it is still questionable whether the established cost price is also applicable for the determination of the taxable amount for services. Lastly, in *Orfey Bulgaria* the CJEU held that, also for the exchange of two services, Article 80 VAT Directive is not applicable and the subjective value should be applied. How this subjective value should be determined in a barter transaction was not further established. Thus, it is represented in the doctrine that, also for the exchange of services, the subjective value is represented by the cost price the supplier incurred for the services.<sup>194</sup> Therefore, the persons exchanging their accommodations have to establish the rental value for the given period of time, which then constitutes the taxable amount.<sup>195</sup>

Concerning the business model in which people rent out their accommodation to receive points from LoveHomeSwap to later rent another accommodation with those points, the direct link can be questioned. The problem for the direct link test in this scenario is that the person renting out its accommodation gets some kind of consideration from the platform, LoveHomeSwap, in form of points. These points can later be exchanged to rent a home from another person, who also opted into this point system. In this sense, it seems like LoveHomeSwap has invented its own ‘currency’ which can be earned by renting out homes and in the future be spent on renting holiday homes from other persons. Taking into consideration these characteristics of this sharing economy platform, the reciprocal relationship in form of the points received for the accommodation service cannot be denied. As it is said in Article 73 VAT Directive, the consideration can be obtained from the customer or a third

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<sup>194</sup> Terra and Kajus, *Introduction to European VAT (Recast)* (n. 41), sec. 13.2.2 Promotion schemes; Ad van Doesum, Herman van Kesteren and Gert-Jan van Norden, *Fundamentals of EU VAT Law* (Kluwer 2016), pg. 220.

<sup>195</sup> For the discussion of practical implications of using a subjective value see van Doesum, van Kesteren and van Norden (n. 194), pg. 220+221.

party, which means that also LoveHomeSwap can ‘pay’ the consideration for the services provided in form of their points. This interpretation is also supported by the principle of neutrality, since, if transactions carried out through this point-payment-scheme would not become a taxable transaction for consideration, then two comparable transactions face different VAT treatment, which is against the principle of neutrality. The taxable amount is to be determined in the same way as in the other business model of LoveHomeSwap, on the subjective prices being the cost prices.

## **6. Summary on the treatment of the different sharing economy platforms**

### **6.1. General summary of the difficulties all the sharing economy platforms face under the VAT Directive**

The most problematic issue with all described sharing economy platforms is the question if the peers, who are providing the services, are considered to be taxable persons. Especially the fulfilment of the economic activity criterion has to be analysed on a case-to-case basis. In general, all of the peers who use the introduced platforms exploit their property, but the solution, if this exploitation is done with the aim to receive income on a continuous basis, has to be decided in each case individually. The problem is that, although the peers sign up to the sharing economy platforms, it is not a given that they do so with the aim to receive income on a continuous basis, since their motivation might be, for example, to just see how the platform works.

### **6.2. Specific difficulties of the different sharing economy platforms**

#### **6.2.1. Uber**

The analysis of Uber has shown that this sharing economy raises problems concerning the independency criterion. It could be argued, that the drivers providing the services via Uber are not acting independently. A follow-up question arising from this is, if Uber is supplying one composite supply, of the driving service and the service of connecting the peers, or if these are two distinct services. According to the nature of how the platform is set up, it can be assumed that Uber is supplying one composite supply and, accordingly, the reduced rate for the transportation of passengers would be applicable to their services.

#### **6.2.2. Blablacar**

The platform Blablacar is confronted with the question on the proper interpretation of ‘to obtain income’. For the services provided via Blablacar

only the cost price is charged so that the problem arises if the charging of the cost price is sufficient to have the aim to obtain income. Based on the guidance the CJEU has provided in its judgments, it can be assumed that this aim is not fulfilled if the charged price is only a moderate fee. Accordingly, also the charging of the cost price can be an economic activity.

### 6.2.3. Airbnb

Airbnb is confronted with the described general problems<sup>196</sup>, but no specific issues arise concerning this platform.

### 6.2.4. LoveHomeSwap

The analysis of LoveHomeSwap has shown that the biggest difficulty with this sharing economy platform is the fact that the services are not paid in money but by the swapping of the accommodations or by receiving points. This results in the question, if the direct link for the consideration is fulfilled, which, after the undertaken analysis can be answered in the affirmative. The taxable amount, which represents the basis for the calculation of the VAT is represented by the cost price of the accommodation.

### 6.2.5. Couchsurfing

Services provided via Couchsurfing fall out of the scope of the VAT Directive, since they are provided for free; thus, the service provider does not fulfil the criterion of providing the service with the ‘aim to obtain income’.

## 7. Conclusion

The purpose of VAT being a consumption tax is put to a whole new level due to the introduction of sharing economy platforms. As it can be seen from the undertaken analysis, every sharing economy platform has to be analysed separately and is confronted with different difficulties under the current VAT Directive, but that is not enough. Due to the fact that any person could become a taxable person, but then the small enterprise regime might be applicable to them, also every single service provider has to be evaluated based on his or her given circumstances. The question if peers providing services are even to be considered taxable persons and, furthermore, also the question if the criterion of the fulfilment of the direct link test is fulfilled are most critical when assessing the services. These uncertainties cause the collection of VAT concerning services provided via sharing economy platforms to be extremely complex and difficult to administer.

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<sup>196</sup> See chapter 6.1 General summary of the difficulties all the sharing economy platforms face under the VAT Directive.

This complexity is confronted with the VAT principle of fiscal neutrality, according to which comparable services should be treated the same under the VAT regime. In this sense, the services provided via sharing economy platforms should be charging VAT, otherwise a market distortion caused by the peers offering prices excluding VAT is the result.

In this sense, the question arises, which adjustments in the VAT Directive could be taken to make the administration of collection of VAT for services provided via sharing economy platforms more accessible. One possibility, suggested by Cannas<sup>197</sup>, would be to delete the continuous requirement for becoming a taxable person, so that also people supplying services only occasionally are considered to be taxable persons.<sup>198</sup> With the introduction of this new system, the traditional VAT would be existing next to a sale taxation for small businesses, in which the small businesses could not deduct the input VAT.<sup>199</sup> The benefit of this new system would be that the amount of taxable persons would be increased drastically, which would also result in more revenue for the MS and the EU and, at the same time, the fiscal neutrality would be secured.<sup>200</sup>

Furthermore, in the current system, one of the main issues is the fact that, since on some of the platforms the consideration is paid in cash from the service recipient to the provider, the treasury does not even get the background information that there is a service supplier, who might be VAT liable. This issue could be conquered by an obligation of the sharing economy platforms, which connect the peers, to report the services, which are concluded through their platforms.<sup>201</sup>

However the EU and the MS decide to conquer the VAT gap caused by services supplied via sharing economy platforms, it is overdue for the legislator to act and to re-establish the fiscal neutrality for the traditional competitors. After all, with an estimated transaction value of €570 billion<sup>202</sup> by 2025 generated through the sharing economy, it is a tremendous amount of VAT that would slip through the treasuries' fingers.

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<sup>197</sup> Cannas (n. 127).

<sup>198</sup> Cannas (n. 127), pg. 15; with reference to the hybridisation suggested by Joachim Englisch, "Hybrid" forms for taxing consumption: A viable alternative to EU VAT? (2015) 4:2 World Journal of VAT/GST Law, 119.

<sup>199</sup> Cannas (n. 127), pg. 16 ff..

<sup>200</sup> Cannas (n. 127), pg. 17.

<sup>201</sup> See also Giorgio Beretta, 'The Taxation of the "Sharing Economy"' (2016) 70 Bulletin International Taxation available at IBFD research platform, pg. 8, who discusses this radical approach concerning the direct taxation in sharing economy.

<sup>202</sup> PWC (n. 6).

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### **Advocate General's Opinions**

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